HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

REGGIE WURRIDJAL & ORS PLAINTIFFS

AND

THE COMMONWEALTH OF AUSTRALIA & ANOR DEFENDANTS

Wurridjal v The Commonwealth of Australia [2009] HCA 2
2 February 2009
M122/2007

ORDER

1. Demurrer allowed.

2. Plaintiffs to pay the costs of the first defendant.

3. Further conduct of the action to be a matter for direction by a Justice.

Representation

R Merkel QC with R M Niall, K L Walker and A M Dinelli for the plaintiffs (instructed by Holding Redlich)

H C Burmester QC and S B Lloyd SC with A M Mitchelmore for the first defendant (instructed by Australian Government Solicitor)

B W Walker SC with S A Glacken for the second defendant (instructed by Northern Land Council)

Intervener

M P Grant QC, Solicitor-General for the Northern Territory with S L Brownhill intervening on behalf of the Attorney-General for the Northern Territory (instructed by Solicitor for the Northern Territory)

CATCHWORDS

Wurridjal v The Commonwealth of Australia

Constitutional law (Cth) – Legislative power – Acquisition of property on just terms – Whether power to make laws for government of Territory under s 122 of Constitution limited by s 51(xxxi) – Scope of application of s 51(xxxi) where law of dual character – Relevance of notion of "abstraction" of power of acquisition of property from other powers – Whether *Teori Tau v The Commonwealth* (1969) 119 CLR 564 should be overruled or departed from – Circumstances in which previous constitutional decision should be overruled.

Constitutional law (Cth) – Legislative power – Acquisition of property on just terms – *Northern Territory National Emergency Response Act* 2007 (Cth) ("Emergency Response Act"), Pt 4 provided for grant of leases of land in Northern Territory to Commonwealth, including land at Maningrida ("Land") – Second defendant ("Land Trust") held estate in fee simple in Land for benefit of Aboriginals pursuant to *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ("Land Rights Act") – Whether grant of Commonwealth lease an acquisition of Land Trust property for purposes of s 51(xxxi) of Constitution – Nature of estate in fee simple under Land Rights Act – Circumstances where acquisition of property rights of statutory origin – Whether no acquisition of property because rights of Land Trust inherently susceptible to statutory modification.

Constitutional law (Cth) – Legislative power – Acquisition of property on just terms – Land Rights Act, s 71 conferred entitlement on first and second plaintiffs to enter upon, use or occupy Land in accordance with Aboriginal tradition – Whether s 71 entitlements diminished by grant of Commonwealth lease or preserved by s 34 of Emergency Response Act so that no acquisition of any property constituted by those entitlements – Whether Commonwealth empowered by s 37 of Emergency Response Act to terminate s 71 entitlements – Relationship between Pt 4 of Emergency Response Act and offence of entry onto sacred sites in s 69 of Land Rights Act – Whether "property" includes traditional rights required by the general law – Use of international legal materials.

Constitutional law (Cth) – Legislative power – Acquisition of property on just terms – Saving provision – Emergency Response Act, s 60 made Commonwealth liable to pay reasonable compensation for acquisitions of property to which s 51(xxxi) applied – Reasonable compensation determined, absent agreement, by court – Meaning of "just terms" – Whether Emergency Response Act, s 60 afforded "just terms" or mere "contingent rights" – Whether acquisition of non-compensable interests – Whether no just terms absent express provision for

interest – Whether "just terms" extend to consultation requirement – Relevance of requirement for court to consider Commonwealth-funded improvements.

Constitutional law (Cth) – Legislative power – Acquisition of property on just terms – *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act* 2007 (Cth) ("FCSIA Act"), Sched 4, Items 12 and 15 amended Land Rights Act by inserting provisions conferring certain rights of access to Land – Whether FCSIA Act resulted in acquisition of Land Trust property for purposes of s 51(xxxi) of Constitution.

Constitutional law (Cth) – Legislative power – Acquisition of property on just terms – Saving provision – FCSIA Act, Sched 4, Item 18 made Commonwealth liable to pay reasonable compensation for acquisitions of property to which s 51(xxxi) applied – Reasonable compensation determined, absent agreement, by court – Whether FCSIA Act, Sched 4, Item 18 afforded "just terms".

Practice and procedure – Demurrer – Function and purpose of demurrer – Extent to which facts expressly or impliedly averred in statement of claim might be taken as admitted for purposes of demurrer.

Practice and procedure – High Court – Amicus curiae – Criteria for acceptance of submissions.

Words and phrases – "acquisition of property", "fee simple", "for the benefit of", "just terms", "property".

Constitution, ss 51(xxxi), 122.
Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), ss 4, 12, 69, 70, 71.
Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth), Sched 4, Items 12, 15, 18.
Northern Territory National Emergency Response Act 2007 (Cth), ss 31, 32, 34-37, 50, 52, 60-62.

FRENCH CJ.

Introduction

1 On Tuesday, 7 August 2007 the Minister for Families, Community Services and Indigenous Affairs introduced into the House of Representatives a package of legislation designed to support what he described in the Second Reading Speech as an emergency response by the Commonwealth Government to deal with sexual abuse of Aboriginal children in the Northern Territory and associated problems relating to alcohol and drug abuse, pornography and gambling.

2 The package comprised five Bills, which included:

1. the Northern Territory National Emergency Response Bill 2007 ("the NER Bill");

2. the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007 ("the FaCSIA Bill"); and

3. the Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 ("the Welfare Reform Bill")[1].

3 Concern about child sexual abuse of Aboriginal children in the Northern Territory had been generated in part by a report commissioned by the Northern Territory Government entitled *Little Children are Sacred*[2]. The Minister said that the Commonwealth Government had decided to intervene and declare an emergency situation and use the "territories power available under the Constitution" to make laws for the Northern Territory[3].

4 In addition to administrative measures already taken, further steps were necessary to improve living conditions and reduce overcrowding. There was a

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1 The other two Bills were Appropriation Bills.

2 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 August 2007 at 10; Northern Territory, *Ampe Akelyernemane Meke Mekarle "Little Children are Sacred": Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, (2007).

3 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 August 2007 at 10.

need for more houses to be built. In order that this could be done quickly the government had a need to "control the land in the townships for a short period"[4].

5 The measures in the NER Bill applied to Northern Territory Aboriginal communities on land scheduled under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ("the Land Rights Act") and other areas including community living areas and town camps[5]. Five-year leases would be created on such land in favour of the Commonwealth. The Minister described the "acquisition" of the leases as "crucial to removing barriers so that living conditions can be changed for the better in these communities in the shortest possible time frame"[6]. Underlying ownership by traditional owners was to be preserved and compensation, "when required by the Constitution"[7], would be paid.

6 The areas to be covered by the lease provisions of the NER Bill were "major communities or townships, generally of over 100 people, some of several thousand people"[8]. The leases would "give the government the unconditional access to land and assets required to facilitate the early repair of buildings and infrastructure"[9]. Native title in respect of the leased land would be suspended but not extinguished. The leases could be terminated early if the Northern Territory Emergency Response Taskforce reported that a community no longer required intensive Commonwealth oversight[10].

7 The FaCSIA Bill complemented the NER Bill and the Welfare Reform Bill. Among other things it affected what the Minister called "the permit

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4 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 August 2007 at 11.

5 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 August 2007 at 12.

6 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 August 2007 at 13.

7 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 August 2007 at 14.

8 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 August 2007 at 14.

9 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 August 2007 at 14.

10 Under the NER Bill such termination required ministerial consent.

system". The "permit system" was a reference to the prohibition imposed by the *Aboriginal Land Act* (NT) against entry onto Aboriginal land held by an Aboriginal Land Trust under the Land Rights Act without a permit issued by the Aboriginal Land Council for the area. While the permit system would be left in place on "99.8 per cent … of Aboriginal land" permits would no longer be required in the main townships and the road corridors connecting them. "Closed towns" meant less public scrutiny and made it easier for abuse and dysfunction to stay hidden. Improving access to the towns would promote economic activity and allow government services to be provided more readily[11].

8 Proceedings were commenced in the original jurisdiction of this Court on 25 October 2007 to challenge the validity of certain provisions of the *Northern Territory National Emergency Response Act* 2007 (Cth) ("the NER Act") and the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act* 2007 (Cth) ("the FaCSIA Act"). The first and second plaintiffs are Aboriginal persons who say they are members of a local descent group who have spiritual affiliation to sites on affected land in the township of Maningrida. The land is held by the Arnhem Land Aboriginal Land Trust ("the Land Trust") under the Land Rights Act. The third plaintiff is an Aboriginal and Torres Strait Islander corporation and a community service entity within the meaning of s 3 of the NER Act. The Commonwealth and the Land Trust are the defendants.

9 The plaintiffs allege, and it is not in dispute, that a five-year lease on the Maningrida land was granted to the Commonwealth pursuant to the NER Act. They say that the grant of the lease constituted acquisition of the Land Trust property and that the acquisition was required to be but was not on just terms within the meaning of s 51(xxxi) of the Constitution.

10 The plaintiffs also say that by its abolition of the permit system the FaCSIA Act deprived the Land Trust of its entitlement to exclusive possession and enjoyment of common areas in the Maningrida land. That measure is also said to have been an acquisition of the first and second plaintiffs' property other than on just terms.

11 In addition, the first and second plaintiffs claim that they are persons who, as traditional Aboriginal owners, are entitled by s 71 of the Land Rights Act to enter upon and use or occupy the Maningrida land in accordance with Aboriginal tradition. They claim those rights are terminable at will by the Minister by reason of s 37 of the NER Act and, alternatively, are effectively suspended by the

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11 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 August 2007 at 20.

grant of the lease. They say that on that basis the Commonwealth has acquired property rights belonging to them and has done so other than on just terms.

12 On 19 March 2008 the Commonwealth demurred to the whole of the plaintiffs' second further amended statement of claim on the ground that the facts alleged in it do not show any cause of action to which effect can be given by the Court as against the Commonwealth. The grounds of the demurrer were, in summary:

(a) The NER and FaCSIA Acts are not relevantly subject to the just terms requirement contained in s 51(xxxi) of the Constitution.

(b) Even if the Acts are subject to the just terms requirement, they provide for compensation constituting just terms in relation to any acquisition of property effected under s 51(xxxi).

(c) The property relied upon by the plaintiffs as having been acquired is not property within the meaning of s 51(xxxi) and alternatively is not property capable of being acquired or which has been acquired by the challenged Acts within the meaning of s 51(xxxi) of the Constitution.

Defences were filed by the Commonwealth and the Land Trust.

13 On 11 June 2008 Hayne J ordered that the Commonwealth's demurrer be referred to the Full Court for hearing. The demurrer came on for hearing on 2 October 2008. In my opinion, the demurrer should succeed. I base that opinion on the following conclusions:

(i) The power of the Commonwealth Parliament to make laws for the government of any Territory pursuant to s 122 of the Constitution is subject to the limitation imposed by s 51(xxxi) of the Constitution that laws for the acquisition of property from any person for any purpose in respect of which the Parliament has power to make laws must be on just terms.

(ii) The decision of this Court to the contrary in *Teori Tau v The Commonwealth*[12] should be overruled.

(iii) The creation by s 31 of the NER Act of a statutory lease on the Maningrida land constituted an acquisition of property from the Land Trust.

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12 (1969) 119 CLR 564; [1969] HCA 62.

(iv) The acquisition was on just terms by reason of the compensation provisions of the NER Act.

(v) The abolition of the permit system effected no additional acquisition but was in any event the subject of just terms provided for in the FaCSIA Act.

(vi) The effects of the NER Act on the claimed rights of the first and second plaintiffs under s 71 of the Land Rights Act did not constitute an acquisition of property within the meaning of s 51(xxxi).

The orders that should be made are as proposed by Gummow and Hayne JJ.

14 The conclusion at which I have arrived does not depend upon any opinion about the merits of the policy behind the challenged legislation. Nor, contrary to the gratuitous suggestion in the judgment of Kirby J[13], is the outcome of this case based on an approach less favourable to the plaintiffs because of their Aboriginality.

15 Before turning in detail to the issues raised by the demurrer it is convenient to outline the statutory basis of the property rights said to have been acquired by the Commonwealth and the provisions of the NER Act and the FaCSIA Act effecting that alleged acquisition.

The Land Rights Act[14] – fee simple estates, Land Trusts and Land Councils

16 The principal property right in issue is the fee simple estate granted to the Land Trust under the Land Rights Act. Such grants may be made by the Governor-General upon the recommendation of the Minister[15].

17 Key definitions in the Act include the definition of "Aboriginal land" which means land held by a Land Trust in fee simple or land the subject of a deed of grant held in escrow by a Land Council pending the expiry of pre-

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13 At [214].

14 The history and general scheme of the Act were most recently described by Kiefel J in *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 82 ALJR 1099 at 1123-1128 [114]-[135]; 248 ALR 195 at 226-232; [2008] HCA 29. The Act as outlined is as it stood in 2007 including amendments effected by Act No 121 of 2007.

15 Sections 10 and 11.

existing interests held by persons other than the Crown[16]. "Traditional Aboriginal owners" means a local descent group of Aboriginals who[17]:

> "(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."

18 Land Trusts are bodies corporate, established by gazetted ministerial notice "to hold title to land in the Northern Territory for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of the land concerned"[18]. They hold title to the land vested in them in accordance with the Act and exercise their powers as owners of the land for the benefit of the Aboriginals concerned[19]. They can only act, in relation to the land, in accordance with directions given by the Land Council for the area[20]. They are not empowered to accept moneys due and owing to them or to give a valid discharge for such moneys, but moneys may be paid to the Land Council for the area[21].

19 Payments may be made in respect of occupation or use by the Crown of land granted under the Act[22]. If the occupation or use is not for a community purpose, the Crown is to pay to the Land Council "amounts in the nature of rent for that occupation or use at such rate as is fixed by the Minister having regard to the economic value of the land"[23].

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16 Sections 3(1) and 12(1).

17 Section 3(1).

18 Section 4(1). The boundaries are subject to ministerial variation to effect grants for additional land or transfers to another Land Trust: s 4(2B).

19 Section 5.

20 Section 5(2).

21 Section 6.

22 The Crown or Commonwealth or Northern Territory Authorities may continue pre-existing occupation or use of granted land: s 14(1).

23 Section 15(1).

20 Land Trusts generally have only a conditional power to deal with or dispose of any estate or interest in land vested in them[24]. With the written consent of the Minister and the written direction of the relevant Land Council, a Land Trust may grant an estate or interest to an Aboriginal or an Aboriginal and Torres Strait Islander corporation for residential or community purposes or for the conduct of a business[25]. It may, on the same conditions, grant an estate or interest to the Commonwealth, the Northern Territory or an Authority for any public purpose or to a mission for any mission purpose[26]. Before giving the requisite written direction the Land Council must be satisfied that the traditional owners understand the nature and purpose of the proposed grant and, as a group, consent to it[27]. Any affected Aboriginal community or group must have been consulted and have had adequate opportunity to express its views to the Land Council. The terms and conditions of any grant must be reasonable[28]. The consent of the Minister is not required for the grant of an estate or interest, the term of which does not exceed 40 years[29].

21 The Land Trust may grant a lease of a township to an approved entity if ministerial consent and Land Council directions are given and the terms and conditions of the proposed lease are "reasonable"[30].

22 The Land Councils are bodies corporate[31] established by the Minister for areas in the Northern Territory (of which there shall be at least two) designated by ministerial notice[32]. Their functions include protection of the interests of traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the designated areas[33]. A Land Council is not to take any action in

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24 Save as provided by ss 19, 19A or 20 of the Act.

25 Section 19(2).

26 Section 19(3).

27 Section 19(5).

28 Section 19(5).

29 Section 19(7).

30 Section 19A.

31 Section 22.

32 Section 21(1).

33 Section 23(1)(b).

connection with Land Trust land unless it is satisfied that the traditional Aboriginal owners understand the nature and purpose of the action and consent to it as a group[34]. Any Aboriginal community or group affected by a proposed action is to have been consulted and to have had adequate opportunity to express its views to the Land Council[35]. The Land Council is required by the Act to give priority to the protection of the interests of traditional land owners and other Aboriginals interested in Aboriginal land in its area[36]. Within six months of receipt of a payment in respect of Aboriginal land the Land Council is to pay an equal amount to or for the benefit of the Aboriginal owners of the land[37]. Aboriginal land shall not be resumed, compulsorily acquired or forfeited under any law of the Northern Territory[38].

The Land Rights Act – sacred site protection

23 There is a general prohibition against entering or remaining on land in the Northern Territory that is a sacred site. Breach of the prohibition is an offence[39]. It does not prevent Aboriginal groups from entering or remaining on the site in accordance with Aboriginal tradition[40]. It is a defence if the person entering or remaining on the land does so in performing functions under or in accordance with the Land Rights Act or another Act[41].

The Land Rights Act – s 71 "rights"

24 Section 70 prohibits persons from entering or remaining on Aboriginal land. The prohibition is subject to defences for persons performing functions under the Act or otherwise in accordance with the Act or a law of the Northern Territory[42] or entering the land in accordance with an authorisation in force under

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34 Section 23(3)(a).

35 Section 23(3)(b).

36 Section 23AA(3).

37 Section 35(4).

38 Section 67.

39 Section 69(1).

40 Section 69(2).

41 Section 69(2A).

42 Section 70(2A).

s 19(13) issued by the Land Trust[43]. Persons with estates or interests in Aboriginal land are entitled to enter and remain on the land for any purpose necessary for the use or enjoyment of their estate or interest[44]. The prohibition is qualified by s 71 which creates a statutory entitlement for any Aboriginal or group of Aboriginals to enter upon and use or occupy Aboriginal land in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land[45]. This does not authorise entry, use or occupation that would interfere with the use or enjoyment of an estate or interest in land held by a person not being a Land Trust or an incorporated association of Aboriginals[46]. The first and second plaintiffs say that s 70, read with s 71, confers rights upon them which are affected by the NER Act.

The *Aboriginal Land Act* (NT) – the permit system

25 This Act is a Northern Territory statute. The term "Aboriginal land", used in the Act, has the same meaning as in the Land Rights Act[47]. The *Aboriginal Land Act* creates the "permit system" which is affected by the FaCSIA Act. The Northern Territory's power to make laws regulating or authorising the entry of persons onto Aboriginal land is conferred by s 73(1)(b) of the Land Rights Act.

26 Subject to the relevant part of the Act and contrary provisions in Territory laws, s 4 prohibits persons from entering onto or remaining on Aboriginal land or a road unless issued with a permit to do so[48]. Aboriginals entitled by Aboriginal tradition to enter or remain on an area of Aboriginal land may do so[49]. The Land Council for the relevant area or its traditional Aboriginal owners may issue permits to persons to enter onto and remain on the Aboriginal land or use a road bounded by that land on such conditions as they think fit[50].

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43 Section 79(2B).

44 Section 70(2)(a).

45 Section 71(1).

46 Section 71(2).

47 *Aboriginal Land Act*, s 3.

48 *Aboriginal Land Act*, s 4(1).

49 *Aboriginal Land Act*, ss 4(2) and 4(3).

50 *Aboriginal Land Act*, ss 5(1) and 5(2).

The NER Act – the statutory leases

27 At the centre of the plaintiffs' challenge is s 31 of the NER Act, which provides, inter alia, in sub-s (1):

> "A lease of the following land is, by force of this subsection, granted to the Commonwealth by the relevant owner of the land …"

The land referred to is that described in Sched 1 to the Act and land prescribed by regulation. The terms of leases granted under s 31(1) are set out in s 31(2) which is to be read with s 32[51].

28 The land described in the Schedule includes Maningrida which covers 10.456 square kilometres. It is part of 89,872 square kilometres of land held by the Land Trust in fee simple pursuant to a grant made under the Land Rights Act on 30 May 1980. The first and second plaintiffs say they are entitled by the traditions, observances, beliefs and customs of the traditional Aboriginal owners to use and occupy the land for traditional purposes, including living on it.

29 The lease over Maningrida created by the NER Act commenced on 17 February 2008[52]. It terminates five years after the commencement of s 31 and so will terminate on 18 August 2012[53].

30 Section 34 applies to any right, title or interest in land if it existed immediately before the time that a s 31 lease took effect[54] and preserves it from after that time[55]. The section does not apply to any native title rights and interests[56]. Section 34(4) provides:

> "If the right, title or interest in the land was granted by the relevant owner of the land, the right, title or interest has effect, while the lease is in force, as if it were granted by the Commonwealth on the same terms and conditions as existed immediately before that time."

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51 The leases granted under s 31 are hereafter referred to in these reasons as "s 31 leases".

52 Section 32.

53 Sections 2, 31.

54 Section 34(1).

55 Section 34(3).

56 Section 34(2).

31 It is convenient to deal at this point with a submission by the plaintiffs that s 34(4) conferred on the Commonwealth an entitlement to receive any moneys otherwise payable to the relevant owner, in this case the Land Trust, by reason of the prior grant of rights, titles or interests to the land. That submission was contested by both defendants. It should not be accepted. Section 34(4) continues in effect the rights, titles and interests in land granted by the relevant owner prior to the creation of the statutory lease. It has nothing to say about any income stream or other consideration flowing to the owner by reason of such grant. There is no reason to construe it as having that consequence which would have no bearing upon the purpose of the legislation. There is a similar sub-section in s 19A of the Land Rights Act which empowers a Land Trust to grant a head lease of a township to a Commonwealth or Northern Territory entity[57].

32 Section 35 sets out terms and conditions of the s 31 leases. The Commonwealth is given exclusive possession and quiet enjoyment of the land while the lease is in force. The grant of exclusive possession and quiet enjoyment is expressed to be subject, inter alia, to s 34 of the NER Act. The owner of the land covered by a s 31 lease may not vary or terminate it[58]. The Commonwealth may not transfer a s 31 lease but may sublease, license, part with possession of, or otherwise deal with, its interest in the lease[59]. The Commonwealth may also vary a s 31 lease by excluding land from the lease or including in it any land that was excluded under s 31(3)[60]. It may terminate the lease at any time[61]. Importantly, s 35(2) provides in relation to rent:

> "The Commonwealth is not liable to pay to the relevant owner of land any rent in relation to a lease of that land granted under section 31, except in accordance with subsection 62(5)."

Section 36 empowers the Minister to determine other terms and conditions of a s 31 lease. It also empowers the Minister to vary the terms and conditions so determined[62].

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57 Section 19A(11).

58 Section 35(4).

59 Section 35(5).

60 Section 35(6).

61 Section 35(7).

62 Section 36(2).

33 The Commonwealth is empowered by s 37 to terminate at any time a right, title or interest preserved under s 34 or an earlier lease of land which, under s 31(3), is excluded from land covered by the s 31 lease[63]. This does not apply to certain rights granted under various provisions of the Land Rights Act[64].

34 The power of a Land Trust to grant a township lease under s 19A of the Land Rights Act is preserved[65].

35 The Act disapplies certain provisions of the *Native Title Act* 1993 (Cth). Various other provisions, including s 52, have effect despite any other law of the Commonwealth or the Northern Territory (whether written or unwritten)[66]. Section 52 preserves the power of the Land Trust to grant another lease over Aboriginal land the subject of a s 31 lease in accordance with s 19 of the Land Rights Act. However, the consent in writing of the Minister is required for the grant or variation of such a lease while the s 31 lease is in force[67]. And despite the grant of the s 31 lease the Land Trust may, in accordance with s 19 of the Land Rights Act, grant an interest (including a licence, but not including a lease) of a kind prescribed by regulations for the purposes of s 52[68]. A Land Trust is not, however, authorised to deal with an estate or interest in land covered by a s 31 lease other than by granting a lease or an interest as referred to in s 52(1) and (4A)[69].

36 The NER Act also provides for registration of dealings including the grant, variation or termination of a s 31 lease[70]. The Minister may lodge with the Registrar-General for the Northern Territory (or other appropriate officer) a notification, certified by writing signed by the Minister, of the dealing with the land[71]. The officer must deal with the notification as if it were "a grant,

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63 Section 37(1).

64 Section 37(2).

65 Section 37(6)-(9).

66 Division 3 of Pt 4.

67 Section 52(2).

68 Section 52(4A).

69 Section 52(5).

70 Section 55(1)(a) and (b).

71 Section 55(2).

conveyance, memorandum or instrument of transfer of relevant rights, titles and interests done under the laws of the Northern Territory"[72].

The NER Act – compensation provisions

37 Section 60, which appears in Div 4 of Pt 4 headed "Miscellaneous", provides for compensation for acquisition of property by operation of the Act. In relation to specified classes of acquisition arising as a result of its operation, it disapplies the just terms provision contained in s 50(2) of the *Northern Territory (Self-Government) Act* 1978 (Cth). The acquisitions of property to which it applies include any acquisition that occurs as a result of any act done in relation to land covered by a s 31 lease[73]. However, if such an act would result in an acquisition of property to which s 51(xxxi) of the Constitution applies, from a person other than on just terms, the Commonwealth is liable to pay "a reasonable amount of compensation"[74]. Absent agreement, the person claiming compensation may institute proceedings to recover it in a court of competent jurisdiction[75]. The terms "acquisition of property" and "just terms" have the same meaning as in s 51(xxxi) of the Constitution[76]. The Commonwealth Minister[77] and the relevant owner may agree in writing to an amount to be paid by the Commonwealth to the owner[78]. This can be made as a one-off payment or periodically while the lease is in force[79]. Before any such agreement is made the Commonwealth Minister may request the Valuer-General of the Northern Territory to determine an indicative amount for the purposes of s 62(1A)[80].

38 Section 62(1) deals with non-consensual determinations of rent under the subheading "Payment of rent". It provides:

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72 Section 55(3).

73 Section 60(1)(b)(i).

74 Section 60(2).

75 Section 60(3).

76 Section 60(4).

77 "Commonwealth Minister", in relation to a provision of the NER Act, means "the Minister administering the provision": s 3.

78 Section 62(1A).

79 Section 62(1B).

80 Section 62(1C).

> "The Commonwealth Minister may, from time to time, request the Valuer-General (appointed under section 5 of the *Valuation of Land Act* of the Northern Territory) to determine a reasonable amount of rent to be paid by the Commonwealth to the relevant owner (not being the Northern Territory) of land that is covered by a lease granted under section 31."

The Valuer-General is required to comply with such a request[81]. In making a determination the Valuer-General must not take into account the value of any improvements on the land[82]. The Commonwealth is required to pay the amount so determined while the lease is in force[83].

The FaCSIA Act

39 The provisions of the FaCSIA Act, like those of the NER Act, are designated, for the purposes of the *Racial Discrimination Act* 1975 (Cth), as special measures[84]. Section 6 of the FaCSIA Act provides:

> "Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms."

40 Schedule 4 to the Act, entitled "Access to Aboriginal land", sets out amendments to the Land Rights Act. It inserts into the Land Rights Act s 70A, which defines "vested Aboriginal land" as land covered by par (a) of the definition of Aboriginal land in s 3(1) of the Land Rights Act. That section also defines "community land" as land described in Sched 7 to the Land Rights Act or in regulations[85]. Section 70B provides a general authority for persons to enter or remain on roads on vested Aboriginal land and that are outside community land and provide access to community land and are specified in a determination under s 70B(2) or provide access to aerodromes or landing places for vessels that service the members of the community concerned. The section also authorises persons to enter or remain on an area within 50 metres either side of the centre line of such a road to the extent that the area is on vested Aboriginal land and is not a sacred site. A condition is that the entry or remaining on the road is for the

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81 Section 62(2).

82 Section 62(4).

83 Section 62(5).

84 Section 4.

85 Section 70A(1) and (2).

purpose of travelling to or from community land and not for an unlawful purpose[86].

41 Persons can board or disembark from aircraft that are on vested Aboriginal land that is outside community land or that are on community land. Similar provision is made for entering or remaining on Aboriginal land at landing places for vessels and on roads within communities[87].

42 A key provision, s 70F, provides for persons to enter or remain on common areas within community land provided it is not done for an unlawful purpose. Section 70H provides:

"Nothing in sections 70B to 70G limits the application of section 71."

43 For the purposes of the definition of community land, there is a new Sched 7 added to the Land Rights Act. Among the areas identified for the purposes of the definition of community land is Maningrida, described in cl 22 of Sched 7 in the same terms as the definition in cl 21 of Sched 1 to the NER Act.

44 The FaCSIA Act also provides for reasonable compensation to be paid in the event that action taken under or in accordance with ss 70B-70G of the Land Rights Act as inserted by the FaCSIA Act would result in an acquisition of property to which s 51(xxxi) of the Constitution applies from a person otherwise than on just terms[88].

Issues on the demurrer

45 The issues raised on the demurrer are:

(i) Whether the "just terms" requirement in s 51(xxxi) of the Constitution applies to laws made by the Commonwealth with respect to the acquisition of property from persons in the Northern Territory.

(ii) Whether the legislation under challenge effected an acquisition of property from any person within the meaning of s 51(xxxi).

(iii) Whether, if the legislation did effect an acquisition of property, it provided just terms for that acquisition.

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86 Section 70B(1).

87 Sections 70C, 70D and 70E.

88 Schedule 4 Item 18.

The Territories power and the "just terms" requirement

46 The position of the Commonwealth Parliament with respect to its territories was regarded at and shortly after federation as that of "a *quasi*-sovereign government" which could "rule the territory as a dependency, providing for its local municipal government as well as for its national government"[89]. The power conferred upon the Parliament by s 122 of the Constitution, to make laws for the government of the Territories, was seen as unconstrained by limits defining the federal distribution of legislative power[90]. The Commonwealth could exercise "all the powers of an unitary government" over the Territories[91]. This view of s 122 reflected what has been called a "disparate power" theory of the Territories power[92]. Broadly speaking it found expression in the decisions of this Court on s 122 over the first 50 years of the federation, albeit not without some misgivings[93].

47 Dixon J foreshadowed a change of approach in *Australian National Airways Pty Ltd v The Commonwealth*[94] when he observed[95]:

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89 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 972. This view may have been inspired by judicial interpretation of Art IV, s 3(2) of the United States Constitution cited by the authors in support of the "*quasi*-sovereign government" reference.

90 Garran, "The Law of the Territories of the Commonwealth", (1935) 9 *Australian Law Journal (Supplement)* 28 at 31.

91 Moore, *The Constitution of The Commonwealth of Australia*, 2nd ed (1910) at 589.

92 Zines, "'Laws for the Government of any Territory': Section 122 of the Constitution", (1966) 2 *Federal Law Review* 72 at 73.

93 *Buchanan v The Commonwealth* (1913) 16 CLR 315; [1913] HCA 29; *R v Bernasconi* (1915) 19 CLR 629; [1915] HCA 13; *Mitchell v Barker* (1918) 24 CLR 365; [1918] HCA 13; *Porter v The King; Ex parte Yee* (1926) 37 CLR 432; [1926] HCA 9; *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582; [1929] HCA 36. And see generally Zelling, "The Territories of the Commonwealth", in Else-Mitchell (ed), *Essays on the Australian Constitution*, 2nd ed (1961) 327 at 330ff; Finlay, "The Dual Nature of the Territories Power of the Commonwealth", (1969) 43 *Australian Law Journal* 256.

94 (1945) 71 CLR 29; [1945] HCA 41.

95 (1945) 71 CLR 29 at 85.

> "For my part, I have always found it hard to see why s 122 should be disjoined from the rest of the Constitution".

The question, relevant to this case, namely whether s 122 is subject to the just terms requirement in s 51(xxxi), had not been decided at that time although it had been left open by Latham CJ in *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth*[96]. The disparate theory continued to have life into the late 1950s as indicated by the Privy Council's description of the Territories power, in the *Boilermakers' Case*, as "a disparate and non-federal matter"[97]. It was also reflected in the judgments of Brennan CJ and Dawson J in *Kruger v The Commonwealth*[98] and by Brennan CJ, Dawson and McHugh JJ in *Newcrest Mining (WA) Ltd v The Commonwealth*[99].

48 The integrationist approach of Dixon CJ found its voice, in the year after *Boilermakers*, through a majority of the Court in *Lamshed v Lake*[100]. In that case the Court upheld the application to a State of a law made under s 122. Dixon CJ (Webb, Kitto and Taylor JJ agreeing) expressly rejected the proposition that s 122 operated to appoint the Commonwealth Parliament "a local legislature in and for the Territory with a power territorially restricted to the Territory"[101]. The laws made under s 122, he said, were "laws made by the Parliament of the Commonwealth and s 5 of the covering clauses makes them binding on the courts, judges and people of every State notwithstanding anything in the laws of any State"[102].

49 In his judgment in *Lamshed* Dixon CJ considered the possible application, to laws made under s 122, of other provisions of the Constitution generally affecting legislative power. He could see no reason why s 116 should not apply and it was "easy to find" in Ch I provisions which would appear on their face to link up with a territory. One example was the incidental power conferred by

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96 (1943) 67 CLR 314 at 318; [1943] HCA 18.

97 *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 545; [1957] AC 288 at 320.

98 (1997) 190 CLR 1 at 43 per Brennan CJ, 55 per Dawson J; [1997] HCA 27.

99 (1997) 190 CLR 513 at 538 per Brennan CJ, 550 per Dawson J, 583 per McHugh J; [1997] HCA 38.

100 (1958) 99 CLR 132; [1958] HCA 14.

101 (1958) 99 CLR 132 at 141.

102 (1958) 99 CLR 132 at 142.

s 51(xxxix)[103]. He did not, however, apply any close analysis to that general question, no doubt because its resolution was not necessary for the disposition of the case.

50 In concurring with the Chief Justice, Kitto J asserted the necessity of "adopting an interpretation which will treat the Constitution as one coherent instrument for the government of the federation, and not as two constitutions, one for the federation and the other for its territories"[104]. The decision in *Lamshed* was followed, in the *Western Australian Airlines Case*[105], with respect to the extension, into the States, of laws made for the Territories.

51 In *Spratt v Hermes*[106] support was expressed by some, but not all, members of the Court for a theory of s 122 as a provision of the Constitution integrated with other legislative powers. Barwick CJ said it was a mistake "to compartmentalize the Constitution, merely because for drafting convenience it has been divided into chapters"[107]. There was no warrant for segregating s 122 from the rest of the Constitution[108]. Windeyer J's judgment was to like effect[109]:

> "The Constitution must be read as a whole, an instrument of government for a nation and its people, the Commonwealth of Australia."

Menzies J moved further in rejecting the proposition that s 122 conferred a legislative power somehow outside the federal system[110]:

> "To me, it seems inescapable that territories of the Commonwealth are parts of the Commonwealth of Australia and I find myself unable to grasp how what is part of the Commonwealth is not part of 'the Federal System'."

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103 (1958) 99 CLR 132 at 143.

104 (1958) 99 CLR 132 at 154.

105 *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492; [1976] HCA 66.

106 (1965) 114 CLR 226; [1965] HCA 66.

107 (1965) 114 CLR 226 at 246.

108 (1965) 114 CLR 226 at 246.

109 (1965) 114 CLR 226 at 278.

110 (1965) 114 CLR 226 at 270.

52 The discounting by Barwick CJ of the significance of the particular place of s 122 in the Constitution had support from the Convention Debates. Deakin had raised a question about the location of the section in the New States chapter rather than cl 53, which became s 52, relating to the exclusive powers of the Commonwealth. In an exchange with Barton, Deakin conceded[111]:

> "It is logical where it is, and it would also be logical if included in clause 53. However that is a question for the Drafting Committee."

53 Barwick CJ accepted that the power conferred by s 122 was "non-federal in character" but said that this did not mean it was "not controlled in any respect by other parts of the Constitution"[112]. It was a question of construction whether any particular provision of the Constitution had a controlling operation upon it[113]. As Professor Zines has pointed out, the judgments of Barwick CJ, Menzies and Windeyer JJ were all "generally … in accordance with the spirit of *Lamshed v Lake* in opposing the 'separation' theory"[114]. The observations made by Barwick CJ, quoted above, were cited with evident approval by Brennan, Deane and Toohey JJ in *Capital Duplicators Pty Ltd v Australian Capital Territory*[115] and by the plurality in *Bennett v The Commonwealth*[116].

54 In its application to s 51(xxxi) the question of construction of which Barwick CJ had spoken in *Spratt v Hermes* was answered in the negative in an ex tempore judgment delivered by a unanimous Court in *Teori Tau*[117]. The brief reasoning that led to that answer may be summarised as follows[118]:

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111 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 28 January 1898 at 257. See also Horan, "Section 122 of the Constitution: A 'Disparate and Non-federal' Power?", (1997) 25 *Federal Law Review* 97 at 109.

112 (1965) 114 CLR 226 at 242.

113 (1965) 114 CLR 226 at 242.

114 Zines, "'Laws for the Government of any Territory': Section 122 of the Constitution", (1966) 2 *Federal Law Review* 72 at 86.

115 (1992) 177 CLR 248 at 272; [1992] HCA 51.

116 (2007) 231 CLR 91 at 111 [43] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; [2007] HCA 18.

117 (1969) 119 CLR 564.

118 (1969) 119 CLR 564 at 570.

1. Section 122 is general and unqualified. It confers a power to make laws for the compulsory acquisition of property.

2. Section 51 is concerned with federal legislative powers as part of the distribution of legislative power between the Commonwealth and the States.

3. Section 122 is concerned with the legislative power for the government of Commonwealth territories in respect of which there is no such division of legislative power.

4. Section 122 is not limited or qualified by s 51(xxxi) or any other paragraph of s 51.

The Court said[119]:

> "While the Constitution must be read as a whole and as a consequence, s 122 be subject to other appropriate provisions of it as, for example, s 116, we have no doubt whatever that the power to make laws providing for the acquisition of property in the territory of the Commonwealth is not limited to the making of laws which provide just terms of acquisition."

The Court is invited in this case to overrule that decision.

55 In *Teori Tau* the legislative power conferred by s 122 was described as "plenary in quality and unlimited and unqualified in point of subject matter"[120]. It has been cited on a number of occasions for that proposition. Nevertheless Barwick CJ's acceptance in *Spratt* that the section could be controlled by other provisions of the Constitution stood. The "plenary quality" of the power conferred by s 122 does not therefore inevitably lead to the conclusion that the section is unconstrained by the just terms requirement in s 51(xxxi). This is relevant when assessing the extent to which reliance upon *Teori Tau* in later authority involved an acceptance of its holding about the relationship between s 122 and s 51(xxxi). A number of later decisions of the Court were referred to by Brennan CJ, Dawson and McHugh JJ in *Newcrest* as applying or supportive

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119 (1969) 119 CLR 564 at 570.

120 (1969) 119 CLR 564 at 570.

of *Teori Tau* and therefore representing a stream of authority in which it had become accepted[121]. It is necessary briefly to refer to those cases.

56 In *Trade Practices Commission v Tooth & Co Ltd*[122] the question before the Court was whether a statutory prohibition of exclusive dealing in relation to the grant, renewal or termination of leases or licences[123] was an acquisition of property other than on just terms. The Court held the provision valid. Aickin J, in dissent, found invalidity save as to the extent of application of the power to territories pursuant to s 122 of the Constitution. He relied upon *Teori Tau* in so holding[124]. The case was not relied upon in any of the other judgments. Barwick CJ, also in dissent in that case, did not carve out the area of validity found by Aickin J although it would have been consistent with *Teori Tau* to have done so.

57 *Clunies-Ross v The Commonwealth*[125] involved a challenge to the compulsory acquisition of land in the Cocos (Keeling) Islands Territory. It was concerned with the *purposes* for which such acquisitions could be made under the *Lands Acquisition Act* 1955 (Cth). The question was one of statutory construction. Passing reference was made to the range of purposes for which acquisition laws could be made under s 51(xxxi) and s 122. Their interaction was not in contention and was not considered. In *Northern Land Council v The Commonwealth*[126] the Court cited *Teori Tau* but only as authority for its general proposition about the wide character of the s 122 power[127]. The majority joint judgment in *Capital Duplicators*[128] also referred to the "plenary power" passage but their Honours were not constrained by it from holding that s 90 of the

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121 (1997) 190 CLR 513 at 540-541 per Brennan CJ, 551 per Dawson J, 575-576 per McHugh J.

122 (1979) 142 CLR 397; [1979] HCA 47.

123 *Trade Practices Act* 1974 (Cth), s 47(9)(a).

124 (1979) 142 CLR 397 at 458.

125 (1984) 155 CLR 193; [1984] HCA 65.

126 (1986) 161 CLR 1; [1986] HCA 18.

127 (1986) 161 CLR 1 at 6. See also a similar application in the Supreme Court of the Australian Capital Territory in *R v O'Neill; Ex parte Moran* (1985) 58 ACTR 26 at 31 per Kelly J.

128 (1992) 177 CLR 248.

Constitution reserved to the Commonwealth Parliament the legislative power to impose duties of excise[129].

58 Importantly, the majority joint judgment in *Capital Duplicators* reaffirmed the necessity, to which Kitto J had adverted in *Lamshed*, of adopting an interpretation which would treat the Constitution as one constitutional instrument for the government of the federation[130]. Their Honours added[131]:

> "It would therefore be erroneous to construe s 122 as though it stood isolated from other provisions of the Constitution which might qualify its scope."

59 *Australian Capital Television Pty Ltd v The Commonwealth*[132] held invalid provisions of the *Broadcasting Act* 1942 (Cth) prohibiting the broadcasting of election material during an election period on the ground that they infringed the implied freedom of political communication. McHugh J found the provisions valid in their application to the Territories on the basis that s 122 was not affected by the implied freedom. In a passage relied upon by Brennan CJ and Dawson J in *Newcrest* he added[133]:

> "Moreover, the decision of this Court in *Teori Tau v The Commonwealth* establishes that the provisions of s 51(xxxi) do not control the operation of s 122 when it is used to acquire property in a territory." (citation omitted)

His Honour was in dissent on the validity of the provisions in the Territories. *Teori Tau* was not relied upon in the other judgments.

60 The law under challenge in *Mutual Pools & Staff Pty Ltd v The Commonwealth*[134] was found to have been made under s 51(ii) of the Constitution and not to be a law effecting an acquisition of property pursuant to s 51(xxxi).

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129 (1992) 177 CLR 248 at 269, 271.

130 (1992) 177 CLR 248 at 272.

131 (1992) 177 CLR 248 at 272.

132 (1992) 177 CLR 106; [1992] HCA 45.

133 (1992) 177 CLR 106 at 246.

134 (1994) 179 CLR 155; [1994] HCA 9.

There was passing reference in footnotes to *Teori Tau* as setting s 122 apart from the acquisition power[135]. But s 122 was not in issue.

61 *Berwick Ltd v Gray*[136] was not relied on in *Newcrest* as supportive of *Teori Tau*. The Court in *Berwick* reiterated, without reference to *Teori Tau*, the plenary character of s 122 but rejected the proposition that the section is disjoined from the rest of the Constitution[137]. The Court also affirmed the views expressed by Barwick CJ and Menzies J in *Spratt* that external territories form part of the Commonwealth, subject to a qualification in respect of territories held under mandate or trusteeship arrangements[138]. On that basis the Court held that the Territories attract the exercise of the legislative power of the Parliament to impose taxes pursuant to s 51(ii)[139].

62 *Kruger v The Commonwealth*[140], which was decided shortly before *Newcrest*, raised the questions whether s 122 was confined by s 116 and by an implied freedom, based on Ch III of the Constitution, from removal or detention without legal process. Section 51(xxxi) did not arise. *Teori Tau* was referred to for the characterisation of s 122 as "unlimited and unqualified in point of subject matter"[141]. Gaudron J cited *Teori Tau* as one of a number of decisions of the Court that had held s 122 not limited by certain other provisions of the Constitution[142]. Gummow J cited it in connection with the proposition that s 122 is subject to s 116[143].

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135 (1994) 179 CLR 155 at 169 fn 37 per Mason CJ, 177 fn 68 per Brennan J, 193 fn 10 per Dawson and Toohey JJ.

136 (1976) 133 CLR 603; [1976] HCA 12.

137 (1976) 133 CLR 603 at 608.

138 (1976) 133 CLR 603 at 605 per Barwick CJ, 608 per Mason J, McTiernan and Murphy JJ agreeing.

139 In *Bennett v The Commonwealth* (2007) 231 CLR 91 at 108 [36], the plurality said that whether an external territory is regarded as "part of the Commonwealth" may depend upon the purpose for which the question is asked. They accepted that Norfolk Island was "a territory under the authority of the Commonwealth".

140 (1997) 190 CLR 1.

141 (1997) 190 CLR 1 at 41 per Brennan CJ, 53-54 per Dawson J.

142 (1997) 190 CLR 1 at 117 fn 463.

143 (1997) 190 CLR 1 at 166 fn 651. *Teori Tau* left open the possibility that s 122 was subject to s 116.

63 *Teori Tau* was held by three members of the Court, Gaudron, Gummow and Kirby JJ, in *Newcrest*, to have been wrongly decided. Gaudron J agreed with the reasoning of Gummow J in that respect[144]. Together with Toohey J they comprised a majority in favour of the alternative proposition that if a law for the acquisition of property within a territory is supported by a head of power other than s 122 and is not solely "for the government of [the] territory", then it will attract the just terms constraints imposed by s 51(xxxi)[145].

64 The treatment of *Teori Tau* in these cases does not indicate that the proposition, about the relationship between s 122 and s 51(xxxi), for which it is authority has become part of a stream of jurisprudence and accepted in subsequent decisions.

Overruling a previous decision of the Court

65 The Court accepted not long after its establishment that it could overrule its own decisions[146]. Isaacs J put it thus[147]:

> "The oath of a Justice of this Court is 'to do right to all manner of people *according to law*'. Our sworn loyalty is to the law itself, and to the organic law of the Constitution first of all. If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right."

66 In *The Tramways Case [No 1]*[148] the Court said it would generally only review a previous decision where it was manifestly wrong[149]. Barton J observed

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144 (1997) 190 CLR 513 at 561.

145 (1997) 190 CLR 513 at 560 per Toohey J, 568 per Gaudron J, 614 per Gummow J, 661 per Kirby J.

146 *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 278-279 per Isaacs J, 288 per Higgins J; [1913] HCA 41.

147 (1913) 17 CLR 261 at 278.

148 (1914) 18 CLR 54; [1914] HCA 15.

149 (1914) 18 CLR 54 at 58 per Griffith CJ, 69 per Barton J, 70 per Isaacs J, 83 per Gavan Duffy and Rich JJ, 86 per Powers J.

that the question was not whether the Court could review its previous decisions but whether it would, having due regard to the need for continuity and consistency. He said[150]:

> "[T]he strongest reason for an overruling is that a decision is manifestly wrong, and its maintenance is injurious to the public interest."

Isaacs J spoke positively of "the duty of [the] Court to correct an erroneous interpretation of the fundamental law". The opposite view would make the Court "guardians, not of the Constitution, but of existing decisions"[151].

67 Barton J, in *The Tramways Case [No 1]*, was quoted, with evident approval, by a unanimous Court in 1949 in *Thomas' Case*[152]. However in *Attorney-General (NSW) v Perpetual Trustee Co Ltd*[153] Dixon J observed that the Court had adopted "no very definite rule as to the circumstances in which it will reconsider an earlier decision"[154]. In *The State of Victoria v The Commonwealth*[155] he declined to follow the earlier decision of the Court in *South Australia v The Commonwealth*[156] having regard to the isolation of the decision and the fact that it formed no part of a stream of authority[157]. Kitto J agreed with the judgment of Dixon CJ. McTiernan J in that case thought the earlier decision "manifestly wrong"[158].

68 The operation of *stare decisis* in constitutional cases was considered in the *Second Territory Senators Case*[159]. Aickin J undertook a review of the authorities and set out some general considerations to assist in deciding whether

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150 (1914) 18 CLR 54 at 69.

151 (1914) 18 CLR 54 at 70.

152 *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1949) 77 CLR 493 at 496; [1949] HCA 4.

153 (1952) 85 CLR 237; [1952] HCA 2.

154 (1952) 85 CLR 237 at 243-244.

155 (1957) 99 CLR 575; [1957] HCA 54.

156 (1942) 65 CLR 373; [1942] HCA 14.

157 (1957) 99 CLR 575 at 615-616.

158 (1957) 99 CLR 575 at 626.

159 *Queensland v The Commonwealth* (1977) 139 CLR 585; [1977] HCA 60.

a previous constitutional decision regarded as erroneous should be overruled. In summary, these considerations were[160]:

1. Whether the error of the prior decision had been made manifest by later cases which had not directly overruled it.

2. Whether the prior decision went with "a definite stream of authority" and did not conflict with established principle.

3. Whether the prior decision could be confined as an authority to the precise question which it decided or whether its consequences would extend beyond that question.

4. Whether the prior decision was isolated as receiving no support from other decisions and forming no part of a stream of authority.

5. Whether the prior decision concerned a fundamental provision of the Constitution or involved a question of such vital constitutional importance that its consequences were likely to be far reaching, although not immediately foreseeable in detail.

Aickin J also pointed out that as a result of the progressive abolition of appeals to the Privy Council in 1968 and 1975 the Court had become "in all respects a court of ultimate appeal". He said[161]:

> "The fact that error can no longer be corrected elsewhere must change our approach to the overruling of our own decisions, at least to some extent. It remains however a serious step, not lightly to be undertaken."

Another important factor distinguishing constitutional cases from others is that the effect of constitutional decisions cannot generally be remedied by legislative amendment[162].

69 The observation by Dixon J that there was "no very definite rule as to the circumstances in which [the Court] will reconsider an earlier decision" was cited

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160 (1977) 139 CLR 585 at 630.

161 (1977) 139 CLR 585 at 630.

162 There may be legislative means to offset the effects of a particular constitutional decision: see the use of referral of powers by the States in support of the *Corporations Act* 2001 (Cth) and associated legislation following the decision of the Court in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; [1999] HCA 27.

by the joint judgment in *John v Federal Commissioner of Taxation*[163]. Four relevant considerations were set out in that case:

1. Whether the earlier decision rested upon a principle carefully worked out in a significant succession of cases.

2. Whether there was a difference between the reasons of the Justices constituting the majority in the earlier decision.

3. Whether the earlier decision had achieved a useful result or caused considerable inconvenience.

4. Whether the earlier decision had been independently acted upon in a way which militated against reconsideration, as in the *Second Territory Senators Case*.

70 It is apparent from the authorities that the question whether the Court will overrule one of its earlier decisions is not to be answered by the application of a well-defined rule. Nor is it simply to be answered by the application of such visceral criteria as "manifestly" or "clearly" wrong. Rather it requires evaluation of factors which may weigh for and against overruling. That evaluation will be informed by a strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law, that such a course should not lightly be taken. As Gibbs J said in the *Second Territory Senators Case*, no Justice of the Court is entitled to ignore the previous decisions and reasoning of the Court and arrive at his or her own judgment as though the pages of the law reports were blank[164]:

> "A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court."

71 Although decisions of this Court about overruling its own prior decisions have referred to the identification of "error" in the previous decision, it does not follow that it is always necessary to make a finding that a prior decision was erroneous in order to justify overruling it. In many cases of interpretation of the Constitution, constructional choices are presented. To say that, upon a

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163 (1989) 166 CLR 417 at 438-439; [1989] HCA 5.

164 (1977) 139 CLR 585 at 599.

consideration of text, context, history and attributed purpose, one choice is to be preferred to another, is not necessarily to say that the choice rejected is wrong. Reasonable minds may differ on a point of constitutional interpretation. It may be that in some cases subsequent decisions have made clear that the decision which the Court is asked to overrule not only stands isolated but has proven to be incompatible with the ongoing development of constitutional jurisprudence. Dixon CJ once spoke of the possibility that an earlier decision had been "weakened" by subsequent decisions or in the light of experience[165]. This does not require the taxonomy of "truth" and "error". It may reflect an evolving understanding of the Constitution[166] albeit subject to the conservative cautionary principle referred to earlier.

72 Against that background it is necessary to consider the proposition for which *Teori Tau* is authority.

The interaction between s 122 and s 51(xxxi)

73 The starting point for consideration of the interaction between s 122 and s 51(xxxi) is the text of the Constitution. Covering cl 5 in the *Commonwealth of Australia Constitution Act* 1900 (Imp) renders "all laws made by the Parliament of the Commonwealth under the Constitution … binding on the courts, judges, and people of every State and of every part of the Commonwealth". The collocation "every part of the Commonwealth" indicates that the geographical extent of the Commonwealth, as that term is there used, is not limited to the States.

74 Section 51 of the Constitution confers powers upon the Parliament to make laws for the "peace, order, and good government of the Commonwealth" with respect to the various matters set out in that section. Consistently with covering cl 5 the Court held in *Berwick Ltd v Gray* that "the Commonwealth" for which the Parliament may make such laws extends to the external territories of Australia[167]. A fortiori, it covers the internal territories. Section 122 authorises laws which, while they must be for the government of a territory, may have

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165 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 370; [1961] HCA 21.

166 For a helpful discussion of various approaches to overruling see Harris, "Overruling Constitutional Interpretations", in Sampford and Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions*, (1996) 231.

167 (1976) 133 CLR 603 at 608 per Mason J; Barwick CJ, McTiernan, Jacobs and Murphy JJ agreeing.

application in the States[168]. The legislative powers of the Commonwealth Parliament are generally capable of application to the States and Territories[169]. These considerations indicate that an integrated approach to the availability of legislative powers and limits on them throughout the Commonwealth is to be preferred where the language of the Constitution so permits. That conclusion favours, although it is not determinative of, the proposition that s 122 is subject to limitations on legislative powers which are of general application. It therefore favours, although it is not determinative of, the proposition that laws made under s 122 which effect compulsory acquisition of property must do so on just terms within the meaning of s 51(xxxi).

75 Dixon CJ (with whom the other members of the Court agreed) discussed the interaction of s 51(xxxi) with other provisions of the Constitution in *Attorney-General (Cth) v Schmidt*[170]. Assets of a German business operating in Australia at the outbreak of World War II were seized under the *Trading with the Enemy Act* 1939 (Cth). They were realised and after the war the moneys paid to the Controller of Enemy Property. The question for the Court was whether the disposition of the moneys was acquisition other than on just terms under s 51(xxxi). Dixon CJ concluded that the subject matter of the legislation was "altogether outside the scope of s 51(xxxi)"[171]. It was supported by the defence power in s 51(vi). Dixon CJ said[172]:

> "It is hardly necessary to say that when you have, as you do in par (xxxi), an express power, subject to a safeguard, restriction or qualification, to legislate on a particular subject or to a particular effect, it is in accordance with the soundest principles of interpretation to treat that as inconsistent with any construction of other powers conferred in the context which would mean that they included the same subject or produced the same effect and so authorized the same kind of legislation but without the safeguard, restriction or qualification."

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168 *Lamshed v Lake* (1958) 99 CLR 132; *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492.

169 Albeit there are some which, because of their subject matter, appear to be inapposite to the Territories, eg s 51(xxxvii) and s 51(xxxviii).

170 (1961) 105 CLR 361.

171 (1961) 105 CLR 361 at 373.

172 (1961) 105 CLR 361 at 371-372.

In so saying the Chief Justice cautioned against a sweeping and undiscriminating application of that doctrine to the various powers contained in s 51[173]. He was, of course, focussing on the operation of s 51 and powers within it when he said[174]:

> "It 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."

The larger question of the application of s 51(xxxi) to the legislative power of the Commonwealth in s 122 was not before the Court. Nevertheless the general constructional principle enunciated by Dixon CJ is relevant to the interaction between s 51(xxxi) and s 122. It was cited in *Mutual Pools* by Mason CJ as "a well-accepted principle of interpretation"[175]. Section 122, as noted earlier, was not in issue in that case. Mason CJ, after acknowledging its "separate position" on the strength of *Teori Tau*, said[176]:

> "[I]n the absence of any indication of contrary intention, the other legislative powers reposed in the Parliament must be construed so that they do not authorize the making of a law which can properly be characterized as a law with respect to the acquisition of property for any relevant purpose otherwise than on just terms."

Absent the authority of *Teori Tau* the general principle so stated favours the application of s 51(xxxi) to s 122.

76 Another general consideration favours the application of the just terms limitation to the compulsory acquisition of property in the Territories. The Constitution of the Commonwealth began its life as a statute of the Imperial Parliament. While it is to be construed as a constitution and not as a mere Act of Parliament, its interpretation can be informed by common law principles in existence at the time of federation[177]. In this connection there is a principle long

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173 (1961) 105 CLR 361 at 372.

174 (1961) 105 CLR 361 at 372.

175 (1994) 179 CLR 155 at 169.

176 (1994) 179 CLR 155 at 169.

177 This does not involve consideration of wider issues about the interaction between the common law and the Constitution: see Dixon, "The Common Law as an Ultimate Constitutional Foundation", (1957) 31 *Australian Law Journal* 240 and Gummow, "The Constitution: Ultimate Foundation of Australian Law?", (2005) 79 *Australian Law Journal* 167.

pre-dating federation that, absent clear language, statutes are not to be construed to effect acquisition of property without compensation. The principle was recognised by Blackstone[178]. It was put clearly by Bowen LJ in *London and North Western Railway Co v Evans*[179]:

> "[T]he Legislature cannot fairly be supposed to intend, in the absence of clear words shewing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him."

The common law principle was expressly linked to the guarantee in s 51(xxxi) by Quick and Garran who wrote[180]:

> "This condition is consistent with the common law of England and the general law of European nations. It is intended to recognize the principle of the immunity of private and provincial property from interference by the Federal authority, except on fair and equitable terms, and this principle is thus constitutionally established and placed beyond legislative control."

They also noted that[181]:

> "In each State, at the present time, such machinery and procedure already exist for provincial purposes, in the shape of Acts known as Lands Clauses Compensation Acts, or Lands for Public Purposes Acquisition Acts."

It seems improbable in the circumstances that the drafters of the Constitution regarded the State Parliaments, in the absence of an equivalent constitutional guarantee affecting the States, as likely to acquire private property without compensation. This reflects upon the proposition in the disparate theory of the Territories power that the Commonwealth was to be put on the same footing as a State legislature for the purposes of legislating for the Territories and thus not encumbered by the just terms limitation.

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178 Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 1 at 134-135.

179 [1893] 1 Ch 16 at 28. See also *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508.

180 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 641.

181 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 641.

77 The guarantee in s 51(xxxi) of just terms in favour of "any … person" whose property is acquired "for any purpose in respect of which the Parliament has power to make laws" accords with common law principle. Laws for the government of any Territory made under s 122 are also laws made for a "purpose in respect of which the Parliament has power to make laws". Once that connection is made, the common law interpretive principle protective of individual property rights supports a construction of s 122 that will apply to it the limitation found in s 51(xxxi).

78 It would be idle to pretend that the linkage of the limitation in s 51(xxxi) to s 122 is plain and unambiguous in the text of the Constitution. Indeed the drafting history of s 51(xxxi) suggests that it was intended to overcome the possible insufficiency of other Commonwealth powers to support acquisition of private property[182]. But given an integral approach to the place of the Territories power in the Constitution, the constructional principle enunciated by Dixon CJ in *Schmidt* and adopted in *Mutual Pools* by Mason CJ and the generality of the common law interpretive principle, the factors weighing in favour of the application of the just terms limitation to s 122 are powerful.

79 Importantly, the application of s 51(xxxi) to s 122 does not involve imposing on the Territories power a limitation relevant only to the federal distribution of powers. The just terms guarantee relates not only to States but also to persons. The result of its application to s 122 is that no person anywhere within the Commonwealth of Australia can be subjected to a law of the Commonwealth acquiring the property of that person other than on just terms. It will also protect States where laws made under s 122 effect or authorise the acquisition of State property.

80 There were other matters referred to by Gummow J in *Newcrest* which give rise to consequences weighing against the non-application of the just terms limitation in s 51(xxxi) to s 122:

1. The application of laws made under s 122 affecting property cannot always be confined to property located within a territory. There are many species of incorporeal property the situs of which may not be fixed or readily ascertainable[183].

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182 Evans, "Property and the Drafting of the Australian Constitution", (2001) 29 *Federal Law Review* 121 at 128-132.

183 (1997) 190 CLR 513 at 602.

2. The power conferred by s 122 on the Commonwealth Parliament to make laws for the Territories which also affect the States and which might include acquisition of property within a State, eg for the establishment of a tourist bureau for a territory[184]. Another example might be the establishment of a transport terminal.

3. The capriciousness of the non-application of the just terms requirement where a law made under s 51 and extending to a territory is also supported by s 122[185].

As his Honour also pointed out in *Newcrest*, a construction of the Constitution which treats s 122 as disjoined from s 51(xxxi) produces absurdities and incongruities particularly with respect to the people of the Northern Territory, which was formerly part of South Australia and was surrendered to the Commonwealth in 1910[186].

81 In my opinion, ordinary principles of construction, the weight of authority, other than *Teori Tau*, and the inconvenience of the contrary position, support a construction of s 122 that subjects it to the just terms guarantee in s 51(xxxi).

Whether *Teori Tau* should be overruled

82 *Teori Tau* has been referred to in a number of subsequent decisions of the Court. It has not been relied upon by any member of a majority of the Court for the proposition that s 51(xxxi) does not constrain the power under s 122 to make laws for the acquisition of property. The decision was relied upon in the Court of Appeal of New South Wales in *Durham Holdings Pty Ltd v New South Wales*[187] as support for the proposition that the legislative power of the State was not restrained by any deeply rooted common law principle against compulsory acquisition of property without compensation. But that case was not about the relationship between s 51(xxxi) and s 122 of the Constitution, as Spigelman CJ noted in distinguishing the views expressed by Gaudron, Gummow and Kirby JJ in *Newcrest*[188].

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184 (1997) 190 CLR 513 at 602.

185 (1997) 190 CLR 513 at 601.

186 (1997) 190 CLR 513 at 600-601.

187 (1999) 47 NSWLR 340 at 364.

188 (1999) 47 NSWLR 340 at 364.

83 *Teori Tau* has been applied directly in cases concerning the cooperative corporations scheme established after the decision of this Court in *The Incorporation Case*[189]. The Commonwealth enacted the *Corporations Act* 1989 as a law for the government of the Australian Capital Territory and enacted as part of it a Corporations Law which was adopted by each of the States. The takeover provisions of the Law made provision for compulsory acquisition of minority shares in publicly listed companies by bidders who had obtained the requisite majority of acceptances. Challenges to the validity of this provision as a law of the Australian Capital Territory on the basis that it did not meet the just terms requirement of s 51(xxxi) were rejected by Gummow J, sitting as a single Justice of this Court, and by the Queensland Court of Appeal[190]. In each case *Teori Tau* was applied. However, corporations regulation is now effected nationally under laws of the Commonwealth made pursuant to referrals of power from the various States.

84 In the 40 years that have passed since it was decided, the particular proposition for which *Teori Tau* is authority, namely that s 122 confers power to acquire property which is unconstrained by the just terms requirement of s 51(xxxi), has not entered the mainstream of constitutional jurisprudence nor formed the basis for subsequent decisions of this or any other court save for decisions relating to the former cooperative corporations scheme which has, in any event, long been overtaken by successive arrangements for corporate regulation not dependent upon the Territories power.

85 The decision in *Teori Tau* did not accord with a pre-existing "stream of authority". Its reasoning has been described as "totally at odds with that of Dixon CJ and Kitto J in *Lamshed v Lake*"[191]. It was a unanimous decision of this Court but the circumstances in which it was made, which are discussed in the joint judgment of Gummow and Hayne JJ, indicate that it was not informed by extended reflection upon the constructional issues thrown up by s 51(xxxi) and s 122. It concerned a question of considerable constitutional importance. It cannot be said that it has achieved a useful result. Indeed it has been little relied upon for the precise question which it decided. There are potential absurdities and inconveniences resulting from it. There is no evidence that it has been independently acted upon in a way which militates against reconsideration in this case. So far as acquisitions within the Northern Territory by the Northern

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189 *New South Wales v The Commonwealth* (1990) 169 CLR 482; [1990] HCA 2.

190 *Gambotto v Resolute Samantha Ltd* (1995) 69 ALJR 752; 131 ALR 263; [1995] HCA 48; *Pauls Ltd v Elkington* (2001) 189 ALR 551.

191 Zines, "The Nature of the Commonwealth", (1998) 20 *Adelaide Law Review* 83 at 83.

Territory Government are concerned, the *Northern Territory (Self-Government) Act* 1978 (Cth) has made provision, from the time of its enactment, for acquisitions of property to be on just terms[192].

86 The constructional considerations referred to earlier militate powerfully against the interpretation adopted in *Teori Tau*. The contrary interpretation is, in my respectful opinion, to be preferred. Given the isolation of the decision from the stream of prior and subsequent jurisprudence, its overruling would not effect any significant disruption to the law as it stands. The cautionary principle in this case does not stand against overruling. For these reasons I consider that *Teori Tau* should be overruled and that the acquisition of property from any person, pursuant to laws made under s 122, must be on just terms as required by s 51(xxxi).

Acquisition of property under s 51(xxxi)

87 Section 51(xxxi) has been given a liberal construction which informs both the content of the power it confers and the limitation on that power. In *The Commonwealth v New South Wales*[193] Knox CJ and Starke J said that "property" was "the most comprehensive term that can be used" and that no limitation was placed by the Constitution on the property in respect of which the Parliament could legislate[194]. In *Minister of State for the Army v Dalziel*[195] the taking of possession and occupation of land for a period was held to be an acquisition of property for the purposes of par (xxxi) notwithstanding that no legal or equitable estate was acquired. Latham CJ in that case described s 51(xxxi) as "plainly intended for the protection of the subject" and said that it should be liberally interpreted[196]. Starke J described the concept of property in par (xxxi) as extending to "every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action"[197]. To acquire any such right would be rightly described as an "acquisition of property"[198].

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192 Section 50.

193 (1923) 33 CLR 1; [1923] HCA 34.

194 (1923) 33 CLR 1 at 20-21.

195 (1944) 68 CLR 261; [1944] HCA 4.

196 (1944) 68 CLR 261 at 276.

197 (1944) 68 CLR 261 at 290.

198 (1944) 68 CLR 261 at 290.

88 The linkage between the concepts of property and acquisition in s 51(xxxi) was described by Dixon J in the *Bank Nationalisation Case* when he said[199]:

> "[Section] 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."

89 The Court has restated its liberal approach to the construction of s 51(xxxi) over many years[200]. Recently in *Telstra Corporation Ltd v The Commonwealth*[201] the Court reaffirmed that s 51(xxxi) is concerned with matters of substance rather than form and that acquisition and property are to be construed liberally and said[202]:

> "In the present case it is also useful to recognise the different senses in which the word 'property' may be used in legal discourse. Some of those different uses of the word were identified in *Yanner v Eaton*[203]. In many cases, including at least some cases concerning s 51(xxxi), it may be helpful to speak of property as a 'bundle of rights'. At other times it may be more useful to identify property as 'a legally endorsed concentration of power over things and resources'. Seldom will it be

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199 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349; [1948] HCA 7.

200 eg *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 370-371; *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201-202; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509; [1993] HCA 10; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 172-173 per Mason CJ, 184-185 per Deane and Gaudron JJ, 200 per Dawson and Toohey JJ; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303 per Mason CJ, Deane and Gaudron JJ, 312 per Brennan J, 320 per Toohey J; [1994] HCA 6.

201 (2008) 234 CLR 210; [2008] HCA 7.

202 (2008) 234 CLR 210 at 230-231 [44].

203 (1999) 201 CLR 351 at 365-367 [17]-[20] per Gleeson CJ, Gaudron, Kirby and Hayne JJ, 388-389 [85]-[86] per Gummow J; [1999] HCA 53.

> useful to use the word 'property' as referring only to the subject matter of that legally endorsed concentration of power." (some references omitted)

90 Although broadly interpreted, acquisition is to be distinguished from mere extinguishment or termination of rights. In *Australian Tape Manufacturers Association Ltd v The Commonwealth*[204], the majority quoted with approval the statement by Mason J in *The Tasmanian Dam Case*[205]:

> "To bring the constitutional provision into play it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be."

So a right of action against the Commonwealth is "property" within the meaning of s 51(xxxi) and a law which extinguishes such a right of action may bear the character of a law with respect to the acquisition of property[206].

91 A law which is not directed to the acquisition of property as such, but which is concerned with the adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity, is unlikely to be susceptible of legitimate characterisation as a law with respect to the acquisition of property for the purposes of s 51(xxxi). Such a law would therefore be beyond the reach of the just terms guarantee[207].

92 A right which has no existence apart from statute is one that of its nature may be susceptible to modification or extinguishment. In *Georgiadis* Mason CJ, Deane and Gaudron JJ said[208]:

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204 (1993) 176 CLR 480.

205 (1993) 176 CLR 480 at 499-500 per Mason CJ, Brennan, Deane and Gaudron JJ citing *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 145 per Mason J; [1983] HCA 21. See also *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 634 per Gummow J, Toohey and Gaudron JJ concurring in the relevant respect at 560 and 561.

206 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297; *The Commonwealth v Mewett* (1997) 191 CLR 471; [1997] HCA 29; *Smith v ANL Ltd* (2000) 204 CLR 493; [2000] HCA 58.

207 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 161; [1994] HCA 27.

208 (1994) 179 CLR 297 at 306.

> "There is no acquisition of property involved in the modification or extinguishment of a right which has no basis in the general law and which, of its nature, is susceptible to that course."

Nevertheless a law of the Commonwealth which extinguishes purely statutory rights having no basis in the general law can effect an acquisition of property. Brennan CJ gave an example[209]:

> "If statutory rights were conferred on A and a reciprocal liability were imposed on B and the rights were proprietary in nature, a law extinguishing A's rights could effect an acquisition of property by B."

93 When the property said to have been acquired is of statutory origin the terms of the statute and the nature of the property to which it gives rise require consideration to see whether or not it attracts the protection of s 51(xxxi). In *Attorney-General (NT) v Chaffey* the joint judgment said[210]:

> "The term 'property' is used in various settings to describe a range of legal and equitable estates and interests, corporeal and incorporeal. In its use in s 51(xxxi) the term readily accommodates concepts of the general law. Where the asserted 'property' has no existence apart from statute further analysis is imperative." (footnote omitted)

Their Honours rejected as "too broad" the proposition that the contingency of legislative modification or extinguishment of statutory rights would, in every case, remove them from the scope of s 51(xxxi)[211]. *Newcrest* was an example to the contrary. Similarly, a law reducing the content of subsisting statutory exclusive rights in intellectual property could attract the operation of s 51(xxxi)[212]. On the other hand, where a statutory right is inherently susceptible of variation, the mere fact that a particular variation reduces an entitlement does not make that variation an acquisition of property[213].

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209 *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 17 [16]. See also at 36 [79] per Gaudron J, 70 [184] per Gummow J, 91-92 [237] per Kirby J; [1998] HCA 8.

210 (2007) 231 CLR 651 at 664 [23] per Gleeson CJ, Gummow, Hayne and Crennan JJ; [2007] HCA 34.

211 (2007) 231 CLR 651 at 664 [24].

212 (2007) 231 CLR 651 at 664 [24].

213 *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 237 per Mason CJ, Deane and Gaudron JJ, 243-244 per Brennan J, 256 per Toohey J;

(Footnote continues on next page)

94 The Commonwealth's submissions in this case focussed upon the statutory character of the fee simple estate held by the Land Trust and the inherently variable regulatory framework in which it was embedded. It is necessary now to turn to the particular contentions about the effects of the challenged provisions of the NER and FaCSIA Acts and their characterisation for the purposes of s 51(xxxi).

The Land Trust property

95 The standing of the plaintiffs to bring their action on the basis of the effect of the NER Act on the Land Trust's fee simple estate was not disputed. They pleaded in their statement of claim that the estate in fee simple in the Maningrida land held by the Land Trust is property of the Land Trust within the meaning of s 51(xxxi) of the Constitution. Their plea was denied by the Commonwealth in its defence, reflecting the position stated in its demurrer that:

> "[T]he alleged species of property relied upon by the Plaintiffs as having allegedly been acquired are either not property within the meaning of s 51(xxxi) of the Constitution or are not property which is capable of being acquired or which has been acquired by the challenged Acts within the meaning of s 51(xxxi) of the Constitution".

96 In its written submissions the Commonwealth accepted that the s 31 leases altered and diminished rights available to the Land Trust as holder of the fee simple for the period of the lease in respect of the land covered by the lease. The Commonwealth also disclaimed, in oral argument, any suggestion that the fee simple estate held by the Land Trust was not a form of property. Moreover, despite the generality of its demurrer, it did not deny that the property could be "acquired", for example in a case in which the Commonwealth Parliament created a lease in favour of a third party.

97 The Commonwealth's substantive submission was that the legislative scheme of the Land Rights Act had always been subject to adjustment of the interests necessarily involved. These were matters of regulation susceptible to parliamentary variation. Legislative amendments to give effect to such variations could be done without the need to pay compensation to the holder of the fee simple estate or anyone else. Counsel put it thus:

[1994] HCA 8; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 634-635 per Gummow J, Toohey and Gaudron JJ concurring in the relevant respect at 560 and 561.

> "What one has done is simply changed the rules around the control of this piece of land, and in the circumstances, that is not an acquisition to which s 51(xxxi) applies".

98 The Commonwealth's submission must be considered against the objects of the Land Rights Act and the provisions of that Act and the NER Act to which reference has already been made. The Land Rights Act established a regime for the grant of statutory rights in land to traditional Aboriginal owners in the Northern Territory. In so doing it gave effect to recommendations of the Woodward Royal Commission. The aims of the scheme proposed by the Royal Commission included[214]:

> "(i) the doing of simple justice to a people who have been deprived of their land without their consent and without compensation,
>
> …
>
> (iii) the provision of land holdings as a first essential for people who are economically depressed and who have at present no real opportunity of achieving a normal Australian standard of living,
>
> (iv) the preservation, where possible, of the spiritual link with his own land which gives each Aboriginal his sense of identity and which lies at the heart of his spiritual beliefs".

These aims were reflected in the Second Reading Speech for the Bill which became the Land Rights Act. Relevant extracts from the Speech are set out in the judgment of Crennan J.

99 The object of the Act was described by Toohey J, as first Aboriginal Land Commissioner, thus[215]:

> "Essentially the object of the Act is to give standing, within the Anglo-Australian legal system, to a system of traditional ownership that has so far failed to gain recognition by the courts."

And in *R v Toohey; Ex parte Meneling Station Pty Ltd* the Act was said to give "legislative recognition to Aboriginal rights and interests in … land"[216].

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214 Commonwealth, *Aboriginal Land Rights Commission: Second Report*, (1974) at 2.

215 Commonwealth, Aboriginal Land Commissioner, *Yingawunarri (Old Top Springs) Mudbura Land Claim*, (1980) at 14 [70].

216 (1982) 158 CLR 327 at 355; [1982] HCA 69.

100 It was a purpose of the Act to confer some of the important benefits of ownership of land upon traditional Aboriginal owners in the Northern Territory. In the *Blue Mud Bay Case*[217] the plurality characterised the fee simple estates granted under the Act consistently with that purpose. Their Honours recognised the important differences between such interests granted under the Land Rights Act and those ordinarily recorded under the Torrens system and said[218]:

> "But despite these differences, because the interest granted under the Land Rights Act is described as a 'fee simple', it must be understood as granting rights of ownership that 'for almost all practical purposes, [are] the equivalent of full ownership' of what is granted. In particular, subject to any relevant common law qualification of the right, or statutory provision to the contrary, it is a grant of rights that include the right to exclude others from entering the area identified in the grant." (references omitted)

101 The fee simple estate in the Maningrida land granted to the Land Trust lay well within the class of "property" to which s 51(xxxi) applies.

102 It may be accepted, as the provisions of the Land Rights Act referred to earlier amply demonstrate, that the administration of the fee simple estate is subject to close regulation. The Land Trust can only grant estates or interests in the land with the written consent of the Minister and the direction of the relevant Land Council. These and associated provisions relating to Aboriginal land under the Act are directed to the protection of the interests of the traditional Aboriginal owners. Legislative amendments to the provisions of the Act affecting the powers of Land Trusts and Land Councils in dealing with the fee simple estates granted under the Act, are unlikely to constitute acquisitions of property within the meaning of s 51(xxxi).

103 It may be accepted that the creation of the s 31 leases was intended to facilitate Commonwealth control of townships so that additional accommodation and other services could be provided to the relevant Aboriginal communities. In a broad sense the s 31 lease granted over the Maningrida land might be described as a legal device adopted for regulatory purposes. However, its legal effect was to diminish the ownership rights conferred by the grant of the fee simple estate so far as they related to the Maningrida township. By operation of s 35 of the NER Act the statutory lease conferred upon the Commonwealth the essential rights of a lessee abstracted from the fee simple estate. It also conferred the right to vary

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217 *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 82 ALJR 1099; 248 ALR 195.

218 (2008) 82 ALJR 1099 at 1111 [50]; 248 ALR 195 at 208.

the area covered by the lease and to terminate the lease early. An acquisition of property is no less an acquisition of property because it also has a regulatory or other public purpose. The grant of the lease was an acquisition of property from the Land Trust. Assuming the correctness of the facts pleaded in the statement of claim it indirectly affected the rights of the first and second plaintiffs.

104 In my opinion, however, the compensation provisions of the NER Act, to which reference was made earlier, afforded just terms for the acquisition of the Land Trust property. Heydon J has provided detailed reasons in support of that conclusion and I agree with them.

The Land Trust fee simple estate and the permit system

105 The plaintiffs alleged that the abolition of the permit system by the FaCSIA Act caused the Land Trust to lose its entitlement to exclusive possession and enjoyment of common areas within the Maningrida land. Consequently its rights as owner of an estate in fee simple in that land would no longer include an entitlement to limit entry upon the common areas subject to the permits under the *Aboriginal Land Act* or other rights of entry under s 70 of the Land Rights Act. The written submissions in support of this point were brief, stating simply that the loss of the permit system resulted in a significant loss of control over the Maningrida land. The permit system was said to have formed the basis upon which traditional owners could enjoy exclusive possession.

106 The Commonwealth accepted that the conferral of rights to enter upon portions of the Maningrida land created by the new ss 70A-70G of the Land Rights Act had the effect of removing the possibility of an action for ejectment in relation to persons lawfully exercising such new rights of entry and that this thereby diminished the rights previously contained in the fee simple grants, albeit to a relatively minor degree. Nevertheless, it was said, the conferral of such rights of entry was an amendment of a kind expressly envisaged under ss 70(1) and 73(1) at the time of commencement of the Land Rights Act and prior to the fee simple grants. Grants having been made under a scheme that foreshadowed the possibility of variations of rights of entry, laws modifying those rights did not constitute an acquisition of property.

107 The Land Trust pointed out that s 70H provides that nothing in ss 70B-70G limits the application of s 71. Moreover, those provisions engage the proviso that in proceedings against a person for an offence against s 70(1) it is a defence if the person enters or remains on Aboriginal land in accordance with the Act (s 70(2A)(h)). The defence covers the entry onto roads and common areas within community land which is subject to the s 31 lease. The Commonwealth submitted that the right of the Land Trust to exclude others from the land having been ousted on the grant of the lease, the provisions imported by the FaCSIA Act have no further or additional effect on that right while the lease remains in force. That submission should be accepted. It does not mean that there is not an

acquisition of property from the Land Trust within the meaning of s 51(xxxi). I hold, on the basis of the Commonwealth concession, which was correctly made, about the effect of the conferral of rights of entry, that there was such an acquisition.

108 Importantly however, as is pointed out in the judgment of Gummow and Hayne JJ, the FaCSIA Act contains provision for compensation for acquisition in terms following those of s 60 of the NER Act. At best there was no additional effect on the Land Trust property by reason of the abolition of the permit system. Whether or not there was any additional effect the compensation provisions of the FaCSIA Act meet the requirement of just terms imposed by s 51(xxxi) of the Constitution.

The s 71 rights

109 The first and second plaintiffs claim that they have an entitlement, pursuant to s 71 of the Land Rights Act, to enter upon, use or occupy the Maningrida land in accordance with Aboriginal tradition. They say that those rights are property within the meaning of s 51(xxxi) of the Constitution.

110 Their contentions that these rights have been acquired by the Commonwealth under the NER Act are set out in par 19 of the statement of claim. In summary their contentions are:

(a) if the s 71 rights are preserved by s 34(3) of the NER Act they are terminable at will by the Minister acting pursuant to s 37 of that Act;

(b) if they are not preserved by s 34(3), then they have been suspended by reason of the Commonwealth's entitlement under the s 31 lease to exclusive possession and quiet enjoyment of the Maningrida land.

111 It may be accepted that each of the first and second plaintiffs has a statutory entitlement under s 71 to enter upon and use or occupy the Maningrida land in accordance with Aboriginal tradition. It may be accepted also that the statutory entitlement constitutes property for the purposes of s 51(xxxi). In my opinion, that right is preserved by s 34(3) of the NER Act. The question of suspension of the right does not arise.

112 The entitlement created by s 71(1) is qualified by s 71(2) so that it does not authorise entry, use or occupation that would interfere with the use or enjoyment of an estate or interest held by someone other than a Land Trust or an incorporated association of Aboriginals. The Commonwealth submitted that the estates or interests protected under s 71(2) would extend to that created by its s 31 lease. But as Gummow and Hayne JJ point out in their reasons, this does not give effect to the preservation by s 34, to which s 35(1) is subject, of any

right, title or interest in the land that existed immediately before the coming into effect of the s 31 lease.

113 The question that next arises is whether s 37 of the NER Act effects an acquisition of the first and second plaintiffs' s 71 rights. Section 37 authorises the Commonwealth to "at any time … terminate … a right, title or interest that is preserved under section 34". The first and second plaintiffs submitted that by virtue of s 37 their s 71 rights were "now terminable at will and without notice". They no longer enjoy, it was submitted, the permanence and stability necessary to constitute an interest in land[219].

114 The Commonwealth terminates a right, title or interest preserved under s 34 "by the Minister giving notice in writing to the person who holds the right, title, interest or lease"[220]. This is the only way in which such a termination can be effected. The procedure and the language in which it is formulated are quite inapposite to terminate the rights of each of a group of traditional Aboriginal owners created by s 71(1) of the Land Rights Act and preserved by s 34(3) of the NER Act. Absent a mechanism adapted to the termination of that class of rights, the power to terminate does not extend to them. It may be that there is a certain incoherence in the statutory scheme relating to preserved rights as a result. But as Gummow and Hayne JJ point out, clear words would be expected if Parliament had intended to authorise the effective repeal or suspension of the operation of s 71 of the Land Rights Act.

115 There is, in my opinion, no acquisition by the Commonwealth of the rights of the first and second plaintiffs under s 71 of the Land Rights Act.

Conclusion

116 For the preceding reasons, the demurrer should be allowed. I agree with Gummow and Hayne JJ that the plaintiffs should pay the costs of the Commonwealth, the Land Trust bear its own costs and the further conduct of the action be a matter for further direction by a Justice.

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219 *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342 per Mason J.

220 Section 37(3).

117 GUMMOW AND HAYNE JJ. By an action instituted in the original jurisdiction of this Court the plaintiffs seek declaratory relief. This includes a declaration that various provisions of the *Northern Territory National Emergency Response Act* 2007 (Cth) ("the Emergency Response Act")[221] and the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act* 2007 (Cth) ("the FCSIA Act") result in an acquisition of certain property in the Northern Territory ("the Territory") to which s 51(xxxi) of the Constitution applies, and a declaration that these provisions are invalid in their application to that property.

118 The first defendant, the Commonwealth, has pleaded a defence to the statement of claim, as has the second defendant ("the Land Trust"). However, the Commonwealth also has demurred to the whole of the statement of claim[222] on the grounds that the facts alleged therein do not show any cause of action to which effect can be given by the Court as against the Commonwealth[223]. It is that demurrer which has been heard by the whole Court. For the reasons which follow, the demurrer should be allowed.

The demurrer

119 Of the function of a demurrer in a case such as this, Dixon CJ said in *South Australia v The Commonwealth*[224]:

> "[T]he use of a demurrer, which certainly has been found a speedy and not unsatisfactory procedure in this Court, where causes depending on questions of *ultra vires* and upon other federal questions of statutory instruments are frequent, presupposes a pleading which is drawn so as to allege with distinctness and clearness the constituent facts of the cause of

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221 The Emergency Response Act has been amended by the *Indigenous Affairs Legislation Amendment Act* 2008 (Cth) which commenced on 2 July 2008. The Court entertained submissions made by the parties on the footing that the legislation be read in this amended form.

222 The pleadings of the defendants and the demurrer are made in respect of the Second Further Amended Statement of Claim filed on 12 March 2008 ("the Statement of Claim").

223 Rule 27.07.4 of the High Court Rules 2004 permits a party to plead and demur to the same matter.

224 (1962) 108 CLR 130 at 142; [1962] HCA 10. See also *Levy v Victoria* (1997) 189 CLR 579 at 597, 628, 649; [1997] HCA 31.

> action or defence set up and which puts aside the temptation to adorn the pleading with evidentiary statements and tendentious legal conclusions. It is not going too far to say that what justifies demurrer as a means of determining a legal controversy is the supposition that the pleading will contain and contain only a statement of the material facts on which the party pleading relies for his claim or defence and not the evidence by which they are to be proved ... When a court deals with a demurrer it should in strictness discard all statements which are no more than evidentiary and all statements involving some legal conclusion."

Much thus depends upon the statement of material facts in the pleading which attracts the demurrer and thus close attention will be required to the terms of the Statement of Claim by the plaintiffs.

120 However, counsel for the plaintiffs may have sought to qualify the force of what had been said by Dixon CJ respecting the importance of attention to the material facts pleaded. Counsel referred to observations later made by Gibbs J in *Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission*[225]. His Honour spoke of facts which are "expressly or impliedly" averred in the statement of claim which is challenged on the demurrer. But in making that statement Gibbs J relied upon remarks of Isaacs J in an appeal from the Supreme Court of New South Wales, *Lubrano v Gollin & Co Pty Ltd*[226]. Isaacs J had drawn a critical distinction; the term "implication" is used to identify that which is "included in and part of that which is expressed", and is distinguished from "an inference [which is] additional to what is stated"[227]. The former, but not the latter, might be taken as admitted for the purposes of the demurrer.

121 The procedure by way of demurrer proceeds from the premise that a party whose pleading is challenged will have set out, in that pleading, the case which the party seeks to make. Thus the premise for the present hearing was that the plaintiffs advanced the case which they sought to make in this Court in the best way that they could. The parties had held extensive consultations[228], over many months, about whether the statement of claim was in a form to which the Commonwealth could demur. In the course of that process, the plaintiffs put forward several different versions of their statement of claim before seeking and

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225 (1977) 139 CLR 117 at 135; [1977] HCA 55.

226 (1919) 27 CLR 113 at 118; [1919] HCA 61.

227 (1919) 27 CLR 113 at 118.

228 [2007] HCATrans 745, ll 10-15, 310-315; [2008] HCATrans 092; [2008] HCATrans 139.

obtaining leave to file their amended pleading in the form now under consideration. There is then no basis for doubting that the plaintiffs have put their case in the way in which they have been advised is to their best advantage.

122 No different or special principle is to be applied to the determination of the demurrer to the plaintiffs' pleading of invalidity of provisions of the Emergency Response Act and the FCSIA Act because the plaintiffs are Aboriginals. No party to this litigation sought to rely upon any such principle, whether the suggested principle be described as a rule of "heightened" or "strict" scrutiny or in some other way. There was therefore no examination of the content of any such principle. But we would agree that such a principle "seems artificial when describing a common interpretative function"[229]. In any event, to adopt such a principle would have departed from the fundamental principle of "the equality of all Australian citizens before the law", as Brennan J put it in *Mabo v Queensland [No 2]*[230].

123 The demurrer is presented by the Commonwealth against the background provided by two decisions of this Court respecting the relationship between the legislative powers conferred by s 51(xxxi) and s 122 of the Constitution. In *Teori Tau v The Commonwealth*[231] the Court answered "no" to the question in a special case, namely whether certain ordinances of the Territory of New Guinea, made pursuant to the *New Guinea Act* 1920 (Cth) and the *Papua and New Guinea Act* 1949 (Cth) and providing for the acquisition of property, were invalid as failing to provide just terms. The Court said in reasons delivered by Barwick CJ[232]:

> "The grant of legislative power by s 122 is plenary in quality and unlimited and unqualified in point of subject matter. In particular, it is not limited or qualified by s 51(xxxi) or, for that matter, by any other paragraph of that section."

124 On the other hand, in the subsequent decision, *Newcrest Mining (WA) Ltd v The Commonwealth*[233], this Court declared that, in respect of certain mining

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229 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 263-264 [240]; [2004] HCA 41.

230 (1992) 175 CLR 1 at 58; [1992] HCA 23.

231 (1969) 119 CLR 564; [1969] HCA 62.

232 (1969) 119 CLR 564 at 570.

233 (1997) 190 CLR 513; [1997] HCA 38.

leases of tenements in the Territory, two proclamations under the *National Parks and Wildlife Conservation Act* 1975 (Cth) were invalid to the extent that they effected acquisitions of property from the appellant other than on just terms within the meaning of s 51(xxxi) of the Constitution. A purpose of the statute was the performance of Australia's international obligations and it was supported by s 51(xxix) of the Constitution, the power with respect to external affairs, as well as by s 122.

125 The stances taken respecting these authorities by the parties in the submissions on the demurrer are indicated later in these reasons.

The parties and the issues on demurrer

126 The Land Trust is registered owner within the meaning of the *Land Title Act* (NT) of land identified in the Statement of Claim as the "Maningrida land". It comprises five separate parcels of land with a total area of about 10.456 square kilometres[234]. They are situated within a large area of about 89,872 square kilometres ("the Land Grant Area"). The Land Grant Area is identified in the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ("the Land Rights Act")[235] as "Arnhem Land (Mainland)". It is bounded on the north and east by the low water marks of the Arafura Sea and the Gulf of Carpentaria respectively and is the subject of a deed of grant of "an estate in fee simple" executed by the Governor-General on 30 May 1980 pursuant to s 12 of the Land Rights Act, as then in force.

127 In *Northern Territory v Arnhem Land Aboriginal Land Trust* ("the *Blue Mud Bay Case*")[236], emphasis was given in the joint reasons of this Court to the need to read the Land Rights Act as a whole when considering the expression "an estate in fee simple" for the purposes of s 12. The joint reasons concluded[237]:

> "It is thus apparent that the interest granted under the Land Rights Act differed in some important ways from the interest ordinarily recorded under the Torrens system as an estate in fee simple. But despite these

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234 Emergency Response Act, Sched 1, Pt 1, cl 21.

235 Sched 1, Pt 1. References to the provisions of the Land Rights Act in these reasons are to the provisions as in force immediately prior to commencement of the challenged legislation, save where otherwise indicated.

236 (2008) 82 ALJR 1099 at 1110-1111 [48]-[50] per Gleeson CJ, Gummow, Hayne and Crennan JJ; 248 ALR 195 at 207-208; [2008] HCA 29.

237 (2008) 82 ALJR 1099 at 1110-1111 [50]; 248 ALR 195 at 208.

> differences, because the interest granted under the Land Rights Act is described as a 'fee simple', it must be understood as granting rights of ownership that 'for almost all practical purposes, [are] the equivalent of full ownership'[238] of what is granted. In particular, subject to any relevant common law qualification of the right[239], or statutory provision to the contrary, it is a grant of rights that include the right to exclude others from entering the area identified in the grant."

128 The Land Trust is an Aboriginal Land Trust established as a body corporate under s 4 of the Land Rights Act. This permits the establishment of Aboriginal Land Trusts (s 4(1)):

> "to hold title to land in the [Territory] for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of the land concerned".

The phrase "Aboriginal tradition" is defined in s 3(1) as meaning:

> "the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships".

It is unnecessary for present purposes to determine whether the use in s 4(1) of the phrase "for the benefit of" indicates a legislative intention to create trusts in the strict sense or to create a lesser form of statutory regime with some characteristics of a trust[240]. What does appear from the reasoning in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*[241] is that a party with the necessary standing would be assisted by a court of equity to enforce performance of the statutory obligations of the Land Trust with respect to the Land Grant Area. The Commonwealth in its submissions appeared to accept this position.

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238 *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635 at 656 per Deane, Dawson and Gaudron JJ; [1993] HCA 45. See also *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 80 per Deane and Gaudron JJ; *Fejo v Northern Territory* (1998) 195 CLR 96 at 126 [43] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [1998] HCA 58.

239 *Fejo v Northern Territory* (1998) 195 CLR 96 at 128 [47] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

240 See *Wik Peoples v Queensland* (1996) 187 CLR 1 at 197; [1996] HCA 40.

241 (1998) 194 CLR 247; [1998] HCA 49.

129 The Maningrida land is "Aboriginal land" for the purposes of the Land Rights Act because it is held by the Land Trust for an estate in fee simple (s 3(1)). Section 19 of the Land Rights Act permits the Land Trust, upon certain conditions, to grant a range of estates or interests in land such as the Maningrida land, including (s 19(2)) for use in the conduct of a business by, among other bodies, an Aboriginal and Torres Strait Islander corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act* 2006 (Cth) ("the Aboriginal Corporations Act").

130 The first plaintiff and the second plaintiff are Aboriginal persons and senior members of the Dhukurrdji clan with common spiritual affiliations to what are identified in the Statement of Claim with some specificity as four sacred sites located on the Maningrida land[242]. Each of these plaintiffs is stated in the Statement of Claim to be entitled by the body of traditions, observances, customs and beliefs of the traditional Aboriginal owners to enter, use and occupy the Maningrida land to live there, and to pursue purposes including participation in ceremonies in relation to these sacred sites, foraging as of right, hunting, fishing and gathering. Section 71 of the Land Rights Act then is said to confer entitlement upon the first and second plaintiffs to enter upon the Maningrida land and use or occupy it to the extent that that activity is in accordance with Aboriginal tradition governing their rights with respect to that land. The text of s 71 is set out later in these reasons.

131 Further, the plaintiffs contend that this entitlement of the first and second plaintiffs under s 71 constitutes "property" of those plaintiffs within the meaning of s 51(xxxi) of the Constitution. They also contend that the estate in fee simple in the Maningrida land held by the Land Trust pursuant to the Land Rights Act is "property" of the Land Trust within the same provision of the Constitution. It is in their application to these two items of property that the plaintiffs plead that the contested laws are invalid. The issues of law presented on the hearing of the demurrer must be considered on that footing and not as part of some more fluid and hypothetical controversy.

132 The third plaintiff is an Aboriginal and Torres Strait Islander corporation within the meaning of the Aboriginal Corporations Act. It does not assert that its

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242 Section 3(1) of the Land Rights Act defines "sacred site" as meaning:

> "a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the [Territory], is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition".

property has been acquired pursuant to the Emergency Response Act or the FCSIA Act, but it conducts business activities on the Maningrida land under agreements between it and the Land Trust. This may be accepted as affording standing along with that of the other plaintiffs to seek the relief sought in the action. The defendants did not dispute that standing at the hearing of the demurrer.

The challenged legislation

133 The object of the Emergency Response Act is stated in s 5 as being "to improve the well-being of certain communities in the [Territory]".

134 In the course of the Second Reading speech by the Minister on the Bill for the Emergency Response Act, he referred to material indicating the sad plight of Aboriginal children in the Territory and to the decision to intervene in certain communities and went on[243]:

> "**Five-year leases**
>
> This bill provides for the Australian government to acquire five-year leases over townships on [L]and [R]ights [A]ct land, community living areas and over certain other areas.
>
> It provides for the immediate and later acquisition of these leases to correspond to the rollout of the emergency response.
>
> *The acquisition of leases is crucial to removing barriers so that living conditions can be changed for the better in these communities in the shortest possible time frame.*
>
> *It must be emphasised that the underlying ownership by traditional owners will be preserved, and compensation when required by the Constitution will be paid.*
>
> *This includes provision for the payment of rent.* Existing interests will be generally preserved or excluded and provision will be made for early termination of the lease, such as when a 99-year township lease is granted.
>
> *This is not a normal land acquisition. People will not be removed from their land.*

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243 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 August 2007 at 13-14.

> The areas to be covered by the five-year leases are major communities or townships, generally of over 100 people, some of several thousand people.
>
> These communities are not thriving; some are in desperate circumstances that have led to the tragedy of widespread child abuse.
>
> The leases will give the government the unconditional access to land and assets required to facilitate the early repair of buildings and infrastructure.
>
> The most significant terms and conditions of the leases are provided for in the legislation. However, additional terms and conditions will be determined, and these will be in place when the leases start.
>
> The area of land for the five-year leases is minuscule compared to the amount of Aboriginal land in the [Territory]. It is in fact less than 0.1 per cent. There are no prospects for mining in these locations." (emphasis added)

135 Part 4 (ss 31-64) of the Emergency Response Act is headed "Acquisition of rights, titles and interests in land". Division 1 is headed "Grants of leases for 5 years" and Subdiv A comprises ss 31-37[244]. The Maningrida land is referred to in cl 21 in Pt 1 of Sched 1 to the Emergency Response Act, with the result that by force of par (a) of s 31(1), a five year lease from 17 February 2008 has been granted to the Commonwealth by the Land Trust ("the Maningrida Five Year Lease")[245]. Section 31(1) relevantly provides:

> "A lease of the following land is, by force of this subsection, granted to the Commonwealth by the relevant owner of the land:
>
> (a) land referred to, in a clause, in Parts 1 to 3 of Schedule 1 to this Act".

Section 55 provides for the lodgement with and registration by the Registrar-General for the Territory of a notification of the grant of a lease under s 31 as if it were a dealing under the laws of the Territory.

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244 These headings are part of the statute: *Acts Interpretation Act* 1901 (Cth), s 13(1).

245 Although the statute refers to the grant of leases for "5 years", ss 31(2)(a)(ii), 31(2)(b) and 32 of the Emergency Response Act may produce a shorter term. In the light of these provisions, counsel for the plaintiffs submitted that the term of the Maningrida Five Year Lease was effectively four and a half years.

136 Among other allegations in the Statement of Claim, the plaintiffs contend that there is no automatic obligation imposed upon the Commonwealth to pay rent to the Land Trust in respect of the Maningrida Five Year Lease and that the Commonwealth is given, by force of the Emergency Response Act, exclusive possession of the Maningrida land, including sacred sites thereon.

137 Division 3 of Pt 4 (ss 50-59) of the Emergency Response Act is headed "Effect of other laws in relation to land covered by this Part etc". Section 50 relevantly provides that Div 1 of Pt 4 (the five year lease provisions) and also s 52 have effect "despite any other law", written or unwritten, of the Commonwealth or the Territory. Section 52 makes special and further provision with respect to the exercise by the Land Trust of its powers under s 19 of the Land Rights Act with respect to land such as the Maningrida land. In particular, s 52(2) requires the written consent of the Minister administering the Emergency Response Act to any exercise by the Land Trust of its power under s 19 to grant or vary a lease while a five year lease under s 31 is in force.

138 Division 4 of Pt 4 (ss 60-64) is headed "Miscellaneous". Sections 60 and 61 make particular provision with respect to compensation where the operation of Pt 4 would result in an acquisition from a person of property, to which s 51(xxxi) of the Constitution applies, otherwise than on just terms. Provision also is made by s 62 for payment of rent by the Commonwealth to the Land Trust.

139 Schedule 4 to the FCSIA Act makes various changes and additions to the Land Rights Act. Item 12 adds ss 70A-70H to the Land Rights Act. These amendments commenced on 17 February 2008 and include elaborate provisions changing what the plaintiffs call "the permit system" and allowing certain persons to have access to, and to enter and remain on, what is Aboriginal land within the meaning of the Land Rights Act. However, s 70H provides that nothing in ss 70B-70G limits the application of s 71 of the Land Rights Act. Section 71 is not amended by the express terms of any provision now under challenge.

140 Section 70(1) of the Land Rights Act makes it an offence for a person to "enter or remain on Aboriginal land". The importance of s 70(1) to the scheme of the Land Rights Act was considered in the *Blue Mud Bay Case*[246]. Item 4 in Sched 5 to the FCSIA Act should be noted. Its effect is to amend s 70 of the Land Rights Act so as to provide a defence to a charge of entering or remaining

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246 (2008) 82 ALJR 1099 at 1103 [6], 1111 [52]-[55], 1112 [61]; 248 ALR 195 at 197-198, 208-209, 210-211.

on Aboriginal land contrary to s 70(1). The new defence may be engaged where the defendant has entered or remained on Aboriginal land that is leased to the Commonwealth under s 31 of the Emergency Response Act. No challenge is made to the validity of Item 4 in Sched 5, but if s 31 be invalid as the plaintiffs contend then Item 4 is bereft of subject matter and in that sense inoperative.

141 Item 15 in Sched 4 to the FCSIA Act is challenged and adds a new Sched 7 to the Land Rights Act; this is headed "Community land" and identifies those 52 areas of land (including the Maningrida land)[247] which are "Aboriginal land" within the meaning of the Land Rights Act and which constitute "community land"[248] for the purposes of the new access provisions in ss 70B-70F of the Land Rights Act.

142 Item 18 in Sched 4 is a free-standing provision. It provides that s 50(2) of the *Northern Territory (Self-Government) Act* 1978 (Cth)[249] does not apply to any acquisition of property that occurs as a result of the operation of Sched 4 or any action taken under, or in accordance with, the added provisions of ss 70B-70G of the Land Rights Act. However, Item 18 goes on to provide its own system of compensation for such acquisition of property.

143 The plaintiffs claim a declaration that ss 31, 32, 34-37, 50, 52 and 60-62 of the Emergency Response Act and Items 12, 15 and 18 in Sched 4 to the FCSIA Act, result in an acquisition of the property of the Land Trust in the fee simple of the Maningrida land and property of the first and second plaintiffs constituted by their s 71 entitlements, to which s 51(xxxi) of the Constitution applies. They also seek a declaration that those provisions are invalid in their application to that Land Trust property and to the property of the first and second plaintiffs.

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247 Sched 7, cl 22.

248 Defined in s 70A(2).

249 Section 50(2) states:

> "Subject to section 70, the acquisition of any property in the Territory which, if the property were in a State, would be an acquisition to which paragraph 51(xxxi) of the Constitution would apply, shall not be made otherwise than on just terms."

Section 70 deals with acquisition by the Commonwealth from the Territory.

The submissions on the demurrer

144 It became clear in the course of argument on the demurrer that the submissions respecting validity turn to a significant degree upon the resolution of contested questions of statutory construction. Accordingly, in these reasons it will be necessary in the first instance to attend to various issues of that character.

145 One submission by the Land Trust should be noted and accepted immediately. This is that the rights of the first and second plaintiffs which are in issue have their source in s 71 of the Land Rights Act, and that no issue arises respecting the compulsory acquisition of native title which is recognised by the *Native Title Act* 1993 (Cth) ("the Native Title Act"), and may be acquired under provisions thereof, such as those considered in *Griffiths v Minister for Lands, Planning and Environment*[250]. Section 210 of the Native Title Act provides that nothing in that statute affects the rights or interests of any person under the Land Rights Act. The passage of the Land Rights Act preceded that of the Native Title Act, but the latter does not attempt to displace the former, as s 210 emphasises. It may also be noted that the provisions of the Native Title Act with respect to the validity of "future acts" in Div 3 of Pt 2 of that statute do not apply to the grant of a lease under s 31 of the Emergency Response Act or to any other act done by, under or in accordance with Pt 4 of the Emergency Response Act. This is provided by s 51(1) of the Emergency Response Act. Section 51(2) provides for the non-extinguishment principle, as understood in the Native Title Act[251], to apply to these acts. The validity of s 51 is not challenged by the plaintiffs.

146 The Attorney-General for the Territory intervened in support of the plaintiffs' submission that the requirements of s 51(xxxi) of the Constitution apply to a law supported by s 122 of the Constitution, whether or not, as was the situation in *Newcrest*[252], that law be also supported by another head of federal legislative power. To the extent that, to make good this submission, leave is required to challenge the decision in *Teori Tau*[253], the Territory joins the plaintiffs and the Land Trust in seeking that leave.

147 The Commonwealth meets the plaintiffs' case on several fronts, raising grounds not all of which need be decided for its demurrer to be allowed. First, it is said that s 51(xxxi) of the Constitution does not constrain the power of the

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250 (2008) 82 ALJR 899; 246 ALR 218; [2008] HCA 20.

251 Native Title Act, s 238.

252 (1997) 190 CLR 513.

253 (1969) 119 CLR 564.

Parliament to enact the challenged provisions of the Emergency Response Act and the FCSIA Act; this is said to be so even if those provisions be supported not solely by s 122 of the Constitution, but also as "special laws" within the meaning of s 51(xxvi)[254].

148 At the threshold of that latter submission, the Commonwealth not only relies upon *Teori Tau* but also, as a counter-attack, seeks leave to re-open and dispute the correctness of the decision in *Newcrest*. In this regard, the Commonwealth disputed the submission by the plaintiffs that the challenged legislation is supported by one or more heads of power conferred by s 51 of the Constitution, as well as by s 122.

149 Secondly, the Commonwealth contends that, in any event, the challenged legislation does not effect an acquisition of property within the meaning of the terms used in s 51(xxxi) of the Constitution. The final submission by the Commonwealth is that, even if the challenged legislation does effect an acquisition of property to which s 51(xxxi) applies, then the challenged legislation does provide just terms.

150 The Land Trust submits, with the plaintiffs, that there has been an acquisition of the property of the Land Trust to which s 51(xxxi) applies, but makes no submission as to the absence of just terms. The Land Trust parts company with the plaintiffs with respect to the rights of the first and second plaintiffs to enter and use, or occupy, the Maningrida land in accordance with Aboriginal tradition. The Land Trust submits that upon the proper construction of s 71 of the Land Rights Act and the five year lease provision in the Emergency Response Act, there is no question of any acquisition of s 71 rights of the first and second plaintiffs. In their oral submissions in reply, the plaintiffs indicated that if these issues of statutory construction concerning the sacred sites on the Maningrida land were to produce that outcome then they would welcome that result.

Section 71 issues

151 It is convenient first to consider that branch of the case on the demurrer which concerns in particular the sacred sites on the Maningrida land.

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254 This provides federal legislative power with respect to "the people of any race for whom it is deemed necessary to make special laws". The plaintiffs also maintain, but as what was said to be a "fall-back" position, that the challenged laws give effect to the obligations of Australia under the International Convention on the Elimination of All Forms of Racial Discrimination and "engage the external affairs power".

152 Sub-sections (1) and (2) of s 71 of the Land Rights Act state:

> "(1) Subject to this section, an Aboriginal or a group of Aboriginals is entitled to enter upon Aboriginal land and use or occupy that land to the extent that that entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land, whether or not those rights are qualified as to place, time, circumstances, purpose, permission or any other factor.
>
> (2) Subsection (1) does not authorize an entry, use or occupation that would interfere with the use or enjoyment of an estate or interest in the land held by a person not being a Land Trust or an incorporated association of Aboriginals."

153 The reference in s 71(2) to an estate or interest in Aboriginal land held by third parties includes a reference to interests of the kind described by s 66, including mining interests (s 66(a)). The reference also includes, by amendments to the Land Rights Act made by the FCSIA Act[255], various licences and rights conferred by or under other provisions of the Land Rights Act, including a licence granted under s 19 (s 71(3)(a)). However, these amendments are not challenged in the litigation.

154 Section 71(1) is expressed in terms of entitlement of Aboriginal persons to enter upon and use or occupy certain land to the extent that that entry, use or occupation meets a particular description; namely, entry, use or occupation in accordance with Aboriginal tradition. That entitlement is expressly subjected to s 71(2). The question then arises whether, as a matter of construction, the exercise of the entitlement of the first and second plaintiffs under s 71(1) could, within the operation of s 71(2), interfere with the use or enjoyment of the estate or interest in the Maningrida land held by the Commonwealth under the Maningrida Five Year Lease. If so, then the entitlement of the first and second plaintiffs under s 71(1) has been diminished and the constitutional questions would arise for decision. But, as explained below, that hypothesis respecting the operation of s 71(2) is not made good.

155 The provisions of the Emergency Response Act pertaining to the Maningrida Five Year Lease are declared by s 50(1) of that statute to "have effect despite any other law of the Commonwealth or the [Territory]". Section 35(1) states that a lease of land granted to the Commonwealth under s 31 "gives the

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255 FCSIA Act, Sched 5, Item 6.

Commonwealth exclusive possession and quiet enjoyment of the land while the lease is in force". But that provision in s 35(1) is then expressly stated to be subject to s 34. The chapeau to s 34 reads "Preserving any existing right, title or other interest". The section applies[256] "to any right, title or other interest in land if ... the land is covered by a lease granted under section 31" and this existed "immediately before the time that lease takes effect" (s 34(1)). The reference to "a right, title or interest" includes a reference to a licence (s 34(10)). This is an indication that the phrase in s 34(1) "interest in land" has a meaning wide enough to include interests pertaining to land, including statutory entitlements such as those conferred by s 71 of the Land Rights Act upon the first and second plaintiffs.

156 The critical sub-section in s 34 is s 34(3). This states:

> "The right, title or interest is preserved as a right, title or interest (as the case requires) in the land after that time."

In the result, the statutory entitlements of the first and second plaintiffs under s 71 of the Land Rights Act, as existed immediately before the Maningrida Five Year Lease, are preserved by s 34(3).

157 The consequence is that upon their proper construction the relevant provisions of the Emergency Response Act have not operated to diminish the measure of the entitlement with respect to the Maningrida land which is conferred upon the first and second plaintiffs under s 71 of the Land Rights Act, and, as a result, constitutional issues do not arise for consideration.

158 However, something should be said respecting the operation of s 37 of the Emergency Response Act. So far as immediately relevant, this states:

> "(1) The Commonwealth may, at any time, terminate:
>
> (a) a right, title or interest that is preserved under section 34; or
>
> ...
>
> (3) The Commonwealth terminates a right, title or interest in land, or a lease of land, by the Minister giving notice in writing to the person who holds the right, title, interest or lease. The Minister may also give a copy of the notice to the relevant owner of the land and any other relevant person.

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256 Subject to exceptions that are not presently relevant; see ss 39 and 40.

(4) The termination takes effect, by force of this subsection, at the time specified in the notice (which must not be earlier than the day on which the notice is given to the person who holds the right, title, interest or lease).

(5) A notice given under subsection (3) is not a legislative instrument."

159 The entitlement conferred by s 71(1) is expressed as being in favour of "an Aboriginal or a group of Aboriginals" who have the traditional rights to enter, occupy or use the land in question. Section 37 is not drawn in terms apt to terminate that entitlement because it stipulates the giving of written notice to "the person who holds the right, title, interest or lease". Further, clearer words would be expected of the Parliament were it to authorise the Executive Branch to repeal, *pro tanto*, the operation of s 71 of the Land Rights Act.

160 Before parting with this aspect of the case, it is necessary further to consider the interaction between the s 31 lease provisions of the Emergency Response Act and s 71(2) of the Land Rights Act and the submissions made by the Commonwealth on that subject. The Commonwealth accepts the general proposition that s 34 of the Emergency Response Act permits the continued exercise of s 71 entitlements so that, for example, those of the first and second plaintiffs were not destroyed upon commencement of the Maningrida Five Year Lease. But the Commonwealth argues for a qualification to that general proposition. The Commonwealth (a) fixes upon the phrase in s 71(2) "would interfere with the *use or enjoyment* of an estate or interest in the land" (emphasis added) as applicable, for example, to the position of the Commonwealth under a s 31 five year lease, (b) distinguishes this from interference with an estate or interest *per se*, and (c) submits that there is an interference within the meaning of (a) when the Commonwealth takes some step to use or enjoy the estate or interest, such as putting a fence around a building site. The Commonwealth then contends that, while this interference would be a diminution in a relevant s 71 entitlement, that would be nothing more than what s 71(2) had always accepted as a possibility.

161 These submissions by the Commonwealth concerning the nature and extent of the continued operation of s 71(2) of the Land Rights Act should not be accepted. They fail to give to the exclusive possession and quiet enjoyment conferred by s 35(1) of the Emergency Response Act in respect of a s 31 lease, the force of the subjection of s 35(1) to s 34 and the preservation thereby of existing rights, titles and interests. The Commonwealth submissions deny full effect to that preservation by seeking to condition it upon physical use of the land by the Commonwealth in exercise of the s 35 rights of exclusive possession. But this would be to give to the s 35 rights a paramountcy which s 35 itself denies by the subjection of that provision to s 34.

162 If the provisions of the Emergency Response Act be read in this way and then be read with s 71(2) of the Land Rights Act, the composite legal meaning produced by this conflation[257] is that the exclusive possession and quiet enjoyment conferred upon the Commonwealth by the Maningrida Five Year Lease is no fetter upon the continued exercise of the entitlements of the first and second plaintiffs conferred by s 71 of the Land Rights Act.

163 It should be added that the interests of the first and second plaintiffs respecting the four sacred sites located on the Maningrida land remain further protected by s 69 of the Land Rights Act. Whilst s 71 confers entitlements, s 69 imposes responsibility in the criminal law by creating an offence. Section 69 states:

> "(1) A person shall not enter or remain on land in the [Territory] that is a sacred site.
>
> Penalty:
>
> (a) for an individual – 200 penalty units or imprisonment for 12 months; or
>
> (b) for a body corporate – 1,000 penalty units.
>
> (2) Subsection (1) does not prevent an Aboriginal from entering or remaining on a sacred site in accordance with Aboriginal tradition.
>
> (2A) In proceedings for an offence against subsection (1), it is a defence if the person enters or remains on the land in performing functions under this Act or otherwise in accordance with this Act or a law of the [Territory].
>
> (3) Subject to subsection (4), in proceedings for an offence against subsection (1), it is a defence if the person charged proves that he or she had no reasonable grounds for suspecting that the land concerned was a sacred site.
>
> (4) Where the charge relates to a sacred site on Aboriginal land, the defence provided by subsection (3) shall not be taken to have been established by a person unless he or she proves that:

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257 cf *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 375-376 [66]-[68]; [1998] HCA 22.

(a) his or her presence on the land would not have been unlawful if the land had not been a sacred site; and

(b) he or she had taken all reasonable steps to ascertain the location and extent of the sacred sites on any part of that Aboriginal land likely to be visited by him or her." (notation omitted)

164 In accordance with accepted principles of statutory construction, explained by Dixon J in *Cain v Doyle*[258], it would require the clearest indication of legislative purpose to demonstrate that such a penal provision attached to the Commonwealth as a body politic. There is no such indication.

165 However, with respect to officers of the Commonwealth and other parties the prohibition imposed by s 69 would apply. In oral submissions, the Commonwealth accepted that s 69 is not deprived of operation merely because the Commonwealth has exclusive possession of an area in which a sacred site is located. If the presence of a person in the area were, for example, without the consent of the Land Council but was authorised by the Commonwealth, there would only be a defence to a charge under s 69 if that person had taken all the reasonable steps identified in par (b) of s 69(4) to ascertain the location and extent of the sacred sites.

The Land Trust fee simple

166 In light of the remarks in the *Blue Mud Bay Case*[259], set out earlier in these reasons[260], which considered the nature of a grant of an estate in fee simple under s 12 of the Land Rights Act, the Commonwealth made the following primary submissions:

> "The Commonwealth does not dispute that the grant of a form of statutory lease over the Maningrida land has the effect of altering (and diminishing) the rights available to the holder of the fee simple for the period of the lease in respect of the area of the lease. However, the granting of rights and interests (including leases) out of the fee simple estates has, since prior to the fee simple grants [in 1980], been the subject of a detailed regime under the [Land Rights] Act, which has effected a

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258 (1946) 72 CLR 409 at 425; [1946] HCA 38. See also *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 75 [22]; [1999] HCA 12.

259 (2008) 82 ALJR 1099 at 1110-1111 [50]; 248 ALR 195 at 208.

260 At [127].

> balance between different interests including the Commonwealth. If property is seen as a 'legally endorsed concentration of power over things and resources'[261], the power over the [Land Rights] Act fee simple estate has been held in several hands, including the Commonwealth's, and closely regulated by the [Land Rights] Act. Since the commencement of the [Land Rights] Act, Parliament has adjusted both the ambit of the powers to grant interests in the fee simple land and aspects of the balance between different interested parties."

167 The Land Trust was established on 19 July 1978 to hold title to land including the Land Grant Area, which was later the subject of the deed of grant of an estate in fee simple dated 30 May 1980. The registered title shows the Land Trust as owner and there are a number of registered dealings by the Land Trust, including leases to Telstra Corporation Limited and Airservices Australia.

168 The deed of grant bears a date two days after the commencement on 28 May 1980 of many of the provisions in the *Aboriginal Land Rights (Northern Territory) Amendment Act* 1980 (Cth). As the Land Rights Act stood on 30 May 1980, s 67 forbad resumption, compulsory acquisition or forfeiture under a law of the Territory, and s 68 required the consent of the local Land Council to any road construction.

169 Part III (ss 21-39) of the Land Rights Act as then in force provided for the establishment of Land Councils as bodies corporate, to ascertain, express and protect the interests of traditional Aboriginal owners of, and other Aboriginals interested in, the area of each Land Council (s 23(1)). The members of each Land Council were to be Aboriginals living in the area or registered as traditional Aboriginal owners of Aboriginal land in the area, chosen as provided in s 29. A Land Trust was not to exercise its functions in relation to land held by it save in accordance with the direction given by the relevant Land Council (s 5(2)). The members of each Land Trust were appointed by the Minister from among Aboriginals living in the area and registered traditional owners in accordance with the procedures laid down in s 7; appointments might be terminated by the Minister as provided in s 8.

170 With the consent in writing of the Minister, and at the written direction of the relevant Land Council, a Land Trust was empowered by s 19(4) to grant leases or licences in respect of land vested in it and to transfer land to another Land Trust. The giving of a written direction by the Land Council was subject to its satisfaction as to the matters set out in s 19(5).

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261 *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 230-231 [44]; [2008] HCA 7.

171 With respect to the Maningrida land located in the Land Grant Area, these and other provisions of the Land Rights Act as it stood at the time of the grant in 1980 show that the uses to which the Maningrida land might be put by the Land Trust were circumscribed by the involvement of the Minister and the relevant Land Council. To that extent it is fair to say, as the Commonwealth put it, that what was granted to the Land Trust was not "a fee simple in its purest form". However, as emphasised in the submissions by the Land Trust, the same might be said throughout Australia where the exercise of the incidents of freehold titles is subjected to a range of statutory controls and, in addition, many registered proprietors hold the title as trustees. The Land Trust submits that the involvement by statutory provision of the Minister and the local Land Council, and the force to be given to the phrase "for the benefit of" in s 4 of the Land Rights Act, did not render the fee simple grant to the Land Trust so unstable or defeasible by the prospect of subsequent legislation, such as the impugned provisions of the Emergency Response Act, as to deny any operation of s 51(xxxi) of the Constitution. That submission should be accepted.

172 In *Attorney-General (NT) v Chaffey*[262] Gleeson CJ, Gummow, Hayne and Crennan JJ referred to what was decided in *Newcrest*[263] as an authority rendering too broad any proposition that the contingency of subsequent legislative modification removes all statutory rights and interests from the scope of s 51(xxxi). Their Honours contrasted the statutory licensing scheme for off-shore petroleum exploration, the validity of which was upheld in *The Commonwealth v WMC Resources Ltd*[264], and the workers' compensation scheme established by the Territory legislation considered in *Chaffey* itself. Those cases concerned express legislative stipulations in existence at the time of the creation of the relevant statutory "right", whereby its continued and fixed content depended upon the will from time to time of the legislature. The registered fee simple owned by the Land Trust is not of that character.

173 The result is that the submissions by which the Commonwealth sought to deflect the conclusion that there had been an acquisition of the fee simple of the Land Trust in the Maningrida land should be rejected.

174 There then arise for resolution the issues outlined earlier in these reasons respecting the operation of s 51(xxxi) of the Constitution with respect to that

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262 (2007) 231 CLR 651 at 664 [24]-[25]; [2007] HCA 34.

263 (1997) 190 CLR 513.

264 (1998) 194 CLR 1; [1998] HCA 8.

acquisition effected by the Emergency Response Act of the fee simple. For the reasons earlier given, there has been no acquisition of s 71 entitlements of the first and second plaintiffs and no issue of invalidity is presented on that branch of the demurrer.

The scope and operation of s 51(xxxi) and s 122

175 The starting point for consideration of the issues of construction of the Constitution which are involved is provided by two judgments of Dixon CJ. The first is that in *Lamshed v Lake*[265], with which Webb J, Kitto J and Taylor J expressed their agreement, and the second that in *Attorney-General (Cth) v Schmidt*[266], with which Fullagar J, Kitto J, Taylor J and Windeyer J agreed. The former decision upheld the power of the Parliament, in reliance upon s 122 of the Constitution, to legislate with effect outside the geographical limits of a territory and within the area of the whole of the Commonwealth. The reasoning in *Lamshed v Lake* politely but forcefully discountenanced the then recent assertion by the Privy Council in *Attorney-General of the Commonwealth of Australia v The Queen*[267] that:

> "The legislative power in respect of the Territories is a disparate and non-federal matter."

To that statement Dixon CJ responded in *Lamshed v Lake*[268]:

> "But the legislative power with reference to the Territory, disparate and non-federal as in the subject matter, nevertheless is vested in the Commonwealth Parliament as the National Parliament of Australia; and the laws it validly makes under the power have the force of law throughout Australia. They are laws made by the Parliament of the Commonwealth and s 5 of the covering clauses makes them binding on the courts, judges and people of every State notwithstanding anything in the laws of any State."

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265 (1958) 99 CLR 132; [1958] HCA 14.

266 (1961) 105 CLR 361; [1961] HCA 21.

267 (1957) 95 CLR 529 at 545; [1957] AC 288 at 320.

268 (1958) 99 CLR 132 at 142. See also *Newcrest* (1997) 190 CLR 513 at 604 per Gummow J, 656 per Kirby J.

176 In *Schmidt*[269] the Chief Justice turned his attention to the relationship between constitutional provisions which forbid or restrain some legislative course and others which appear to permit that course without the restraint. That is a subject of importance beyond consideration of s 51(xxxi). In the joint reasons in the *Work Choices Case*[270] the following appears:

> "There is a further general proposition that 'a law with respect to a subject matter within Commonwealth power does not cease to be valid because it affects a subject outside power or can be characterised as a law with respect to a subject matter outside power'[271]. That proposition, however, does not apply when, as it was put in *Bourke v State Bank of New South Wales*[272], 'the second subject matter with respect to which the law can be characterised is not only outside power *but is the subject of a positive prohibition or restriction*' (emphasis added). That positive prohibition or restriction may merely confine the ambit of the particular head of legislative power within which it is found, or it may be of general application. If the latter, then the other paragraphs in s 51 are to be construed as subject to the limitation.
>
> In *Bourke* itself, it was held that the phrase in s 51(xiii) 'other than State banking' imposes a restriction upon federal legislative power generally, rather than a restriction only upon the ambit of s 51(xiii). Other examples of positive prohibitions or restrictions are found in the paragraphs of s 51 dealing with taxation (s 51(ii)) – 'but so as not to discriminate between States or parts of States'; bounties (s 51(iii)) – 'but so that such bounties shall be uniform throughout the Commonwealth'; insurance (s 51(xiv)) – 'other than State insurance'; and medical and dental services (s 51(xxiiiA)) – 'but not so as to authorise any form of civil conscription'[273]."

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269 (1961) 105 CLR 361 at 371.

270 *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 127 [219]-[220] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; [2006] HCA 52.

271 *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 285; [1990] HCA 29.

272 (1990) 170 CLR 276 at 285.

273 See, as to s 51(xxiiiA), *British Medical Association v The Commonwealth* (1949) 79 CLR 201; [1949] HCA 44.

The *Work Choices Case* decided that s 51(xxxv) did not contain a positive prohibition or restriction to which provisions including s 51(xx) were subjected.

177 With respect to s 51(xxxi), in *Schmidt* Dixon CJ said[274]:

> "The decisions of this Court show that if par (xxxi) had been absent from the Constitution many of the paragraphs of s 51, either alone or with the aid of par (xxxix), would have been interpreted as extending to legislation for the acquisition of land or other property for use in carrying out or giving effect to legislation enacted under such powers. The same decisions, however, show that in the presence in s 51 of par (xxxi) those paragraphs should not be so interpreted but should be read as depending for the acquisition of property for such a purpose upon the legislative power conferred by par (xxxi) subject, as it is, to the condition that the acquisition must be on just terms."

178 *Teori Tau*[275] depends upon a view of the territories power which is at odds with principles accepted and acted upon by the Court since *Lamshed v Lake*[276]. It is at odds with the accepted understanding of s 51(xxxi) expressed by Dixon CJ in *Schmidt*[277], which underpins all that has subsequently been written about the relationship between s 51(xxxi) and other heads of legislative power. What was said by Barwick CJ in *Teori Tau* also does not sit well with his later statement in *Trade Practices Commission v Tooth & Co Ltd*[278] that s 51(xxxi) is "a very great constitutional safeguard" whose "constitutional purpose is to ensure that in no circumstances will a law of the Commonwealth provide for the acquisition of property except upon just terms".

<u>*Teori Tau* should be overruled</u>

179 *Teori Tau* is a unanimous judgment of the Court given at the conclusion of oral argument on behalf of the plaintiff, without calling upon counsel for the defendants. As the judgment records[279], the point was seen as not attended by

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274 (1961) 105 CLR 361 at 371.

275 (1969) 119 CLR 564.

276 (1958) 99 CLR 132.

277 (1961) 105 CLR 361 at 371-372.

278 (1979) 142 CLR 397 at 403; [1979] HCA 47.

279 (1969) 119 CLR 564 at 569-570.

doubt. The Court held "that the power to make laws providing for the acquisition of property in the territory of the Commonwealth is not limited to the making of laws which provide just terms of acquisition"[280].

180 Examination of the transcript of argument shows that counsel for the plaintiff put the plaintiff's case on the basis that s 51(xxxi) was the sole power of the Parliament with respect to the acquisition of property in the Territory. On the footing that s 122 is a "plenary" power, the Court then held that the territories power authorises laws with respect to the acquisition of property in the territories and that that power is distinct from the power conferred by s 51(xxxi).

181 Echoes may be heard in *Teori Tau* of the proposition that a law which may be regarded as bearing two characters nevertheless must be characterised as a law with respect to a single head of legislative power and cannot bear a dual character[281]. The doctrine of the Court is quite different and was put by Stephen J in *Actors and Announcers Equity Association v Fontana Films Pty Ltd*[282] as follows:

> "That characterization does not require a search for one sole or predominant character where the law in question can be seen to possess several characters is now well established in Australian constitutional law."

182 In any event, there are the two fundamental defects in the reasoning in *Teori Tau* mentioned above.

183 Writing in 1945, Dixon J had said that for his part he had "always found it hard to see why s 122 should be disjoined from the rest of the Constitution"[283]. Thereafter, in *Lamshed v Lake*[284], Dixon CJ pointed out that "[i]n considering the operation of s 122 an obvious starting point is that it is 'the Parliament' that is to

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280 (1969) 119 CLR 564 at 570.

281 See the statements by Barwick CJ in *Victoria v The Commonwealth* (1971) 122 CLR 353 at 372-373; [1971] HCA 16.

282 (1982) 150 CLR 169 at 193; [1982] HCA 23. See also *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* (1987) 162 CLR 271 at 279; [1987] HCA 6.

283 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 85; [1945] HCA 41.

284 (1958) 99 CLR 132 at 141.

make the law pursuant to the power s 122 confers". And as Dixon CJ went on to say[285]:

> "[W]hen s 122 gives a legislative power to the Parliament for the government of a territory the Parliament takes the power in its character as the legislature of the Commonwealth, established in accordance with the Constitution as the national legislature of Australia, so that the territory may be governed not as a *quasi* foreign country remote from and unconnected with Australia except for owing obedience to the sovereignty of the same Parliament but as a territory of Australia about the government of which the Parliament may make every proper provision as part of its legislative power operating throughout its jurisdiction."

184 Thus, whatever differences may be observed between the legislative power conferred on the Parliament by s 122 and other heads of legislative power, it is necessary to bear steadily in mind that s 122 is but one of several heads of legislative power given to the national legislature of Australia, and that a law which is made under s 122 is made in exercise of the legislative power of the Parliament and operates according to its tenor throughout the area of the Parliament's authority.

185 Next, for present purposes, the critical point to be derived from *Schmidt* is that the application of the principle of interpretation described there[286] – that conferral of an express legislative power subject to a limitation is inconsistent with construction of other legislative powers in a way that would authorise the same kind of legislation but without the safeguard or restriction – cannot be confined to construction of the heads of power enumerated in s 51. The principle, the soundness of which is not disputed, must be applied to all heads of the power of the Parliament.

186 The application of this principle of construction has been described as "abstracting"[287] the power of acquisition from other heads of power[288]. That description may readily be accepted if it is intended as no more than a shorthand

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285 (1958) 99 CLR 132 at 143-144.

286 (1961) 105 CLR 361 at 371-372.

287 The term seems first to appear in *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 445 per Aickin J.

288 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 283; [1994] HCA 10; *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 124 [55]; [2006] HCA 18.

description of the effect of applying the principle of construction identified by Dixon CJ in *Schmidt*. In the present case, however, the notion of "abstraction" was, at times during the argument for the Commonwealth, treated as leading to "incongruous" results in the construction of s 122. But when it is recognised that the task to be undertaken is the construction, as a whole, of the legislative powers of the Parliament, any supposed incongruity said to follow from reading s 122 as limited in relevant respects by s 51(xxxi) disappears.

187 It disappears essentially for two reasons. In considering the validity of a law passed by the Parliament, it is neither necessary nor appropriate to seek to characterise that law as a law with respect to a single head of legislative power. The law may, and commonly will, find support in several heads of power. The present case, and the situation considered in *Newcrest*, are examples where s 122 is one of several heads. So also is *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame*[289]. Secondly, if, in addition to whatever other characters it may have, the law has the character of a law with respect to the acquisition of property, the law in that aspect must satisfy the safeguard, restriction or qualification provided by s 51(xxxi), namely, the provision of just terms.

188 It has been well said of the reasoning in *Teori Tau* that it is "totally at odds" with that in *Lamshed v Lake*[290]. Further, as the Territory, in particular, illustrated by the many instances given in its written submissions, the tenor of decisions since *Teori Tau* indicates a retreat from the "disjunction" seen in that case between s 122 and the remainder of the structure of government established and maintained by the Constitution[291]. Further, s 128 of the Constitution since 1977[292] has engaged electors in the territories, and valid provision has been made by the Parliament for representation in both chambers of the Parliament of electors in the two populous territories[293].

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289 (2005) 222 CLR 439; [2005] HCA 36.

290 Zines, "The Nature of the Commonwealth", (1998) 20 *Adelaide Law Review* 83 at 83.

291 The cases include *Davis v The Commonwealth* (1988) 166 CLR 79; [1988] HCA 63; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248; [1992] HCA 51; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 565 [82], 595-596 [175], 636 [312]; [1999] HCA 27; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [28]-[30]; [2004] HCA 31.

292 *Constitution Alteration (Referendums)* 1977 (Cth).

293 See *Newcrest* (1997) 190 CLR 513 at 608-609.

189 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.

Just terms

190 It remains to determine whether in its application to the Maningrida land the challenged legislation is invalid for the want of "just terms" on which there has been an "acquisition" of the fee simple owned by the Land Trust, within the meaning of s 51(xxxi) of the Constitution. Of the expression "just terms", Kitto J remarked in *Nelungaloo Pty Ltd v The Commonwealth*[294]:

> "The standard of justice postulated by the expression 'just terms' is one of fair dealing between the Australian nation and an Australian State or individual in relation to the acquisition of property for a purpose within the national legislative competence."

191 A curiosity of the litigation is that the party immediately concerned to complain of any absence of "just terms", the Land Trust, does not do so. It is the plaintiffs alone who agitate the issue. Their interests in ensuring the observance by the Land Trust of its statutory obligations under the Land Rights Act in respect of the Maningrida land may give them sufficient standing to agitate the issue, and, as noted above[295], there is no challenge to that standing. But in the absence of a controversy between the Land Trust and the Commonwealth and the pleading by the Land Trust of material facts, the issue of alleged invalidity was presented in somewhat general and unspecific terms.

192 A striking instance is the reliance the plaintiffs sought to place upon s 34(4) of the Emergency Response Act. That sub-section speaks to the situation presented by the grant of the Maningrida Five Year Lease to the Commonwealth for rights, titles and interests previously granted by the Land Trust as the relevant owner. While the lease to the Commonwealth is in force, these interests of third parties have effect "as if ... granted by the Commonwealth on the same terms and conditions as existed immediately before that time" (s 34(4)); the Minister may determine that s 34(4) does not apply in particular cases (s 34(5)). However, there is an absence of pleaded facts raising any controversy as to any actual operation of these provisions upon the land the subject of the Maningrida Five Year Lease.

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294 (1952) 85 CLR 545 at 600; [1952] HCA 11.

295 At [132].

193 The Emergency Response Act makes provision in s 62 for the determination of "a reasonable amount of rent" to be paid by the Commonwealth to a party such as the Land Trust[296]. No 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. What is immediately important, however, is that the amounts of rent paid or payable under s 62 must, by force of s 61(a), be taken into account in determining "a reasonable amount of compensation" for the purposes of s 60.

194 It is therefore not necessary to embark upon the question debated at some length during the oral hearing about the proper construction of s 62 or about the significance to be attached to the requirement in s 62(4) to not take account of the value of improvements on the land.

195 The operation of Pt 4 of the Emergency Response Act has resulted in an acquisition of the property of the Land Trust to which s 51(xxxi) of the Constitution applies. Section 60(2) thus renders the Commonwealth "liable to pay a reasonable amount of compensation" to the Land Trust. If the parties do not agree on the amount of compensation – and the pleaded facts are silent as to any such agreement or disagreement between the Land Trust and the Commonwealth – the Land Trust is empowered by s 60(3) to "institute proceedings in a court of competent jurisdiction for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines". An amount payable by the Commonwealth under s 60 is payable out of the Consolidated Revenue Fund, which is appropriated by s 63(2).

196 The plaintiffs stigmatise s 60 as creating what are but "contingent" rights. That is not so. The section is in the well-recognised and preferable form[297] whereby if the necessary constitutional fact exists (the operation of s 51(xxxi)) a liability is imposed by s 60(2) and jurisdiction is conferred by s 60(3)[298]. Section 60 is an example of prudent anticipation by the Parliament that its law

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296 By force of the *Indigenous Affairs Legislation Amendment Act* 2008 (Cth), Sched 2, Item 10, provision now is also made by s 62(1A) of the Emergency Response Act for the making of agreements between the Commonwealth and a party such as the Land Trust as to the amount of rent to be paid.

297 cf *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 165-166 per Dixon J; [1945] HCA 50.

298 The immediacy of the rights so created may be contrasted with the complexities of the system treated as invalid by Deane J in *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 288-292; [1983] HCA 21.

may be held to attract the operation of s 51(xxxi) and of the inclusion of provision for compensation in that event, thereby avoiding the pitfall of invalidity. Moreover, the right to compensation is absolute if it transpires that s 51(xxxi) is engaged[299].

197 The provision for payment of "reasonable compensation" determined, in the absence of agreement, by exercise of the judicial power of the Commonwealth, satisfies the requirement of "just terms" with respect to the Maningrida Five Year Lease. The phrase "reasonable compensation" is apt to include provision for interest to reflect delay occasioned by recourse to adjudication in the absence of agreement. The submissions to the contrary by the plaintiffs raise a false alarm. Another false alarm is the contention that, when s 61 requires in that adjudication the taking into account of amounts of rent and other matters specified in that section, no other matters may be taken into account even where failure to do so would deny "just terms".

198 The plaintiffs in their written submissions, and somewhat differently in the course of oral submissions, postulated cases where something less than a complete acquisition might be mandated by the Constitution so as to minimise the prejudice suffered by the holders of rights not readily compensable in money terms. If there be such instances the "acquisition" of the fee simple of the Land Trust is not one of them. Whether such cases may be found[300] and, if so, whether they occasion any special qualification to ordinary principle, are matters which do not arise here and may be left for another day. It is sufficient to add here that, contrary to the plaintiffs' submission, the passage to which they refer in *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth*[301] does not support the existence of a category of incompensable interests. The concern there was rather with the nature of the process by which the Minister determined the price which became the compensation. In particular, as Starke J emphasised[302], the regulations under successful challenge in that case required that the price paid by the Commonwealth not exceed the maximum price (if any)

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299 See *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 230 [42]; *Commonwealth v Western Mining Corporation Ltd* (1996) 67 FCR 153 at 200; *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 167-168.

300 cf *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899; 246 ALR 218.

301 (1943) 67 CLR 314 at 322-323 per Latham CJ; [1943] HCA 18.

302 (1943) 67 CLR 314 at 327. See also at 323 per Latham CJ, 323-324 per Rich J.

fixed for the goods by the Commonwealth Prices Commissioner, under the National Security (Prices) Regulations.

199 Something should be added concerning the FCSIA Act. The changes effected to the "permit system" by the addition to the Land Rights Act of ss 70B-70G by provision made by the FCSIA Act are pleaded as effecting an acquisition of the fee simple in the Maningrida land owned by the Land Trust. Item 18 in Sched 4 to the FCSIA Act makes its own arrangements respecting compensation for acquisition of property as a result of action taken under, or in accordance with, ss 70B-70G. Sub-items (2) and (3) of Item 18 are in terms which follow those of sub-ss (2) and (3) of s 60 of the Emergency Response Act and the attack upon their validity also fails.

200 Both sets of provisions state that they use the expressions "acquisition of property" and "just terms" with "the same meaning" as in s 51(xxxi) of the Constitution (s 60(4) of the Emergency Response Act; sub-item (4) of Item 18 in Sched 4 to the FCSIA Act). In *R v Federal Court of Australia; Ex parte WA National Football League*[303], Barwick CJ gave the constitutional expression "trading ... corporations"[304] as an example where rather than repeat the terms of the Constitution as the criterion of operation of a statute, it would be better to assay a definition of the content of the constitutional expression, so that the Parliament made a judgment of its ambit. The advantage Barwick CJ saw in such a course lay in avoiding the need to litigate what in each instance might be a constitutional question of some dimension. But his Honour was not suggesting that adoption by the Parliament of this practice produced invalidity for lack of sufficient specificity or clarity. Submissions by the plaintiffs which appeared to be relying for invalidity upon such a proposition should be rejected.

201 Nor is there substance in the plaintiffs' complaint that curial proceedings will be necessary in the absence of agreement with the Commonwealth to gain access to the appropriation from the Consolidated Revenue Fund to pay reasonable compensation. Even if payment were dependent purely upon determination not by exercise of judicial power but by an officer of the Commonwealth, the presence of s 75(v) of the Constitution provides the assurance that it will be for the judicial power of the Commonwealth to enforce the requirement of s 83 of the Constitution that no money be drawn from the Treasury of the Commonwealth "except under appropriation made by law". To complain, as going to invalidity of the relevant provisions of the challenged laws,

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303 (1979) 143 CLR 190 at 199; [1979] HCA 6.

304 Constitution, s 51(xx).

that they engage the exercise of the judicial power, is to misunderstand the scheme of the Constitution.

202 The plaintiffs' submissions as to the absence of "just terms" with respect to the acquisition of property from the Land Trust fail.

Orders

203 The demurrer should be allowed. The plaintiffs should pay the costs of the Commonwealth. The Land Trust should bear its costs. The further conduct of the action itself will be a matter for further direction by a Justice.

204 KIRBY J. The claimants in these proceedings are, and represent, Aboriginal Australians. They live substantially according to their ancient traditions. This is not now a reason to diminish their legal rights. Given the history of the deprivation of such rights in Australia[305], their identity is now recognised as a ground for heightened vigilance and strict scrutiny of any alleged diminution. This is not an occasion to provide peremptory legal relief to the Commonwealth, by way of demurrer. Certainly, it is not so where the claimants might establish arguable legal entitlements by refining and repleading their cause; by presenting their evidence to make their claims clearer and more concrete; by testing the governmental objections at trial; and by elaborating the applicable law when addressing novel aspects of their claim.

205 It is not contested that the claimants have the necessary interest and legal standing to represent themselves and other Aboriginal people from their community[306]. Before this Court they are represented by experienced counsel. They are in the position to advance their claim that recent federal legislation, the *Northern Territory National Emergency Response Act* 2007 (Cth) ("the Emergency Response Act") and the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act* 2007 (Cth) ("the FCSIA Act"), fails to accord "just terms" for the disturbance of their legal interests.

206 Apart from the property interests personal to the claimants, the second defendant, the Arnhem Land Aboriginal Land Trust ("the Land Trust"), has a fee simple interest in Aboriginal land in the Northern Territory. The claimants have the requisite interest and standing to argue that the Land Trust has suffered a diminution of its interests that constitutes an "acquisition of property" without "just terms", given the meaning of those expressions established by earlier decisions of this Court. At the very least, the claimants can therefore establish that the impugned legislation results in "acquisition" of "property" that they can challenge.

207 This Court has long taken an expansive view of each of the critical expressions in s 51(xxxi) of the Constitution, in issue in these proceedings:

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305 Acknowledged in the National Apology: see Australia, House of Representatives, *Parliamentary Debates* (Hansard), 13 February 2008 at 167-177. See also Rudd, "Federal Government Apology", (2008) 7(4) *Indigenous Law Bulletin* 2.

306 The standing and interest of the first and second plaintiffs was not contested. For the third plaintiff, see reasons of Gummow and Hayne JJ at [132]. As to the standing of the first and second plaintiffs with respect to the Land Trust's property, see reasons of French CJ at [95], reasons of Gummow and Hayne JJ at [130], these reasons at [289].

"acquisition", "property" and the requirement of "just terms". The promise of "just terms" arguably imports a notion wider than the provision of monetary compensation, which is the most that the challenged laws offer for the disturbance of the Aboriginal property, of the Land Trust and of the claimants. The notion that the National Emergency Response legislation does not warrant scrutiny by a court at trial is counter-intuitive. This is particularly so given the timing and conceivable purpose of its enactment; its deliberately intrusive character; its unique and controversial features; its imposition upon property owners of unconsensual five-year leases that are intended to (and will) significantly affect the enjoyment of their legal rights; and the coincidental authorisation of other federal intrusions into the lives and activities of the Aboriginal peoples concerned.

208 In its approach to the legal entitlements of the claimants in these proceedings, this Court must examine what has been done by the laws that they challenge. It must do so against the standards that it has previously applied, both in peace and in war[307], to non-Aboriginal Australians. Those standards appear to attract strong protections for property interests.

209 Further, the primary ground of objection in the Commonwealth's demurrer is based on a suggested meaning of s 51(xxxi)[308] which this Court now expressly rejects[309]. That ground was a legal submission which, if it had been upheld, would certainly have warranted the peremptory dismissal of the entire proceedings. With the rejection of that contention, only the *minutiae* of claim and counter claim, based on the analysis of common law and statutory entitlements, remain. Such arguments should proceed to trial if for no other reason than that the current pleadings (or as they might be amended) propound arguable propositions, serious issues arising under the Constitution, and a case that should be decided after a full and public hearing.

210 History, and not only ancient history, teaches that there are many dangers in enacting special laws that target people of a particular race and disadvantage their rights to liberty, property and other entitlements by reference to that

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307 See *Minister of State for the Army v Dalziel* (1944) 68 CLR 261; [1944] HCA 4; *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269; [1946] HCA 11.

308 As expressed in *Teori Tau v The Commonwealth* (1969) 119 CLR 564; [1969] HCA 62.

309 See reasons of French CJ at [86], reasons of Gummow and Hayne JJ at [189], my own reasons at [287].

criterion[310]. The history of Australian law, including earlier decisions of this Court[311], stands as a warning about how such matters should be decided. Even great judges of the past were not immune from error in such cases[312]. Wrongs to people of a particular race have also occurred in other courts and legal systems[313]. In his dissenting opinion in *Falbo v United States*, Murphy J observed, in famous words, that the "law knows no finer hour"[314] than when it protects individuals from selective discrimination and persecution. This Court should be specially hesitant before declining effective access to the courts to those who enlist assistance in the face of legislation that involves an alleged deprivation of their legal rights on the basis of race. All such cases are deserving of the most transparent and painstaking of legal scrutiny.

211 Vigilance of such a kind ultimately led this Court in *Mabo v Queensland [No 2]*[315] to re-express the legal rights of the indigenous peoples of Australia to enjoy interests in their traditional lands that had been denied by previous understandings of the common law. Such understandings had been "founded on unjust discrimination in the enjoyment of civil and political rights … contrary both to international standards and to the fundamental values of our common law"[316]. Why should this Court be less vigilant today? Why should it reject the Aboriginal claimants' case unheard at trial if the claims are (or might be rendered) legally arguable by the claimants who wish to tender evidence and argument to sustain those claims?

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310 See *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 416-417 [164]; [1998] HCA 22 citing laws in Germany after 1933 and in South Africa before 1993.

311 See, for example, *Chia Gee v Martin* (1905) 3 CLR 649; [1905] HCA 70; *Ah Yin v Christie* (1907) 4 CLR 1428; [1907] HCA 25; *Ling Pack v Gleeson* (1913) 15 CLR 725; [1913] HCA 15 referring to the *Immigration Restriction Act* 1901 (Cth); cf *O'Keefe v Calwell* (1949) 77 CLR 261; [1949] HCA 6.

312 See *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 85-86 per Isaacs J; [1925] HCA 53; *Williamson v Ah On* (1926) 39 CLR 95 at 104 per Isaacs J; [1926] HCA 46; cf Kirby, "Sir Isaac Isaacs – A Sesquicentenary Reflection", (2005) 29 *Melbourne University Law Review* 880 at 893-894, 902.

313 Instances in other countries include *Plessy v Ferguson* 163 US 537 at 550-551 (1896); *Korematsu v United States* 323 US 214 at 219 (1944).

314 320 US 549 at 561 (1944). See *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 114 [165]; [2006] HCA 46.

315 (1992) 175 CLR 1; [1992] HCA 23.

316 (1992) 175 CLR 1 at 42 per Brennan J (Mason CJ and McHugh J concurring).

212 My purpose in these reasons is to demonstrate that the claims for relief before this Court are far from unarguable. To the contrary, the major constitutional obstacle urged by the Commonwealth is expressly rejected by a majority, with whom on this point I concur. The proper response is to overrule the demurrer. We should commit the proceedings to trial to facilitate the normal curial process and to permit a transparent, public examination of the plaintiffs' evidence and legal argument. The law would then determine whether intuition was correct and a proper case can be presented that brings the claims within demonstrated legal entitlements that have not been respected in the legislation. The law of Australia owes the Aboriginal claimants nothing less.

213 The legislative provisions in question here are applied to Aboriginal Australians by specific reference to their race[317]. The Emergency Response Act expressly removes itself from the protections in the *Racial Discrimination Act* 1975 (Cth)[318] and hence, from the requirement that Australia, in its domestic law, adhere to the universal standards expressed in the International Convention on the Elimination of All Forms of Racial Discrimination, to which Australia is a party[319].

214 If any other Australians, selected by reference to their race, suffered the imposition on their pre-existing property interests of non-consensual five-year statutory leases, designed to authorise intensive intrusions into their lives and legal interests, it is difficult to believe that a challenge to such a law would fail as legally unarguable on the ground that no "property" had been "acquired"[320]. Or that "just terms" had been afforded, although those affected were not consulted about the process and although rights cherished by them might be adversely

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317 See Emergency Response Act, ss 4, 5, 31(1), Sched 1 Pt 1, referring to "Aboriginal land" as defined in the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ("the Land Rights Act"), s 3(1).

318 Emergency Response Act, s 132.

319 International Convention on the Elimination of All Forms of Racial Discrimination, [1975] ATS 40, 60 UNTS 195 (opened for signature by United Nations General Assembly resolution 2106 (XX) of 21 December 1965, entered into force generally 4 January 1969, entered into force for Australia 30 October 1975). The Emergency Response Act, s 132, relies upon the "special measures" exception to the *Racial Discrimination Act* 1975 (Cth), s 8(1), as provided for in Art 1(4) of the Convention.

320 In the context of this case, "property" in the sense of traditional rights of the individual claimants, recognised and protected by the general law. See below these reasons at [244]-[247].

affected. The Aboriginal parties are entitled to have their trial and day in court. We should not slam the doors of the courts in their face. This is a case in which a transparent, public trial of the proceedings has its own justification.

215 The issue for decision is not whether the "approach" of the majority is made on a basis less favourable because of Aboriginality[321]. It is concerned with the objective fact that the majority rejects the claimants' challenge to the constitutional validity of the federal legislation that is incontestably less favourable to them upon the basis of their race and does so in a ruling on a demurrer. Far from being "gratuitous"[322], this reasoning is essential and, in truth, self-evident. The demurrer should be overruled.

The facts

216 *The background facts*: Many of the relevant facts are contained in the reasons of French CJ[323], Gummow and Hayne JJ[324] and Crennan J[325]. As others in the majority have done, I shall use the same descriptions and abbreviations as Gummow and Hayne JJ have used.

217 These proceedings started in the original jurisdiction of this Court to challenge the federal legislation enacted to authorise the Northern Territory National Emergency Response ("the National Emergency Response"). The challenge concerns interests in "Aboriginal land"[326] and other interests enjoyed in the "Maningrida land"[327]. That land is represented in a map reproduced in Sched 7 to the plaintiffs' second further amended statement of claim ("the statement of claim").

218 The map shows that the Maningrida land abuts the mouth of the Liverpool River in Arnhem Land in the Northern Territory of Australia. It includes a built-up area of many allotments that contains public and commercial buildings, dwellings, allocations for future dwellings, parks, ovals, a public swimming pool

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321 Reasons of French CJ at [14].

322 Reasons of French CJ at [14].

323 Reasons of French CJ at [1]-[15].

324 Reasons of Gummow and Hayne JJ at [126]-[132].

325 Reasons of Crennan J at [343]-[348].

326 Within the meaning of the Land Rights Act, s 3(1).

327 See reasons of Gummow and Hayne JJ at [129]-[131].

and other features typical of an Australian outback township. The Maningrida land also includes four areas beyond the township itself. The entirety of the subject land encompasses the township, several sacred sites, an outstation, a sand quarry pit, a billabong and a ceremonial site.

219 *The parties*: The reasons of Gummow and Hayne JJ explain the identity of the parties to the proceedings[328]. Mr Reggie Wurridjal and Ms Joy Garlbin ("the first and second plaintiffs") are senior members of the Dhukurrdji Aboriginal clan. Together with other members of that clan, they live on the Maningrida land. According to the statement of claim, which must be accepted as true for such purposes, the Dhukurrdji clan are the "traditional Aboriginal owners" of the Maningrida land, as defined by s 3(1) of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ("the Land Rights Act"). This means, in relation to land, 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".

220 The traditional Aboriginal owners, including the first and second plaintiffs, thus enjoy legally protected rights and interests in the Maningrida land. According to Aboriginal law, such rights and interests relate to the land itself, to spiritual associations with that land and to the activities of the traditional owners on and in relation to that land. Until *Mabo [No 2]*, the law of Australia held that such interests were wholly extinguished upon the acquisition of sovereignty over Australia by the British Crown. However, the decision in that case reversed that conclusion[329]. It held that, in identified respects and subject to contrary statutory provisions, rights derived from Aboriginal law and tradition are recognised by the common law of Australia. They must now be protected and enforced by Australian courts, according to law.

221 Pursuant to s 4(1) of the Land Rights Act, the first and second plaintiffs enjoy the right to have the Maningrida land held for their benefit by a body corporate established in accordance with the Land Rights Act. That body corporate has the power to hold the title to land in the Northern Territory for the benefit of those Aboriginals entitled by Aboriginal tradition to the use and occupation of that land. That body corporate is the Land Trust.

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328 See reasons of Gummow and Hayne JJ at [126]-[132].

329 (1992) 175 CLR 1 at 15 per Mason CJ and McHugh J, 57 per Brennan J, 109 per Deane and Gaudron JJ, 182-183 per Toohey J.

222 The statement of claim asserts that members of the Dhukurrdji clan are entitled by Aboriginal tradition to live, participate in ceremonies, forage as of right, hunt, fish and gather upon the Maningrida land. Pursuant to s 71 of the Land Rights Act, they are entitled to enter, use or occupy the Maningrida land to the extent that such entry, use or occupation accords with Aboriginal tradition. In these proceedings, the first and second plaintiffs assert their rights in accordance with that tradition. Before the legislation impugned in these proceedings was enacted, they could enjoy those rights without any relevant lawful interference by the Commonwealth, its officers, employees or agents.

223 The Bawinanga Aboriginal Corporation ("the third plaintiff") is an Aboriginal and Torres Strait Islander corporation within the meaning of s 16.5 of the *Corporations (Aboriginal and Torres Strait Islander) Act* 2006 (Cth). Consequently, it is a community services entity within the meaning of s 3 of the Emergency Response Act[330]. The third plaintiff was established to promote and maintain language, culture and traditional practices; promote community development; and foster economic development. At all material times, the third plaintiff has conducted several businesses and activities on the Maningrida land. These included financial and tourism services, bush deliveries, a supermarket, a nursery, a "Good Food Kitchen", and artistic and cultural activities.

224 The reasons of Gummow and Hayne JJ partly describe the respective property rights and interests of the plaintiffs and of the Land Trust[331]. It will be necessary to add to that description concerning the property and interests of Mr Wurridjal and Ms Garlbin. As stated by Gummow and Hayne JJ[332], no defendant disputed the interest and standing of any of the plaintiffs to bring these proceedings to seek relief of the kind set out in the statement of claim. In that sense, the Court has before it parties who, at trial, have an accepted interest and motivation to assert, and to defend, their claims to relief based upon their asserted legal interests. Potentially, the contest would be refined and sharpened at trial to ensure that all relevant evidence was presented and every arguable legal foundation propounded, for and against the provision of relief.

225 By reason of the past deprivation of legal and economic rights, some Aboriginal litigants have not previously been well represented (or represented at

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330 That Act was amended by the *Indigenous Affairs Legislation Amendment Act* 2008 (Cth), which commenced on 2 July 2008. See reasons of Gummow and Hayne JJ at [117].

331 Reasons of Gummow and Hayne JJ at [126]-[132].

332 Reasons of Gummow and Hayne JJ at [132].

all) before Australian courts when those rights have been in contention. Here, however, the plaintiffs, like the defendants, are represented by highly experienced counsel. Their claims, and the defences propounded to them, would receive at trial expert and efficient presentation, including in the presentation of evidence and the provision of legal submissions. A concern expressed in the reasons of Gummow and Hayne JJ about ill-focussed testimony, unanalysed legislation and "fluid and hypothetical"[333] controversies is entirely misplaced. It is not a relevant consideration. It should be disregarded as unworthy.

226 *The National Emergency Response*: The Emergency Response Act and the FCSIA Act are central to the National Emergency Response. The very title and content of these two statutes indicate the context and background to the enactment of these laws. That context and background are within the public domain. They are explained, in general terms, in published official reports which are available for judicial notice. It would be a mistake to ignore the background circumstances that led to the enactment of the relevant legislation. So much is recognised in the reasons of other members of this Court, notably in the citations by Gummow and Hayne JJ from a speech of the Minister. This background helps to identify the purpose of the legislation, thereby assisting the Court to resolve the constitutional and legal questions.

227 In June 2007, a Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse published its report, *Ampe Akelyernemane Meke Mekarle – "Little Children Are Sacred"* ("the Board of Inquiry Report")[334]. The Report was addressed to the government of the Northern Territory of Australia. The Northern Territory had been granted self-government in 1978 pursuant to the *Northern Territory (Self-Government) Act* 1978 (Cth) ("the Self-Government Act"). Its government performs the functions envisaged by the Self-Government Act. It was that government that had initiated the Board of Inquiry.

228 Whatever might be the position at common law where self-government was granted by the Crown to formerly dependent peoples, under the Australian Constitution and as recognised in the Self-Government Act, the Federal Parliament may at any time, by law, override laws made by the Northern Territory legislature. It may also withdraw the power of that legislature to make

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333 Reasons of Gummow and Hayne JJ at [131].

334 Northern Territory, Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle – "Little Children Are Sacred"*, (2007). The inquiry co-chairs were Mr Rex Wild QC and Ms Patricia Anderson. Mr Wild was formerly the Director of the Office of Public Prosecutions of the Northern Territory.

laws[335]. However, since self-government, such overriding powers have been used only in the rarest of circumstances[336]. In the events that transpired, the Board of Inquiry Report was delivered to the government of the Northern Territory whilst a federal election was pending in accordance with the Constitution[337].

229 In the Report, the Board of Inquiry envisaged, and intended, that the government and legislature of the Northern Territory would be responsible for the response to the Report[338]. In doing so, it was expressly contemplated that such bodies would consult the communities concerned (especially the Aboriginal communities)[339]. It was anticipated that the Territory authorities might receive appropriate federal aid. Instead, on 21 June 2007, the then Prime Minister (the Hon John Howard) and the then Minister for Families, Community Services and Indigenous Affairs (the Hon Mal Brough) announced a unilateral initiative of the federal government. The measures involved in that initiative envisaged the legislation presently challenged by the plaintiffs.

230 The authors of the Board of Inquiry Report publicly criticised the lack of consultation that took place and the actual measures proposed in the federal intervention. The federal intervention was expressed to be founded on a conclusion that there was a "National Emergency". Unlike many national constitutions, that phrase has no significance under the Australian Constitution. Section 119 is the provision in the Constitution that comes closest to affording emergency powers to the Commonwealth. However, that provision imposes on the Commonwealth a duty to "protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence". It has no suggested application to the subject matters of these proceedings. It affords no validity to the impugned federal laws.

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335 cf *Bennett v The Commonwealth* (2007) 231 CLR 91 at 106 [30]; [2007] HCA 18 citing Kitto J in *Lamshed v Lake* (1958) 99 CLR 132 at 153-154; [1958] HCA 14.

336 *Euthanasia Laws Act* 1997 (Cth).

337 See Constitution, ss 7, 28.

338 The Board of Inquiry Report stated at 82 that there should be a "collaborative partnership with a Memorandum of Understanding" between the Northern Territory and federal governments.

339 The Board of Inquiry Report stated at 82 that it was "critical that both governments commit to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities".

231 To support its legislation, the Commonwealth relied on s 122 of the Constitution. That provision grants the Federal Parliament the power to "make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth". The Northern Territory of Australia is such a territory[340].

232 As announced, the National Emergency Response included a range of measures that have never before been addressed, at least in peacetime, to any particular group of the Australian community, let alone a group identified by reference to the race of its members. The specific measures included:

> "a. A [six] month ban on alcohol on Aboriginal land,
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> b. The compulsory acquisition of Aboriginal townships for five years to improve property and public housing,
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> c. A ban on pornographic videos and an audit of Commonwealth computers to identify pornographic material,
>
> d. The quarantining of 50% of welfare payments so it can only be spent on essentials,
>
> e. Linking of income support and family assistance to school attendance and providing meals to children at school, which are to be paid for by parents,
>
> f. Compulsory health checks for Aboriginal children under 16,
>
> g. An increase in police numbers on Aboriginal communities,
>
> h. Engaging of the army in providing logistical support,
>
> i. Abolishing the entry permit system to Aboriginal reserves for common areas, road corridors and airstrips."[341]

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340 The Northern Territory of Australia was surrendered to the Commonwealth by the State of South Australia as ratified by the *Northern Territory Surrender Act* 1907 (SA) and accepted by the *Northern Territory Acceptance Act* 1910 (Cth). The course of the legislation is explained in *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 547-548, 640-641; [1997] HCA 38.

341 McIntyre, "An Imbalance of Constitutional Power and Human Rights: The 2007 Federal Intervention in the Northern Territory", (2007) 14 *James Cook University Law Review* 81 at 84, citing Australian Government, Press Release, "National emergency response to

(Footnote continues on next page)

233 The legislative measures to implement the National Emergency Response were introduced into the Federal Parliament on 7 August 2007. Most of the legislation came into effect on 18 August 2007[342], just over three months before the federal election. As could be expected, the political environment at the time was intense. Ultimately, the election on 24 November 2007 led to a change in the federal government of Australia.

234 This Court is not, of course, concerned with the merits, wisdom, prudence, politics or justice of the legislation, or even (as such) its discriminatory provisions. However, the foregoing background and contextual circumstances, well known and wholly in the public domain, require a vigilant approach to the plaintiffs' contention that the extraordinary features of the legislation involve a serious disturbance of their legal interests and a partial acquisition of their property interests. Of particular note was the failure of the federal government to heed the injunction of the Board of Inquiry Report to engage in "genuine consultation with Aboriginal people" in designing initiatives asserted to be for their benefit. As enacted by the Federal Parliament, the Aboriginal people affected, including the first and second plaintiffs, were not consulted at all. They were presented with a legislative *fait accompli*.

235 *The ministerial statement*: Other reasons contain extended extracts from the Minister's Second Reading Speech, delivered in support of the impugned legislation[343]. That statement needs to be examined with care. It asserts that the "acquisition of leases is crucial" to the Commonwealth's legislative purpose. Acquiring five-year leases from property owners ordinarily involves the "acquisition" of any "property" interest that may conflict with such acquisition. To that extent, the Minister's speech candidly acknowledged the centrality to the Commonwealth's legislative scheme of the federal statutory acquisition of such leases.

236 The declared motive for this action was "so that living conditions can be changed". Such a motive, however, does not alter or diminish the constitutional entitlements of those whose inconsistent property interests are thereby affected. Naturally, when acquiring the property of others, the Commonwealth normally

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protect Aboriginal children in the NT", 21 June 2007, available at http://www.facsia.gov.au/internet/Minister3.nsf/content/emergency_21june07.htm.

342 See Emergency Response Act, s 2; FCSIA Act, s 2.

343 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 August 2007 at 13-14. See reasons of French CJ at [3]-[7], reasons of Gummow and Hayne JJ at [134], reasons of Crennan J at [373]-[374], [378].

expresses pure motives. Regardless of motive, if an "acquisition of property" occurs, by or under federal law, to be valid it must be effected upon "just terms".

237 The Minister also declared that "the underlying ownership by traditional owners will be preserved, and compensation when required by the Constitution will be paid"[344]. This declaration insufficiently addresses the intrusion into the inconsistent rights of others. Take, for example, a statutory lease that is superimposed by federal law upon the property interests of someone who can trace his or her ethnic lineage to European or other later settlers. If the reversion remains with that person, it does not render the governmental acquisition of the leasehold interest any less an "acquisition of property". Moreover, as will be explained, the Constitution does not require the provision of "compensation", limited to the terms employed by the Minister and used in the legislation. Instead it requires observance of the broader concept of "just terms"[345].

238 Similarly, the Minister's declaration that this "is not a normal land acquisition"[346] cannot be accepted at face value. Obviously, such an assertion does not determine the legal question now before this Court. That is a function reserved to the judiciary. In so far as the Minister was contrasting the *temporary* duration of the five-year leases contained in the legislation and the *permanent* acquisition of other property interests by the Commonwealth, his statement did not contradict the contention of the first and second plaintiffs in the statement of claim. Temporary acquisition of property interests, certainly where they extend for five years and potentially more, may indeed not be the "normal" form of acquisition of property by the Commonwealth. Yet it may still constitute an "acquisition of property" which, without "just terms", will render the "acquisition" beyond federal constitutional power. Likewise, the fact that "[p]eople will not be removed from their land"[347] is not determinative of the "acquisition" issue.

239 There is a clear potential for inconsistency between the property rights of the first and second plaintiffs and the five-year leases acquired by the Commonwealth. The Minister effectively admits this by acknowledging that the "five-year leases" under the legislation cover areas that contain "major communities or townships, generally of over 100 people, some of several thousand people"[348]. Thus, the Minister and the legislation envisaged that the

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344 See reasons of Gummow and Hayne JJ at [134].

345 See below these reasons at [303]-[308].

346 See reasons of Gummow and Hayne JJ at [134].

347 See reasons of Gummow and Hayne JJ at [134].

348 See reasons of Gummow and Hayne JJ at [134].

statutory grant of property interests to the Commonwealth, by way of leaseholds, was expected to apply in areas where people (mostly Aboriginal Australians) were living. The five-year statutory leaseholds were liable to have an impact upon the pre-existing legal rights of those living within the leasehold area. It was not as if the leaseholds concerned only unoccupied land in the vast hinterland of the Northern Territory. Quite the contrary. It was built-up, occupied residential and traditional Aboriginal lands that were singled out for the operation of the impugned legislation.

240 The leases were necessary in law to permit the Commonwealth (and its officers, employees and agents) unhindered access to the relevant areas. Only this would afford them the legal right to implement the initiatives deemed necessary to fulfil the purposes of the National Emergency Response. So much is clear, by inference, from what the Minister told the Parliament. This is in direct contrast to the pastoral leases examined by this Court in *Wik Peoples v Queensland*[349]. In that case, the pastoral leases were, in part at least, a theoretical or legal construct which, because of the huge distances involved, might never actually impinge on the lives of the Aboriginal peoples concerned. Here, impingement on the lives of the Aboriginal inhabitants of the subject land was the very purpose of the National Emergency Response. The impact of the Emergency Response Act, as announced and as reflected in that Act, was intended to be intense, prolonged, intrusive, highly personal, comprehensive, and to involve criminal liability on the part of at least some of the Aboriginal peoples affected.

241 The Minister told the Parliament that the "communities are not thriving; some are in desperate circumstances"[350]. However, living in such conditions does not affect in the slightest the legal question before this Court. At least arguably, respecting and enlarging property rights is the best way to reverse such deprivation and to empower those affected. Certainly, the existence of such deprivation does not remove the constitutional entitlement of persons affected, relevantly Aboriginal property owners, to "just terms" for such a federal acquisition.

242 The Minister also stated that "[t]he area of land for the five-year leases is minuscule compared to the amount of Aboriginal land in the Northern Territory"[351]. This is likewise a consideration totally immaterial to the constitutional issue.

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349 (1996) 187 CLR 1; [1996] HCA 40.

350 See reasons of Gummow and Hayne JJ at [134].

351 See reasons of Gummow and Hayne JJ at [134].

243 It follows that there is nothing in the Minister's Second Reading Speech that throws any light on the question for decision by this Court. To the contrary, many of the Minister's statements affirm an intuitive response to the provisions of the Emergency Response Act and the FCSIA Act, read according to their terms and so as to achieve their declared purposes. The Parliament authorised a remarkable governmental intrusion by the Commonwealth into the daily lives of Australian citizens in the Northern Territory, identified mostly by reference to their race. As was its intention, such intrusions impinged upon the property interests of at least some individuals and communities on the Maningrida land. The plaintiffs brought these proceedings to have their rights determined in light of this deliberate impingement upon their legal interests. On the face of things, they have a clearly arguable case on that issue warranting a trial.

244 *The plaintiffs' claims*: Understandably, much of the analysis in the majority reasons, as to the propounded legal rights of the first and second plaintiffs and the Land Trust, addresses those property rights and the effect of s 71 of the Land Rights Act. However, it is important to recognise that, to some extent, the legal interests, in the nature of property, asserted by the first and second plaintiffs in the statement of claim, are somewhat different from, and additional to, conventional property rights known to Australian law. Such interests are based on the recognition now accorded by Australian law to entitlements conforming to Aboriginal custom. They are hence arguably not limited to "any right, title or other interest in land if … the land is covered by a lease granted under section 31"[352].

245 To demonstrate this proposition, it is sufficient to repeat the pleadings of the interests of the first and second plaintiffs contained in the statement of claim which they claim to be affected[353]:

> "Each of [Mr] Wurridjal and [Ms] Garlbin is:
>
> (a) a person who is entitled by the body of traditions, observances, customs and beliefs of the traditional Aboriginal owners governing his or her rights with respect to the Maningrida land to enter, use and occupy the Maningrida land for the following purposes:
>
> (i) to live;
>
> (ii) to participate in ceremony, particularly on or in relation to the sacred sites referred to … herein;

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352 Emergency Response Act, s 34(1).

353 See also reasons of Crennan J at [407].

(iii) to forage as of right;

(iv) to hunt;

(v) to fish; and

(vi) to gather

(together, *the traditional purposes*).

Particulars of traditional purposes

(aa) Fishing and foraging in the inter-tidal zone.

(bb) Harvesting bivalves, such as mangrove mussels that grow on the margins of the salt water creeks and live in the mud on inland creeks and freshwater mussels.

(cc) Gathering of bush fruit and vegetables which is generally undertaken by women, but also by men.

(dd) Gathering tucker sourced from the billabong located in Area 5 of the Maningrida land, including water lilies, long-necked fresh water turtles, fresh water goannas, geese and ducks.

(ee) Hunting wallabies, goannas, geese, ducks and flying foxes.

(ff) Utilising certain floral species and minerals on the Maningrida land for medicinal purposes in accordance with custom. A species of white mango fruit is gathered and eaten in order to assist in the treatment of flu, coughs and headaches.

(gg) Taking white pigment from the Maningrida land to paint bodies and sacred objects for ceremonies.

(hh) Observing traditional laws and performing traditional customs and ceremonies, particularly on sacred sites, on the Maningrida land.

(ii) Being responsible for maintaining the traditional connection of the members of the Dhukurrdji clan with country.

(b) a person who, by reason of the matters set out in paragraph (a), is entitled to benefit of the rights conferred by s 71 of the Land Rights Act."

246 The first and second plaintiffs did not therefore limit their "property interests" to those derived from, or recognised in, the Land Rights Act (or any other legislation). This is made still more clear by the alternative arguments advanced by the plaintiffs before this Court. Relevantly, they submitted:

> "Alternatively, [Mr] Wurridjal and [Ms] Garlbin's property is based on antecedent traditional rights including usufructuary rights, which themselves are not inherently defeasible. Further, although the Land Rights Act gives statutory recognition to traditional rights, to the extent that the traditional rights correspond to native title those rights and interests are recognised by the common law. That is they are capable of being enforced by the grant of remedies through the ordinary processes of law and equity.[354] The underlying traditional rights recognised by the Land Rights Act are permanent, stable and capable of ongoing enjoyment."

247 It follows that the first and second plaintiffs (in respect of their own legal interests) did not confine themselves to a *statutory* "interest in land". Instead, they asserted wider property interests under the *general law*, enforceable in Australian courts by invoking the principles of common law and equity as upheld in the courts, subject to any statutory provision to the contrary. There are no such contrary provisions. Once this is appreciated, the error of the analysis in the majority of this Court is, with respect, demonstrated.

248 *Arguable claims should go to trial*: The reasons of the majority treat all of the plaintiffs' claims as though they were no more than a statutory "right, title or other interest in land", thus held subject to a declared non-impingement by the impugned laws. Specific reference is made in this respect to s 34(1) of the Emergency Response Act. However, nothing in that Act prevents the interests in property of persons such as the first and second plaintiffs from extending to those alternative interests asserted by the plaintiffs in their statement of claim and argument before this Court. At the very least, the point is arguable. Alone, that is sufficient to require that the demurrer be overruled and a trial of the issues had in the normal way.

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354 *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 49 [42] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; [2001] HCA 56.

The Constitution and the legislation

249 *Constitutional basis of the laws*: The reasons of the majority contain extracts from, and descriptions of, the relevant provisions of the Emergency Response Act, the FCSIA Act and the Land Rights Act[355]. They also explain the operation of s 50(2) of the Self-Government Act. That provision ensures that acquisitions of property within the Northern Territory after self-government were effectively to be subject to the same guarantee as provided by s 51(xxxi) of the Constitution. Section 50(2) of the Self-Government Act states:

> "[T]he acquisition of any property in the Territory which, if the property were in a State, would be an acquisition to which paragraph 51(xxxi) of the Constitution would apply, shall not be made otherwise than on just terms."

The meaning, purpose and application of this provision was examined by this Court in *Newcrest Mining (WA) Ltd v The Commonwealth*[356].

250 The Commonwealth relied on s 122 of the Constitution as presenting a true threshold barrier to the entirety of the plaintiffs' claim[357]. However, it is necessary also to mention s 51(xxvi) of the Constitution, as amended by the *Constitution Alteration (Aboriginals)* 1967 (Cth). The latter provision now empowers the Federal Parliament to make laws with respect to the "people of any race for whom it is deemed necessary to make special laws", including people of the Aboriginal race.

251 The amended provision of s 51(xxvi) was enacted following a referendum in 1967 held in accordance with s 128 of the Constitution. The proposed amendment received the requisite approval of the electors. It deleted from the original power the exclusion "other than the aboriginal race in any State". The first and second plaintiffs argued that, both in form and substance, the Emergency Response Act and the FCSIA Act were "special laws" enacted by the Federal Parliament with respect to "the people of any race", namely people of the Aboriginal race in the Northern Territory of Australia. As such, upon this ground, and quite apart from any operation of s 122 of the Constitution, any resulting acquisition of property was subject to the "just terms" requirement in s 51(xxxi) of the Constitution.

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355 See, for example, reasons of Gummow and Hayne JJ at [128], [134]-[142].

356 (1997) 190 CLR 513 at 531-532 per Brennan CJ, 561 per Toohey J, 589 per Gummow J.

357 Above, these reasons at [231].

252 *Construction of the legislation*: In considering the Commonwealth's demurrer, what is the correct approach to the construction of the Emergency Response Act and the FCSIA Act where there is uncertainty or ambiguity about the ambit and effect of the legislation? This Court has generally insisted upon first analysing the impugned legislative language before determining a contested issue of constitutional validity[358].

253 The first ground of the Commonwealth's demurrer in these proceedings was, however, one of principle. It asserted that the Emergency Response Act and the FCSIA Act were not "relevantly subject to the just terms requirement contained in s 51(xxxi) of the Constitution" or at all. No statutory construction question arises on that ground. Truly, it is a threshold contention. If upheld, it would mean that the entirety of the plaintiffs' claim was misconceived, doomed to fail and thus apt for the remedy invoked by the pleading device of demurrer. The proceedings would end. They would do so because, as a matter of constitutional law, they would be unsustainable on any footing.

254 If this barrier were ineffective, the remaining grounds of the demurrer would require the construction of the impugned legislation. The second ground asserts that the Emergency Response Act and the FCSIA Act "provide for compensation constituting just terms". The third ground asserts that the plaintiffs' "alleged species of property" are not capable of being "acquired" or have not in fact been "acquired" so as to give rise to an entitlement to "just terms".

The applicable interpretative principles

255 *Construing legislation affecting Aboriginals*: In my opinion, an Australian legislature, purporting to extinguish or diminish any legal interest belonging to indigenous peoples (including native title), can only do so by "specific legislation" which clearly has that effect in law[359], which legislation expressly addresses the special character of such interests[360] and accepts

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358 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186 per Latham CJ; [1948] HCA 7; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 662 [81]; [2000] HCA 33.

359 *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at 919 [105]-[106]; 246 ALR 218 at 240-241; [2008] HCA 20; *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 82 ALJR 1099 at 1114 [67]; 248 ALR 195 at 212; [2008] HCA 29. See *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 82 ALJR 1505 at 1509 [12]; 249 ALR 602 at 605-606; [2008] HCA 48.

360 *Arnhem Land Trust* (2008) 82 ALJR 1099 at 1114 [69]; 248 ALR 195 at 213.

accountability for any such provision[361]. This is the approach that applies when addressing the statutory construction issues of the second and third grounds of the demurrer.

256 My opinion, in this respect, reflects what has for some time been the law of Canada[362]. In Australia too, such an approach has firm foundations in earlier opinions of Justices of this Court[363]. Indeed, it is no more than a species of the commonly applied general principle that legislation that *could* be read as diminishing basic civil rights *will* ordinarily be read restrictively and protectively by the courts of this country. Legislation designed to protect such rights is ordinarily read beneficially[364]. This is especially so where the legislation might otherwise be construed to diminish, or extinguish, the legal interests of indigenous peoples which, in earlier times, our law failed to protect adequately or at all[365].

257 Such an approach has been adopted in several recent decisions of this Court affecting the property and other legal rights of indigenous peoples. This has been done without necessarily expressing the principle; explaining its

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361 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [30]; [2003] HCA 2; *Chang v Laidley Shire Council* (2007) 234 CLR 1 at 27 [85]; [2007] HCA 37; *Griffiths* (2008) 82 ALJR 899 at 919 [106]; 246 ALR 218 at 240-241; *Arnhem Land Trust* (2008) 82 ALJR 1099 at 1114 [69]; 248 ALR 195 at 213; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131; *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 at 615 [44].

362 See *Calder v Attorney-General of British Columbia* [1973] SCR 313 at 402 per Hall J, Spence and Laskin JJ concurring; *R v Sparrow* [1990] 1 SCR 1075 at 1099 per Dickson CJ and La Forest J for the Court; *R v Badger* [1996] 1 SCR 771 at 794 [41] per Cory J, La Forest, L'Heureux-Dubé, Gonthier and Iacobucci JJ concurring; cf Slattery, "Understanding Aboriginal Rights", (1987) 66 *Canadian Bar Review* 727 at 765-767.

363 cf *Mabo [No 2]* (1992) 175 CLR 1 at 111 per Deane and Gaudron JJ; *Wik* (1996) 187 CLR 1 at 85 per Brennan CJ, 155 per Gaudron J, 185 per Gummow J ("clearly and distinctly").

364 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 562-563 [43], 577 [90], 592-593 [134] and cases cited therein; [2002] HCA 49.

365 cf *Griffiths* (2008) 82 ALJR 899 at 919 [105]-[106]; 246 ALR 218 at 240-241 citing *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 657-658 per Cooke P; *Nowegijick v The Queen* [1983] 1 SCR 29 at 36.

consistency with general interpretative doctrine; or justifying its role by reference to the past failures of the law[366]. The present proceedings require consideration of unclear and ambiguous provisions in the impugned legislation. My approach to such legislation is one protective of the interests of the first and second plaintiffs. Specifically, it is protective of their right to have any doubts and uncertainties in the proceedings resolved at trial, on the basis of a full consideration of all of the admissible evidence that the plaintiffs tender, rather than by the pre-emptive procedure of demurrer based solely on the pleadings, now invoked by the Commonwealth.

258 *Construing laws by reference to international law*: The legal rights of indigenous peoples are a concern for Australian courts as they are for the courts of many other countries. They are of particular concern for those countries that were settled by migrants of the European Empires who sought a better life for themselves and their families. There is now a much greater awareness of how these historical events caused the dispossession of indigenous peoples; the damage done to indigenous communities and their members as a result; the impact on the language, culture and economic well-being of indigenes; and the need, as a consequence, to re-express the governing law. In part, such awareness is the consequence of the assertion of their rights by indigenous peoples themselves. But, in part, it has also occurred in national courts because of the increasing impact of the international law of human rights.

259 This Court's decision in *Mabo [No 2]* was itself a product of the determined assertions by Mr Eddie Mabo of his legal rights. His litigation led to the realisation by this Court that the previous approach to the recognition and protection of the legal rights of indigenous peoples could not be maintained as a matter of basic equality and justice upheld by the common law of Australia as understood in the light of the developing principles of international law[367].

260 *Exclusion of the amici curiae*: At the commencement of the oral hearing of these proceedings, counsel[368] sought leave to intervene as *amici curiae*. They sought to provide international legal materials to the Court, in order to illustrate the wider understanding of the "property" of indigenous peoples under international law. They wished to argue that such understanding was broader

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366 See, for example, *Arnhem Land Trust* (2008) 82 ALJR 1099 at 1114 [69]; 248 ALR 195 at 213; *NSW Aboriginal Land Council* (2008) 82 ALJR 1505 at 1508-1509 [7]-[10]; 249 ALR 602 at 604-605.

367 *Mabo [No 2]* (1992) 175 CLR 1 at 42 per Brennan J.

368 Professor Kim Rubenstein and Mr Ernst Willheim of the Centre for International and Public Law in the Australian National University.

when compared to approaches taken in Australian municipal law towards the property rights of others. By inference, they suggested that municipal law should be adapted to conform to the developments of the international law. Whilst the Commonwealth suggested that such submissions were immaterial, neither it nor any party to the proceeding opposed the application.

261 In recent years, this Court has relaxed somewhat its earlier reluctance to permit *amici curiae* to intervene in proceedings[369]. This development partly reflects the greater recognition by the Court of its normative role as a final national court. This is especially so in constitutional adjudication, such as the present proceedings.

262 A clear illustration of the enlargement of the role of *amici curiae* before this Court may be found in *Attorney-General (Cth) v Alinta Ltd*[370]. In that case, this Court granted permission to *amici*, appointed and funded by the Commonwealth, so as to provide a contradictor. In recent years, even where, occasionally, this Court has rejected such applications, it has commonly permitted written submissions to be tendered by such *amici*. This occurred, for example, in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004*[371]. That case involved an important question affecting the interpretation of the Refugees Convention and Protocol[372]. This Court granted leave for the United Nations High Commissioner for Refugees to present written submissions, whilst refusing counsel leave to present oral submissions[373]. Out of respect for the office and special functions of the High Commissioner, I would

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369 *Levy v Victoria* (1997) 189 CLR 579 at 600-605 per Brennan CJ, cf at 650-652 of my own reasons; [1997] HCA 31. See, generally, Kenny, "Interveners and Amici Curiae in the High Court", (1998) 20 *Adelaide Law Review* 159; Mason, "Interveners and Amici Curiae in the High Court: A Comment", (1998) 20 *Adelaide Law Review* 173; Williams, "The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis", (2000) 28 *Federal Law Review* 365.

370 (2008) 233 CLR 542 at 557-559 [28]-[33] of my own reasons, 567-568 [63]-[68] per Hayne J, 580 [104] per Heydon J; [2008] HCA 2.

371 (2006) 231 CLR 1; [2006] HCA 53.

372 Convention relating to the Status of Refugees, [1954] ATS 5, 189 UNTS 150 (opened for signature 28 July 1951, entered into force generally and for Australia 22 April 1954); read with the Protocol relating to the Status of Refugees, [1973] ATS 37, 606 UNTS 267 (opened for signature 31 January 1967, entered into force generally 4 October 1967, entered into force for Australia 13 December 1973).

373 See (2006) 231 CLR 1 at 4.

have granted unrestricted leave for oral as well as written argument[374]. However, at the least, the written submissions were formally received and considered in that case.

263 Even that course was refused by this Court in the present case. This was so despite the fact that, in the event, the *amici curiae* only sought to tender written materials on international law. I favoured receiving the written materials. At the time of the ruling I noted that, in any case, the materials provided by the proposed *amici* comprised nothing beyond publicly available treaty provisions, judicial decisions and other material relevant to the developing international understanding of property and property interests in the context of the rights of indigenous peoples. The leave that the *amici curiae* sought was refused by a majority of this Court on its own unrequested initiative[375]. Respectfully, I maintain my disagreement with that decision[376].

264 *International law and indigenous property*: In recent years at least, this Court has not applied a wholly "originalist" approach in interpreting provisions of the Constitution[377]. On any alternative contemporary approach to such interpretation, "property" in s 51(xxxi) of the Constitution would arguably include an understanding of that notion as it applies to Aboriginal Australians.

265 Whatever exclusions were originally intended by the founders, following the amendments by the 1967 referendum[378] it is clear that the Constitution now speaks with equality to Aboriginal Australians as to those of other races; to descendants of indigenous Australians and of settlers; and to indigenous Australians observing traditional customs as well as those living in ways indistinguishable from the majority population. The Constitution speaks to all people. Its reference in s 51(xxxi) to "property" is arguably, therefore, not confined to the traditional notions of "property" as originally inherited in Australia from the common and statute law of England. The s 51(xxxi) reference to "property" appears to incorporate notions of "property" as understood by indigenous Aboriginals, at least so far as such notions are upheld by Australian law.

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374 (2006) 231 CLR 1 at 29 [77].

375 See [2008] HCATrans 348 at 14-43 per French CJ (Gummow, Hayne, Heydon and Kiefel JJ concurring).

376 See [2008] HCATrans 348 at 47-90 (Crennan J concurred in my dissenting reasons).

377 See, for example, *Cheatle v The Queen* (1993) 177 CLR 541 at 560-561; [1993] HCA 44; *Sue v Hill* (1999) 199 CLR 462 at 486-492 [47]-[65]; [1999] HCA 30.

378 *Constitution Alteration (Aboriginals)* 1967.

266 In expounding the contemporary meaning of a constitutional expression, this Court may pay regard, as a contextual matter, to understandings of relevant expressions of the Constitution as they have developed in contemporary international law. I have said this on a number of occasions[379]. I adhere to that opinion. I recognise that it is not accepted by some judges of this Court[380]. However, I observe that in deciding constitutional cases, a growing number of judges in this Court have lately referred to international legal materials[381]. That development is inevitable. It is also desirable, natural and legally correct.

267 *International law and municipal notions*: Quite separately, by orthodox doctrine the principles of international law are available to help resolve any ambiguities or uncertainties in the meaning of Australian municipal legislation.

268 The reasons of the majority of this Court in the present case conclude that the Emergency Response Act and the FCSIA Act should be read so that no "property" of the individual plaintiffs has been "acquired". In arriving at such a conclusion it is essential for Australian judges to at least be aware of international law developments when considering any suggested acquisition of the property of indigenous peoples. This legal issue arises in many parts of the world. International treaties and other sources of international law have recognised that such acquisitions constitute a significant factor contributing to

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379 See, for example, *Newcrest Mining* (1997) 190 CLR 513 at 657-661; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 615-630 [145]-[193]; [2004] HCA 37. This is an accepted course in many countries, including Canada: *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 at 38 [60]; *R v Hape* [2007] 2 SCR 292 at 316 [39], 324 [55]; United Kingdom: *R v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696 at 760-761 per Lord Ackner; *Derbyshire County Council v Times Newspapers Ltd* [1992] QB 770 at 813, 819, 830; South Africa: *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at 251 [33]-[34] per Chaskalson CJ, 282-283 [160] per Ngcobo J, 299 [222] per O'Regan J. In South Africa, in the interpretation of the Constitution, express constitutional authority is given for access to international law. See Constitution of the Republic of South Africa, s 233.

380 See, for example, *Al-Kateb* (2004) 219 CLR 562 at 586-595 [51]-[74] per McHugh J; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 220-221 [163]-[166] per Hayne J, 224-225 [181] per Heydon J; [2007] HCA 43.

381 See, for example, *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at 45-46 [44]-[45] per Gummow, Hayne and Crennan JJ, cf at 50-52 [66]-[69] of my own reasons; [2006] HCA 28; *Roach* (2007) 233 CLR 162 at 177-178 [13]-[15] per Gleeson CJ, 203-204 [100] per Gummow, Kirby and Crennan JJ.

the serious economic disadvantages suffered by indigenous peoples and their communities. As well, international law now affords remedial principles. By analogy, these principles may at least assist national judges in performing their functions, specifically in expressing the common law of Australia and in interpreting Australian statutory provisions that are ambiguous or unclear.

269 Relevant sources of international law recognise the general right to property[382]. Specifically, there is a growing body of international law that recognises the entitlement of indigenous peoples, living as a minority in hitherto hostile legal environments, to enjoy respect for, and protection of, their particular property rights[383]. There is also express recognition of the cultural, religious and linguistic rights of indigenous peoples, including in United Nations treaties of general application to which Australia is a party[384]. Commonly, such cultural, religious and linguistic rights are directly connected to the land of indigenous peoples, warranting protection of their property rights[385].

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382 Universal Declaration of Human Rights, Art 17 (adopted and proclaimed by United Nations General Assembly resolution 217A (III) of 10 December 1948); American Convention on Human Rights, 1144 UNTS 123, Art 21 (opened for signature 22 November 1969, entered into force 18 July 1978).

383 Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries, Art 14 (adopted by the General Conference of the International Labour Organization on 27 June 1989, entered into force 5 September 1991) ("Convention No 169"); United Nations Declaration on the Rights of Indigenous Peoples, Arts 25, 26 (adopted by General Assembly resolution 61/295 of 13 September 2007); *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-American Court of Human Rights, 31 August 2001 at 74 [148] ("*Mayagna*").

384 International Covenant on Civil and Political Rights, [1980] ATS 23, 999 UNTS 171, Art 27 (opened for signature by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force generally 23 March 1976, entered into force for Australia 13 November 1980) ("the ICCPR"); Convention on the Rights of the Child, [1991] ATS 4, 1577 UNTS 3, Art 30 (opened for signature by United Nations General Assembly resolution 44/25 of 20 November 1989, entered into force generally 2 September 1990, entered into force for Australia 16 January 1991).

385 Convention No 169, Art 13; *Mayagna*, Inter-American Court of Human Rights, 31 August 2001 at 74 [149]; Office of the United Nations High Commissioner for Human Rights, *General Comment No 23: The rights of minorities (Art 27)* (comment on the ICCPR, to which Australia is a party), 8 April 1994, UN Doc CCPR/C/21/Rev.1/Add.5 at [7]; United Nations Economic and Social Council, Final Working Paper of the Special Rapporteur (E A Daes), *Prevention of*

(Footnote continues on next page)

270 For an Australian court to accept the diminution or abolition of pre-existing legal interests of indigenous peoples with respect to land, communal and personal existence, culture, habits and traditions, as by treating them as "property" rights insusceptible to a constitutional guarantee of protection from "acquisition" without "just terms", would appear to contravene the foregoing expressions of international law. In my opinion, a position has been reached in Australian constitutional and common law where any such diminution or abolition could only be achieved by express provisions of municipal law that conform to the Australian constitutional norm of "just terms" as that provision reflects contemporary international principles. In particular, it would arguably appear to be contrary to the developing principles of international law for any pre-existing rights of indigenous peoples to be reduced or abolished without "positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them"[386].

271 *International law in a dualist system*: None of the foregoing statements of international law is automatically rendered part of Australian domestic law. Australian law remains "dualist", like the legal systems of many other countries[387]. Nevertheless, where a court such as this is required to interpret the national constitution, particular legislation or relevant common law principles, that court should inform itself about any applicable developments of international law. Obviously, any such investigation would preferably be performed with the assistance of the parties, interveners or *amici curiae*. A court should hesitate before rejecting such assistance or adopting meanings of constitutional or statutory texts that are inconsistent with the growing body of international law. Likewise when approaching a legal problem. To say this is to say nothing more than that today, in every country, municipal law will be understood by any light that is provided by contextual provisions of international law, particularly those expressing universal principles of human rights.

272 In the matter of the legal rights of its indigenous peoples, the Australian legal system can learn from the experience of other countries facing similar legal

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Discrimination and Protection of Indigenous Peoples and Minorities, 11 June 2001, UN Doc E/CN.4/Sub.2/2001/21 at 7-9 [12]-[20].

386 Office of the United Nations High Commissioner for Human Rights, *General Comment No 23: The rights of minorities (Art 27)* (comment on the ICCPR, to which Australia is a party), 8 April 1994, UN Doc CCPR/C/21/Rev.1/Add.5 at [7].

387 See, for example, *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 266; *Suresh* [2002] 1 SCR 3 at 38 [60].

issues and from the insights of the international community more generally. It is not as if, in this area of the law, the previously expressed understandings of the legal rights of Australia's indigenous peoples were so developed, beneficial and protective that Australian courts have nothing to learn from comparative and international law in this field. Ultimately, international law may prove irrelevant or unhelpful to the resolution of the local legal problem. However, this will not be known until municipal judges analyse the relevant international materials and consider the propounded analogies.

273 In these proceedings a growing body of international law concerning indigenous peoples exists that confirms the rules that are already now emerging in Australian domestic law. Laws that appear to deprive or diminish the pre-existing property rights of indigenous peoples must be strictly interpreted. This is especially so where such laws were not made with the effective participation of indigenous peoples themselves. Moreover, where (as in Australia) there is a constitutional guarantee providing protection against "acquisition of property" unless "just terms" are accorded, development of international law will encourage the national judge to give that guarantee the fullest possible protective operation. These are the approaches I would adopt in addressing the issues presented by the Commonwealth's demurrer.

The issues in the present proceedings

274 The following issues arise for decision:

1. *The demurrer issue*: What is the correct approach to the three grounds presented by the Commonwealth's demurrer to the plaintiffs' statement of claim? If the pleadings appear to present arguable legal issues, is the proper response to the demurrer to refuse such relief at this stage and to commit the proceedings to trial in the normal way?

2. *The constitutional issues*: The Commonwealth submits that a law of the Federal Parliament that involves the "acquisition of property" in the Northern Territory is not, by reason of that character, subject to the "just terms" requirement in s 51(xxxi). It is wholly governed by s 122 of the Constitution. Is that submission correct? Alternatively, the plaintiffs submit (with the support of the Land Trust and the Attorney-General of the Northern Territory intervening) that the decision of this Court in *Teori Tau v The Commonwealth*[388], so far as it supports the Commonwealth's submission in this respect, is incorrect and should be overruled. Should *Teori Tau* be reversed? If *Teori Tau* is upheld, can the Emergency Response Act and the FCSIA Act nonetheless be additionally

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388 (1969) 119 CLR 564.

characterised as laws with respect to the people of any race for whom it is deemed necessary to make special laws, in accordance with s 51(xxvi)? Do these Acts, for that reason, become subject to the "just terms" requirement of s 51(xxxi)? Is the meaning of "property" in s 51(xxxi), in the case of traditional Aboriginal owners, wider than that ordinarily given to property in Australian statute and common law?

3. *The acquisition of the Land Trust's interests issue*: Do the first and second plaintiffs have the requisite interest and standing to seek relief against the Commonwealth for any "acquisition of property" of the Land Trust that they can prove? Should this Court reject the Commonwealth's submission that the Land Trust's fee simple under the Land Rights Act is inherently defeasible? Was there an arguable "acquisition" of that fee simple in the Maningrida land which the Commonwealth's submissions failed to answer?

4. *The acquisition of the plaintiffs' interests issue*: Is the submission of the first and second plaintiffs arguable that their entitlements under s 71 of the Land Rights Act constitute "property", within the meaning of s 51(xxxi), that is susceptible to "acquisition"? Notwithstanding s 71 of that Act and the provisions of the Emergency Response Act, was any such "property" arguably "acquired" by the statutory grants of five-year leases to the Commonwealth under Pt 4 of the Emergency Response Act? Alternatively, or in any case, based on the antecedent traditional Aboriginal rights of the first and second plaintiffs, are their entitlements a form of *sui generis* "property" within s 51(xxxi) arguably affected in a way that amounts to "acquisition", notwithstanding the Emergency Response Act and the FCSIA Act, so as to warrant a trial of that issue?

5. *The "just terms" issue*: Depending on the conclusions on the previous issues, does the provision for payment by the Commonwealth of a "reasonable amount of rent" under s 62(1) and a "reasonable amount of compensation" under ss 60(2) and 61 of the Emergency Response Act constitute "just terms" as required by s 51(xxxi) of the Constitution? Or does the constitutional requirement of "just terms" import a wider concept of fairness such that (at least in a case of the present kind) the statutory obligation to make financial recompense alone would not, or not necessarily, constitute "just terms"?

Demurrer and the modern approach to civil litigation

275 *Principles of demurrer*: At the outset, the reasons of Gummow and Hayne JJ refer to earlier observations of this Court about pleading practice and the proper approach to the resolution of a demurrer[389].

276 A demurrer is "the formal mode in pleading of disputing the sufficiency in law of the pleading of the other side"[390]. Although this pleading may sometimes be useful, a potential defect in proceeding by way of demurrer was noticed at an early stage. As a consequence it was enacted[391]:

> "that where any demurrer should be joined the judges should give judgment according as the very right of the cause and matter in law should appear unto them, without regarding any imperfection, omission, defect, or want of form, except those only which the party demurring should specially and particularly set down and express … [with the] causes of the same."

277 Over time, partly through legislation[392], provision was made to prevent premature, immaterial or capricious objections to pleadings for a want of proper form permitting peremptory termination of the cause. Thus, although a party might elect not to demur to a pleading said to be legally defective, that party would be entitled to object later by "a subsequent demurrer, or by motion in arrest of judgment, or for judgment *non obstante veredicto*, or by error"[393].

278 Whilst a proceeding by way of demurrer is still available, in modern pleading practice[394] it is much less common. Ordinarily, a party that believes it has a full legal answer to a cause may plead that answer by way of defence. That pleading may be ruled upon separately at any time before, during or at the end of a trial, to dispose of the entire cause.

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389 Reasons of Gummow and Hayne JJ at [119]-[125]. See generally *Levy* (1997) 189 CLR 579 at 648-649.

390 Bullen and Leake, *Precedents of Pleadings*, 2nd ed (1863) at 690.

391 Bullen and Leake, *Precedents of Pleadings*, 2nd ed (1863) at 690 referring to the statutes 27 Eliz c 5 and 4 Anne c 16.

392 For example, *Common Law Procedure Act* 1852 (UK) (15 & 16 Vict c 76), s 50.

393 Bullen and Leake, *Precedents of Pleadings*, 2nd ed (1863) at 691; cf *Thompson v Knowles* (1854) 24 LJ Ex 43.

394 See, for example, High Court Rules 2004 (Cth), r 27.07; formerly High Court Rules 1952 (Cth), O 26.

279 *Decline in the use of demurrer*: The recent decline in the use of demurrer in this Court is partly explained by considerations of legal history. It may also be explained by a number of additional considerations that are relevant to the present proceedings:

- A demurrer divides proceedings. It tends to delay or interrupt a trial. Experience emphasises the desirability, in most cases, of proceeding to trial without delay and avoiding the fragmentation of the trial process. Prevarication and interruption are common features of litigation. In criminal trials, interlocutory interruptions (even on strong legal grounds) are ordinarily discouraged by this Court[395]. Many of the adverse considerations that arise in the context of criminal trials can also arise in civil proceedings.

  In constitutional contests, it is sometimes useful to isolate a clear, short and confined question of constitutional law. However, the better course is normally to require the parties to proceed to trial. Determination of the legal questions is then postponed until all relevant evidence is adduced and the law is examined and applied by reference to that evidence. A demurrer is addressed to a pleading. Such a document should *not* elaborate the evidence said to be relevant to the exposition of the law. In the present proceedings, the discrete constitutional questions involve the suggested application of s 51(xxxi) to federal acquisitions of property in the Territories, and the proposed overruling of *Teori Tau*. Evidence is almost wholly immaterial to such questions. Thus, this issue is susceptible to demurrer. However, other constitutional questions in this case are not;

- Previously, when allowing a defendant's demurrer, the practice of this Court was normally to grant leave to a plaintiff, if seeking such leave, to amend the statement of claim. That way, the plaintiff could address the suggested legal imperfections of the original pleading and respond to the arguments canvassed on the return of the demurrer. In this respect, the original advantage of the demurrer procedure has now been replaced by the common course of permitting repleading. This course reflects the practice of this[396] and other Australian courts. Without securing peremptory and final judgment on the demurrer and in the action, the

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395 See, for example, *R v Elliott* (1996) 185 CLR 250 at 257; [1996] HCA 21.

396 See, for example, *Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 139 per Gibbs J, 152 per Stephen J, 155 per Mason J, 157 per Jacobs J, 160 per Murphy J; [1977] HCA 55.

critical advantage of the procedure, with its additional cost and delay, is greatly diminished; and

- Relevant contemporary considerations also include, first, the modern disinclination to endorse technical outcomes to litigation which elevate the form of pleadings over the substantive merits[397]. Secondly, there is now a greater awareness of the importance for legal outcomes of facts and evidentiary detail. Evidence sometimes throws light on the correct legal disposition of proceedings[398], rendering peremptory relief by dismissal, strike-out or demurrer inappropriate. This is also the case in constitutional matters. Disputes over the relevant "constitutional facts"[399] can render it preferable to adduce evidence at trial and to apply a detailed examination of the relevant law to that evidence. Thirdly, a demurrer is even less satisfactory for this purpose than a stated case. The latter procedure ensures substantial judicial control over the elaboration of the facts conceived to be essential to the constitutional issue. In demurrer, the process focuses on a pleading which normally contains little or no reference to the evidence. The pleading is usually prepared by one party (relevantly its lawyers) before judicial inquisitiveness and the trial process elicit contextual and background evidence helpful to the elucidation and determination of the constitutional issues.

280 *Special parties and issues*: In the Second Reading Speech in support of the Emergency Response Act, cited in some of the other reasons of this Court[400] to provide background facts deemed relevant, the Minister stated that "[t]his is not a normal land acquisition. People will not be removed from their land."[401] To the demurrer, the first and second plaintiffs can likewise respond that these

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397 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 155, 167-172; [1997] HCA 1.

398 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 565-566 [138]; [2004] HCA 16; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 74-75 [226]-[230]; [2005] HCA 12 applying *E (A Minor) v Dorset County Council* [1995] 2 AC 633 at 694.

399 See *Thomas v Mowbray* (2007) 233 CLR 307 at 386-388 [225]-[229], 397-400 [255]-[261] of my own reasons, 481-484 [523]-[529] per Callinan J, 514-525 [620]-[649] per Heydon J; [2007] HCA 33.

400 See reasons of French CJ at [3]-[7], reasons of Gummow and Hayne JJ at [134], reasons of Crennan J at [373]-[374], [378].

401 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 August 2007 at 14.

are not normal proceedings. Nor are the parties normal parties. The proceedings are constitutional. The first and second plaintiffs are Aboriginal Australians, traditional owners who claim particular and novel legal interests including in land. They have the requisite interest and standing in law to challenge the legality of the extraordinary measures that were introduced into federal legislation that arguably impinge upon their enjoyment of their traditional and unusual "property" rights. They are well represented to do so. Against the background of two centuries of deprivation of legal rights by Australian law, it would require the clearest possible legal principle to persuade me to uphold the grounds of the Commonwealth's demurrer.

281 *Exceptional s 122 ground of demurrer*: The only exception to the foregoing conclusion is presented by the first ground of the demurrer. That ground alone affords a comparatively short point of law for which evidence is substantially immaterial. If the Commonwealth is successful, it would be entitled to relief and judgment on the demurrer. Indeed, if the Commonwealth's primary submission were to succeed, judgment in the action would then appear necessarily to follow. It is therefore appropriate and just to deal immediately with the first ground of the demurrer. The remaining grounds should be decided on the evidence with full legal argument, not on the bare pleadings. Where the relevant law is unclear and in a state of development, as is the case here, a party seeking relief by way of demurrer faces special difficulties. In the present case, those difficulties prove fatal to the Commonwealth's reliance on all but the ground of demurrer based on s 122 of the Constitution.

The constitutional issues

282 *Confining the issues*: I have earlier identified four constitutional issues that are raised by this matter[402]. The first three concern whether the "just terms" guarantee applies to acquisitions by the Commonwealth in a Territory, and not just in a State. The fourth concerns the meaning of "property" within s 51(xxxi): specifically, whether "property" in the context of Australian Aboriginals has a wider meaning than it ordinarily does in relation to more conventional "property" interests. I regard this last question as distinctly arguable. However, I can put it to one side as it was not expressly advanced by the plaintiffs; was not the subject of submissions; and did not elicit notices and other action as contemplated by s 78B of the *Judiciary Act* 1903 (Cth). I will now therefore address only the constitutional questions presented by the propounded relationship between ss 51(xxxi) and 122 of the Constitution.

283 *Overruling Teori Tau*: In *Newcrest*, I acknowledged a number of reasons of legal authority, principle and policy for adhering to the unanimous opinion of

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402 Above, these reasons at [274].

this Court stated in *Teori Tau*[403]. I accepted that the holding in that case could not be "discarded as a mere anomaly in this Court's jurisprudence"[404]. If *Teori Tau* were to be overruled, this needed to be done "in full recognition of its lineage: appreciating and accepting the significant implications, legal and otherwise, of that course"[405]. That said, I joined Gaudron J[406] and Gummow J[407] in concluding that *Teori Tau*[408]:

> "should no longer be treated as authority denying the operation of the constitutional guarantee in par (xxxi) in respect of laws passed in reliance upon the power conferred by s 122."

Nothing submitted in these proceedings has caused me to change my opinion. It is an opinion to which I have returned and restated[409].

284 Indeed, there are now several additional reasons to support the conclusion that Gaudron J, Gummow J and I expressed in *Newcrest*. First, as explained in other reasons of this Court in these proceedings[410], there is the consideration of the opinion of Dixon CJ (with whom Fullagar, Kitto, Taylor and Windeyer JJ agreed) in *Attorney-General (Cth) v Schmidt*[411].

285 Secondly, there is the apparent disparity noted in other reasons[412] between the reasoning of Barwick CJ, for the Court, in *Teori Tau*[413] and his Honour's later

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403 *Newcrest* (1997) 190 CLR 513 at 646-652.

404 (1997) 190 CLR 513 at 652.

405 (1997) 190 CLR 513 at 652.

406 (1997) 190 CLR 513 at 561.

407 (1997) 190 CLR 513 at 613-614.

408 (1997) 190 CLR 513 at 614 per Gummow J. Toohey J was also critical of *Teori Tau*: (1997) 190 CLR 513 at 560-561.

409 *Griffiths* (2008) 82 ALJR 899 at 915 [83]; 246 ALR 218 at 235.

410 See reasons of French CJ at [75], reasons of Gummow and Hayne JJ at [176]-[178].

411 (1961) 105 CLR 361 at 371; [1961] HCA 21.

412 See reasons of French CJ at [56], reasons of Gummow and Hayne JJ at [178].

413 (1969) 119 CLR 564 at 569-570.

opinion in *Trade Practices Commission v Tooth & Co Ltd*[414] on the ambit of the constitutional "safeguard" in s 51(xxxi). (I note the contrasting deployment of *Schmidt* in these proceedings and the neglect of its instruction in *New South Wales v The Commonwealth* (*Work Choices Case*)[415]. However, this comment is not decisive for my purposes.)

286 Thirdly, there are the arguments, explained in the reasons of Gummow and Hayne JJ[416], concerning the 1977 amendment of s 128 of the Constitution. That amendment permitted electors in the Territories to participate in the formal alteration of the Constitution[417]. It would be to adopt an extremely artificial interpretation of the Constitution to accept that Australian nationals and electors of the Commonwealth who live in the Territories are, for constitutional purposes, somehow disjoined from the Commonwealth[418]. Likewise, it would be very artificial to regard the arrangements which the Constitution puts in place for the integrated Judicature of the nation as suggesting that Territory courts are linked to this Court by statute only and that Territory courts might be validly removed from the integrated Judicature provided for in Ch III[419]. I could never accept such erroneous constitutional notions.

287 One day this Court will correct the unsatisfactory state of its doctrines in relation to the Territories, their people and courts. We should begin that process in these proceedings. *Teori Tau* should be overruled. In this respect I agree in the conclusions stated in the reasons of Gummow and Hayne JJ[420]. Because a like conclusion is expressed by French CJ in his reasons[421], this will be the first

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414 (1979) 142 CLR 397 at 403; [1979] HCA 47.

415 (2006) 229 CLR 1 at 123-124 [205], 212-216 [504]-[518], 243 [606]; [2006] HCA 52.

416 Reasons of Gummow and Hayne JJ at [188].

417 cf Horan, "Section 122 of the Constitution: A 'Disparate and Non-Federal' Power?", (1997) 25 *Federal Law Review* 97 at 120-121; see at 115 for a discussion of the Commonwealth legislation enacted that provided for representation of the Territories in the Senate and the House of Representatives.

418 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 380-383 [149]-[154]; [1999] HCA 44.

419 *Ex parte Eastman* (1999) 200 CLR 322 at 380-383 [149]-[154].

420 Reasons of Gummow and Hayne JJ at [189].

421 Reasons of French CJ at [86].

holding of this Court in the present case. It is a holding that is essential to my reasoning that follows.

288 *Conclusion: application of "just terms"*: It is therefore strictly unnecessary to consider whether, had the authority of *Teori Tau* been maintained, the plaintiffs might still have defeated the Commonwealth's first demurrer ground on the basis that an Act of the Parliament can bear a dual constitutional character[422]. Likewise, it is possible to disregard the argument that the impugned federal Acts were both laws for the government of a territory (under s 122) and laws with respect to people of any race for whom it is necessary to make special laws (under s 51(xxvi)). The earlier stated conclusion renders unnecessary any differentiated characterisation of the contested legislation. The "just terms" guarantee of s 51(xxxi) applies in any case. The first and second plaintiffs were correct to so argue. To that extent, the plaintiffs have been successful in these proceedings on the issue which was the primary, and arguably the most important, one propounded by the Commonwealth's demurrer.

The acquisition of the Land Trust's interests

289 *The relevant issues*: Having thus established the foundation for their constitutional claim, the first and second plaintiffs then propounded their entitlement regarding the "acquisition" of their "property" by reference to the interference of the impugned laws in the fee simple granted to the Land Trust. The relevant issues in this respect have been identified above[423]. In effect, the Land Trust either did not contest these issues (as to the interest and standing of the first and second plaintiffs to rely on the suggested acquisition of the Land Trust's property) or it contested the Commonwealth's submission (as to the insusceptibility of the Land Trust's fee simple to be "property" for constitutional purposes). The reasons of Gummow and Hayne JJ find in favour of the first and second plaintiffs on all of these issues[424]. I agree with those reasons. I have nothing to add to them.

290 *Residual question: "just terms"*: Such conclusions leave to be decided the issue that divided the first and second plaintiffs from the Land Trust. The latter

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422 See *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 193 per Stephen J; [1982] HCA 23.

423 Above, these reasons at [274].

424 Reasons of Gummow and Hayne JJ at [171], [173].

accepted that the impugned laws provided "just terms" whereas the first and second plaintiffs disputed this submission[425]. I shall return to this issue later[426].

The acquisition of the plaintiffs' interests

291 *The remaining issue of acquisition*: There are two prior questions in the assertion in the statement of claim that the impugned federal laws involve an "acquisition" of identified "property" of the traditional owners, Mr Wurridjal and Ms Garlbin. The only other applicable question for those plaintiffs concerns the "acquisition of property" of the Land Trust and whether the legislation provides for "just terms".

292 *The broad ambit of acquisition and property*: "Property" was identified in separate ways, both under the impugned legislation and under the general law. It is critical to recall the breadth of such concepts, as explained in earlier decisions of this Court.

293 I will not repeat what I have said above concerning the differential pleading of "property" alleged to have been "acquired"[427]. However, I emphasise the broad way that this Court has previously explained the constitutional notion of "acquisition" and the types of property that may be acquired. Because the language of s 51(xxxi) affords a "constitutional guarantee"[428], it should not be restrictively interpreted. It should be applied broadly and liberally so as to fulfil its protective constitutional purposes[429].

294 In an often quoted passage in *Minister of State for the Army v Dalziel*[430], Starke J said:

> "Property … extends to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as

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425 See below these reasons at [303].

426 See below these reasons at [303]-[308].

427 cf reasons of Crennan J at [356]-[358].

428 *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509; [1993] HCA 10.

429 *Dalziel* (1944) 68 CLR 261 at 276 per Latham CJ, 284-285 per Rich J; *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 230 [43]; [2008] HCA 7.

430 (1944) 68 CLR 261 at 290.

> rents and services, rights of way, rights of profit or use in land of another, and choses in action. And to acquire any such right is rightly described as an 'acquisition of property'."

Adopting this approach, this Court has insisted that "property" is a wide and ample concept[431]. "Property" is "the most comprehensive term that can be used"[432]. It extends to "innominate and anomalous interests"[433]. Self-evidently, it applies not only to the interests of corporations or the bank shares of suburban citizens[434], but also to the "property" of Aboriginal Australians.

295 "Property" clearly includes an estate in fee simple such as that granted to the Land Trust. The holder of such an estate enjoys rights akin to full ownership, including the right to exclude others from the subject land and to decline a leasehold interest in that land to a stranger. On this basis, the statutory imposition upon the Land Trust of a five-year lease in favour of the Commonwealth constitutes the "acquisition", although temporary, of defined "property".

296 "Property", however, is not limited to an interest in fee simple. It is a "bundle of rights"[435] or "a legally endorsed concentration of power over things and resources"[436]. Such broad understandings of "property", as used in s 51(xxxi), make it clear that the concept extends at least to include the traditional rights of Australian Aboriginals, particularly in relation to their land. Moreover, it does so whether such rights are enforceable by the common law or are granted by statute[437]. Such rights are "property" so long as they are

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431 See, for example, *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 559; [1996] HCA 56; *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 663 [21]; [2007] HCA 34.

432 *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 20-21 per Knox CJ and Starke J; [1923] HCA 34; *Australian Tape Manufacturers* (1993) 176 CLR 480 at 509.

433 *Bank of NSW* (1948) 76 CLR 1 at 349 per Dixon J.

434 *Bank of NSW* (1948) 76 CLR 1 at 349 per Dixon J.

435 *Dalziel* (1944) 68 CLR 261 at 285 per Rich J; cf *Fejo v Northern Territory* (1998) 195 CLR 96 at 126 [43]; [1998] HCA 58.

436 *Yanner v Eaton* (1999) 201 CLR 351 at 365-367 [17]-[20]; [1999] HCA 53; *Telstra* (2008) 234 CLR 210 at 230-231 [44].

437 cf *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342, 352-353; [1982] HCA 69.

permanent, stable and capable of ongoing enjoyment. It does not matter that they are personal to individuals or to members of a group or given community. The already broad doctrine of the Court as to "property" may be sufficient to obviate the need to postulate a particular constitutional elaboration to address the special interests of Aboriginal Australians guaranteed by s 51(xxxi). The judicial discourse on the meaning of the word seems ample and broad enough to ensure that the constitutional word embraces all such property interests.

297 Similarly, the word "acquired" is not to be given a restricted meaning. This Court has emphasised the compound nature of the "acquisition-on-just-terms" idea[438]. An "acquisition" will occur even where the interest acquired is "slight or insubstantial"[439]. Where an existing valuable right is modified or diminished, producing a corresponding benefit or advantage to the Commonwealth or some other party, it is an "acquisition of property" for the purposes of s 51(xxxi).

298 Acquisition connotes a transfer. Mere termination or extinguishment of rights will not attract the constitutional guarantee[440]. The propounded acquirer must obtain "a direct benefit or financial gain"[441]. The present case does not involve mere extinguishment. To the extent that the five-year statutory lease relieved the Commonwealth of any risk of interference or restriction by activities of the first and second plaintiffs and people like them, it did so by enlarging the Commonwealth's own rights and diminishing those of such people, including the first and second plaintiffs.

299 Some statutory rights are, by their nature, inherently susceptible to extinguishment. Abolition or modification of such rights has been held not to constitute an "acquisition" for the purposes of s 51(xxxi)[442], even if the abolition or modification produces a corresponding benefit in another party[443]. However, in these proceedings, the interests of the first and second plaintiffs are not

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438 *Grace Brothers* (1946) 72 CLR 269 at 290 per Dixon J.

439 *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 145 per Mason J; [1983] HCA 21.

440 *Tasmanian Dam Case* (1983) 158 CLR 1 at 145, 283.

441 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305; [1994] HCA 6.

442 See reasons of Crennan J at [363].

443 *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 237; [1994] HCA 8.

extinguished. They remain. The Commonwealth's statutory lease is simply superimposed upon them. The interests of the first and second plaintiffs are not inherently susceptible to abolition or modification[444], particularly those which are derived from long-standing Aboriginal tradition, enforced on that account by the courts under the general law.

300 *The arguable claim of acquisition*: As pleaded in the statement of claim, the statutory lease in favour of the Commonwealth over the interests of the first and second plaintiffs arguably diminishes or restricts their enjoyment of their property rights. The impugned legislation arguably asserts that the first and second plaintiffs have an entitlement to continue to enjoy their traditional rights without interference or disturbance. Even if that conclusion is reached, it only addresses the intersection of interests provided in or under statute. Arguably, it would not affect the impact of the Commonwealth's new statutory leasehold interest upon the first and second plaintiffs' legal interests derived from Aboriginal tradition and law as recognised by the common law.

301 As indicated by the short title of the Emergency Response Act, the federal intervention in question in these proceedings involves an extensive series of initiatives that envisage intense personal and community or group intrusions into the lives of Aboriginal Australians. It would be extremely naïve of this Court to assume that the impact of the Commonwealth's statutory leases upon Aboriginal traditional rights on the Maningrida land would be trivial or inconsequential. The very purpose of securing the five-year statutory leasehold interests for the Commonwealth was to permit federal initiatives of an avowedly intrusive character to be undertaken on such land impinging on the property rights of the Aboriginal peoples affected.

302 This Court cannot properly resolve the issues presented in the statement of claim on the basis only of the pleading of the causes of action. That pleading includes the cause of action based upon what the first and second plaintiffs correctly contend is the "acquisition of property" of the Land Trust. Against the background of this Court's broad understandings of s 51(xxxi) of the Constitution, the first and second plaintiffs have adequately pleaded claims cognisable to the law. Subject to what follows, the ultimate proof as to their entitlement to relief would depend upon the evidence adduced at trial and the legal arguments addressed to that evidence. Demurrer is not, therefore, a remedy that is available to the Commonwealth in this case. It would be contrary to the purpose of demurrer and the emerging practice of this and other courts in applying that remedy to afford such relief to the Commonwealth in the circumstances of this case.

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444 cf reasons of Crennan J at [363]-[364], [441]-[443].

The "just terms" issue

303 *The final remaining issue*: The final issue presented by the language of s 51(xxxi) is whether, notwithstanding the foregoing, any defect in the impugned legislation is overcome by other provisions of the Emergency Response Act. Section 62 of that Act requires the Commonwealth to pay "a reasonable amount of rent" to a party such as the Land Trust or the first and second plaintiffs. As well, s 60(2) renders the Commonwealth "liable to pay a reasonable amount of compensation". The Land Trust itself submits that these provisions amount to a statutory guarantee of the provision of "just terms", thereby validating the demonstrated "acquisition of property". The reasons of a majority of this Court accept that conclusion[445]. Is such a conclusion legally correct?

304 The enactment of "fail-safe" measures to ensure compliance with s 51(xxxi) of the Constitution is obviously a sensible legislative precaution. Legislation incorporating such provisions should be upheld as long as the applicable measures adequately satisfy the constitutional obligation of "just terms". In this I agree with the general approach of the majority. Monetary "compensation" will arguably be sufficient for most property interests of a commercial, financial or economic kind. The owners of shares in the Bank of New South Wales, when that bank and others were purportedly nationalised by federal legislation, rarely if ever loved the share scrip as such. A few might have had sentimental or employment attachments to the bank, dating as many of the affected banks did back to colonial days. However, the only real virtue of the shares for shareholders was the monetary equivalent of the value of the shares, freed from the blight of a forced governmental acquisition. For such value the promise in the legislation to pay a "reasonable amount" and monetary "compensation" might well satisfy the "just terms" requirement. There are now a number of such statutory provisions in federal legislation[446]. There is no reason to question their effectiveness in most cases. So far, I agree with the majority reasoning.

305 *"Just terms" in the present context*: However, the first and second plaintiffs dispute that a statutory entitlement to reasonable "rent", even if

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445 Reasons of French CJ at [104], [108], reasons of Gummow and Hayne JJ at [199]-[202], reasons of Heydon J at [324]-[327], [331], [333]-[334], [337], reasons of Kiefel J at [463]-[469].

446 See, for example, *Customs Act* 1901 (Cth), s 4AB; *Historic Shipwrecks Act* 1976 (Cth), s 21; *Water Act* 2007 (Cth), s 254; cf *Telstra* (2008) 234 CLR 210 at 228 [36]. Sometimes federal legislation uses the constitutional expression "just terms" which is defined to have the same meaning as in s 51(xxxi) of the Constitution. See, for example, *Olympic Insignia Protection Act* 1987 (Cth), s 72.

enforceable, and to monetary "compensation", even if paid, would satisfy the "just terms" guarantee in their case. They draw attention to what Dixon J said in *Nelungaloo Pty Ltd v The Commonwealth* that "[u]nlike 'compensation,' which connotes full money equivalence, 'just terms' are concerned with fairness"[447].

306 Section 51(xxxi) of the Australian Constitution was inspired by the Fifth Amendment to the Constitution of the United States of America. The final requirement in that amendment is that "nor shall private property be taken for public use, without just compensation". The drafters of the Australian Constitution considered the Fifth Amendment. In adopting what became par (xxxi) of s 51 of the Australian Constitution, it must be assumed that they intended to differentiate between "just compensation" and "just terms". This is the point of distinction mentioned by Dixon J in *Nelungaloo*.

307 At least arguably, "just terms" imports a wider inquiry into fairness than the provision of "just compensation" alone. The latter, measured in monetary value, is objectively ascertainable in most cases. Identifying the "terms" required for an acquisition of property to be "just" invites a broader inquiry. It is one that could cut both ways. Take, for example, acquisition of property during wartime. The acquisition of an interest in property might be essential, temporary and involve very limited federal interference. Such property interests might be controlled by the Commonwealth briefly, for the defence of the nation. So long as proper procedures were instituted and observed and the property owners duly informed and quickly restored to full rights once the danger had passed, "just terms" might require little or no monetary compensation.

308 By contrast, however, an acquisition of legal interests in property belonging to traditional Aboriginals, even if only temporary, is not of such a character. Such interests are, or may be, essential to the identity, culture and spirituality of the Aboriginal people concerned. The evidence might ultimately show in this case that they do indeed love their traditional "property" interests in a way that conventional "property" is rarely if ever cherished in the general Australian community. This might oblige a much more careful consultation and participation procedure, far beyond what appears to have occurred here. As stated by Dixon J, the "terms" which s 51(xxxi) guarantees are "concerned with fairness"[448] and potentially the inquiry is a wide one. It is enlivened by the type of Aboriginal "property" affected in consequence of the impugned legislation. As such, the "just terms" requirement of the Constitution arises for consideration.

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447 (1948) 75 CLR 495 at 569. See also *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth* (1943) 67 CLR 314 at 326 per Starke J; [1943] HCA 18; *Tasmanian Dam Case* (1983) 158 CLR 1 at 289-291 per Deane J.

448 *Nelungaloo* (1948) 75 CLR 495 at 569.

Its application would depend upon evidence, including evidence as to the way the Commonwealth went about the process of "acquisition". Such evidence could only be considered at trial. It is not met by a statutory obligation to pay monetary compensation. Demurrer is not a procedure apt to resolving the resulting question.

309 *Conclusion: insusceptibility to demurrer*: Given the background of sustained governmental intrusion into the lives of Aboriginal people intended and envisaged by the National Emergency Response legislation, "just terms" in this context could well require consultation before action; special care in the execution of the laws; and active participation in performance in order to satisfy the constitutional obligation in these special factual circumstances. At the least, the Commonwealth has failed to demonstrate that this view of the constitutional obligation in s 51(xxxi) is not reasonably arguable. It follows that its demurrer should be overruled.

Conclusion: costs and orders

310 Given my conclusion that the demurrer fails in its entirety, it is my opinion that the Commonwealth should pay the plaintiffs' costs and all of them. The Land Trust should bear its own costs, obviating the necessity to make any order in that regard.

311 The contrary conclusion reached by the other members of this Court prevails. Nonetheless, as the plaintiffs succeeded on the first ground of the demurrer and partly on the second, they should at least be spared some of the costs of the demurrer. Had I shared the opinion that is now adopted by the majority in this Court, I would have required that the plaintiffs pay half only of the Commonwealth's costs. They brought proceedings which, in the result, have established an important constitutional principle affecting the relationship between ss 51(xxxi) and 122 of the Constitution for which the plaintiffs have consistently argued. It was in the interests of the Commonwealth, the Territories and the nation to settle that point. This the Court has now done. In my respectful opinion, to require the plaintiffs to pay the entire costs simply adds needless injustice to the Aboriginal claimants and compounds the legal error of the majority's conclusion in this case.

312 The demurrer should be overruled with costs.

313 HEYDON J. The circumstances of these proceedings are set out in the plurality judgment.

The argument disavowed by the plaintiffs

314 In a section of their written argument dealing with just terms, the plaintiffs submitted that "[t]raditional Aboriginal rights and interests in land cannot be readily replaced, nor readily compensated for by the payment of money". This submission would prima facie have considerable force where the relevant rights and interests were related to spiritual matters, for example use of sacred sites. It may also be thought prima facie to have some force in relation to matters which are not strictly spiritual. The submission appeared to constitute a platform for the contention that since the impugned legislation did not replace the rights and interests allegedly affected with comparable rights and interests, and since money did not adequately compensate their owners, the legislation was invalid without further analysis of the just terms question. However, for three reasons there is no point in examining that contention.

315 The first is that, in oral argument, the plaintiffs – perhaps inconsistently with other parts of their argument – disavowed any contention that there were some Aboriginal rights and interests in land the loss of which was non-compensable. Counsel for the plaintiffs did not go beyond submitting that, apart from difficulties with the money compensation provisions in the impugned legislation, the terms on which sacred sites could be acquired, if they were to be just, had to include legislation requiring their special nature to be taken into account before any discretionary decision to make an acquisition was arrived at.

316 The second reason is that while the allegations in the Second Further Amended Statement of Claim referred to land with which Aboriginals had common spiritual affiliations for which they had a primary spiritual responsibility and to sacred sites, they did not include a specific allegation that the terms of acquisition were unjust because what was acquired could not be readily replaced or readily compensated for by the payment of money.

317 The third reason is that, as the plurality judgment has demonstrated, the relevant legislation does not diminish the protections afforded by s 69 of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth)[449].

Just terms

318 *Arguments which need not be considered.* Analysis of the question whether the impugned legislation effected an acquisition of property, and of the

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449 See above at [163]-[165].

question whether s 51(xxxi) applies to the acquisition, is unnecessary if the terms contained in the legislation for any acquisition are just terms[450].

319 Let it be assumed, without deciding, that the answer to each of those two questions is affirmative. Those assumptions call for an examination of numerous reasons why, on the submissions of the plaintiffs, the terms were unjust.

320 The plaintiffs submitted that so far as the legislation conferred a lease on the Commonwealth, it did not create an obligation to pay rent, or adequate rent, for that lease. They further submitted that the Commonwealth was able to receive rents otherwise owing to the second defendant or the Northern Land Council without accounting for them to the second defendant or the traditional Aboriginal owners. They also submitted that the legislation permitted the Commonwealth to deal with its interest in the lease it had obtained without accounting to the second defendant or the traditional Aboriginal owners. Finally, they submitted that the Commonwealth could vary or terminate the lease or dispose of its interest as lessee in a manner adverse to the second defendant without compensation.

321 *Section 60(2) and (3).* These arguments could only avail if s 60 of the *Northern Territory National Emergency Response Act* 2007 (Cth) could be said to have failed to ensure the provision of just terms. Section 60(2) provides:

> "[I]f 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."

Section 60(3) provides:

> "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."

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450 The analysis is also undesirable to the extent that there was no controversy between the parties on some aspects of those questions. In particular, there was no controversy between the plaintiffs and the second defendant in relation to s 71 of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) and, to a large extent, no controversy on the Commonwealth's part either: see [160]. So far as the Commonwealth did raise any controversy, it was hypothetical in that no facts were pleaded making it live – that is, no facts suggesting that s 71 rights interfered with the Commonwealth's use and enjoyment of the leased land.

There are similar provisions in the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act* 2007 (Cth): Sched 4 Item 18(2) and (3). The relevant provisions in the latter Act have no equivalent to s 61, discussed below[451].

322 The plaintiffs advanced many detailed arguments in support of their submissions that s 60 did not provide for just terms. It is those arguments which must be examined in corresponding detail.

323 *"Contingent" right: s 60(2).* The first of the plaintiffs' arguments was that while s 51(xxxi) requires an immediate right to compensation, s 60 confers only a "contingent" right. The argument proceeded:

> "Because the jurisprudence of this Court is unsettled in relation to the relationship between s 51(xxxi) and s 122, and because the nature of certain of the property interests claimed by the Plaintiffs is *sui generis*, institution of proceedings for compensation in a lower court could not be expected to resolve these issues. Rather, before any entitlement to payment of compensation arises, the Plaintiffs must, as a practical matter, ultimately prosecute or defend one or more proceedings to judgment in this Court, with exposure to adverse costs orders and without any entitlement to legal aid or other financial assistance, to establish that:
>
> (i) section 51(xxxi) of the Constitution applies to the impugned provisions;
>
> (ii) an acquisition of property has occurred; and
>
> (iii) the acquisition is otherwise than on just terms."

The plaintiffs further submitted:

> "The imposition of an onerous, costly and time-consuming process without aid or protection in order for a person whose property is acquired to obtain just terms is oppressive and renders s 60 ineffective to guarantee the just terms required by s 51(xxxi)."

The plaintiffs relied on what Deane J said about invalidity resulting from slow and indirect procedures for recovering compensation in *The Commonwealth v Tasmania*[452].

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451 At [332]-[335].

452 (1983) 158 CLR 1 at 291; [1983] HCA 21.

324 This argument must be rejected. First, it did not attempt to deal with the authorities which have held or said that legislation which provides for the payment of "reasonable compensation as determined by" a court is legislation which provides for just terms[453]. Those authorities are inconsistent with the proposition that the right to reasonable compensation is only contingent.

325 Secondly, the argument lacks practical reality. The fact is 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 s 51(xxxi) and s 122 of the Constitution. It is not clear why the supposedly sui generis nature of the property rights claimed by the plaintiffs prevents courts of competent jurisdiction rather than this Court from resolving disputes about compensation for their acquisition, particularly since on the plurality view the property rights acquired do not include rights to sacred land[454].

326 Further, it is a misuse of language to call the right to compensation "contingent" by reason of any delay involved, or by reason of the possible need to go to court. The need to vindicate rights in court does not make those rights "contingent", and the process of doing so is not unfair. It should not take long to establish that the Commonwealth will not agree with the amount of compensation claimed by the person seeking it. Thereafter the controversy is committed to the court of competent jurisdiction, and in modern conditions such a court will endeavour to give a speedy remedy to a claimant who is not tardy in using the court's procedures. A claimant of that kind does not fall within the

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453 *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 229-230 [41]-[42]; [2008] HCA 7, concerning s 152EB(1)(c) and (d) of the *Trade Practices Act* 1974 (Cth), which provide that where a determination would result in an acquisition of property and the determination would not be valid, apart from s 152EB, because a particular person has not been sufficiently compensated:

> "the Commonwealth must pay that person:
>
> (c) a reasonable amount of compensation agreed on between the person and the Commonwealth; or
>
> (d) failing agreement – a reasonable amount of compensation determined by a court of competent jurisdiction."

See also *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 167; *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 462-463 [197]; [1999] HCA 5.

454 See [162].

category stated by Deane J in *The Commonwealth v Tasmania* of those who "will be forced to wait years before [they are] allowed even access to a court, tribunal or other body which can authoritatively determine the amount of the compensation which the Commonwealth must pay."[455] As Black CJ and Gummow J said of similarly worded legislation[456]:

> "It is not correct to say that in such circumstances the right to compensation is conditional rather than absolute; the right is absolute if upon a proper analysis the law effects an acquisition of property."

And even if there is delay, its effects can be overcome by orders for interest[457].

327 Finally, neither the exposure of the person claiming compensation to adverse costs orders, nor the lack of entitlement of that person to any form of legal aid, prevents the legislation from conferring just terms. For better or worse, many claimants to legal remedies are exposed to adverse costs orders if their claims fail, and without assistance from the public purse in prosecuting those claims. Those circumstances do not detract from the conclusion that successful claimants to those legal remedies may be said to have "rights" of a non-contingent kind.

328 *"Contingent" right: the abrogation of s 50(2).* A secondary form of the argument that s 60 only conferred a contingent right was put thus. The starting point was s 50(2) of the *Northern Territory (Self-Government) Act* 1978 (Cth). It provides:

> "the acquisition of any property in the Territory which, if the property were in a State, would be an acquisition to which paragraph 51(xxxi) of the Constitution would apply, shall not be made otherwise than on just terms."

Section 60(1) of the *Northern Territory National Emergency Response Act* 2007 (Cth) provides that s 50(2) does not apply in relation to any acquisition of property referred to in s 50(2) that occurs, inter alia, as a result of the operation of Pt 4 of the *Northern Territory National Emergency Response Act* 2007. The plaintiffs' submission proceeds:

> "[The] abrogation [of s 50(2)] reinforces the contingent nature of the 'right' conferred by s 60. Had there been an intention to ensure that just

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455 (1983) 158 CLR 1 at 291.

456 *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 167.

457 See below at [331].

> terms were provided, it would have been unnecessary to abrogate the operation of s 50(2) … Thus, the present case can be easily distinguished from cases where there was doubt about whether there was an acquisition of property at all."

329 First, the present case is in fact one in which there was doubt about whether there was an acquisition of property at all, even if the plurality judgment has now resolved that doubt. Secondly, the argument is a quibble: it does not explain in what way the rights conferred by s 50(2) have been cut down by s 60(1) in view of the existence of s 60(2).

330 *Interest.* The plaintiffs' next argument was that s 60 did not provide for just terms because it conferred no right to the payment of compensation referable to the period from the date of acquisition to the date when the court of competent jurisdiction made a decision. This was essentially a subset of a further argument that s 60 did not provide for just terms because, unlike the legislation in *Grace Brothers Pty Ltd v The Commonwealth*[458], it conferred no right to interest in the period from the date of acquisition to the date when compensation was paid. The absence of a right to interest was seen by Deane J in *The Commonwealth v Tasmania* as a factor pointing against validity[459].

331 Even assuming that the absence of a right to interest points against validity – and there is authority the other way[460] – these arguments have the following flaws. Either s 60, on its true construction, empowers the court of competent jurisdiction, in determining the reasonableness of the compensation it awards, to include interest in order to reflect delay in payment[461], or it does not. If it does, the plaintiffs' complaint is met. Even if it does not (on the basis that on one view interest is not part of compensation, but interest on compensation[462]), any court of competent jurisdiction is likely to have powers conferred by statute or by rule of court to order both pre-judgment interest and post-judgment interest. Thus by

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458 (1946) 72 CLR 269; [1946] HCA 11, concerning s 40 of the *Lands Acquisition Act* 1906 (Cth).

459 (1983) 158 CLR 1 at 291. See also *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 279 and 317; [1948] HCA 7.

460 Eg, *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 343.

461 See *Marine Board of Launceston v Minister of State for the Navy* (1945) 70 CLR 518; [1945] HCA 42; *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 462 [195]-[196].

462 See *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 282; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 228.

reason of s 39B(1A)(c) of the *Judiciary Act* 1903 (Cth), the Federal Court of Australia would be a "court of competent jurisdiction". So far as pre-judgment interest is concerned, s 51A(1) of the *Federal Court of Australia Act* 1976 (Cth) empowers the Court to award simple interest on any money judgment for the whole or any part of the period between the date when the cause of action arose and the date of judgment. The section does not authorise the award of compound interest: s 51A(2)(a). But the section does not limit the operation of "any enactment or rule of law" which would otherwise allow for the award of interest: s 51A(2)(d). As to post-judgment interest, s 52 of the *Federal Court of Australia Act* provides that a judgment debt of the Court carries interest from the date of entry. Order 35 r 8 of the Federal Court Rules fixes the rate at 10.5% per annum unless the Court fixes a lower rate. A proposition underlying the plaintiffs' submissions – that a duty to pay interest be explicitly stated in the provisions – cannot be correct: it would suffice if that duty is implicit in the provisions or derivable from some other rule of law.

332 *Section 61(c).* Section 61(c) of the *Northern Territory National Emergency Response Act* 2007 (Cth) provides:

> "For the purposes of section 60, in determining a reasonable amount of compensation that is payable in relation to land, the Court must take account of:
>
> …
>
> (c) any improvements to the land that are funded by the Commonwealth (whether before or after a lease is granted to, or all rights, titles or interests are vested in, the Commonwealth), including the construction of, or improvements to, any buildings or infrastructure on the land."

So far as s 61(c) relates to improvements funded by the Commonwealth before the grant of the lease, the plaintiffs submitted, first, that it was inconsistent with the basis on which funding was provided by the Commonwealth; secondly, that it was so "uncertain, discretionary, unreasonable, arbitrary and capricious in its operation and effect" that it rendered the terms provided by s 60 not just; thirdly, that it allowed for the compensation provided by s 60 to be less than the market value of the land; and fourthly, that it was legislatively unique, and hence discriminatory against Aboriginal people.

333 These submissions rest on an assumption of construction. The assumption is that on its true construction s 61 requires the matters listed in pars (a)-(c) to be considered to the exclusion of any other matter. That assumption is incorrect. The court is obliged to take account of the matters described in pars (a)-(c), but it is not limited to them.

334 Hence, even if s 61(c) is uncertain in its operation, that will not prevent the s 60 terms from being just: the court's duty will be to assess an overall amount of compensation which is reasonable, and this will prevent any uncertainties arising from s 61(c) from counting against the claimant. The same is true of any other criticism to be made of s 61(c) considered in isolation.

335 The plaintiffs advanced a separate criticism of what they called "the requirement that the value of any improvements funded by the Commonwealth after the grant of the Commonwealth lease be taken into account". They said that this was also "so uncertain, discretionary, unreasonable, arbitrary and capricious" that it was not a just term. This submission rests on the same false assumption of construction as that which underlies the plaintiffs' first group of criticisms of s 61(c).

336 *Other uncertainties.* In other respects the plaintiffs contended that for various reasons s 60 was so uncertain and discretionary that it was incapable of ensuring that an acquisition was on just terms. One reason assigned was the absence of any commercial market in relation to parts of the property acquired, in particular the sacred sites. A second reason was "the sole criterion of payment of a reasonable amount of compensation": this was said not to provide just terms because it did not take into account "the non-financial disadvantages and deprivations suffered by the traditional Aboriginal owners, and by [the first two plaintiffs], by reason of the acquisition of Land Trust property and [the first two plaintiffs'] property and the abolition of the permit system"[463]. A particular example was given of the non-financial disadvantages – "the suspension of the rights and interests of the traditional Aboriginal owners to use the Maningrida land for traditional purposes." A third reason was that the sole criterion of payment of a reasonable amount of compensation for the consequences flowing from abolition of the permit system was too uncertain and discretionary.

337 There are two difficulties with these contentions. The first is that the law can provide compensation for money losses even though there is no market for the thing lost and even though the attraction of the thing lost to the person who lost it rests on non-financial considerations. Secondly, a good example of things for which there is no market and which have non-financial aspects is native title rights. Yet in *Griffiths v Minister for Lands, Planning and Environment*[464] a

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463 That is, the system by which, despite the prohibition in s 70(1) of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) on persons entering or remaining on Aboriginal land, persons may do so, by reason of s 70(2A)(b), pursuant to permits granted by the relevant Land Council under s 5 of the *Aboriginal Land Act* (NT).

464 (2008) 82 ALJR 899; 246 ALR 218; [2008] HCA 20.

majority of the Court assumed that it was possible to extinguish native title on just terms. Given the abandonment by the plaintiffs of the possible argument hinted at in their written submissions and outlined at the start of this judgment[465], there is no reason to hold in this case that that assumption was incorrect. That outcome invalidates the plaintiffs' contentions.

338 *Non-monetary terms.* The plaintiffs submitted that "just terms" could require more than the provision of monetary compensation. An appeal was made to "the equitable maxim that one who suffers a wrong shall not be without a remedy, which applies where damages would be an inadequate remedy", and to cases recognising a right to the specific performance of contracts[466]. The plaintiffs submitted that a particular example of the extension of "just terms" beyond monetary compensation might arise where the acquisition of traditional Aboriginal rights and interests in land was under consideration, in view of their "*sui generis* nature". The plaintiffs relied on a proposition that "the determination of just terms must take into account the particular value of the property to the former owner in circumstances where it … cannot be readily replaced, nor readily compensated for by the payment of money". They attributed this proposition to Latham CJ in *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth*[467]. One legislative provision of a non-monetary character causing the terms of acquisition to be just might be a provision guaranteeing a continuation of access by the traditional owners to the land for traditional purposes "side-by-side with the acquisition". The plaintiffs submitted that the failure of the *Northern Territory National Emergency Response Act* 2007 (Cth) to do this meant that it had not provided just terms in two respects. One was that the traditional Aboriginal owners were not given concurrent rights to exercise their rights and interests for traditional purposes. The other was that the traditional Aboriginal owners or native title holders were not given a continuing legally enforceable entitlement to exercise native title rights and interests, or traditional dominion, custodianship and responsibility, over the sacred sites supposedly acquired by the Commonwealth. The plaintiffs also submitted that the acquisition of sacred sites by the Commonwealth was not on just terms because it had failed to consider the consequences of interfering in the rights of the Aboriginal peoples concerned with sacred sites in circumstances where the interference may have been unnecessary for the Commonwealth's purposes.

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465 See above at [314]-[315].

466 The cases cited were *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460 at 503; [1967] HCA 3; *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 574-575 [128]; [2004] HCA 56.

467 (1943) 67 CLR 314 at 322-323; [1943] HCA 18.

339 The present case does not afford an occasion on which it is appropriate to consider these issues raised by the plaintiffs. That is partly because the plaintiffs and the second defendant agree that the preferred view of the rights conferred by s 71 is that they were not affected by s 31 of the *Northern Territory National Emergency Response Act* 2007 (Cth), and the small degree of dissent from this by the Commonwealth is in respect of a point in relation to which no facts were pleaded[468]. In any event, the Commonwealth's proposition has been held to be incorrect by the plurality. That is, nothing prevents the first and second plaintiffs from obtaining access to sacred sites. A further reason why the present case does not afford an occasion on which it is appropriate to consider the plaintiffs' submissions is that no issue is raised on the pleadings about native title rights in relation to sacred sites. A further reason is that the protection afforded to sacred sites by s 69 of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) is not reduced by the *Northern Territory National Emergency Response Act* 2007 (Cth).

340 In any event, the appeal which the plaintiffs make to the authorities is defective in two respects. First, the cases applying the principles relating to specific performance do not suggest any relevant analogy with the present controversy. Secondly, the point of Latham CJ's reasoning in the *Johnston Fear* case was not that just terms for the acquisition of some interests could include matters other than money; rather it was that if monetary payments were not truly compensatory, the acquisition was invalid.

341 Further, it is novel to suggest that s 51(xxxi) can narrow the power to acquire particular items, as distinct from invalidating the legislation which acquires those items if just terms are not provided. The novelty of the suggestion would require a closeness of examination it did not receive in argument.

Conclusion

342 I agree with the orders proposed by the plurality.

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468 See above n 450.

343 CRENNAN J. The Maningrida land in the Northern Territory is included in the *Northern Territory National Emergency Response Act* 2007 (Cth) ("the Emergency Response Act")[469] which provides for the grant of leases to the Commonwealth, on certain terms and conditions, for up to five years ("the lease provisions").

344 Related legislation, the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act* 2007 (Cth) ("the FCSIA Act"), provides a defence to a person who enters and remains on common areas within the Maningrida land provided the purpose for entering and remaining was not unlawful ("the entry provisions"). This would otherwise be an offence pursuant to s 70(1) of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ("the Land Rights Act").

345 This case concerns the constitutional validity of the lease and entry provisions ("the challenged provisions"). The Commonwealth legislative powers on which the challenged provisions rest are those conferred under the Constitution by s 122, to make laws for the government of any territory, and by s 51(xxvi), to make laws with respect to the people of any race for whom it is deemed necessary to make special laws[470].

346 The challenged provisions are said to effect an acquisition of property governed by the Land Rights Act, without affording just terms, contrary to s 51(xxxi) of the Constitution.

347 The Dhukurrdji clan are the traditional Aboriginal owners[471] of land identified as the "Maningrida land", described in cl 21 in Pt 1 of Sched 1 to the Emergency Response Act. The Maningrida land includes a township area with

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469 As amended by the *Indigenous Affairs Legislation Amendment Act* 2008 (Cth).

470 The plaintiffs contended that the challenged legislation also rested on the external affairs power in s 51(xxix) of the Constitution.

471 Section 3(1) of the Land Rights Act defines "traditional Aboriginal owners", in relation to land, to mean:

> "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."

residential and commercial buildings and infrastructure, sacred sites[472], an outstation, a sand quarry pit, a billabong and a ceremonial site. It is "Aboriginal land" within the meaning of par (a) of the definition of Aboriginal land in s 3(1) of the Land Rights Act, namely "land held by a Land Trust for an estate in fee simple".

348 Each of the first and second plaintiffs, Reggie Wurridjal and Joy Garlbin, is a senior member of the Dhukurrdji clan. The Maningrida land is held by the second defendant, the Arnhem Land Aboriginal Land Trust ("the Land Trust"), for the benefit of the traditional Aboriginal owners[473]. Each of the first and second plaintiffs is also an Aboriginal who has a right to use and occupation of the Maningrida land in accordance with Aboriginal tradition[474]. The third plaintiff, which is not claiming any property rights, is an Aboriginal and Torres Strait Islander corporation[475], and is a "community services entity"[476] which has business dealings with the Land Trust.

The proceedings

349 The plaintiffs proceeded within the original jurisdiction of the High Court[477], to seek declarations that the challenged provisions effected an acquisition of property to which s 51(xxxi) of the Constitution applies and that those provisions are invalid in their application to the property claimed.

350 The plaintiffs asserted that, by reason of the challenged provisions, two kinds of property had been acquired or will be acquired otherwise than on just terms: first, an estate in fee simple in the Maningrida land held by the Land Trust; and second, the rights of the first and second plaintiffs to use and

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472 Which are the subject matter of the *Northern Territory Aboriginal Sacred Sites Act* (NT) and are dealt with in s 69 of the Land Rights Act.

473 The Land Trust is an "Aboriginal Land Trust" within the meaning of s 4(1) of the Land Rights Act.

474 Pursuant to s 71 of the Land Rights Act.

475 Within the meaning of s 16-5 of the *Corporations (Aboriginal and Torres Strait Islander) Act* 2006 (Cth).

476 Within the meaning of s 3 of the Emergency Response Act.

477 By reference to s 30(a) of the *Judiciary Act* 1903 (Cth) and s 75(iii) of the Constitution, in accordance with the established practice of the Court, as to which see *Toowoomba Foundry Pty Ltd v The Commonwealth* (1945) 71 CLR 545 at 570 per Latham CJ; [1945] HCA 15.

occupation of that land, including use and occupation of four sacred sites located on it. The Land Trust is obliged to exercise its powers as owner of the land "for the benefit of the Aboriginals concerned"[478]. It was claimed that the challenged provisions did not impose a similar obligation on the Commonwealth or the Minister. The importance of the Land Rights Act, and of the Aboriginal interests in Aboriginal land which are granted and governed by that Act, was not in question.

351 The first defendant, the Commonwealth, has demurred to the whole of the plaintiffs' Second Further Amended Statement of Claim ("the Statement of Claim")[479] on the ground that the facts alleged therein do not show any cause of action to which effect can be given by the Court as against the Commonwealth. The Land Trust was joined as the second defendant after the initiation of the proceedings. Each of the defendants has filed a defence.

352 The proceedings did not raise an issue about native title rights under the *Native Title Act* 1993 (Cth), dealt with in s 51 of the Emergency Response Act.

Questions

353 Three questions arose on the demurrer, not all of which need to be decided. The first was whether s 51(xxxi) of the Constitution constrains the Parliament when making laws, in the form of the challenged provisions, for the government of the Northern Territory in reliance on s 122 or upon that section and s 51(xxvi) of the Constitution. The second question was whether the challenged provisions effect an acquisition of an interest in the Maningrida land which can be characterised as an acquisition of property within s 51(xxxi) of the Constitution. On that second question, the Commonwealth contended that the challenged provisions fell outside the scope of s 51(xxxi). The third question, which arose if the second question were answered adversely to the Commonwealth, was whether the challenged provisions provide "just terms" for any acquisition effected. In the reasons which follow the second question is answered in favour of the Commonwealth and accordingly the demurrer should be allowed.

354 In the context of the first question, the Commonwealth contended that s 51(xxxi) of the Constitution has no application to the challenged legislation because it is wholly supported by s 122. There was full argument on the first question, including support of the plaintiffs by the Northern Territory on this point. The Commonwealth accepted that it is appropriate for this Court to

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478 Section 5(1)(b) of the Land Rights Act.

479 Filed 12 March 2008.

reconsider the correctness of both *Teori Tau v The Commonwealth*[480] and *Newcrest Mining (WA) Ltd v The Commonwealth*[481].

355 Given the basis on which I consider the demurrer should be allowed and the settled practice of this Court to decline to answer unnecessary constitutional questions[482], in my respectful opinion this case does not present an occasion on which it is necessary to determine the relationship between s 122 and s 51(xxxi) of the Constitution.

Relevant principles

356 It is a well-established principle that "every species of valuable right and interest"[483] including "innominate and anomalous interests"[484] are encompassed by "property" in s 51(xxxi) of the Constitution[485]. Even an indirect acquisition of property may attract the constitutional guarantee of just terms[486]. It follows from

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480 (1969) 119 CLR 564; [1969] HCA 62.

481 (1997) 190 CLR 513; [1997] HCA 38.

482 *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 per Dixon CJ (for himself, McTiernan, Webb, Fullagar, Kitto and Taylor JJ). See also *Attorney-General for NSW v Brewery Employés Union of NSW* (1908) 6 CLR 469 at 491-492 per Griffith CJ, 553-554 per Isaacs J; [1908] HCA 94; *Cheng v The Queen* (2000) 203 CLR 248 at 270 [58] per Gleeson CJ, Gummow and Hayne JJ; [2000] HCA 53; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 473-474 [250]-[252] per Gummow and Hayne JJ; [2001] HCA 51; *O'Donoghue v Ireland* (2008) 234 CLR 599 at 614 [14] per Gleeson CJ; [2008] HCA 14.

483 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 290 per Starke J; [1944] HCA 4. See also *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509 per Mason CJ, Brennan, Deane and Gaudron JJ; [1993] HCA 10; *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 559 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; [1996] HCA 56.

484 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349 per Dixon J; [1948] HCA 7.

485 *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 663 [21] per Gleeson CJ, Gummow, Hayne and Crennan JJ; [2007] HCA 34.

486 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349 per Dixon J.

the width of the meaning of "property" that the phrase "acquisition of property" must also be construed widely[487].

357 Notwithstanding the width of the meaning of "property", the existence of other heads of Commonwealth legislative power which may support an acquisition of property means that the guarantee of just terms in s 51(xxxi) is not to be applied in "a too sweeping and undiscriminating way"[488]. Limits upon the scope of s 51(xxxi) have been recognised in numerous cases, in different ways.

358 There are some kinds of acquisitions of property which are, of their nature, antithetical to the notion of just terms, but which are plainly intended to be permissible under heads of power within s 51 of the Constitution. Obvious examples include acquiring property in the context of tax, bankruptcy, condemnation of prize and forfeiture of prohibited imports[489].

359 In *Mutual Pools & Staff Pty Ltd v The Commonwealth*, McHugh J said[490]:

> "When, by a law of the Parliament, the Commonwealth … compulsorily acquires property in circumstances which make the notion of fair compensation to the transferor irrelevant or incongruous, s 51(xxxi) has no operation."

360 In *Nintendo Co Ltd v Centronics Systems Pty Ltd*, decided some months later, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ further explained[491]:

> "Th[e] operation of s 51(xxxi) to confine the content of other grants of legislative power, being indirect through a rule of construction, is subject to a contrary intention either expressed or made manifest in those other grants. In particular, some of the other grants of legislative power clearly encompass the making of laws providing for the acquisition of property

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487 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 184-185 per Deane and Gaudron JJ; [1994] HCA 9.

488 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372 per Dixon CJ; [1961] HCA 21.

489 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372-373 per Dixon CJ; *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 282 per Deane J; [1983] HCA 21.

490 (1994) 179 CLR 155 at 219-220.

491 (1994) 181 CLR 134 at 160; [1994] HCA 27.

> unaccompanied by any quid pro quo of just terms. Where that is so, the other grant of legislative power manifests a contrary intention which precludes the abstraction from it of the legislative power to make such a law." (footnote omitted)

361 In considering statutory liens on aircraft in *Airservices Australia v Canadian Airlines International Ltd*, Gleeson CJ and Kirby J identified another approach to the problem of determining whether challenged laws fell within the scope of s 51(xxxi) when they said[492]:

> "In *Mutual Pools & Staff Pty Ltd v The Commonwealth*, Brennan J[493], referring to earlier authority, pointed out that a grant of legislative power comprehends a power to enact provisions appropriate and adapted to the fulfilment of any objective falling within the power, and that s 51(xxxi) does not abstract the power to prescribe the means appropriate and adapted to the achievement of an objective falling within another head of power where the acquisition of property without just terms is a necessary or characteristic feature of the means prescribed." (some footnotes omitted)

362 It was pointed out by Deane J in *The Tasmanian Dam Case*[494], that less obvious examples of permissible acquisitions of property under heads of power within s 51 of the Constitution make it necessary to ask whether what the impugned law effects can properly be characterised as an acquisition of property within the scope of s 51(xxxi). His Honour observed that when it comes to laws which are not directed to an acquisition of property but which are concerned with "no more than the adjustment of competing claims between citizens in a field which needs to be regulated in the common interest … no question of acquisition of property for a purpose of the Commonwealth is involved"[495].

363 It can be significant that rights which are diminished by subsequent legislation are statutory entitlements. Where a right which has no existence apart from statute is one that, of its nature, is susceptible to modification, legislation which effects a modification of that right is not necessarily legislation with

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492 (1999) 202 CLR 133 at 180 [98]; [1999] HCA 62.

493 (1994) 179 CLR 155 at 179-180.

494 (1983) 158 CLR 1.

495 (1983) 158 CLR 1 at 283. See also *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 413-415 per Stephen J; [1979] HCA 47; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 185 per Deane and Gaudron JJ.

respect to an acquisition of property within the meaning of s 51(xxxi)[496]. It does not follow, however, that all rights which owe their existence to statute are ones which, of their nature, are susceptible to modification[497], as the contingency of subsequent legislative modification or extinguishment does not automatically remove a statutory right from the scope of s 51(xxxi)[498].

364 Putting to one side statutory rights which replace existing general law rights[499], the extent to which a right created by statute may be modified by subsequent legislation without amounting to an acquisition of property under s 51(xxxi) must depend upon the nature of the right created by statute. It may be evident in the express terms of the statute that the right is subject to subsequent statutory variation[500]. It may be clear from the scope of the rights conferred by the statute that what appears to be a new impingement on the rights was in fact always a limitation inherent in those rights[501]. The statutory right may also be a part of a scheme of statutory entitlements which will inevitably require modification over time[502].

365 Although even a slight or insubstantial acquisition of an interest in property may be sufficient to bring the acquisition within s 51(xxxi)[503], rights of ownership may be impaired without there being an acquisition of property within

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496 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305-306 per Mason CJ, Deane and Gaudron JJ; [1994] HCA 6; *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 237 per Mason CJ, Deane and Gaudron JJ; [1994] HCA 8.

497 *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 16-17 [16] per Brennan CJ; [1998] HCA 8.

498 *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 664 [23]-[25] per Gleeson CJ, Gummow, Hayne and Crennan JJ, approved in *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 232 [49] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ; [2008] HCA 7.

499 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305-306 per Mason CJ, Deane and Gaudron JJ.

500 *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651; see also *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1.

501 *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210.

502 *Health Insurance Commission v Peverill* (1994) 179 CLR 226.

503 *The Tasmanian Dam Case* (1983) 158 CLR 1 at 145 per Mason J.

s 51(xxxi) if the degree of impairment is insufficient to attract the operation of that provision[504].

The legislation

366 The main provisions of the Emergency Response Act, for present purposes, are those contained in Div 1[505] of Pt 4[506]. The relevant provisions commenced operation on 18 August 2007. Under the headings set out, they relevantly provide:

> "**31 Grant of lease for 5 years**
>
> (1) A lease of the following land is, by force of this subsection, granted to the Commonwealth by the relevant owner of the land[507]:
>
> (a) land referred to, in a clause, in Parts 1 to 3 of Schedule 1 to this Act[508];
>
> …
>
> (2) A lease granted under subsection (1) is for a term
>
> …
>
> (b) ending 5 years after the time at which this section commences[509].
>
> …

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504 *Waterhouse v Minister for the Arts and Territories* (1993) 43 FCR 175. See also *Smith v ANL Ltd* (2000) 204 CLR 493 at 505 [23] per Gaudron and Gummow JJ; [2000] HCA 58.

505 Entitled "Grants of leases for 5 years".

506 Entitled "Acquisition of rights, titles and interests in land".

507 The Land Trust.

508 Clause 21 in Pt 1 of Sched 1 identified the Maningrida land.

509 18 August 2012.

Exclusion of land covered by earlier leases

(3) If:

(a) land would, apart from this subsection, be covered by a lease granted under subsection (1); and

(b) a registered lease covering all or part of that land (the whole or the part being the ***previously leased land***) existed immediately before the lease granted under subsection (1) takes effect;

then, at the time the lease granted under subsection (1) takes effect, the previously leased land is, by force of this subsection, excluded from the land that is covered by the lease granted under subsection (1).

…"

(Section 55 provides that the lease granted under s 31(1) may be registered under the *Land Title Act* (NT).)

"**34 Preserving any existing right, title or other interest**

(1) This section applies to any right, title or other interest in land if:

(a) the land is covered by a lease granted under section 31; and

(b) the right, title or interest exists immediately before the time that lease takes effect.

…

(3) The right, title or interest is preserved as a right, title or interest (as the case requires) in the land after that time.

…

(4) If the right, title or interest in the land was granted by the relevant owner of the land, the right, title or interest has effect, while the lease is in force, as if it were granted by the Commonwealth on the same terms and conditions as existed immediately before that time.

(5) However, at any time, the Minister may determine in writing that subsection (4) does not apply to a right, title or interest.

…"

(Section 34(4) will need to be read in conjunction with s 63(1) and (2) set out below.)

"**35 Terms and conditions of leases**

(1) A lease of land granted under section 31 gives the Commonwealth exclusive possession and quiet enjoyment of the land while the lease is in force (subject to section 34, subsection 37(6) and section 52 of this Act or sections 70C to 70G of the *Aboriginal Land Rights (Northern Territory) Act 1976*).

…

(2) The Commonwealth is not liable to pay to the relevant owner of land any rent in relation to a lease of that land granted under section 31, except in accordance with subsection 62(5).

…

(4) The relevant owner of land covered by a lease granted under section 31 may not vary or terminate the lease.

(5) The Commonwealth may not transfer a lease granted under section 31. However, the Commonwealth may, at any time, sublease, license, part with possession of, or otherwise deal with, its interest in the lease.

(6) The Commonwealth may, at any time, vary a lease granted under section 31 by:

(a) excluding land from the lease; or

(b) including in the lease any land that was excluded under subsection 31(3).

…"

(Section 35(2) will need to be considered with s 62(1), (4) and (5) set out below.)

"**37 Termination etc of rights, titles, interests or leases**

Termination of existing rights, titles, interests or leases

(1) The Commonwealth may, at any time, terminate:

(a) a right, title or interest that is preserved under section 34; or

(b) a lease (the ***earlier lease***) of land that (under subsection 31(3)) is excluded from the land covered by a lease (the ***later lease***) granted under section 31.

…

(3) The Commonwealth terminates a right, title or interest in land, or a lease of land, by the Minister giving notice in writing to the person who holds the right, title, interest or lease. The Minister may also give a copy of the notice to the relevant owner of the land and any other relevant person.

(4) The termination takes effect, by force of this subsection, at the time specified in the notice (which must not be earlier than the day on which the notice is given to the person who holds the right, title, interest or lease).

…

Early termination of lease on granting a subsequent lease of a township

(6) Despite the grant of a lease of Aboriginal land under section 31, the Land Trust for the land may, in accordance with section 19A of the *Aboriginal Land Rights (Northern Territory) Act 1976*, grant a lease (the ***township lease***) of a township.

…

(7) If the Land Trust grants a township lease that covers all of the land, the lease granted under section 31 of that land is terminated by force of this subsection.

(8) If the Land Trust grants a township lease that covers part of the land, the lease granted under section 31 that covers that part is varied, by force of this subsection, to exclude that part.

(9) The lease granted under section 31 is terminated, or varied, at the time the township lease takes effect."

367 Relevant provisions in Div 3[510] provide:

"**52 Aboriginal Land Rights (Northern Territory) Act**

Grants of leases by a Land Trust under section 19

(1) Despite the grant of a lease of Aboriginal land under section 31, the Land Trust for the land may grant another lease, in accordance with section 19 of the *Aboriginal Land Rights (Northern Territory) Act 1976*, that covers part of the land.

…

(2) The consent, in writing, of the Minister is required for the grant or variation of a lease under section 19 of that Act (as it applies because of subsection (1)) while the lease under section 31 is in force.

(3) If, in accordance with section 19 of the *Aboriginal Land Rights (Northern Territory) Act 1976* and this section, the Land Trust grants a lease that covers part of the land, the lease granted under section 31 that covers that part is varied, by force of this subsection, to exclude that part.

…"

368 Relevant provisions in Div 4[511] provide:

"**62 Payment of agreed amounts or rent etc**

…

Payment of rent

(1) The Commonwealth Minister may, from time to time, request the Valuer-General (appointed under section 5 of the *Valuation of Land Act* of the Northern Territory) to determine a reasonable amount of rent to be paid by the Commonwealth to the relevant owner (not being the

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510 Entitled "Effect of other laws in relation to land covered by this Part etc".

511 Entitled "Miscellaneous".

Northern Territory) of land that is covered by a lease granted under section 31.

General provisions relating to requests for valuation

…

(4) In making a determination under subsection … (1), the Valuer-General must not take into account the value of any improvements on the land.

(5) The Commonwealth must pay the amount determined by the Valuer-General under subsection (1) in relation to the land to the relevant owner of the land while the lease is in force.

63 Appropriation

(1) The section applies to the following amounts:

(a) an amount that is payable by the Commonwealth under section … 62;

…

(d) an amount:

(i) that is paid to the Commonwealth in respect of a right, title or interest in land that is taken to have been granted by the Commonwealth under subsection 34(4); and

(ii) that is payable by the Commonwealth to the relevant owner of the land;

…

(2) Amounts referred to in subsection (1) are payable out of the Consolidated Revenue Fund, which is appropriated accordingly."

369 It can be noted also that s 60 in Div 4 provides that if Pt 4 or acts done in relation to a lease covered by s 31 result in an acquisition of property, to which s 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" (s 60(2)).

370 The challenged provisions of the FCSIA Act are Items 12, 15 and 18 of Sched 4, which insert ss 70A-70H and Sched 7 into the Land Rights Act and

affect the "permit system" to be discussed later in these reasons[512]. In essence, they provide that a person who enters or remains on certain areas[513], in particular "common areas", of the Maningrida land, or enters or remains for certain reasons[514], has a defence to the statutory prohibition on entry in s 70 of the Land Rights Act, if the entry or remaining on the land is for a purpose that is not unlawful. "Common area" is defined in s 70F(20) to mean "an area that is generally used by members of the community concerned", excluding a building, sacred site or prescribed area. Item 18 provides that if the operation of Sched 4 or an action taken under or in accordance with ss 70B-70G results in an acquisition of property, to which s 51(xxxi) of the Constitution applies, otherwise than on just terms, "the Commonwealth is liable to pay a reasonable amount of compensation to the person".

History and context of the challenged provisions

371 Matters of history and the context of challenged provisions are relevant to questions of construction arising on a claim that an acquisition of property has occurred contrary to s 51(xxxi) of the Constitution[515].

372 The Emergency Response Act and the FCSIA Act are two Acts in a package of legislation[516] designed to support what was described as an "emergency response" by the Federal Government to the *Little Children Are Sacred* Report commissioned by the Northern Territory Government[517].

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512 At [401].

513 The other areas are access roads to communities (s 70B), aerodromes (s 70C), landing places for vessels (s 70D) and roads within communities (s 70E).

514 Section 70H covers a person who enters or remains on the land for the purpose of attending or leaving a court hearing held on the land.

515 See, eg, *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 220-223 [9]-[21] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ.

516 The three other Acts making up the package are the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act* 2007 (Cth), the *Appropriation (Northern Territory National Emergency Response) Act (No 1)* 2007-2008 (Cth) and the *Appropriation (Northern Territory National Emergency Response) Act (No 2)* 2007-2008 (Cth).

517 Northern Territory, *Ampe Akelyernemane Meke Mekarle "Little Children Are Sacred": Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, (2007).

373 In the Second Reading Speech on the Bill which became the Emergency Response Act, the Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs said of certain Aboriginal communities living on land governed by the Land Rights Act[518]:

> "We need to improve living conditions and reduce overcrowding. More houses need to be built and we need to control the land in the townships for a short period to ensure that we can do this quickly."

374 The Minister said living conditions in some communities "are appalling" and that the children in such communities cannot wait years for improvement to the physical state of some places[519]. The Minister spoke of a need "to intervene and declare an emergency situation"[520] which would involve the Commonwealth acquiring five-year leases in prescribed areas (one of which covers some of the Maningrida land). Of the proposed leases in respect of major communities or townships, the Minister said[521]:

> "The acquisition of leases is crucial to removing barriers so that living conditions can be changed for the better in these communities in the shortest possible time frame.
>
> It must be emphasised that the underlying ownership by traditional owners will be preserved, and compensation when required by the Constitution will be paid.
>
> This includes provision for the payment of rent. …
>
> These communities are not thriving; some are in desperate circumstances that have led to the tragedy of widespread child abuse.

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518 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 August 2007 at 11.

519 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 August 2007 at 12.

520 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 August 2007 at 10.

521 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 August 2007 at 13-14.

> The leases will give the government the unconditional access to land and assets required to facilitate the early repair of buildings and infrastructure."

375 The purposes for which the leases were to be granted were explained further in the Explanatory Memorandum to the Bill[522]:

> "The impact of sexual abuse on indigenous children, families and communities is a most serious issue requiring decisive and prompt action. The Northern Territory national emergency response will protect children and implement Australia's obligations under human rights treaties. In doing so, it will take important steps to advance the human rights of the indigenous peoples in communities suffering the crisis of community dysfunction.
>
> …
>
> Preventing child abuse depends upon families living in stable and secure environments. Indigenous communities cannot enjoy their social and economic rights equally with non-indigenous people, including their rights over their land, if living conditions in communities are dangerous and their children are subject to abuse. Sustainable housing is a key element to making lasting improvements to community living arrangements.
>
> The leasing provisions are required to allow the Government to address the national emergency in the Northern Territory. The Government cannot build and repair buildings and infrastructure without access to the townships and security over the land and assets.
>
> The leases will not prevent the indigenous communities from living on and using the land, or lead to limitations not connected with the Government's emergency intervention. The existing rights, title and interest of indigenous owners over the leased land are not removed but are preserved and compensation, on just terms, will be given whenever it is payable."

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522 Explanatory Memorandum to the Northern Territory National Emergency Response Bill 2007 (Cth) at 77-78. These comments were specifically directed to explaining the subclause of the Bill that became s 132 of the Emergency Response Act, which provides that the provisions of the Emergency Response Act and acts done under or for the purposes of them are "special measures" for the purposes of the *Racial Discrimination Act* 1975 (Cth).

376 The object of the Emergency Response Act, "to improve the well-being of certain communities in the Northern Territory"[523], covers dealing with the problems identified in the secondary materials, which must include improving living conditions.

377 Apart from the challenged provisions, the Emergency Response Act deals with: control of the possession, sale and transportation of alcohol[524]; control of pornography through an audit regime for publicly funded computers[525]; community needs, such as housing construction and maintenance, and community services, such as waste collection and road maintenance[526]; prohibiting authorities exercising bail or sentencing discretions from taking into account customary law or cultural practice to lessen or aggravate the seriousness of criminal behaviour[527]; and a licensing regime for community stores[528]. This Court is not asked to make any judgment in these proceedings about any of these provisions.

378 In the Second Reading Speech, the Minister also mentioned the "permit system" which is affected by the challenged provisions. He said[529]:

> "[T]hese towns have been closed to outsiders because of the permit system.
>
> After consultation the government has decided on balance to leave the permit system in place in 99.8 per cent of Aboriginal land in the Northern Territory.

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523 Section 5.

524 Part 2.

525 Part 3.

526 Part 5.

527 Part 6

528 Part 7.

529 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 August 2007 at 12. See also the Second Reading Speech on the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007 (Cth): Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 August 2007 at 20-21.

> But in the larger public townships and the road corridors that connect them, permits will no longer be required.
>
> Closed towns mean less public scrutiny, so the situation has been allowed to get worse and worse.
>
> Normally, where situations come to light that are as terrible as the child abuse occurring in the Northern Territory, solutions are pursued relentlessly by the media.
>
> But closed towns have made it easier for abuse and dysfunction to stay hidden.
>
> Closed towns also prevent the free flow of visitors and tourists that can help to stimulate economic opportunities and create job opportunities."

379 Evincing consideration and respect for blameless persons caught up in them, senior counsel for the plaintiffs, Mr Merkel QC, did not contest the existence or gravity of the problems identified in the secondary materials ("the present problems"). It cannot be doubted that without satisfactory living conditions, traditional Aboriginal owners will not enjoy fair access to health, education, and social and economic opportunities. Satisfactory living conditions are essential if traditional Aboriginal owners are to achieve the personal autonomy and communal self-determination expected to flow from the Land Rights Act[530]. Mr Merkel conceded the Parliament's undoubted power to institute the regime it has chosen to tackle the present problems[531]. He made it clear that the plaintiffs' complaint is that insofar as the challenged provisions effect an acquisition of property, including an acquisition of the sacred sites on the land, just terms are not provided.

380 It follows that the Court's only task in respect of the second question raised in these proceedings is to characterise the challenged provisions in order to determine whether they fall within the scope of s 51(xxxi) of the Constitution.

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530 See [382].

531 It can be noted that in *The Tasmanian Dam Case* (1983) 158 CLR 1 at 158, Mason J said s 51(xxvi) enables Parliament "to protect the people of a race in the event that there is a need to protect them".

The Land Rights Act

381 The "practical and legal operation"[532] of the challenged provisions can only be understood by reference to the regime of land holding under the Land Rights Act and the "underlying ownership by traditional owners" referred to by the Minister in the Second Reading Speech relating to the Emergency Response Act as set out above.

382 The importance of that "underlying ownership by traditional owners" and their affinity with the land was made plain in the Second Reading Speech to the Bill which became the Land Rights Act, the Aboriginal Land Rights (Northern Territory) Bill 1976 (Cth) ("the Land Rights Bill")[533]:

> "This Bill will give traditional Aborigines inalienable freehold title to land on reserves in the Northern Territory … [A]ffinity with the land is fundamental to Aborigines' sense of identity … [T]his Bill will allow and encourage Aborigines in the Northern Territory to give full expression to the affinity with land that characterised their traditional society and gave a unique quality to their life.
>
> …
>
> [P]rimary control over Aboriginal land lies with the traditional owners. …
>
> It is the objective of the Government to secure conditions in which all Australians can realise their own goals in life – to find fulfilment in their own way – consistent with the interests of the whole Australian community.
>
> The Australia we, as a Government, look to is one in which there is diversity and choice, because it is in diversity that people can pursue the lives they want in ways that they determine. Securing land rights to Aborigines in the Northern Territory is a significant expression of this objective. … This Bill is a major step forward for Aborigines in the Northern Territory not only for this generation but also for future generations who will benefit from it. They will have a land base that will be preserved in perpetuity."

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532 *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 232 [49] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ.

533 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 4 June 1976 at 3081-3084.

383 In *Northern Territory v Arnhem Land Aboriginal Land Trust* ("the *Blue Mud Bay Case*")[534], Kiefel J described the detailed background to, and the history of the passage of, the Land Rights Act, including the Woodward Inquiry established by the Federal Government and the *Second Report* of that Inquiry to which reference will later be made.

384 In *R v Toohey; Ex parte Meneling Station Pty Ltd*, Brennan J described the objects of the Land Rights Act[535]:

> "The Act provides for the restoration of some areas of land within the Northern Territory to Aboriginal control and gives legislative recognition to Aboriginal rights and interests in that land."

385 The purposes of the Land Rights Act, broadly stated, are to support traditional Aboriginal owners of Aboriginal land over successive generations, and to support traditional Aboriginal culture. A straightforward example of support of traditional Aboriginal owners is the legislative scheme, under the Land Rights Act, in respect of mining leases and for the payment of mining royalties[536]. It was intended by the legislature that the system of land control under the Land Rights Act would result in conditions in which traditional Aboriginal owners of the land could live and thrive within, and according to, traditional Aboriginal culture. Clearly, communities subject to the present problems cannot properly support traditional Aboriginal owners living in them or enable them to thrive.

386 By notice published in the *Gazette* on 21 July 1978, the Land Trust was established to hold title to lands in Sched 1 to the Land Rights Act described under the headings "Arnhem Land (Mainland)" and "Arnhem Land (Islands)"[537].

387 On 30 May 1980, pursuant to s 12 of the Land Rights Act, the Governor-General executed a Deed of Grant of an estate in fee simple to the Land Trust, in relation to land in the Northern Territory, which included the land identified as the Maningrida land. That grant of an estate in fee simple was expressed to be "subject to the [Land Rights Act]".

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534 (2008) 82 ALJR 1099 at 1123-1128 [114]-[135]; 248 ALR 195 at 226-232; [2008] HCA 29.

535 (1982) 158 CLR 327 at 355; [1982] HCA 69; see also *Blue Mud Bay Case* (2008) 82 ALJR 1099 at 1125-1126 [125]-[127] per Kiefel J; 248 ALR 195 at 228-229.

536 Part IV of the Land Rights Act.

537 Pursuant to s 4(1) of the Land Rights Act. See *Commonwealth of Australia Gazette*, S138, 21 July 1978, par (b) and Scheds 2, 3.

388 In the *Blue Mud Bay Case*, the relevant fee simple was described in the judgment of Gleeson CJ, Gummow, Hayne and Crennan JJ as[538]:

> "granting rights of ownership that 'for almost all practical purposes, [are] the equivalent of full ownership' of what is granted. In particular, subject to any relevant common law qualification of the right, or statutory provision to the contrary, it is a grant of rights that include the right to exclude others from entering the area identified in the grant." (footnotes omitted)

It had earlier been decided by this Court that the word "property" can be used as a description of "a degree of power that is recognised in law as power permissibly exercised over [a] thing" or as consisting of control of access to do something[539].

389 The *Blue Mud Bay Case* considered the fee simple, and the right to regulate and prohibit entry to Aboriginal land, in the context of fishermen asserting a right to fish in the waters covered by the grant of the fee simple, without first obtaining permission under the "permit system" discussed below. These proceedings raise a very different question: whether an alteration of the Land Trust's rights of possession and control, and rights to regulate and prohibit entry, for the purpose of dealing with the present problems, is an acquisition of property by the Commonwealth, attracting the guarantee of just terms.

390 The rights of ownership referred to in the *Blue Mud Bay Case* are *sui generis*, reflecting the nature of Aboriginals' interests in the land[540]. As the Land Rights Act stood before the commencement of the challenged provisions, those rights were inalienable except in the limited circumstances permitted under ss 19, 19A and 20 of the Land Rights Act. They are held to ensure that the land is "preserved in perpetuity"[541] for the benefit of all generations of the traditional

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538 (2008) 82 ALJR 1099 at 1111 [50]; 248 ALR 195 at 208.

539 *Yanner v Eaton* (1999) 201 CLR 351 at 366 [17]-[18] per Gleeson CJ, Gaudron, Kirby and Hayne JJ; [1999] HCA 53.

540 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 89 per Deane and Gaudron JJ; [1992] HCA 23; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 215 per Kirby J; [1996] HCA 40; *Western Australia v Ward* (2002) 213 CLR 1 at 397 [969] per Callinan J; [2002] HCA 28. See also *Osoyoos Indian Band v The Town of Oliver* [2001] 3 SCR 746.

541 Second Reading Speech on the Land Rights Bill, Australia, House of Representatives, *Parliamentary Debates* (Hansard), 4 June 1976 at 3084.

Aboriginal owners[542], here the Dhukurrdji clan, which is inevitably in a state of constant flux as deaths and births occur within the group[543]. Section 19 concerns dealings with interests in land by the Land Trust and s 19A covers township leases, both of which will be dealt with later in these reasons. Section 20 covers dealings which are not presently relevant.

391 The Land Trust's rights of ownership have always been held subject to arrangements in the Land Rights Act of some complexity which provide for dealings between traditional Aboriginal owners and any Aboriginal person or group[544], Aboriginal persons entitled by Aboriginal tradition to use and occupation of Aboriginal land, Aboriginal Land Trusts[545], Aboriginal Land Councils[546] and the Commonwealth[547]. Each person or entity has different rights, duties, powers and obligations but all are interrelated and all are directed ultimately to the benefit of "the traditional Aboriginal owners" of the land[548]. The Aboriginal Land Council for the area in which the Maningrida land is situated is the Northern Land Council ("the Land Council").

392 The Land Council holds the power to issue binding directions to the Land Trust and the Land Trust must then take action in accordance with those directions. The Land Trust must not exercise its functions in relation to land held by it except in accordance with such directions[549]. At the direction of the Land Council (and in some instances with the additional consent of the Minister) the Land Trust has the power under s 19 to grant leases and licences in respect of the land.

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542 Section 5(1)(b).

543 Section 24(a) of the Land Rights Act provides that the relevant Aboriginal Land Council may compile and maintain a register setting out the names of people who are the traditional Aboriginal owners of Aboriginal land within its area.

544 Section 19(5)(b).

545 Section 3 and Pt II.

546 Section 3 and Pt III.

547 Through the relevant Minister.

548 Sections 3, 4(1), 5(1)(b) and 35(4).

549 Section 5(2).

393 In Pt II[550], under the heading "Dealings etc with interests in land by Land Trusts", s 19 of the Land Rights Act relevantly provides:

> "(1) Except as provided by this section or section 19A or 20, a Land Trust shall not deal with or dispose of, or agree to deal with or dispose of, any estate or interest in land vested in it.
>
> …
>
> (2) With the consent, in writing, of the Minister, and at the direction, in writing, of the relevant Land Council, a Land Trust may, subject to subsection (7), grant an estate or interest in land vested in it to an Aboriginal or an Aboriginal and Torres Strait Islander corporation:
>
> (a) for use for residential purposes by:
>
> (i) the Aboriginal and his or her family; or
>
> (ii) an employee of the Aboriginal or the corporation, as the case may be;
>
> (b) for use in the conduct of a business by the Aboriginal or the corporation, not being a business in which a person who is not an Aboriginal has an interest that entitles him or her to a share in, or to a payment that varies in accordance with, the profits of the business; or
>
> (c) for any community purpose of the Aboriginal community or group for whose benefit the Land Trust holds the land.
>
> (3) With the consent, in writing, of the Minister, and at the direction, in writing, of the relevant Land Council, a Land Trust may, subject to subsection (7), grant an estate or interest in land vested in it to the Commonwealth, the Northern Territory or an Authority[551] for any public purpose or to a mission for any mission purpose.
>
> …
>
> (4A) With the consent, in writing, of the Minister, and at the direction, in writing, of the relevant Land Council, a Land Trust may, subject to

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550 Entitled "Grants of land to Aboriginal Land Trusts".

551 Section 3(1) provides: "***Authority*** means an authority established by or under a law of the Commonwealth or a law of the Northern Territory".

subsection (7), grant an estate or interest in the whole, or any part, of the land vested in it to any person for any purpose.

(5) A Land Council shall not give a direction under this section for the grant, transfer or surrender of an estate or interest in land unless the Land Council is satisfied that:

(a) the traditional Aboriginal owners (if any) of that land understand the nature and purpose of the proposed grant, transfer or surrender and, as a group, consent to it;

(b) any Aboriginal community or group that may be affected by the proposed grant, transfer or surrender has been consulted and has had adequate opportunity to express its view to the Land Council; and

(c) in the case of a grant of an estate or interest – the terms and conditions on which the grant is to be made are reasonable.

…

(7) The consent of the Minister is not required for the grant under subsection (2), (3) or (4A) of an estate or interest the term of which does not exceed 40 years.

…"

394 It can be noted that the Land Council could only give a direction pursuant to s 19(2), (3) or (4A) in accordance with the provisions of s 19(5), ie with the consent of traditional Aboriginal owners as a group and after consultation with other affected Aboriginals[552]. Pursuant to s 77A, for the purposes of s 19(5)(a), consent is to be obtained in accordance with Aboriginal tradition or, in its absence, by a process agreed to and adopted by the relevant traditional Aboriginal owners.

395 The legislative scheme of control over the land embodied in s 19 of the Land Rights Act, as it operated prior to the commencement of the challenged provisions (and as it still operates), empowered the Land Council to issue a written direction to the Land Trust to grant an interest in the land to the Commonwealth, for a term, giving the Commonwealth temporary possession and control of the land (subject to the interests of all prior interest holders or holders of traditional rights) in order to improve living conditions, provided always that it had the requisite consent of the traditional Aboriginal owners referred to in

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552 See also s 23 of the Land Rights Act.

s 19(5)(a) and the other conditions in s 19(5)(b) and (c) were met. The Land Council is neither a plaintiff in, nor a party to, these proceedings.

396 Whilst the Land Trust was the legal entity with statutory power to deal with the Maningrida land and to create interests in it, particularly under s 19, by reason of s 6 of the Land Rights Act it was not empowered to accept payments in respect of such use and occupation, but any payments to be made could be paid to the Land Council. The Land Council was required, by s 35(4), to "pay an amount equal to that payment to or for the benefit of the traditional Aboriginal owners of the land" within six months of receipt of such payments.

397 Ministerial approval was necessary for numerous matters associated with the operation of Land Councils[553]. By way of example, a Land Council could, with the approval of the Minister, perform any functions conferred on it by a law of the Northern Territory in relation to the protection of sacred sites and access to Aboriginal land (s 23(2)(a) and (b)). The Minister's consent or approval was required for a range of activities or dealings with Aboriginal land[554]. The Minister also had a range of powers in relation to the management of the finances of Land Councils and Land Trusts[555].

398 The fee simple and the Land Trust's rights of ownership were subject always to this legislative scheme of control over the land.

399 The other provisions of the Land Rights Act relevant to this matter, occurring in Pt VII[556], are ss 69, 70, 71 and 73.

400 Sections 69 to 71 relevantly provide:

> "**69 Sacred sites**
>
> (1) A person shall not enter or remain on land in the Northern Territory that is a sacred site.

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553 See ss 21, 23(2), 23E, 27, 29, 30, 31, 34, 35, 36 and 38 of the Land Rights Act.

554 See, for example, ss 19(2), (3), (4) and (4A), 19A(1), 40, 45, 47(1)(d) and (3)(a), and 67B(1).

555 See, for example, ss 27(3), 29, 30(1), 31(3), 33, 34, 35(6), 36, 38 and 39.

556 Entitled "Miscellaneous".

Penalty:

(a) for an individual – 200 penalty units or imprisonment for 12 months; or

(b) for a body corporate – 1,000 penalty units.

(2) Subsection (1) does not prevent an Aboriginal from entering or remaining on a sacred site in accordance with Aboriginal tradition.

…

70 Entry etc on Aboriginal land

(1) A person shall not enter or remain on Aboriginal land.

Penalty: 10 penalty units.

(2) Where a person, other than a Land Trust, has an estate or interest in Aboriginal land:

(a) a person is entitled to enter and remain on the land for any purpose that is necessary for the use or enjoyment of that estate or interest by the owner of the estate or interest; and

(b) a law of the Northern Territory shall not authorize an entry or remaining on the land of a person if his or her presence on the land would interfere with the use or enjoyment of that estate or interest by the owner of the estate or interest.

…

71 Traditional rights to use or occupation of Aboriginal land

(1) Subject to this section, an Aboriginal or a group of Aboriginals is entitled to enter upon Aboriginal land and use or occupy that land to the extent that that entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land, whether or not those rights are qualified as to place, time, circumstances, purpose, permission or any other factor.

(2) Subsection (1) does not authorize an entry, use or occupation that would interfere with the use or enjoyment of

> an estate or interest in the land held by a person not being a Land Trust or an incorporated association of Aboriginals."

401 Before the commencement of the challenged provisions, the operation of the prohibitions in ss 69(1) and 70(1) was qualified by s 73(1)(b), which is an enabling power for the Legislative Assembly of the Northern Territory to make laws regulating or authorising the entry of persons on Aboriginal land. Pursuant to that authority, the Northern Territory has enacted the *Aboriginal Land Act* (NT) ("the Aboriginal Land Act"). Provisions of the Aboriginal Land Act establish the "permit system" (to which reference has already been made), pursuant to which the Land Council or the traditional Aboriginal owners (or a person to whom they delegate their authority) may issue a permit to a person to enter onto and remain on Aboriginal land[557]. As noted above, the entry provisions affect the "permit system".

Submissions

402 Broadly speaking, the plaintiffs' case was largely based on construing the challenged provisions. There were no material facts pleaded in the Statement of Claim constituting acts done by the Commonwealth or the Minister pursuant to the lease granted under s 31(1) of the Emergency Response Act. The plaintiffs submitted that the challenged provisions resulted in the Land Trust losing possession and control, and income (including rent), to which the Land Trust was entitled in respect of the Maningrida land and that this significantly diminished the Land Trust's estate in fee simple.

403 The Land Trust agreed that the lease provisions effected an acquisition of the Land Trust's possession and control of the Maningrida land and that the acquisition attracted the guarantee of just terms but disagreed with the plaintiffs' assertions relating to loss of income. The Land Trust contended that, on the basis that the lease provisions resulted in an acquisition of the Land Trust's right to exclude others from the Maningrida land, the entry provisions did not amount to an acquisition of property from the Land Trust.

404 The Commonwealth did not dispute that the lease provisions have the effect of altering (or diminishing) the Land Trust's rights of possession and control for the period of the lease in respect of the area covered by the lease, and that the challenged provisions diminish the right to exclude or eject others. However, the Commonwealth contended that those alterations of the rights do not amount to the Commonwealth acquiring an interest in land which can be properly characterised as an acquisition of property within the scope of s 51(xxxi).

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557 Aboriginal Land Act, s 5.

405 As to the rights of Reggie Wurridjal and Joy Garlbin under s 71 of the Land Rights Act, the plaintiffs submitted that despite the preservation of their rights under s 34(3) of the Emergency Response Act, the rights were acquired by the grant to the Commonwealth of a power to terminate them under s 37(1) of the Emergency Response Act, although there were no material facts pleaded showing that that power has been, or is likely to be, exercised. Both the Land Trust and the Commonwealth disagreed with those submissions. It is convenient to deal first with the rights of Reggie Wurridjal and Joy Garlbin to enter, use and occupy the Maningrida land.

Section 71 rights

406 Section 71, which grants certain Aboriginals rights to enter, use and occupy land, relevant to this branch of the argument, is set out above.

407 The material facts concerning Reggie Wurridjal and Joy Garlbin's rights under s 71 of the Land Rights Act are set out in the Statement of Claim as follows:

> "9. Each of Wurridjal and Garlbin is:
>
> (a) a person who is entitled by the body of traditions, observances, customs and beliefs of the traditional Aboriginal owners governing his or her rights with respect to the Maningrida land to enter, use and occupy the Maningrida land for the following purposes:
>
> (i) to live;
>
> (ii) to participate in ceremony, particularly on or in relation to the sacred sites referred to in paragraph 6(a) herein;
>
> (iii) to forage as of right;
>
> (iv) to hunt;
>
> (v) to fish; and
>
> (vi) to gather
>
> (together, **the traditional purposes**).
>
> **Particulars of traditional purposes**
>
> (aa) Fishing and foraging in the inter-tidal zone.

(bb) Harvesting bivalves, such as mangrove mussels that grow on the margins of the salt water creeks and live in the mud on inland creeks and freshwater mussels.

(cc) Gathering of bush fruit and vegetables which is generally undertaken by women, but also by men.

(dd) Gathering tucker sourced from the billabong located in Area 5 of the Maningrida land, including water lilies, long-necked fresh water turtles, fresh water goannas, geese and ducks.

(ee) Hunting wallabies, goannas, geese, ducks and flying foxes.

(ff) Utilising certain floral species and minerals on the Maningrida land for medicinal purposes in accordance with custom. A species of white mango fruit is gathered and eaten in order to assist in the treatment of flu, coughs and headaches.

(gg) Taking white pigment from the Maningrida land to paint bodies and sacred objects for ceremonies.

(hh) Observing traditional laws and performing traditional customs and ceremonies, particularly on sacred sites, on the Maningrida land.

(ii) Being responsible for maintaining the traditional connection of the members of the Dhukurrdji clan with country.

(b) a person who, by reason of the matters set out in paragraph (a), is entitled to benefit of the rights conferred by s 71 of the Land Rights Act."

408 For the reasons given by Gummow and Hayne JJ[558], I agree that constitutional issues do not arise for consideration in respect of rights granted

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558 See reasons of Gummow and Hayne JJ at [151]-[165].

under s 71 of the Land Rights Act and would make the following additional comments.

409 Persons entitled to enter upon, use or occupy the land constitute a wider group than the traditional Aboriginal owners on whose behalf the fee simple is held by the Land Trust. Whilst the Land Council may compile and maintain a register setting out the names of the traditional Aboriginal owners of the Maningrida land, there is no similar provision in relation to the Aboriginals or groups of Aboriginals entitled to enter upon, use and occupy the land as provided in s 71. This emphasises the impossibility of the Commonwealth terminating the s 71 rights under s 37(1) and (3) of the Emergency Response Act, at least to the extent of giving notice to all individuals holding s 71 rights under the Land Rights Act.

410 This accords with the acknowledgment in the Second Reading Speech to the Land Rights Bill "that affinity with the land is fundamental to Aborigines' sense of identity"[559]. As is clear from the extracted parts of that speech set out above, it was intended that the proposed land rights legislation would "give full expression to the affinity with land that characterised [Aborigines'] traditional society and gave a unique quality to their life"[560] and that land rights would secure conditions for achieving "goals in life" and for personal "fulfilment"[561].

411 The full force of the subjection of the Commonwealth's rights of "exclusive possession and quiet enjoyment" under s 35(1) of the Emergency Response Act, to the s 71 rights under the Land Rights Act (which are preserved under s 34(3) of the Emergency Response Act), is best understood in the context of the importance which the Land Rights Act accords to rights arising out of that affinity with the land. The statutory construction explained by Gummow and Hayne JJ, with which I agree, recognises the interaction between ss 34(3) and 35(1) of the Emergency Response Act and s 71 of the Land Rights Act. The result of that construction is that, in the absence of some contrary provision, whilst the challenged provisions subsist, all persons who presently hold s 71 rights under the Land Rights Act can continue to participate in ceremony on or in relation to the four sacred sites on the Maningrida land and continue to enter, use

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559 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 4 June 1976 at 3081.

560 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 4 June 1976 at 3081.

561 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 4 June 1976 at 3084.

and occupy the Maningrida land for all the traditional purposes set out above, without any intrusion upon those rights[562].

The Land Trust's fee simple

412 The Commonwealth submitted that the challenged provisions could not legitimately be characterised as effecting an acquisition of property within the meaning and scope of s 51(xxxi) of the Constitution. This was primarily said to be because the Land Trust's ownership and control of the Maningrida land under the Land Rights Act was subject to the type of variation in control which is effected by the lease granted under s 31(1) of the Emergency Response Act, as the fee simple was inherently unstable and defeasible. The lease was described as a mechanism for achieving a temporary and limited adjustment of control over a very small portion of the fee simple in order to improve the well-being of the community. During oral argument, a much narrower proposition emerged. It appeared to be this: accepting that the Land Trust's fee simple was not readily defeasible, it was nevertheless inherent in the legislative scheme of control over the land in the Land Rights Act, under which the Land Trust has always exercised its rights as owner of the fee simple, that that control might be temporarily adjusted, in the circumstances of this case, for the purpose of dealing with the present problems.

413 The plaintiffs preferred to meet the Commonwealth's submission that the challenged provisions could not be legitimately characterised as a law with respect to the acquisition of property for the purposes of s 51(xxxi), by relying on the width of the definition of "property" established in the relevant cases[563] and the description of the same fee simple in the *Blue Mud Bay Case* which has been set out above[564]. It can be accepted that, for example, a lease granted to the Commonwealth over the Maningrida land, for defence purposes, which was unencumbered by all prior interests, might fall within the scope of s 51(xxxi). From an assumption that the estate in fee simple is "property" for the purposes of s 51(xxxi) (with which I do not disagree) the plaintiffs went on to particularise various ways in which it was asserted that the acquisition was not on just terms. Those arguments are relevant to determining whether the challenged provisions fall within the scope of s 51(xxxi).

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562 Cf reasons of Kirby J at [214], [222], [270] and [301].

563 Discussed earlier in these reasons at [356].

564 At [388].

414 It is convenient to consider the practical and legal effect of the challenged provisions by reference to the detail of the plaintiffs' submissions and the interaction between the Land Rights Act and those provisions.

Possession and control

415 The plaintiffs submitted that the Land Trust lost possession and control of the Maningrida land as a result of the operation of s 31(1) and then submitted that, by reason of ss 34-37, the Commonwealth was empowered to exercise all the Land Trust's powers as owner of the estate in fee simple.

416 In particular, the plaintiffs contended that by reason of ss 34, 37 and 52 of the Emergency Response Act, the Land Trust lost its rights of exclusive possession and quiet enjoyment, especially as the Land Trust, during the term of the lease, required the consent of the Minister under s 52(2) of the Emergency Response Act in order to deal with the land under s 19 of the Land Rights Act. There was also a complaint that the Commonwealth was not obliged to pay rent in respect of the lease granted under s 31(1) of the Emergency Response Act. It was contended as well that by reason of ss 70A and 70F of the Land Rights Act, and Sched 7 to that Act, the Land Trust lost exclusive possession and enjoyment of the common areas of the Maningrida land and cannot, since the passing of the challenged provisions, limit entry to the common areas. It was also submitted that the Commonwealth was not obliged to exercise its powers under the lease for the benefit of traditional owners. This gave rise to an argument in oral submissions that the Commonwealth was not obliged to pass on payments made in respect of leases granted by the Land Trust under s 19 of the Land Rights Act.

417 It can be accepted that the Land Trust's fee simple, granted under, and subject to, the Land Rights Act, is a formidable property interest in the Maningrida land and that its *sui generis* nature does not diminish the fee simple's significance[565]. It can also be accepted that the lease operated to carve out from the Land Trust's fee simple certain of the Land Trust's rights of possession and control in respect of the Maningrida land, including the rights to deal with the land under s 19 of the Land Rights Act, without ministerial consent.

418 To evaluate the plaintiffs' submissions, it is necessary to understand the level of interference with the Land Trust's control of the land which is effected by the challenged provisions.

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565 *Fejo v Northern Territory* (1998) 195 CLR 96 at 126 [43] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [1998] HCA 58; *Blue Mud Bay Case* (2008) 82 ALJR 1099 at 1111 [50] per Gleeson CJ, Gummow, Hayne and Crennan JJ; 248 ALR 195 at 208.

What is covered by the s 31(1) lease?

419 *Public roads.* The grant of an estate in fee simple, by reference to which the lease is granted under s 31(1) of the Emergency Response Act[566], was expressed to be subject to certain reserved and excluded interests. Relevantly, certain roads over which the public had a right of way at either of two specified times[567] were excluded from the grant and hence are excluded from the lease.

420 *Registered leases.* The Land Trust's Certificate of Title shows numerous registered leases were in existence at the time of creation of the lease under s 31(1) of the Emergency Response Act including leases to Airservices Australia and Telstra Corporation Ltd. All parts of the Maningrida land which are covered by such registered leases are excluded from the lease by the operation of s 31(3).

421 *Township leases.* Section 19A of the Land Rights Act came into operation on 1 October 2006[568]. It permits a Land Trust to grant a lease of a "township" to certain "approved entities" with the consent of the Minister and the Land Council. "Township" is defined as an area of land of a kind prescribed by regulation (s 3AB).

422 Whilst no township lease has been granted in respect of the Maningrida land, under s 37(6) of the Emergency Response Act the Land Trust may grant a lease of the land in which it holds the fee simple in accordance with s 19A of the Land Rights Act. If such a lease were granted, the Commonwealth's lease under s 31(1) would then be varied to exclude that land or that part of the Maningrida land which is the subject of the township lease (s 37(7) and (8)).

423 *New leases.* The Land Trust, with the consent of the Minister, has the power to grant new leases or licences in respect of part of the Maningrida land under s 19 of the Land Rights Act (s 52(1)). If the Land Trust exercises that

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566 Section 31(1)(a) relevantly directs attention to the land specified in Sched 1 cl 21 to the extent that it is Aboriginal land "within the meaning of paragraph (a) of the definition of ***Aboriginal land*** in subsection 3(1) of the [Land Rights Act]". That definition is "land held by a Land Trust for an estate in fee simple". This was required by s 12(3) of the Land Rights Act as originally enacted; now see s 12(3A).

567 At the time of the commencement of s 3 of the Land Rights Act or at the time when the Deed of Grant was executed. See also *Blue Mud Bay Case* (2008) 82 ALJR 1099 at 1110 [48] per Gleeson CJ, Gummow, Hayne and Crennan JJ; 248 ALR 195 at 207.

568 Section 19A was inserted into the Land Rights Act by the *Aboriginal Land Rights (Northern Territory) Amendment Act* 2006 (Cth).

power, the lease to the Commonwealth would be varied, by the operation of s 52(3), to exclude that part of the Maningrida land from the Commonwealth's lease.

424 The Commonwealth has a power to grant subleases and licences (s 35(5)), which diminishes the Land Trust's powers to deal with the land under s 19 of the Land Rights Act. The Statement of Claim did not plead any material facts in respect of any actual or threatened exercise of that power.

Prior rights, titles and interests

425 The lease to the Commonwealth under s 31(1) of the Emergency Response Act and the rights under it to "exclusive possession and quiet enjoyment"[569] are made "subject to" prior interests by reference to the combined operation of ss 34(3) and 35(1) of the Emergency Response Act. This includes the s 71 rights under the Land Rights Act as already discussed. Also included are any prior interests in land created by the Land Trust under s 19 of the Land Rights Act.

426 Improvements on the Maningrida land included 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. It is pleaded in the Statement of Claim that Commonwealth funding, through the Department of Territories and the Department of Aboriginal Affairs, and the Aboriginal and Torres Strait Islander Commission, has been provided for those purposes. Funding has also come from other sources. Improved land, the subject of an existing lease from the Land Trust under s 19 of the Land Rights Act (which is a preserved interest under s 34(3) and subject to s 34(4) of the Emergency Response Act), might well be occupied by a tenant with rights of possession to which the lease to the Commonwealth would be subject under the combined operation of ss 34(3) and 35(1) of the Emergency Response Act. No material details of such tenancies are pleaded in the Statement of Claim. If such a lease were terminated by the Commonwealth pursuant to s 37(1) of the Emergency Response Act, and that termination constituted an acquisition of property within the scope of s 51(xxxi), s 60 would operate to ensure provision of a reasonable amount of compensation to the tenant. Nothing in these reasons should be taken to suggest that such a termination would necessarily fall outside the scope of s 51(xxxi).

427 To summarise, these considerations show that the possession and control of the Land Trust under its fee simple has been adjusted temporarily by the

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569 Section 35(1).

Commonwealth's lease under s 31(1) in relation to certain areas and in respect of certain dealings with the land under the Land Rights Act, but that the Commonwealth's "exclusive possession" under its statutory lease is made subject to all prior interests, including prior interests in possession granted by the Land Trust, as well as being made subject to all traditional rights covered by s 71, as explained above.

Loss of income

428 Alleged "loss of income" was at the forefront of the plaintiffs' oral submissions that s 31(1) of the Emergency Response Act effected an acquisition of the Land Trust's fee simple. Mr Merkel reiterated many times that diversion of income from the Land Trust to the Commonwealth, as a result of the lease provisions, severed the "tie" between the traditional Aboriginal owners and the "benefits" of the Land Trust's estate in fee simple, which were in turn held for the benefit of the traditional Aboriginal owners.

429 It became clear during oral argument that "loss of income" was a loose description of both payments (including rent) to which the Land Trust may have been entitled as a result of its creation of prior interests under s 19 of the Land Rights Act, and rent obligations on the Commonwealth covered by ss 35(2) and 62(5) of the Emergency Response Act. Such references should not be confused with provisions for income management under the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act* 2007 (Cth), which was not under consideration in these proceedings.

430 *Payments.* Sections 34(1), (3), (4) and (5) and 63(1)(d)(i) and (ii) of the Emergency Response Act, set out above, are relevant to the plaintiffs' contention that the lease granted to the Commonwealth deprived the Land Trust of payments (including rent) to which it was entitled pursuant to prior grants of interests by it under s 19 of the Land Rights Act.

431 This contention was not specifically pleaded but might be said to arise because the Statement of Claim listed the improvements on the Maningrida land and thereby included an implication[570] that the Land Trust had created prior interests under s 19 of the Land Rights Act which were preserved under s 34(3) and subject to s 34(4) of the Emergency Response Act.

432 The plaintiffs submitted that s 34(4) will operate to divert to the Commonwealth financial benefits to which the Land Trust was entitled as the

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570 *Lubrano v Gollin & Co Pty Ltd* (1919) 27 CLR 113 at 118 per Isaacs J; [1919] HCA 61; *Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 135 per Gibbs J; [1977] HCA 55.

grantor of the interests in the Maningrida land. The Land Trust did not agree with the plaintiffs on this issue and pointed out s 63, extracted above[571]. That provision applies to amounts received by the Commonwealth as a result of the operation of s 34(4) which are payable by the Commonwealth to the "relevant owner", namely the Land Trust, and makes them payable out of the Consolidated Revenue Fund, which is appropriated accordingly. The Land Trust urged a construction of these provisions to the effect that, if and to the extent that the Commonwealth stood in the shoes of the Land Trust as grantor, the provisions implied an obligation on the Commonwealth to pay any amounts received to the Land Council as a result of the combined operation of s 34(4) of the Emergency Response Act and s 6 of the Land Rights Act, although the Land Trust could point to no provision of the Emergency Response Act which expressly imposed such an obligation. It may be that it was thought there was no need for any express obligation to be included in the Emergency Response Act, because of s 16 of the Land Rights Act[572]. In any event, the Land Trust's construction of the relevant provisions is plainly to be preferred.

433 Further, s 34(5) of the Emergency Response Act empowers the Minister to exempt any right, title or interest from the operation of s 34(4) of the Emergency Response Act. Since all prior interests are preserved under s 34(3) of the Emergency Response Act, the practical effect of the Minister exercising the power under s 34(5) in respect of prior interests granted under s 19 of the Land Rights Act would be to leave those prior interests to continue as before the grant of the Commonwealth lease, as between the Land Trust as grantor and any grantee.

434 *Rent.* Sections 35(2) and 62 of the Emergency Response Act, relevant to this branch of the argument, are set out above. The plaintiffs contended that the terms and conditions of the lease did not oblige the Commonwealth to pay rent for the reason that s 62(1) of the Emergency Response Act relevantly states that the Commonwealth "may" request a valuation for the purposes of rent; alternatively, they contended that if the Commonwealth were obliged to pay rent,

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571 At [368].

572 Section 16 provides: "The Crown shall pay to a Land Council amounts equal to the amounts of rents and other prescribed payments paid to the Crown in respect of an interest … granted by the Crown (whether before or after the commencement of this Act) in Aboriginal land in the area of the Land Council". The Clause Notes to the Land Rights Bill said of the clause of the Bill which became s 16 of the Land Rights Act (at 6): "Payments received by the Crown in respect of Aboriginal land shall be paid to the relevant Council (eg lease rentals, mining lease rentals, licence fees)."

it was unfair for rent to be assessed by the Valuer-General on an unimproved value of the land.

435 The Land Trust submitted that the Commonwealth has a legal obligation to pay rent to the Land Trust, in respect of the lease, as determined by the Valuer-General. That obligation was said to be evidenced by the language of command in s 62(5) of the Emergency Response Act, and the usual obligation as between lessor and lessee which is the relationship established between the Land Trust and the Commonwealth under the lease. That construction is to be preferred to the Commonwealth's position that the payment of rent was entirely discretionary and, to the extent that it matters, that construction appears to conform with what was said in the secondary materials[573]. Further, when the exclusive possession given under the Commonwealth lease is understood to be qualified as to area and subject to prior interests in possession as is explained above, it is not necessarily anomalous for the rent to be assessed by reference to an unimproved value of land.

436 To summarise, to the extent that the plaintiffs' case depended on erroneous construction of key provisions of the Emergency Response Act, the plaintiffs have not made out their claim that the grant of a lease to the Commonwealth under s 31(1) of the Emergency Response Act, on the terms and conditions already explained, will effect a diminution in the Land Trust's fee simple, specifically an impairment of the Land Trust's receipt of benefits arising from its control of the land, by diverting the Land Trust's income to the Commonwealth.

437 In any event, any payment received by the Land Council from the Commonwealth must be applied in accordance with s 6 of the Land Rights Act, which requires that the Land Council "within 6 months after that payment is received, pay an amount equal to that payment to or for the benefit of the traditional Aboriginal owners"[574].

Entry provisions

438 The rights of entry granted under ss 70C-70E of the Land Rights Act provide that no permit is required to enter and remain on Aboriginal lands covering aerodromes, landing places for vessels and roads within communities. Section 70B permits entry to access roads to the community. None of ss 70B-70E form part of the plaintiffs' attack on the validity of the challenged

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573 See the extract from the Second Reading Speech on the Bill which became the Emergency Response Act set out at [374].

574 Section 35(4) of the Land Rights Act.

provisions because that attack is confined to entry to "common areas", which are the subject of s 70F.

439 The entry provisions undoubtedly diminish the Land Council's rights to regulate and prohibit entry, as they previously existed, by enlarging access to common areas of the land. The Land Council's rights derive from the statutory "permit system", which has been explained above[575]. As already mentioned, the Land Council is not a party to these proceedings. The entry provisions also affect the Land Trust's right, deriving from its fee simple, to exclude others from common areas of the land[576]. However, the entry provisions do not, at least for the term of the lease under s 31(1), amount to an acquisition of an interest in land from the Land Trust distinguishable from the rights of access which the Commonwealth obtains under its statutory lease.

Conclusions on the second question

440 Despite the registrability[577] of the lease granted to the Commonwealth and the usual incidents of a term during which rent is payable, the lease is *sui generis* and does not give the Commonwealth unencumbered rights of possession and control over the Maningrida land[578] or any private rights for the benefit of the Commonwealth. The challenged provisions do not have as their purpose (nor do they operate) to extinguish the Land Trust's rights as an owner of the fee simple, to dispossess the Land Trust's tenants, or to stop or interfere with the exercise of s 71 traditional rights to use and occupy the land, including the sacred sites on it.

441 I agree with Gummow and Hayne JJ that the Commonwealth's broad submission that the fee simple is unstable and defeasible and therefore inherently vulnerable to *any* statutory change in the control of the land must be rejected[579]. However, I accept the much narrower proposition advanced by the Commonwealth, that the scheme of control of Aboriginal land in the Land Rights Act was always susceptible to an adjustment of the kind effected by the challenged provisions, in circumstances such as the existence of the present problems.

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575 See [401].

576 *Blue Mud Bay Case* (2008) 82 ALJR 1099 at 1111 [50] per Gleeson CJ, Gummow, Hayne and Crennan JJ; 248 ALR 195 at 208.

577 Emergency Response Act, s 55.

578 Cf *Minister of State for the Army v Dalziel* (1944) 68 CLR 261.

579 Cf *Health Insurance Commission v Peverill* (1994) 179 CLR 226.

442 The present problems, which are not contested by Mr Merkel, have arisen under a scheme of control of the land which was set up without envisaging or predicting their possibility. The features and structure of that scheme of control, unamended by the challenged provisions, are not easily or necessarily adapted to tackling the present problems quickly. Thirty-five years ago, in his *Second Report*, of April 1974, Aboriginal Land Rights Commissioner Woodward recommended that grants of land under the Land Rights Act be of an estate in fee simple but he foresaw that the recognition of Aboriginal rights to land needed to be "sufficiently flexible to allow for changing ideas and changing needs amongst Aboriginal people over a period of years"[580]. He said that a (then) widely held expectation "about, for example, the ease of reaching a consensus on certain matters, may prove false"[581]. It is understandable that a consensus of all traditional Aboriginal owners, or a consensus of all traditional Aboriginal owners, the relevant Aboriginal Land Councils, the relevant Aboriginal Land Trusts and the Commonwealth, as to how best to deal with the present problems might not be easy to reach.

443 As already explained, the Land Trust's fee simple has always been subject to the legislative scheme of control of the land under the Land Rights Act. That legislative scheme of control, like the fee simple itself, is directed to supporting successive generations of traditional Aboriginal owners. It is inherent in the Land Rights Act that there can be a limited legislative adjustment of the control of the land if a need for such an adjustment arises and if that limited adjustment is directed to achieving the purposes of the Land Rights Act, namely supporting the traditional Aboriginal owners. The challenged provisions fall within that description. It is the *sui generis* nature of the fee simple, particularly the fact that it is held in perpetuity for the benefit of successive generations of beneficiaries, and the statutory scheme of control to which it has always been subject, not the identity or race of the beneficiaries of the fee simple, which are critical to that conclusion[582].

444 Amendments to the legislative scheme of control of the land have been made before the passage of the challenged provisions[583].

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580 Australia, Aboriginal Land Rights Commission, *Second Report*, April 1974 at 10 [50].

581 Australia, Aboriginal Land Rights Commission, *Second Report*, April 1974 at 10 [50].

582 Cf reasons of Kirby J at [214].

583 See, eg, *Aboriginal Land Rights (Northern Territory) Amendment Act* 1987 (Cth), s 12; *Aboriginal Land Rights (Northern Territory) Amendment Act* 2006 (Cth), Sched 1, items 43, 65.

445 The challenged provisions (and the limited impairment of the fee simple which they entail) are directed to tackling the present problems by achieving conditions in which the current generation of traditional Aboriginal owners of the land can live and thrive. They are not directed to benefiting the Commonwealth or to acquiring property for the Commonwealth, as those terms are usually understood, nor are they directed to depriving traditional Aboriginal owners of any prior rights or interests, which are expressly preserved[584]. The purposes of the challenged provisions are to support the current generation of traditional Aboriginal owners by improving living conditions quickly. They are the beneficiaries, in current times, of the fee simple held in perpetuity under the Land Rights Act. The linkage, between the purposes of the Land Rights Act and the purposes of the Emergency Response Act and the FCSIA Act (all of which rest on the same heads of constitutional power), sustains the Commonwealth's submission that the challenged provisions are outside the scope of s 51(xxxi) of the Constitution.

446 Assuming, without deciding, that s 51(xxxi) can apply to an exercise of legislative power under s 122 of the Constitution and accepting that it can apply to s 51(xxvi), for the reasons given, the challenged provisions cannot be characterised as effecting an acquisition of property within the meaning and scope of s 51(xxxi) of the Constitution.

Orders

447 For the reasons I have given the demurrer should be allowed, and the plaintiffs' action should be dismissed. As to costs, I agree with Gummow and Hayne JJ that the plaintiffs should pay the costs of the Commonwealth and that the Land Trust should bear its own costs.

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584 Cf reasons of Kirby J at [214], [222], [270] and [301].

448 KIEFEL J. The facts and the statutory provisions relevant to the plaintiffs' claim are set out in the reasons of Gummow and Hayne JJ. I agree that the *Northern Territory National Emergency Response Act* 2007 (Cth) ("the Emergency Response Act") effects an acquisition of property. It is sufficient for the application of s 51(xxxi) of the Constitution in this case that the acquisition is pursuant to legislation made under s 51(xxxi). The requirement that the acquisition be on just terms is satisfied by the provisions of the Emergency Response Act. The demurrer should be allowed.

The acquisition of property

449 The plaintiffs' statement of claim identifies two property interests as acquired by the Commonwealth otherwise than on just terms: the fee simple estate in the Maningrida land in the Northern Territory, the subject of a grant to the Arnhem Land Aboriginal Land Trust ("the Land Trust") under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) ("the Land Rights Act"); and the rights held by the first and second plaintiffs pursuant to s 71 of that Act.

450 The Maningrida land is held by the Land Trust as trustee[585] for the benefit of persons entitled by Aboriginal tradition to use and occupy the land[586]. The Land Rights Act contains provisions which affect the rights normally associated with ownership and it creates offences with respect to entry upon and presence upon the land. Nevertheless, *Northern Territory v Arnhem Land Aboriginal Land Trust*[587] ("the *Blue Mud Bay Case*") holds that, whilst the interest granted under the Land Rights Act differs in some important respects from an interest in the nature of an estate in fee simple, that Act must be understood as granting rights that, for almost all practical purposes, are the equivalent of full ownership[588].

451 The Emergency Response Act does not effect a land acquisition in the usual sense. Its stated object does not directly concern land. It is said to be to improve the well-being of certain communities in the Northern Territory[589]. The scheme of the Act is to place the Commonwealth in a position of control with

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585 *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth), ss 4(1), 5(1)(a) and (b).

586 *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth), s 4(1).

587 (2008) 82 ALJR 1099; 248 ALR 195; [2008] HCA 29.

588 *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 82 ALJR 1099 at 1110-1111 [50]; 248 ALR 195 at 208.

589 *Northern Territory National Emergency Response Act* 2007 (Cth), s 5.

respect to the lands identified by it in order that that object may be achieved. By force of s 31(1) of the Act a five-year lease of certain lands, which include the Maningrida land, is granted to the Commonwealth[590]. The Commonwealth is given exclusive possession and quiet enjoyment of the lands while the lease remains in force[591]. Significantly for present purposes, any right, title or other interest in the lands, which was in existence prior to the grant of the lease, is preserved[592]. Where the right, title or interest had been granted by the Land Trust, it is to have effect as if granted by the Commonwealth on the same terms and conditions[593]. However the Minister can prevent this effect[594] and can terminate any right, title or interest[595], although there is nothing to suggest that this has occurred or is likely to occur. The Commonwealth is not obliged to pay rent to the Land Trust[596]. The Commonwealth may part with possession of the land and grant sub-leases or licences with respect to it[597] but may not transfer the lease itself[598]. The Emergency Response Act is not expressed to alter the exercise of traditional Aboriginal rights of use and occupation of the lands, which are recognised and protected by s 71 of the Land Rights Act.

452 Given the breadth of protection effected by s 51(xxxi), it may be accepted that the interest in the Maningrida land conferred upon the Commonwealth by the lease amounts to an acquisition of property within the meaning of the paragraph[599]. The plaintiffs further allege that the Land Trust's interests as owner

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590 *Northern Territory National Emergency Response Act* 2007 (Cth), Sched 1, Pt 1, cl 21.

591 *Northern Territory National Emergency Response Act* 2007 (Cth), s 35(1).

592 *Northern Territory National Emergency Response Act* 2007 (Cth), s 34(1) and (3).

593 *Northern Territory National Emergency Response Act* 2007 (Cth), s 34(4).

594 *Northern Territory National Emergency Response Act* 2007 (Cth), s 34(5).

595 *Northern Territory National Emergency Response Act* 2007 (Cth), s 37(1).

596 *Northern Territory National Emergency Response Act* 2007 (Cth), s 35(2). See also s 62(1).

597 *Northern Territory National Emergency Response Act* 2007 (Cth), s 35(5).

598 *Northern Territory National Emergency Response Act* 2007 (Cth), s 35(5).

599 *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 559; [1996] HCA 56; *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 232 [49]; [2008] HCA 7.

of the land are so affected by the "abolition of the permit system" as to amount to another form of acquisition.

453 Permits to enter upon Aboriginal land, which is the subject of the Land Rights Act, are rendered necessary by s 70 of that Act[600] which prohibits entry, with some exceptions. Section 69 contains provisions similar to s 70 with respect to sacred sites. Section 71 recognises and permits the exercise of traditional Aboriginal rights with respect to such land as earlier mentioned. The *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act* 2007 (Cth) ("the FCSIA Act"), which was passed at the same time as the Emergency Response Act, amended s 70 and added ss 70A-70F[601], providing that persons could enter upon and remain upon certain parts of vested Aboriginal land, including common areas, for any purpose that was not unlawful[602]. The evident purpose of such amendment is to provide access to Commonwealth officers and others engaged in works or other activities upon the lands without an offence being committed. The Commonwealth's possession and control under the lease would not be sufficient for this purpose.

454 The statutory prohibition of entry onto land has a different legal character from the right of a landowner to exclude, although the same result may be achieved. The plaintiffs may draw upon the majority judgment in the *Blue Mud Bay Case* to support the connection between s 70 and the Land Trust's rights as owner. It is not necessary to do so. By the grant of the lease the Land Trust has lost the right to possession of the lands and the Commonwealth has the right to quiet enjoyment of them, to the exclusion of others.

455 The first and second plaintiffs' own rights concerning the land, as referred to in the statement of claim, are not alleged to be of the nature of native title rights or interests. The statement of claim refers to the traditional rights of use and occupation of the land which are recognised by s 71 of the Land Rights Act. Such rights are not the subject of acquisitions by the Emergency Response Act; on the contrary, the Act preserves them[603].

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600 Section 5 of the *Aboriginal Land Act* (NT) makes provision for the grant of such permits.

601 By Sched 4, Items 9-12.

602 *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth), ss 70, 70A-70F.

603 *Northern Territory National Emergency Response Act* 2007 (Cth), s 35(1).

Section 51(xxxi)

456 In *Newcrest Mining (WA) Ltd v The Commonwealth*[604] Gaudron J held that s 51(xxxi) applies where the purpose of the legislation in question is supported by a head of power in s 51[605]. Gummow J agreed[606]. Gaudron J pointed out that the power conferred by s 51(xxxi) is one to acquire property "for any purpose in respect of which the Parliament has power to make laws"[607]. Toohey J likewise considered that a law answering the description in s 51(xxxi) attracted its operation and that any acquisition of property by the Commonwealth would almost inevitably have that result, even if the acquisition took place within a Territory[608].

457 On this approach, for which the plaintiffs contended[609], the application of s 51(xxxi) is not denied because the territory power of s 122 may also support the law. A law may, and often does, have more than one purpose. The question in cases such as this is whether a purpose falls within the terms of s 51(xxxi). In *Newcrest* Gummow J said that where it is engaged, for example by a law with respect to external affairs, it is not disengaged by the circumstance that the law in question is also a law for the government of a Territory[610]. It follows that s 51(xxxi) may apply regardless of whether it operates with respect to the exercise of the territory power in s 122.

458 A construction of other paragraphs of s 51 as depending, for the acquisition of property for the purpose there stated, upon the legislative power contained in par (xxxi), was discussed by Dixon CJ in *Attorney-General (Cth) v Schmidt*[611]. Such an approach was followed by Mason CJ in *Mutual Pools &*

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604 (1997) 190 CLR 513; [1997] HCA 38.

605 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 564-565, 568.

606 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 614.

607 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 564.

608 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 560-561.

609 See the plaintiffs' argument, summarised at [147] and footnote 254 of the reasons of Gummow and Hayne JJ.

610 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 614.

611 (1961) 105 CLR 361 at 370-371; [1961] HCA 21.

Staff Pty Ltd v The Commonwealth[612], although his Honour put s 122 in a separate category, because of the decision in *Teori Tau v The Commonwealth*[613]. But as Gaudron J pointed out in *Newcrest*[614] there was no challenge to that decision in *Mutual Pools*.

459 It is not possible to discern, from the short reasons given ex tempore in *Teori Tau*, whether the decision was influenced by other concerns referable to the governance of New Guinea, or about other territories, which might otherwise be acquired by the Commonwealth and to which s 122 might apply. In the course of the argument for the plaintiff Windeyer J raised questions as to the application of s 51(xxxi) to territories outside Australia; and to a polity to which the principle of eminent domain had no relevance.

460 The stated reasoning in *Teori Tau* proceeds upon the basis that s 122 was *the* source of the power to make the law there in question with respect to New Guinea[615]. The question whether s 51(xxxi) was attracted depended upon a view as to the breadth of the power in s 122 with respect to territories. It may be that the power given by s 122 to the Commonwealth is more properly to be seen as given to it as the national legislature of Australia, as discussed by Dixon CJ in *Lamshed v Lake*[616], where it is exercised with respect to territories in Australia such as the Northern Territory. But *Teori Tau* is premised upon s 122 being the only power in question and for that reason is not determinative of an outcome in this case.

Just terms

461 The provisions relating to the grant of the five-year lease and the other powers with respect to the land in question are contained in Pt 4 of the Emergency Response Act[617]. Section 60(2) provides that if the operation of that Part results in an acquisition of property otherwise than on just terms, to which s 51(xxxi) applies, the Commonwealth is liable to pay a reasonable amount of

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612 (1994) 179 CLR 155 at 169; [1994] HCA 9.

613 (1969) 119 CLR 564; [1969] HCA 62.

614 (1997) 190 CLR 513 at 565.

615 (1969) 119 CLR 564 at 570; and see *Newcrest* (1997) 190 CLR 513 at 611 per Gummow J.

616 (1958) 99 CLR 132 at 141; [1958] HCA 14.

617 The FCSIA Act contains like provisions with respect to any property acquired: see Sched 4, Item 18.

compensation to the person from whom it is acquired. In the event that the Commonwealth and that person do not agree on the amount of that compensation, proceedings may be instituted for its determination and recovery[618]. The terms "acquisition of property" and "just terms" are given the same meaning as in s 51(xxxi) of the Constitution[619].

462 A provision such as s 60(2) appeared in the *Historic Shipwrecks Act* 1976 (Cth)[620] and has been incorporated in legislation since then[621]. Such a provision was considered in *Minister for Primary Industry and Energy v Davey*[622] where it was held that it suffices to comply with s 51(xxxi)[623]. As Black CJ and Gummow J there said, "[i]t is possible for the Parliament legislatively to anticipate that a law might be held to constitute an acquisition of property otherwise than on just terms, and to provide in that event for compensation, in order to avoid a legislative vacuum"[624]. It is not necessary that "just terms" be dealt with explicitly, as a precondition to validity[625].

463 The provision of compensation, expressed as an amount that is fair and reasonable in all the circumstances, prima facie complies with the requirement of s 51(xxxi)[626]. Many of the matters upon which the plaintiffs rely, as evidencing want of just terms, would be included in any assessment of what, if anything, the Land Trust has lost by reason of the grant of the lease in the terms provided by the Emergency Response Act. Such an assessment would extend to any rental income lost by the Land Trust, if the Commonwealth receives it. The provision

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618 *Northern Territory National Emergency Response Act* 2007 (Cth), s 60(3).

619 *Northern Territory National Emergency Response Act* 2007 (Cth), s 60(4).

620 Section 21.

621 See, for example, *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 230 [41].

622 (1993) 47 FCR 151.

623 *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 167.

624 *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 167.

625 *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 166-167, referring to *The Commonwealth v Huon Transport Pty Ltd* (1945) 70 CLR 293 at 316 per Dixon J; [1945] HCA 5.

626 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 216, 228 per Latham CJ, 300 per Starke J; [1948] HCA 7.

for the preservation of such interests on pre-existing terms and conditions[627] may not have this result. It is not necessary to determine whether that is so.

464 The plaintiffs argue that, although reasonable compensation is provided for, s 61 of the Emergency Response Act would prevent such an outcome. The submission proceeds upon a misconstruction of that section. Section 61 requires the court determining compensation to take into account any rent which has in fact been paid or is payable by the Commonwealth to the Land Trust; any compensation otherwise paid or payable by the Commonwealth with respect to the land under other legislation; and any improvements upon the land which were funded by the Commonwealth, not the Land Trust. These are matters which could be raised by the Commonwealth in connection with a determination of compensation regardless of the existence of s 61. The section does not require an outcome by reference to them and adverse to the plaintiffs.

465 It was further submitted by the plaintiffs that the right to compensation provided by the Emergency Response Act was contingent and not absolute. It depended upon the undertaking of litigation to establish that s 51(xxxi) was engaged. Moreover, they argued, the provision for compensation might not be effective to provide just terms because of the delays which would result. Deane J had described the system in question in *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*)[628] in this way.

466 Neither consideration operates in the present case, in such a way that just terms could not be guaranteed. A statutory right to compensation is not qualified by the possibility of a question as to whether s 51(xxxi) applies. The provisions involved in the statutory scheme to which Deane J referred were such that an applicant for compensation would be forced to wait years before being able to address a court or other body for a determination of compensation[629]. It involved a frustration of the purpose of compensation. No such obstacles are provided by the Emergency Response Act.

467 The remaining aspect of the plaintiffs' case concerning just terms which requires consideration focuses upon the special value which particular areas may have. Sacred sites were identified in this regard. It was said that it may not be possible to attribute a market value to such sites, implying that a loss of or interference with rights exercised in relation to these places is not compensable by money. Such a proposition should not be readily accepted.

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627 *Northern Territory National Emergency Response Act* 2007 (Cth), s 34(1) and (3).

628 (1983) 158 CLR 1; [1983] HCA 21.

629 *The Tasmanian Dam Case* (1983) 158 CLR 1 at 291.

468 It must also be borne in mind that the importance of sacred sites is a matter personal to those exercising traditional Aboriginal rights. It is not an incident of the Land Trust's property rights and could not be the subject of compensation to it. Rights associated with the use of the sites may be held by one or more Aboriginal persons by way of native title rights and interests, but no such rights are here claimed. So far as concerns the plaintiffs, what is spoken of is the potential for interference with the rights recognised by s 70 of the Land Rights Act so far as concerns areas such as sacred sites. But the prohibition upon persons entering into and remaining upon sacred sites under s 69 of the Land Rights Act continues. It would only be where a sacred site was situated in a common area that the right of entry, given to persons generally by the amendments to s 70 and the addition of ss 70A-70F effected by the FCSIA Act, would operate. No such area was identified by the plaintiffs.

469 The plaintiffs' case in this respect did not depend only upon the notion that special value attaching to rights associated with sacred sites was incapable of assessment and therefore could not be the subject of compensation in money. It was claimed to be a consequence of this that the Minister was obliged to consider whether the acquisition of these lands was for the benefit of Aboriginal people having such rights. Such a consideration might oblige a conclusion to the contrary. So understood, the issue is not whether just terms can be provided, but whether the Minister should decide to acquire the land at all. That issue falls outside the ambit of the plaintiffs' claim.

Conclusion and order

470 The plaintiffs do not establish that the Emergency Response Act effects an acquisition which is not on just terms. I agree with the orders proposed by Gummow and Hayne JJ. In relation to costs I would add that the ultimate issue in the plaintiffs' case, to which questions concerning the application of s 51(xxxi) were directed, was whether any acquisition of property was on just terms. The most obvious property interest affected by the Emergency Response Act was that of the Land Trust. The plaintiffs' case was brought in the face of provision for fair and reasonable compensation. The Land Trust did not seek to assert that just terms were not thereby guaranteed. The plaintiffs' case was not useful to clarify any substantial issue.