HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

GOVERNMENT OF THE RUSSIAN FEDERATION PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA DEFENDANT

Government of the Russian Federation v Commonwealth of Australia
[2025] HCA 44
Date of Hearing: 6 August 2025
Date of Judgment: 12 November 2025
C9/2023

ORDER

The questions stated for the opinion of the Full Court in the special case filed on 16 October 2024 be answered as follows:

Question 1: *Is the* Home Affairs Act 2023 *(Cth) invalid in its entirety on the ground that it is not supported by a head of Commonwealth power?*

Answer: *No.*

Question 2: *If the answer to Question 1 is "no", does the operation of the* Home Affairs Act 2023 *(Cth) result in the acquisition of property from the plaintiff to which s 51(xxxi) of the* Constitution *applies?*

Answer: *Yes.*

Question 3: *If the answer to Question 2 is "yes", is the Commonwealth liable to pay to the plaintiff a reasonable amount of compensation pursuant to s 6(1) of the* Home Affairs Act 2023 *(Cth)?*

Answer: *Yes.*

Question 4: *Who should pay the costs of the special case?*

Answer: *The Commonwealth.*

Representation

B W Walker SC with E A J Hyde for the plaintiff (instructed by Adero Law)

S P Donaghue KC, Solicitor-General of the Commonwealth, with E H I Smith and C M R Ernst for the defendant (instructed by Australian Government Solicitor)

CATCHWORDS

Government of the Russian Federation v Commonwealth of Australia

Constitutional law (Cth) – Legislative power – Acquisition of property on just terms – Where Government of Russian Federation granted lease in 2008 by Commonwealth of Australia for land in Australian Capital Territory – Where land to be used for diplomatic, consular or official purposes by Russian Federation – Where land was 300 metres from Parliament House – Where lease terminated by operation of *Home Affairs Act 2023* (Cth) – Whether *Home Affairs Act* supported by s 122 of the *Constitution* – Whether termination of lease constituted acquisition of property within meaning and scope of s 51(xxxi) of *Constitution* – Whether s 51(xxxi) of *Constitution* limited to empowering acquisition of property for purpose related to need for or proposed use or application of property to be acquired – Whether provision of just terms for termination of lease incongruous notion.

Words and phrases – "abstract", "acquisition", "acquisition of property", "acquisition power", "carved out", "compensation", "discretion as to costs", "fair dealing", "for the government of any territory", "foreign state", "head of power", "incidental power", "incongruous", "just terms", "land", "lease", "national security", "nexus", "Parliament House", "peace, order and good government", "power to make laws", "property", "proposed use", "protect", "purpose", "qualifies", "reversionary interest", "risk", "scope", "source of legislative power", "Takings Clause", "territories power".

Constitution, ss 51(xxxi), 96, 111, 122.
Home Affairs Act 2023 (Cth), ss 4, 5, 6, 7.

1 GAGELER CJ, GLEESON, JAGOT AND BEECH-JONES JJ. This proceeding has been brought in the original jurisdiction of the High Court by the Government of the Russian Federation against the Commonwealth of Australia. It concerns the validity and operation of the *Home Affairs Act 2023* (Cth) ("the Act") which operated upon commencement to terminate a lease from the Commonwealth to the Russian Federation ("the Lease") of land located in the Australian Capital Territory ("the Land") and to render the Commonwealth liable to pay compensation to the Russian Federation if that operation would otherwise have resulted in an acquisition of property from the Russian Federation within the meaning and scope of s 51(xxxi) of the *Constitution*.

2 By a special case in the proceeding, the parties have agreed in stating questions of law for the opinion of the Full Court. Those questions and the answers to them are set out at the conclusion of these reasons.

3 Underlying those answers is the conclusion that termination of the Lease by operation of the Act constituted an acquisition of property from the Russian Federation within the meaning and scope of s 51(xxxi) of the *Constitution*. The acquisition was for a purpose for which the Commonwealth Parliament has power to make laws under s 122 of the *Constitution*. The Act is therefore valid and the Commonwealth is therefore liable to pay compensation to the Russian Federation under the Act.

The Lease

4 The Land is Block 26, Section 44 in the Division of Yarralumla as delineated on Deposited Plan No 10486 in the Office of the Registrar of Titles in the Australian Capital Territory. It comprises approximately 11,526 square metres. Its south-eastern boundary borders State Circle approximately 300 metres north-west of Parliament House.

5 The Land had formed part of a larger portion of land known as the "Duntroon Estate", the "legal estate" in which vested in the Commonwealth by force of the *Lands Acquisition Act 1906* (Cth) on 27 July 1912[1] after surrender by

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1 Section 16 of the *Lands Acquisition Act 1906* (Cth) and *Commonwealth of Australia Gazette*, No 49, 27 July 1912 at 1316.

New South Wales[2] and acceptance by the Commonwealth[3] of the Australian Capital Territory under s 111 of the *Constitution*.

6 On or about 21 December 1990, the Land was specified as a "Designated Area"[4] known as "The Central National Area" in the National Capital Plan prepared by the National Capital Planning Authority under the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth).[5] By amendments which commenced on 3 August 2007, the National Capital Plan was amended to change the permitted use of the Land from "Open Space land use" to "Diplomatic Mission land use".[6]

7 On 16 April 2008, the Land was included within an area declared by instrument under the *Australian Capital Territory (Planning and Land Management) Act* to be "National Land".[7] The effect of that declaration was to render the Land subject to the *National Land Ordinance 1989* (Cth),[8] and to the *Leases (Special Purposes) Ordinance 1925* (Cth) as applied by the *National Land Ordinance*.[9] By the same instrument, the Land was designated to be "required for the special purposes of Canberra as the National Capital" under the *National Land*

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2 Section 6 of the *Seat of Government Surrender Act 1909* (NSW).

3 Section 5 of the *Seat of Government Acceptance Act 1909* (Cth) and *Commonwealth of Australia Gazette*, No 75, 8 December 1910 at 1851.

4 Section 10(1) of the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth).

5 Division 2 of Part III of the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth). The National Capital Plan took effect pursuant to s 21 upon publication of the Minister's approval in *Commonwealth of Australia Gazette*, No S 336, 21 December 1990.

6 *National Capital Plan – Amendment 66 – Diplomatic Mission Yarralumla*.

7 Section 27(1) of the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth) and *Commonwealth of Australia Gazette*, No S 79, 16 April 2008.

8 Originally made under s 12(1)(d) of the *Seat of Government (Administration) Act 1910* (Cth).

9 Section 5 of the *National Land Ordinance 1989* (Cth).

Ordinance[10] and approved to be managed by the National Capital Authority (the continuation of the National Capital Planning Authority under a new name[11]) on behalf of the Commonwealth.

8 On the same day, 16 April 2008, the National Capital Authority on behalf of the Commonwealth made a written offer to lease the Land to the Russian Federation on terms which included payment to be either by a once only payment of a "land premium" of $2,750,000 or annual rent equal to 5% of the unimproved value of the site, in addition to the payment of a "survey/deposited plan fee". The Russian Federation accepted that offer and paid the agreed amounts of land premium and survey/deposited plan fee to the National Capital Authority on or about 23 December 2008.

9 The Lease was then granted by the Commonwealth, as lessor, to the Russian Federation, as lessee, under the *Leases (Special Purposes) Ordinance* as applied by the *National Land Ordinance* on 24 December 2008. The Lease as so granted was for a term of 99 years for purposes identified as "only for any diplomatic consular or official purpose of the Government of the Russian Federation or for the purpose of an official residence for any accredited agent of that Government or for all or any number of those purposes". Upon the repeal of the *National Land Ordinance* on 1 April 2022, the Lease was continued in effect as if it had been granted under the *Australian Capital Territory National Land (Leased) Ordinance 2022* (Cth).[12]

10 During the term of the Lease, the Russian Federation commenced but had not before the commencement of the Act completed construction work on the Land including in relation to a building and a fence.

The Act

11 The Bill for the Act was introduced into the Commonwealth Parliament on 15 June 2023 and was enacted and commenced on the same day.

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10 Section 4(1) of the *National Land Ordinance*.

11 Section 5 of the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth).

12 Sections 62 and 63 of the *Australian Capital Territory National Land (Leased) Ordinance 2022* (Cth).

12 Section 4 of the Act defines "relevant lease" to encompass the Lease.[13] Section 5 provides:

> "A relevant lease, and any legal or equitable right, title, interest, trust, restriction, obligation, mortgage, encumbrance, contract, licence or charge, granted or arising under or pursuant to a relevant lease, or in dependence on a relevant lease, is terminated by force of this section on the commencement of this section."

13 Section 6 provides:

> "(1) If the operation of this Act would result in an acquisition of property to which paragraph 51(xxxi) of the Constitution applies from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.
>
> (2) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in the High Court of Australia or the Federal Court of Australia for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines."

The term "person" includes a "body politic"[14] and therefore includes the Russian Federation.

14 Section 7 provides that the Act has effect despite any other law, and applies despite any rights, duties, obligations, powers, limitations, offences, privileges or immunities which would otherwise apply under any other law, but that the Act does not affect the status of the Land as National Land under the *Australian Capital Territory (Planning and Land Management) Act*. The continuing status of the Land as National Land means that the Land continues to be subject to the *Australian Capital Territory National Land (Leased) Ordinance* under which, in consequence of termination of the Lease, the Land remains available to be the subject of a lease granted by the Commonwealth including a lease for "diplomatic purposes".[15]

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13 Read together with the definition of "land" in s 4 of the Act.

14 Section 2C of the *Acts Interpretation Act 1901* (Cth).

15 Sections 7, 10 and 11 of the *Australian Capital Territory National Land (Leased) Ordinance*.

15 The Explanatory Memorandum for the Act explained the object of the Act as being "to protect Australia's national security interests with regard to land within the area adjacent to Parliament House".[16] In the Second Reading Speech in each of the House of Representatives[17] and the Senate,[18] the responsible Minister referred to its enactment as "necessary to protect Australia's national security interests".

16 The special case records as an agreed fact that the purpose of the Government of the Commonwealth in seeking to terminate the Lease through the introduction of the Bill for the Act was "not related to [the Commonwealth] having a need for, or proposed use or application of, the Land".

17 That agreed fact and the references in the extrinsic material to protection of Australia's national security interests are given context by statements made by the Prime Minister during a press conference at Parliament House in the morning of 15 June 2023 in which he announced the intention of the Government to introduce legislation to terminate the Lease that day. The Prime Minister explained that the Government had "received very clear security advice as to the risk presented by a new Russian presence so close to Parliament House" and that the proposed legislation was "based upon very specific advice ... about the nature of the construction that's proposed for this site, about the location of the site, and about the capability that that would present in terms of potential interference with activity that occurs in this Parliament House". The special case records that the advice to which the Prime Minister referred is said by the Commonwealth to have been informed by information provided by the Australian Security Intelligence Organisation ("ASIO"), constituted under the *Australian Security Intelligence Organisation Act 1979* (Cth), and that the assessment of ASIO was that disclosure of that information "would be expected to cause serious damage to the national interest".

18 Understandably, the special case contains no agreement between the parties as to the risk to which the Prime Minister referred in the press conference. On the hearing of the special case, the Commonwealth disavowed any argument that the existence of any such risk ought to be found as a constitutional fact.

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16 Australia, House of Representatives, *Home Affairs Bill 2023*, Explanatory Memorandum.

17 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 15 June 2023 at 4459.

18 Australia, Senate, *Parliamentary Debates* (Hansard), 15 June 2023 at 2284.

Sections 51(xxxi) and 122 of the *Constitution*

19 Section 51(xxxi) of the *Constitution* confers power on the Commonwealth Parliament to make laws "with respect to ... the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws". Section 122 confers power on the Parliament to make laws "for the government of any territory".

20 This Court recently held in *The Commonwealth v Yunupingu*[19] that "the power conferred on the Commonwealth Parliament by s 122 of the *Constitution* to make laws for the government of a territory does not extend to making a law with respect to an acquisition of property otherwise than on just terms within the meaning of s 51(xxxi) of the *Constitution*".[20] The basis of that holding was that s 51(xxxi) is "the sole source of power to make any law which has the character of a law with respect to an acquisition of property for any purpose in respect of which the Parliament has power to make any law"[21] and that "[a]bstracted from, or 'carve[d] out' of every other legislative power is accordingly power to make any law that is properly characterised as a law with respect to an acquisition of property within the meaning of s 51(xxxi)".[22] The legislative power conferred by s 122 was held to be no exception.[23]

21 The plurality in *Yunupingu* explained there to be no difficulty construing the reference in s 51(xxxi) to an acquisition of property "for any purpose in respect of which the Parliament has power to make laws" to encompass the purpose of "the government of any territory" in respect of which the Commonwealth Parliament has power to make laws under s 122 of the *Constitution*.[24] This explanation proceeded on the implicit understanding that the words "for any purpose in respect of which the Parliament has power to make laws" indicate that a law within the exclusive scope of s 51(xxxi) is a law which would be supported by another source

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19 (2025) 99 ALJR 519; 421 ALR 604.

20 (2025) 99 ALJR 519 at 536 [44]; 421 ALR 604 at 617.

21 (2025) 99 ALJR 519 at 531 [17]; 421 ALR 604 at 610.

22 (2025) 99 ALJR 519 at 531 [17]; 421 ALR 604 at 610-611 (footnote omitted).

23 (2025) 99 ALJR 519 at 536 [44]; 421 ALR 604 at 617.

24 (2025) 99 ALJR 519 at 535 [40]; 421 ALR 604 at 616. See also *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 597, 600.

of Commonwealth legislative power absent the abstraction from power effected by s 51(xxxi).[25]

22 An issue was raised on the hearing of the special case as to whether the Act can properly be characterised as a law for the government of any territory, so as to be supported by s 122 of the *Constitution*, if not properly characterised as a law with respect to an acquisition of property within the meaning of s 51(xxxi). The issue is readily resolved: plainly it is properly so characterised.

23 Subject to the *Constitution*, and relevantly to s 51(xxxi), the power conferred on the Commonwealth Parliament by s 122 to make laws "for the government of any territory" is "a complete power to make laws for the peace, order and good government of the territory",[26] being "as large and universal a power of legislation as can be granted".[27] The power extends to "the entire legal situation of the territory, both internally and in relation to all parts of the Commonwealth"[28] so as to permit laws for the "direct administration" of a territory as well as for "the establishment of a territory as a self-governing polity".[29]

24 No more is required for a law to warrant characterisation as a law "for the government of any territory" within the meaning and scope of s 122 of the *Constitution* than demonstration of the existence of "a sufficient nexus or connexion between the law and the [t]erritory".[30] Though a law otherwise demonstrated to have a sufficient nexus with a territory might well operate to create

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25 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 427. See also *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth* (1943) 67 CLR 314 at 317-318.

26 *Bennett v The Commonwealth* (2007) 231 CLR 91 at 110-111 [43], quoting *Spratt v Hermes* (1965) 114 CLR 226 at 241-242.

27 *Spratt v Hermes* (1965) 114 CLR 226 at 242.

28 *Bennett v The Commonwealth* (2007) 231 CLR 91 at 106 [30], quoting *Lamshed v Lake* (1958) 99 CLR 132 at 154.

29 *The Commonwealth v Yunupingu* (2025) 99 ALJR 519 at 532 [22]; 421 ALR 604 at 612, quoting *Berwick Ltd v Gray* (1976) 133 CLR 603 at 607.

30 *The Commonwealth v Yunupingu* (2025) 99 ALJR 519 at 532 [21]; 421 ALR 604 at 612, quoting *Berwick Ltd v Gray* (1976) 133 CLR 603 at 607-608.

or extinguish rights or obligations outside the geographic limits of that territory,[31] there can be no doubt that the operation of a law to create or extinguish rights or obligations within the geographic limits of a territory in and of itself constitutes a sufficient nexus with that territory to warrant the description of that law as for the government of that territory.[32] A nexus with the Australian Capital Territory sufficient to characterise the Act as a law for the government of that Territory within the meaning and scope s 122 of the *Constitution*, if it is not a law with respect to an acquisition of property within the meaning and scope of s 51(xxxi), is therefore furnished by nothing more than the fact that the Land the subject of the Lease terminated by operation of s 5 of the Act is located within that Territory.

25 The availability of s 122 of the *Constitution* as a source of legislative power sufficient to support the Act, if it is not within the exclusive operation of the power conferred by s 51(xxxi), makes unnecessary any consideration of other potential sources of Commonwealth legislative power, such as s 51(xxix),[33] s 51(xxxix), and s 52(i).[34]

26 The determinative issue is accordingly whether termination of the Lease by operation of s 5 of the Act is properly characterised as having resulted in an acquisition of property within the meaning and scope of s 51(xxxi) of the *Constitution*. If so, the Act is a valid exercise of the legislative power conferred by s 51(xxxi) to enact a law with respect to the acquisition of property on just terms for a purpose in respect of which the Parliament has power to make laws under s 122 of the *Constitution*, and the Commonwealth is liable to pay compensation to the Russian Federation under s 6 of the Act. If not, the Act is a valid exercise of

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31 See *Lamshed v Lake* (1958) 99 CLR 132 at 141; *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 156-157 [335], [337]. Compare *Davis v The Commonwealth* (1988) 166 CLR 79 at 97, 117.

32 See *Northern Land Council v The Commonwealth* (1986) 161 CLR 1 at 6; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 534, 549, 560, 561, 586, 594, 643.

33 See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 223, 258; *Thomas v Mowbray* (2007) 233 CLR 307 at 364 [151].

34 cf *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 266-267, referring to *Spratt v Hermes* (1965) 114 CLR 226 and *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89; *Svikart v Stewart* (1994) 181 CLR 548 at 561.

the legislative power conferred by s 122 and the statutory entitlement to compensation is not enlivened.

27 Properly, the Commonwealth advanced no argument that termination of the Lease by operation of s 5 of the Act did not meet the threshold condition of an acquisition of property within the meaning of s 51(xxxi) of the *Constitution*: that an interest in the nature of property is taken from one person and that an interest in the nature of property is conferred on the Commonwealth or another person.[35] Termination of the Lease extinguished the leasehold estate of the Russian Federation in the Land and thereby, and to that extent, enlarged the reversionary interest of the Commonwealth in the Land. By the termination, the Commonwealth's legal estate in the Land was wholly freed of the encumbrance of the Lease.

28 The argument advanced by the Commonwealth was that the acquisition of property constituted by the termination of the Lease by operation of s 5 of the Act is nevertheless not properly characterised as an acquisition of property within the meaning and scope of s 51(xxxi) of the *Constitution* for either or both of two reasons. The first reason was said to be that s 51(xxxi) is limited to empowering an acquisition of property for a purpose related to a need for or proposed use or application of the property to be acquired. That limitation was said by the Commonwealth to have been exceeded in light of the agreed fact that the Commonwealth had not proposed any future use or application of the Land at the time of the enactment of the Act. The second reason was said to be that provision of "just terms" to the Russian Federation for termination of the Lease would be "incongruous", given that the object of the Act was to protect from a risk to national security which arose from the Russian Federation's continuing occupation and use of the Land pursuant to the Lease. Neither argument can be accepted.

Absence of proposed use or application of the Land irrelevant

29 In *Clunies-Ross v The Commonwealth*,[36] the Commonwealth argued that s 51(xxxi) of the *Constitution* "should be construed as including the power to acquire property not for a purpose related to any need for or desired use of the property but for the purpose of depriving the owner of it and thereby indirectly

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35 *The Commonwealth v Yunupingu* (2025) 99 ALJR 519 at 537 [51]; 421 ALR 604 at 619, citing *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 33-34 [42], 53 [118], 67-68 [169], 99 [278], 130-131 [365] and *Cunningham v The Commonwealth* (2016) 259 CLR 536 at 560 [58].

36 (1984) 155 CLR 193.

achieving some purpose in respect of which the Parliament has power to make laws".[37] The argument was accepted by Murphy J in dissent.[38] The majority did not need to consider the argument.[39] The majority relevantly observed only that there were to be found in previous decisions "statements of high authority which would seem to be framed on the assumption that the legislative power conferred by [s 51(xxxi)] should be confined to the making of laws with respect to acquisition of property for some purpose related to a need for or proposed use or application of the property to be acquired".[40]

30 The first of the arguments advanced by the Commonwealth was framed by reference to that observation of the majority in *Clunies-Ross*.

31 The contradiction that this argument was in direct opposition to the argument earlier advanced by the Commonwealth in *Clunies-Ross* and left unresolved in that case was compounded by the peculiarity of the same argument being advanced on the hearing of the special case by the Russian Federation. The Commonwealth and the Russian Federation each advanced the argument, each in support of the conclusion that the termination of the Lease by operation of s 5 of the Act was not an acquisition of property within the meaning and scope of s 51(xxxi) of the *Constitution*. They differed only as to the consequence of that conclusion: the Russian Federation asserting that the consequence was a hiatus in legislative power to support the Act; the Commonwealth maintaining that the inapplicability of s 51(xxxi) left s 122 of the *Constitution* as a source of legislative power.

32 Aligned in that way, the parties each developed the argument that s 51(xxxi) of the *Constitution* is confined to empowering an acquisition of property for a purpose related to a need for or proposed use or application of the property to be acquired by reference to observations made by Dixon CJ in *Attorney-General (Cth) v Schmidt*.[41] The observations were to the effect that "[p]rima facie" s 51(xxxi) of the *Constitution* "is pointed at the acquisition of property by the Commonwealth for use by it in the execution of the functions, administrative and the like, arising under its laws" and that "[t]he expression 'for any purpose' ... refers

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37 (1984) 155 CLR 193 at 200.

38 (1984) 155 CLR 193 at 205.

39 (1984) 155 CLR 193 at 201-202.

40 (1984) 155 CLR 193 at 200.

41 (1961) 105 CLR 361.

to the use or application of the property in or towards carrying out or furthering a purpose comprised in some other legislative power".[42]

33 The parties each sought further support for the argument from passages in the reasoning in *W H Blakeley & Co Pty Ltd v The Commonwealth*,[43] which led ultimately to the rejection in that case of a submission that s 51(xxxi) of the *Constitution* did not support an acquisition under the *Lands Acquisition Act 1906* (Cth) for a "public purpose" identified as "[p]urposes of providing office accommodation for Departments of the Commonwealth". This was in circumstances claimed in that case to be that "the Commonwealth neither required nor intended to use the said land for any such purpose either forthwith or within any fixed or determinate or reasonable time or at all".[44]

34 The passages in the reasoning in *Blakeley* on which the Commonwealth and the Russian Federation relied were in the context of the statutory definition of "public purpose" in that case having been noted earlier in the reasoning to have followed the language of s 51(xxxi).[45] It was said in that context that the word "purpose" did "not refer to any power or powers defined in the various paragraphs of ss 51 or 52 of the Constitution or elsewhere conferred" but rather "to the object for which the land is acquired" being required to be "one falling within the Commonwealth's power to make laws".[46] It was immediately added, however, that "[t]he expression 'acquisition of property … for any purpose' of the defined kind seem[ed] rather to demand that the acquisition must be relevant to one or more of the subjects of Federal legislative power than to insist on the necessity as a condition of the power of a specific intent in the Executive Government or other acquiring authority".[47]

35 Candidly, the Commonwealth acknowledged the argument to be in tension with more recent decisions, beginning with *Georgiadis v Australian and Overseas*

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42 (1961) 105 CLR 361 at 372.

43 (1953) 87 CLR 501.

44 (1953) 87 CLR 501 at 503.

45 (1953) 87 CLR 501 at 516.

46 (1953) 87 CLR 501 at 518-519.

47 (1953) 87 CLR 501 at 519.

Telecommunications Corporation[48] and including *Yunupingu*,[49] which have emphasised that an interest in the nature of property taken from one person need not coincide with an interest in the nature of property conferred on another in order to constitute an acquisition of property. The Commonwealth sought to reconcile the argument with those decisions by proffering, as a refinement of the asserted limitation on the scope of the power conferred by s 51(xxxi) of the *Constitution* framed by reference to the observation in *Clunies-Ross*, that the taking of the interest in the nature of property must be for a purpose related to a need for or proposed use or application of the interest in the nature of property that is acquired. As applied to the circumstances of the present case, the asserted limitation accordingly linked the need for or proposed use or application of an interest in the nature of property not to the leasehold estate taken from the Russian Federation but rather to the unencumbered legal interest in the Land acquired by the Commonwealth.

36 The difficulty with the argument as so refined by the Commonwealth is that it has repeatedly been held in the same decisions, beginning with *Georgiadis* and including *Yunupingu*, that the interest in the nature of property that is acquired need be identified with no more precision than it be "an identifiable and measurable advantage of a proprietary nature".[50] The "direct benefit or financial gain" recognised in *Georgiadis*[51] to have resulted from a statutory deprivation of a right to bring a common law cause of action is a prime example of an interest of that nature.[52] To proceed on the understanding proffered by the Commonwealth would be to stretch the concepts of "use" or "application" of such an indeterminate

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48 (1994) 179 CLR 297.

49 See also *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 185; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 635; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 179-180 [82]-[83].

50 *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 57 [131]. See also *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 634 and the cases there cited.

51 (1994) 179 CLR 297 at 305. See also *The Commonwealth v Mewett* (1997) 191 CLR 471 at 503-505.

52 *Smith v ANL Ltd* (2000) 204 CLR 493 at 498-499 [3], 504-505 [22].

interest in the nature of property to an extent that would rob those concepts of meaningful content.

37 There is, moreover, a more fundamental reason why the argument (that an acquisition of property within the scope of s 51(xxxi) of the *Constitution* is limited to an acquisition of property for a purpose related to a need for or proposed use or application of the interest in the nature of property that is acquired) must be rejected. The reason lies in the overarching principle that, "[a]s a grant of legislative power, no less than as a guarantee of just terms", s 51(xxxi) must be construed "with all the generality which the words used admit".[53] Interpreted with the generality that the words admit, the connection postulated by the requirement that an "acquisition of property" be for a purpose in respect of which the Parliament has power to make laws is not that the "property" acquired must be for a proposed use or application for a purpose within Commonwealth legislative power. The postulated connection is instead that the "acquisition of property" must be for a purpose within Commonwealth legislative power.

38 That is to say no more than was implicit in the explanation given by the plurality in *Yunupingu* to which attention has already been drawn:[54] within the meaning and scope of s 51(xxxi) of the *Constitution*, an "acquisition of property" is "for any purpose in respect of which the [Commonwealth] Parliament has power to make laws" if the law providing for that acquisition of property would be supported by another source of Commonwealth legislative power absent s 51(xxxi).

39 The point is not that a proposal to use or apply property to be acquired cannot be sufficient to demonstrate that a particular acquisition of property is for a purpose within Commonwealth legislative power. Examples of circumstances where a proposed use or application of the property to be acquired will furnish the requisite connection between the acquisition of property and Commonwealth legislative power include an acquisition of a proprietary interest in land in order to construct and operate a post office within s 51(v) or a lighthouse within s 51(vii)

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53 *The Commonwealth v Yunupingu* (2025) 99 ALJR 519 at 536 [42]; 421 ALR 604 at 617, quoting *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16] and *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226.

54 See [21] above.

or of a proprietary interest in land[55] or a printing press[56] or a ship[57] to be used for a defence purpose within s 51(vi). The point is that a proposed use or application of the property that is to be acquired is not required where the acquisition of property is otherwise established to be for a purpose within Commonwealth legislative power.

40 To the extent that statements in *Schmidt* and *Blakeley* are to the contrary, those statements cannot be treated as having laid down principles of general and enduring application. Both *Schmidt* and *Blakeley* were, as Stephen J noted in *Trade Practices Commission v Tooth & Co Ltd*,[58] cases "concern[ing] the validity of legislation the declared purpose of which was to pass property from one person to another". The "preferable view", as his Honour there suggested, "is to regard what was said in these cases as necessarily restricted to the particular factual setting ... there confronted".

41 The first of the arguments advanced by the Commonwealth for concluding that the acquisition of property constituted by the termination of the Lease was outside the scope of the legislative power conferred by s 51(xxxi) of the *Constitution* must accordingly be rejected on its major premise: an acquisition of property within the scope of the power need not be for a purpose related to any need for or proposed use or application of the property acquired. The argument originally advanced by the Commonwealth in *Clunies-Ross* was correct.

42 Rejection of the major premise means that there is no occasion to consider whether, were that premise to have been accepted, the agreed fact that the Commonwealth's purpose for terminating the Lease was not related to it having a need for or proposed use or application of the Land would have been enough to establish that the acquisition of property constituted by the termination of the Lease lay outside the scope of the power conferred by s 51(xxxi) of the *Constitution*. Nothing in these reasons should be taken to endorse the view that it would.

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55 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261; *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269.

56 *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth* (1943) 67 CLR 314.

57 *Minister of State for the Navy v Rae* (1945) 70 CLR 339.

58 (1979) 142 CLR 397 at 423.

Just terms not incongruent

43 The second of the arguments advanced by the Commonwealth was based on the proposition, stated by Deane and Gaudron JJ in *Re Director of Public Prosecutions; Ex parte Lawler*,[59] and referred to by the plurality in *Theophanous v The Commonwealth* as "settled",[60] that s 51(xxxi) "applies only to acquisitions of a kind that permit of just terms" and "is not concerned with laws in connection with which 'just terms' is an inconsistent or incongruous notion".

44 The Commonwealth developed the argument by recalling that "[t]he 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"[61] and that "what is just as between the Commonwealth and a State, two Governments, may depend on special considerations not applicable to an individual".[62] The argument was that the constitutional conception of "just terms" as "fair dealing" does not extend to requiring a foreign state to be compensated for an acquisition of its property in circumstances where the sole object of that acquisition is to eliminate a legislatively perceived albeit unproven risk that the foreign state might use that property to interfere with the national security of Australia and in particular with the security of Parliament House. Put rhetorically: how could it be consistent or congruent with fair dealing between the Australian nation and the Russian Federation for the Australian taxpayer to be required to compensate the Russian Federation for preventing it from using National Land in a way that the Commonwealth Parliament was satisfied posed a risk to the national security of Australia?

45 The force of the argument is diminished when it is borne in mind that the Lease was granted by the Commonwealth and paid for by the Russian Federation in accordance with Australian domestic law and that use or potential use of the Land by the Russian Federation has not been suggested to involve breach of any term of the Lease or contravention of any domestic legal norm. As senior counsel for the Russian Federation aptly submitted, the legal position of the Russian Federation for the purposes of s 51(xxxi) of the *Constitution* is in those

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59 (1994) 179 CLR 270 at 285.

60 (2006) 225 CLR 101 at 124 [55]-[56].

61 *Nelungaloo Pty Ltd v The Commonwealth* (1952) 85 CLR 545 at 600.

62 *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290.

circumstances no different in principle from the legal position of an Australian citizen whose lawful occupation of land is terminated by operation of a Commonwealth law the object of which is to create a security zone around a defence establishment.

46 The conceptual error in the Commonwealth's argument lies in its stretching of the constitutional conception of "just terms" as "fair dealing" beyond the true import of that description. In the language of Brennan J in *Georgiadis*,[63] the provision of "just terms" "does not attempt a balancing of the interests of the dispossessed owner against the interests of the community at large". Instead, "[t]he purpose of the guarantee of just terms is to ensure that the owners of property compulsorily acquired by government presumably in the interests of the community at large are not required to sacrifice their property for less than its worth". To equate "just terms" with "fair dealing" is not to open up for debate whether the constitutional conditioning of an acquisition of property on the provision of just terms operates fairly in respect of a particular acquisition. The point of the equation is rather to posit the question of whether the law which effects the acquisition makes provision for just terms as an inquiry into "whether the law amounts to a true attempt to provide fair and just standards of compensating or rehabilitating the ... owner of property, fair and just as between [the owner] and the government of the country".[64]

47 There is no doubt that application of considerations of inconsistency and incongruity in the context of s 51(xxxi) of the *Constitution* have the potential to give rise to contestable questions of judgment, as the plurality noted in *Theophanous*.[65] Nevertheless, as Brennan J pointed out in *Mutual Pools & Staff Pty Ltd v The Commonwealth*,[66] "[i]n each of the cases in which laws for the acquisition of property without the provision of just terms have been held valid, such an acquisition has been a necessary or characteristic feature of the means selected to achieve an objective within power, the means selected being

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63 (1994) 179 CLR 279 at 310-311. See also *Smith v ANL Ltd* (2000) 204 CLR 493 at 501 [9].

64 *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290; *Smith v ANL Ltd* (2000) 204 CLR 493 at 513 [48].

65 (2006) 225 CLR 101 at 126 [60].

66 (1994) 179 CLR 155 at 179. See also *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 180 [98]; *Cunningham v The Commonwealth* (2016) 259 CLR 536 at 560 [59].

appropriate and adapted to that end". Thus, as Brennan J later explained in *Lawler*,[67] a fine or forfeiture of property imposed as a sanction for breach of a prescribed rule of conduct does not admit of the provision of just terms because to do so would be "to weaken, if not destroy, the normative effect of the prescription of the rule of conduct". Likewise, to adopt the explanation given by Mason CJ in *Mutual Pools*,[68] the law in *Schmidt* which provided for the application of enemy property as war reparations "was a subsidiary provision in a general scheme for the disposition of enemy property and had to be characterized against the common law subjection of the property of enemy aliens to seizure and forfeiture by the Crown".

48 The holding in *Theophanous* that deprivation of parliamentary superannuation benefits in consequence of conviction of a former parliamentarian of a "corruption offence" did not amount to an acquisition of property within the meaning and scope of s 51(xxxi) fits within the same category. As spelt out by Gleeson CJ[69] consistently with the conclusion expressed by the plurality in terms of incongruity,[70] to have placed the law effecting that deprivation within s 51(xxxi) so as to have conditioned the validity of the law on the provision of just terms would have weakened or destroyed the normative effect of the principle of probity which the deprivation imposed by the law was intended to vindicate.

49 Here, the means selected by the Commonwealth Parliament to protect Australia's national security interests went no further than to terminate the Lease and thereby to eliminate the risk perceived to arise from the continuing lawful occupation and use of the Land by the Russian Federation. To compensate the Russian Federation for the acquisition of its property constituted by that termination would do nothing to undermine the legal or practical operation of s 5 of the Act to achieve that object.

50 To provide just terms to the Russian Federation for the acquisition of its property in those circumstances is not an inconsistent or incongruous notion. To the contrary, it is what the *Constitution* requires.

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67 (1994) 179 CLR 270 at 278.

68 (1994) 179 CLR 155 at 170.

69 (2006) 225 CLR 101 at 115-116 [13]-[14].

70 (2006) 225 CLR 101 at 127 [63].

Conclusion

51 The questions stated by the parties for the opinion of the Full Court and the answers to those questions are as follows:

Question 1: Is the *Home Affairs Act 2023* (Cth) invalid in its entirety on the ground that it is not supported by a head of Commonwealth power?

Answer: No.

Question 2: If the answer to Question 1 is "no", does the operation of the *Home Affairs Act 2023* (Cth) result in the acquisition of property from the plaintiff to which s 51(xxxi) of the *Constitution* applies?

Answer: Yes.

Question 3: If the answer to Question 2 is "yes", is the defendant liable to pay the plaintiff a reasonable amount of compensation pursuant to s 6(1) of the *Home Affairs Act 2023* (Cth)?

Answer: Yes.

Question 4: Who should pay the costs of the special case?

Answer: The defendant.

52 GORDON AND STEWARD JJ. We agree with the answers given by Gageler CJ, Gleeson, Jagot and Beech-Jones JJ to the questions of law stated by the parties for the opinion of the Full Court. We write separately to explain why we join in those answers.

53 The provisions of the lease ("the Lease") from the Commonwealth to the Government of the Russian Federation of land in the Australian Capital Territory ("the Land"), being an internal territory of the Commonwealth ("the Territory"),[71] as well as the terms and legislative history of the *Home Affairs Act 2023* (Cth) ("the Act") and the parties' agreed facts, are set out in the reasons of Gageler CJ, Gleeson, Jagot and Beech-Jones JJ,[72] which we gratefully adopt.

54 There are two issues raised by the questions of law stated in the special case: (1) is the Act supported by a head of power under the *Constitution*; and (2) if so, is just terms compensation required by s 6(1) of the Act? The answer to both questions is "yes".

Act supported by s 122 of the *Constitution*

55 The task of characterising whether the Act is supported by a head of Commonwealth legislative power involves examining the legal and practical operation of the Act and assessing whether there is a sufficient connection between that operation and the relevant head of power.[73]

56 Section 122 of the *Constitution* confers on the Commonwealth Parliament a "complete power to make laws for the peace, order and good government of [a] territory – an expression condensed in s 122 to 'for the government of the Territory'".[74] It is "as large and universal a power of legislation as can be

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71 Section 122 of the *Constitution* applies in relation to an internal territory, being one surrendered by a State to and accepted by the Commonwealth under s 111 of the *Constitution* so as to become "subject to the exclusive jurisdiction of the Commonwealth". As to the Territory, see *Seat of Government Acceptance Act 1909* (Cth).

72 Reasons of Gageler CJ, Gleeson, Jagot and Beech-Jones JJ at [4]-[18].

73 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16]; *Spence v Queensland* (2019) 268 CLR 355 at 404-409 [57]-[68] and the authorities cited; see also 456-457 [197]-[198].

74 *Spratt v Hermes* (1965) 114 CLR 226 at 242; *Bennett v The Commonwealth* (2007) 231 CLR 91 at 110-111 [43]. See also *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 271.

granted".[75] A law will be supported by s 122 where there is "a sufficient nexus or connexion between the law and the Territory".[76] Like any other head of power, s 122 should be construed "with all the generality which the words used admit".[77] The territories power under s 122 includes the power to enact a law that provides for the "direct administration" of a territory.[78] It also includes a power to regulate the ownership and occupancy of territory land[79] and the carrying out of operations on such land.[80]

57 The Act is supported by the territories power. The Act terminates the Lease in respect of the Land, which is located in the Territory. The Act directly administers the Territory by regulating the occupancy of land in the Territory. There is therefore a direct connection between the subject matter of the Act and the Territory. It is a law "for the government of" the Territory. Given that conclusion, it is unnecessary to consider the Commonwealth's alternative argument that the Act is supported by the external affairs power in s 51(xxix) of the *Constitution*.

58 Section 51(xxxi) of the *Constitution* gives the Commonwealth Parliament power to make laws with respect to "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws". It serves a "double purpose": it is both a source of legislative power and a guarantee of property rights.[81] Section 51(xxxi) confers a power and,

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75 *Spratt* (1965) 114 CLR 226 at 242.

76 *Berwick Ltd v Gray* (1976) 133 CLR 603 at 607-608, cited by *The Commonwealth v Yunupingu* (2025) 99 ALJR 519 at 532 [21]; 421 ALR 604 at 611-612; see also (2025) 99 ALJR 519 at 564 [179]; 421 ALR 604 at 653.

77 *Grain Pool* (2000) 202 CLR 479 at 492 [16], cited by *Yunupingu* (2025) 99 ALJR 519 at 536 [42]; 421 ALR 604 at 617; see also (2025) 99 ALJR 519 at 564 [179]; 421 ALR 604 at 653.

78 *Berwick* (1976) 133 CLR 603 at 607, cited by *Yunupingu* (2025) 99 ALJR 519 at 532 [22]; 421 ALR 604 at 612; see also (2025) 99 ALJR 519 at 564 [179]; 421 ALR 604 at 653.

79 *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201.

80 *Northern Land Council v The Commonwealth* (1986) 161 CLR 1 at 6.

81 *Bank of NSW v The Commonwealth* ("the *Bank Nationalisation Case*") (1948) 76 CLR 1 at 349; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 370-371; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at

at the same time, "abstracts", in the sense of removes, that power from the Commonwealth's other heads of power.[82] That is, the other powers conferred by s 51 of the *Constitution*, as well as the power conferred by s 122,[83] do not extend to making a law with respect to the acquisition of property otherwise than on just terms.

59 That a law may be characterised as a law with respect to the acquisition of property does not preclude it from being characterised as a law that is also supported by s 122 of the *Constitution*. That is so for three reasons. First, many laws made by the Parliament of the Commonwealth can be and are supported by several heads of power.[84] Second, if a law supported by s 122 is a law with respect to the acquisition of property, then the law must satisfy the safeguard provided by s 51(xxxi), being the provision of just terms.[85] Third, if s 51(xxxi) "abstracted" the power to make laws with respect to the acquisition of property on just terms from s 122, a real question would arise as to whether the Commonwealth Parliament could pass a law conferring power on a territorial legislature to legislate with respect to the acquisition of property on just terms, where s 51 does not itself confer a power to enable a territorial parliament to make laws with respect to various subject matters.[86] The result is that s 51(xxxi) limits the power conferred

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424-425; *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 145; *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 254; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 197 [134]; *Cunningham v The Commonwealth* (2016) 259 CLR 536 at 615 [270].

82 *Yunupingu* (2025) 99 ALJR 519 at 530 [15], 553 [127]; 421 ALR 604 at 610, 640 and the authorities cited.

83 *Yunupingu* (2025) 99 ALJR 519 at 536 [44], 569 [202], 586 [268]; 421 ALR 604 at 617, 659, 679.

84 *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7, 13; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 387 [187].

85 *Schmidt* (1961) 105 CLR 361 at 371-372; *Wurridjal* (2009) 237 CLR 309 at 387 [187].

86 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 542, cf 593-594; *Wurridjal* (2009) 237 CLR 309 at 387 [186]-[187]; *Yunupingu* (2025) 99 ALJR 519 at 585-586 [266]-[268]; 421 ALR 604 at 678-679. See also *Capital Duplicators* (1992) 177 CLR 248 at 269.

by s 122 in the sense that it operates as a guarantee of just terms for laws made under s 122.[87]

Commonwealth required to pay just terms compensation in accordance with s 6(1) of the Act

60 Section 6(1) of the Act provides that, if the operation of the 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, the Commonwealth is liable to pay a reasonable amount of compensation to the person. Accordingly, it is necessary to determine whether the Act effects an acquisition of property to which s 51(xxxi) applies. As will be explained, s 51(xxxi) also supports the Act and, by reason of that fact, the Commonwealth is liable to pay compensation in accordance with s 6(1).

Act "acquires" property

61 A law properly characterised as a law for the "acquisition" of "property" from any State or person for any purpose in respect of which the Parliament has power to make laws must be authorised by s 51(xxxi) and, to be so authorised, it must be an acquisition on just terms.[88] The status of s 51(xxxi) as a "constitutional safeguard"[89] is significant. The provision is given a "liberal construction appropriate to such a constitutional provision",[90] by giving a liberal construction

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87 *Yunupingu* (2025) 99 ALJR 519 at 565-566 [182]-[186], 569 [202], 585-586 [267]-[268]; 421 ALR 604 at 654-655, 659, 678-679.

88 *Yunupingu* (2025) 99 ALJR 519 at 531 [16]-[17], 553 [127]; 421 ALR 604 at 610-611, 640.

89 *Tooth* (1979) 142 CLR 397 at 403. See also *Wurridjal* (2009) 237 CLR 309 at 385 [178]; *ICM* (2009) 240 CLR 140 at 169 [43]; *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 95 [263].

90 *Clunies-Ross* (1984) 155 CLR 193 at 202; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 184; *Newcrest* (1997) 190 CLR 513 at 595; *ICM* (2009) 240 CLR 140 at 169 [43], 213 [185]; *JT International* (2012) 250 CLR 1 at 33 [41].

to the concepts of "property"[91] and "acquisition"[92] in s 51(xxxi). Further, the court looks to the practical operation – the substance, rather than form – of the law.[93]

62 For there to be an "acquisition" within the meaning of s 51(xxxi), there must be the obtaining of at least "some identifiable benefit or advantage relating to the ownership or use of property".[94] The identifiable benefit or advantage relating to the ownership or use of property does not need to correspond precisely to what was taken.[95] The phrase "acquisition of property" is not to be confined by reference to traditional conveyancing principles.[96] On the other hand, s 51(xxxi) "is directed to 'acquisition' as distinct from deprivation".[97] As a result, "[t]he extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property".[98] There must be "an acquisition whereby

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91 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 276; *Mutual Pools* (1994) 179 CLR 155 at 172; *Smith v ANL Ltd* (2000) 204 CLR 493 at 533 [119]; *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 663 [21]; *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 230 [43]; *ICM* (2009) 240 CLR 140 at 213 [186].

92 *Mutual Pools* (1994) 179 CLR 155 at 184-185; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303; *ANL* (2000) 204 CLR 493 at 533 [119]; *Telstra* (2008) 234 CLR 210 at 230 [43]; *ICM* (2009) 240 CLR 140 at 179-180 [82], 213 [186].

93 *Tooth* (1979) 142 CLR 397 at 433; *Mutual Pools* (1994) 179 CLR 155 at 184, 219, 223; *Georgiadis* (1994) 179 CLR 297 at 320; *ICM* (2009) 240 CLR 140 at 169-170 [44]; *JT International* (2012) 250 CLR 1 at 67 [169]; *Yunupingu* (2025) 99 ALJR 519 at 554 [128]; 421 ALR 604 at 641.

94 *Mutual Pools* (1994) 179 CLR 155 at 185. See also *ICM* (2009) 240 CLR 140 at 179-180 [82]; *JT International* (2012) 250 CLR 1 at 63-64 [152]-[153], 69 [173], 77-78 [198].

95 *Georgiadis* (1994) 179 CLR 297 at 304-305. See also *Newcrest* (1997) 190 CLR 513 at 634.

96 *Mutual Pools* (1994) 179 CLR 155 at 185.

97 *Mutual Pools* (1994) 179 CLR 155 at 185.

98 *Mutual Pools* (1994) 179 CLR 155 at 185 and the authorities cited.

the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be".[99]

63 "Acquisition" includes "the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property".[100] It includes "[a] law of the Commonwealth requiring one person to grant a lease to another".[101] And it includes the taking possession of land by the Commonwealth.[102]

64 In this case, the legal estate in the Land was vested in the Commonwealth. On extinguishment of the Lease, the Russian Federation was deprived of its leasehold interest. But the relevant interest in property was not merely extinguished or reduced without any correlative acquisition. On the termination of the Lease, the Commonwealth acquired the right to exclusive possession of the Land unencumbered by the Lease. The Commonwealth therefore "acquired" property within the meaning of s 51(xxxi).

Act acquires property "for any purpose in respect of which the Parliament has power to make laws"

65 Section 51(xxxi) does not confer an unconfined power to acquire property. To be authorised by s 51(xxxi), the acquisition of property must be "for any purpose in respect of which the Parliament has power to make laws" – that is, one of the other heads of Commonwealth legislative power.

66 Both parties contended that the Act does not effect an acquisition of property "for any purpose in respect of which the Parliament has power to make laws". The basis for that contention was the agreed fact that the Commonwealth's purpose for terminating the Lease was not related to it having a need for or proposed use or application of the Land. The Russian Federation submitted that, as a result, the Act is not supported by s 51(xxxi) of the *Constitution*. The Commonwealth contended that, the Act not being a law within the meaning of s 51(xxxi), s 51(xxxi) does not abstract from the heads of power that the Commonwealth submitted do support the Act, so that just terms compensation is not required. As Hayne and Bell JJ observed in *JT International*

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99 *Tasmanian Dam Case* (1983) 158 CLR 1 at 145, quoted by *Tape Manufacturers* (1993) 176 CLR 480 at 499-500.

100 *Bank Nationalisation Case* (1948) 76 CLR 1 at 349.

101 *Tooth* (1979) 142 CLR 397 at 408; see also 444.

102 *Dalziel* (1944) 68 CLR 261 at 290.

SA v The Commonwealth, s 51(xxxi) "does not abstract any more widely or differently expressed power".[103]

67 In *Trade Practices Commission v Tooth & Co Ltd*, Mason J observed that the requirement that the acquisition be "for any purpose in respect of which the Parliament has power to make laws" simply reflects that "a law made with respect to the acquisition of property on just terms is also a law made with respect to some other head or heads of power".[104] Or, as Barwick CJ observed, "the very terms of s 51(xxxi) contemplate that a law with respect to acquisition of property will involve a purpose relevant to some other head of power".[105] Dawson and Toohey JJ in *Mutual Pools & Staff Pty Ltd v The Commonwealth* expressed it as a requirement that the acquisition be "for a purpose in respect of which the Parliament has power to make laws".[106] In this case, contrary to the agreed position of the parties, the Act does effect an acquisition of property "for any purpose in respect of which the Parliament has power to make laws", at least in respect of the Parliament's power under s 122 to make laws for the government of the Territory.

68 In *Clunies-Ross v The Commonwealth*, six judges observed, in obiter dicta,[107] that the question whether s 51(xxxi) "should be construed as including the power to acquire property not for a purpose related to any need for or desired use of the property but for the purpose of depriving the owner of it and thereby indirectly achieving some purpose in respect of which the Parliament has power to make laws" was "not without difficulty".[108] That argument arose in the context of construing a statutory power to acquire land "for a public purpose". Although it was unnecessary for their Honours to express any concluded view on the issue, they noted that earlier cases had suggested that s 51(xxxi) was "confined to

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103 (2012) 250 CLR 1 at 67 [167]. See also *Schmidt* (1961) 105 CLR 361 at 372.

104 (1979) 142 CLR 397 at 427.

105 *Tooth* (1979) 142 CLR 397 at 403.

106 (1994) 179 CLR 155 at 199.

107 (1984) 155 CLR 193 at 201.

108 (1984) 155 CLR 193 at 200.

the making of laws with respect to acquisition of property for some purpose related to *a need for or proposed use or application of the property to be acquired*".[109]

69 That narrow view of s 51(xxxi) should be rejected for three reasons.

70 First, there is no basis for the restriction in the text of s 51(xxxi). The paragraph refers to the "*acquisition* of property ... *for any purpose* in respect of which the Parliament has power to make laws" (emphasis added). The *acquisition* must be for the relevant purpose. However, there is no reference in s 51(xxxi) to the acquired property needing to be *used or applied* in a particular manner, let alone to the property being required to be used or applied *by the Commonwealth*. Given that any requirement for property to be used or applied (by the Commonwealth) is not securely based in the text of s 51(xxxi), imposing such a requirement would deny the status of s 51(xxxi) as a constitutional guarantee that should be liberally construed.[110] Moreover, to the extent that the narrow view relies on some distinction between the acquisition of property which is to be left unused in the *indirect* pursuit of some Commonwealth purpose, as compared to property that is to be used *directly* for some Commonwealth purpose, it prioritises form over substance.[111]

71 Second, there is some tension between the narrow view of s 51(xxxi) and the accepted proposition that a law may fall within the terms of s 51(xxxi) where property is acquired by a person *other than* the Commonwealth.[112] Where property is acquired by a person *other than* the Commonwealth, it would not then necessarily be used or applied *by the Commonwealth*. In *Tooth*, several judges cast doubt on the correctness of the narrow view of s 51(xxxi) expressed by Dixon CJ in the earlier cases.[113] Mason J observed that there was "nothing in the wide and general language" of s 51(xxxi) to support the view that the acquisition of property

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109 *Clunies-Ross* (1984) 155 CLR 193 at 200-201 (emphasis added), citing *Andrews v Howell* (1941) 65 CLR 255 at 281-282, *Schmidt* (1961) 105 CLR 361 at 372 and *Jones v The Commonwealth* (1963) 109 CLR 475 at 483. See also *W H Blakeley & Co Pty Ltd v The Commonwealth* (1953) 87 CLR 501 at 518-519.

110 *Clunies-Ross* (1984) 155 CLR 193 at 202; *Tape Manufacturers* (1993) 176 CLR 480 at 509; *Mutual Pools* (1994) 179 CLR 155 at 184.

111 cf *Tooth* (1979) 142 CLR 397 at 433; *Mutual Pools* (1994) 179 CLR 155 at 184, 219, 223.

112 *Tooth* (1979) 142 CLR 397 at 403, 407-408, 423, 426, 451-452. See also *Mutual Pools* (1994) 179 CLR 155 at 189, 199; *ICM* (2009) 240 CLR 140 at 169 [42], 196-197 [133].

113 See fn 109 above.

to which it refers "is limited to acquisition for the 'use and service of the Crown', a conception which is in itself by no means precise and certain in scope".[114] His Honour observed that, as a matter of policy, it would make "very little sense" to say that the Commonwealth can pass a law for the acquisition of property without giving just terms provided that the property is acquired by a person other than the Commonwealth.[115] The same point could be made about any distinction that depends on any particular use to which the Commonwealth proposes to put property which it has acquired. Gibbs J also doubted the correctness of Dixon CJ's view that "anything which lies outside the very general conception expressed by the phrase 'use and service of the Crown'" falls outside of s 51(xxxi).[116] Stephen J concluded that it seemed "clear" that s 51(xxxi) extended "some distance beyond" the "acquisition of property by the Commonwealth *for use by it*".[117]

72 In *Mutual Pools*, Dawson and Toohey JJ acknowledged the tension between Dixon CJ's narrow view and the Court's acceptance that s 51(xxxi) captures acquisitions of property by persons other than the Commonwealth. Their Honours accepted that the phrase "for any purpose" does "appear primarily to refer to the acquisition of real or personal property which itself is intended to be used by the government in administering laws made by the Parliament in the exercise of its legislative power".[118] However, their Honours then observed that Dixon CJ's view cannot be taken too far since it is now settled that s 51(xxxi) applies where property is acquired by a person other than the Commonwealth.[119]

73 Third, as has been explained, the identifiable benefit relating to the ownership or use of property which is taken from one person need not correspond precisely with that which is conferred on another,[120] and the interest which is acquired must only be "an identifiable and measurable advantage of a proprietary nature".[121] In *Georgiadis v Australian and Overseas Telecommunications Corporation*, such an advantage was gained as a result of an Act that deprived

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114 *Tooth* (1979) 142 CLR 397 at 426.

115 *Tooth* (1979) 142 CLR 397 at 426.

116 *Tooth* (1979) 142 CLR 397 at 408.

117 *Tooth* (1979) 142 CLR 397 at 423-424 (emphasis added).

118 *Mutual Pools* (1994) 179 CLR 155 at 198.

119 *Mutual Pools* (1994) 179 CLR 155 at 199.

120 *Georgiadis* (1994) 179 CLR 297 at 304-305; *Newcrest* (1997) 190 CLR 513 at 634.

121 *JT International* (2012) 250 CLR 1 at 57 [131].

the plaintiff of a right to bring a common law cause of action.[122] It is not evident how such an interest might be said to be "used" or "applied" within the ordinary meaning of those words.

Would the provision of just terms be incongruous?

74 The circumstances in which a law properly characterised as for the acquisition of property within the meaning of s 51(xxxi) will nonetheless not be subject to s 51(xxxi) are limited. Section 51(xxxi) will not apply to laws in respect of which "just terms" is an "inconsistent or incongruous" notion.[123] To fall within the scope of this exception, acquisition without just terms must be a "necessary or characteristic feature" of the means which the law selects to achieve an objective which is within power.[124] Examples of such laws include laws levying taxes,[125] imposing fines and exacting penalties and forfeitures,[126] and seizing the property of enemy aliens as part of a scheme of reparations.[127] In such cases, the "just terms" requirement does not apply because to characterise these exactions as an acquisition of property would be "incompatible with the very nature of

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122 (1994) 179 CLR 297 at 305.

123 *Mutual Pools* (1994) 179 CLR 155 at 187; *Lawler* (1994) 179 CLR 270 at 285; *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 124 [56]; *ICM* (2009) 240 CLR 140 at 214 [188]; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 436 [77]. See also *JT International* (2012) 250 CLR 1 at 122 [335]; *Yunupingu* (2025) 99 ALJR 519 at 566 [189]; 421 ALR 604 at 655; *G Global 120E T2 Pty Ltd v Commissioner of State Revenue* [2025] HCA 39 at [105].

124 *Mutual Pools* (1994) 179 CLR 155 at 179-181. See also *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 180 [98]; *Wurridjal* (2009) 237 CLR 309 at 439 [361]; *Yunupingu* (2025) 99 ALJR 519 at 566-567 [189]; 421 ALR 604 at 655-656; *G Global* [2025] HCA 39 at [107].

125 *Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 263; *Federal Commissioner of Taxation v Barnes* (1975) 133 CLR 483 at 494-495; *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 638-639; *Tape Manufacturers* (1993) 176 CLR 480 at 508-509; *G Global* [2025] HCA 39 at [107]-[108].

126 *R v Smithers; Ex parte McMillan* (1982) 152 CLR 477 at 487-488; *Lawler* (1994) 179 CLR 270 at 285; *Emmerson* (2014) 253 CLR 393 at 436 [77]. See also *Mutual Pools* (1994) 179 CLR 155 at 178; *Theophanous* (2006) 225 CLR 101 at 124-125 [56], 126 [60]; *JT International* (2012) 250 CLR 1 at 122 [335].

127 *Schmidt* (1961) 105 CLR 361 at 373, 377.

the exaction".[128] In relation to the exaction of a tax, for example, the relationship between s 51(ii) (the taxation power) and s 51(xxxi) "necessarily involves antinomy between" the concepts of taxation and acquisition of property.[129] Of its nature, "'taxation' presupposes the absence of the kind of direct quid pro quo" involved in just terms compensation.[130]

75 Where the law is said to be with respect to forfeiture, the question is "whether the statutory scheme can be properly characterised as a law with respect to forfeiture, that is, a law which exacts or imposes a penalty or sanction for breach of provisions which prescribe a rule of conduct".[131] If it can be so characterised, it will not be a law within the meaning of s 51(xxxi) because to place it within that category would "weaken, if not destroy, the normative effect of the prescription of the rule of conduct".[132] The Act, properly construed, is not of that character. Its operation does not hinge, for example, on any breach of the terms of the Lease or some other legal rule or standard which the Russian Federation is said to have offended.

76 The Commonwealth's contention that it would be incongruous to require a foreign state to be compensated for actions taken to address the risk of that foreign state interfering with Australia's democratic institutions must be rejected. The absence of just terms is not a necessary or characteristic feature of the means adopted by the Act to achieve its objective, being the termination of the Lease in order to return exclusive possession of the Land to the Commonwealth and thereby address any security risk posed by the presence of a Russian embassy on the Land. Put another way, the termination of the Lease would be no less effective at achieving that purpose if just terms compensation were provided.

77 It is unnecessary to address the Commonwealth's submission that there may be a broader principled basis for incongruity, namely that it would be incongruous for the Commonwealth to be required to pay compensation to anyone whose property is taken in order to prevent it from being used in a way that is harmful to

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128 *Theophanous* (2006) 225 CLR 101 at 126 [60]. See also *Emmerson* (2014) 253 CLR 393 at 438 [84].

129 *Tape Manufacturers* (1993) 176 CLR 480 at 508; see also 509-510.

130 *Tape Manufacturers* (1993) 176 CLR 480 at 509.

131 *Emmerson* (2014) 253 CLR 393 at 437-438 [80].

132 *Lawler* (1994) 179 CLR 270 at 278.

others.[133] As the Commonwealth submitted, that more general proposition does not require determination in this case.

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133 cf *Tooth* (1979) 142 CLR 397 at 405, 414-416, 427-428.

EDELMAN J.

Introduction

78 This special case concerns the relationship between the acquisition power in s 51(xxxi) and the rest of the *Constitution*. Section 51(xxxi), read with the chapeau to s 51, provides as follows:

> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ...
>
> (xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws".

79 On 24 December 2008, the Commonwealth of Australia granted to the Government of the Russian Federation ("the Russian Federation") a lease of land near Parliament House in Canberra ("the Lease"). The Lease was for a term of 99 years. It was given "only for any diplomatic[,] consular or official purpose of the Government of the Russian Federation or for the purpose of an official residence for any accredited agent of that Government or for all or any number of those purposes". The Russian Federation agreed to pay a once only payment of $2,750,000 as a land premium.

80 On 15 June 2023, the Commonwealth Parliament passed the *Home Affairs Act 2023* (Cth). The *Home Affairs Act* purported to terminate the Lease. Section 6(1) of the *Home Affairs Act* provides that "[i]f the operation of this Act would result in an acquisition of property to which paragraph 51(xxxi) of the Constitution applies from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person". Section 4 of the *Home Affairs Act* defines "acquisition of property" and "just terms" as having "the same meaning as in paragraph 51(xxxi) of the Constitution".

81 The Russian Federation challenged the validity of the *Home Affairs Act* on the ground that it was not supported by a head of Commonwealth power. The consequence of that challenge (if successful) would be that the Lease had not been validly terminated by the *Home Affairs Act*. Alternatively, the Russian Federation asserted that if any head of power supported the *Home Affairs Act*, then the Commonwealth was required to pay compensation because the *Home Affairs Act* had resulted in an acquisition of property of the Russian Federation within s 51(xxxi) of the *Constitution*. Hence, the Russian Federation submitted that compensation was payable to it under s 6 of the *Home Affairs Act*.

82 The Commonwealth submitted that the *Home Affairs Act* was supported by heads of power including s 122 of the *Constitution*. The Commonwealth also

submitted that the *Home Affairs Act* did not involve any acquisition of property within s 51(xxxi) of the *Constitution* because the termination of the Lease was not related to a need for, or proposed use or application of, the land which was the subject of the Lease, or because a requirement to provide just terms would be incongruous.

83 The special case stated by the parties for determination by this Court thus raised three principal issues:

(i) Is the *Home Affairs Act* supported by a head of power in the *Constitution*, including the primary focus of the Commonwealth's submissions which was the territories head of power in s 122?

(ii) Is the *Home Affairs Act* also supported by the head of power to acquire property on just terms in s 51(xxxi) of the *Constitution*?

(iii) Would it be incongruous for just terms to be required under s 51(xxxi) for any acquisition of the Lease by the *Home Affairs Act*?

84 There is an issue that is anterior to these three principal issues. The anterior issue concerns the relationship between s 51(xxxi) and other heads of power in the *Constitution*. Decisions of this Court have suggested that the power related to an acquisition of property is impliedly removed from—"carved out" or "abstracted" from—every head of legislative power in s 51 of the *Constitution* other than the express acquisition power in s 51(xxxi). In other words, the scope of all powers in s 51 is cut down to exclude any exercise of power related to an acquisition of property. More recently that view has been extended to cut down all powers in the *Constitution* other than s 51(xxxi), leaving the entirety of Commonwealth legislative power related to an acquisition of property in the *Constitution* reserved to s 51(xxxi). On this view, as senior counsel for the Russian Federation put it, s 51(xxxi) is a "shag on a rock".

85 At one point in oral submissions the Russian Federation appeared to challenge this view. It was right to do so. The better view is that no constitutional power related to acquisition of property, including authorising or supporting the acquisition of property, is cut down by s 51(xxxi). Instead, conflict is resolved in each case between: (i) the s 51(xxxi) express power related to acquisition of property on just terms; and (ii) another constitutional power that relates to acquisition of property without any express condition of "just terms". That conflict

will usually be resolved by requiring the exercise of the other constitutional power to be subject to the "just terms" condition unless that condition is incongruent with the purpose of the legislation enacted under that power.

86 The consequence of this better answer to the anterior issue is that the three principal issues in this case can be resolved in the following simple manner. First, since s 122 extends to laws for the termination of a lease of land in a territory, the *Home Affairs Act* is supported by that head of power. Secondly, the *Home Affairs Act* is also supported by the express head of power in s 51(xxxi): the reference in s 51(xxxi) to "any purpose in respect of which the Parliament has power to make laws" does not require the existence of any specific purpose of the Commonwealth Parliament. The reference to "purpose" is not an invitation to examine the ends of Parliament other than to ensure that the legislation falls within a head of power. Hence, the scope of power in s 122 means that there is no requirement for Parliament to have a particular need for, or proposed use or application of, the land which is the subject of the leasehold property right of exclusive possession. Thirdly, in the instance of the *Home Affairs Act* the conflict between the application of the general territories power to acquire property on any terms and the application of the specific and express power in s 51(xxxi) to acquire property on just terms requires the territories power to be subject to the condition of just terms. There is no incongruity in imposing that just terms condition upon s 122 in the enactment of the *Home Affairs Act*.

The anterior issue: Does s 51(xxxi) cut down other Commonwealth heads of power?

87 In the application of heads of power in s 51 of the *Constitution* other than s 51(xxxi), there are numerous instances where those other heads of power might apply to the acquisition of property: "under the power to legislate with respect to lighthouses and bankruptcy, there is no doubt that the Parliament would have been entitled to legislate for the purpose of acquiring land for the erection of lighthouses and bankruptcy courts".[134] None of those acquisitions would require just terms. By contrast, the power in s 51(xxxi) requires that just terms be provided for the acquisition of property for any purpose in respect of which the Commonwealth Parliament has power to make laws. There is therefore potential conflict between the application of other heads of power to the acquisition of property and the application of the specific head of power to the acquisition of property.

88 The potential conflict is resolved by a rule that, unless it is "incongruous" to require a condition of just terms, other heads of power in s 51 are subject to the

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134 *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth* (1943) 67 CLR 314 at 317.

condition of just terms in s 51(xxxi). As Dixon CJ said in *Attorney-General (Cth) v Schmidt*:[135]

> "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".

89 There are two routes by which other heads of power in s 51 of the *Constitution* might be made subject to the condition of just terms in s 51(xxxi). The first route is to cut down any other head of power to remove that aspect of the power related to the acquisition of property, reserving such power only for s 51(xxxi). The second route is simpler, historically justified, does less violence to the application of constitutional heads of power, and avoids anomalies and absurdities. It is merely to ask whether any acquisition authorised by the other head of power should be subject to the condition of just terms. No head of power is cut down in cases where the just terms condition is to be applied to legislative power under any other head of power in s 51. Rather, the condition of just terms is imposed on any exercise of power related to an acquisition falling within a head of power under s 51: any other head of power is not cut down but is instead made subject to the "safeguard, restriction or qualification, to legislate on a particular subject".

An early mistake in s 51(xxxi) authority

90 The first route became the dominant approach in this Court. The first route was assumed to be correct, "without deciding", by Dixon J in *Andrews v Howell*.[136] An early application of it was by Latham CJ who thought that "[w]hen par xxxi is thus construed in relation to a particular purpose it must ... be regarded as limiting the legislative power with respect to the acquisition of property for that purpose". Hence, in relation to laws that might otherwise have fallen within the defence power in s 51(vi), his Honour said that "the only power of the Commonwealth Parliament to legislate with respect to the acquisition of property for defence purposes is that conferred by s 51(xxxi)".[137]

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135 (1961) 105 CLR 361 at 371-372.

136 (1941) 65 CLR 255 at 282.

137 *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth* (1943) 67 CLR 314 at 318.

91 The first route was also taken by this Court in *W H Blakeley & Co Pty Ltd v The Commonwealth*,[138] apparently on the mistaken assumption that the first route was the only route by which the just terms condition could be imposed on acquisitions of property under the incidental aspect of the application of other heads of power in s 51: "the acquisition of property could not be left to the incidental powers because it was desired to limit the power of acquisition by imposing a condition that it must be exercised upon just terms". The first route was again taken by Aickin J in *Trade Practices Commission v Tooth & Co Ltd*.[139]

92 It is possible that at one stage Dixon J contemplated the possibility of the second, and simpler, route by which no power would be cut down in its application to acquisitions of property. Rather, unless it was incongruous to require a condition of just terms, powers other than s 51(xxxi) would be made subject to the just terms condition contained in s 51(xxxi). Thus, in *Bank of New South Wales v The Commonwealth*,[140] Dixon J said that "[i]n requiring just terms s 51(xxxi) fetters the legislative power by forbidding laws with respect to acquisition *on any terms that are not just*". But more than a decade later, Dixon CJ described his reasoning in that case as "introductory or descriptive generally of the nature of the question" and added that "[t]he decisions of this Court show" that paragraphs of s 51, other than s 51(xxxi), "should be read as depending for the acquisition of property ... upon the legislative power conferred by par (xxxi) subject, as it is, to the condition that the acquisition must be on just terms".[141] It has thus become generally accepted that s 51(xxxi) cuts down other heads of power in s 51, sometimes described as "carv[ing] out"[142] or "abstracting"[143] the power to acquire property from those other heads of power.

93 While this general acceptance of the first route was confined to s 51 there was no damage to constitutional law. There is no practical difference whether a power related to an acquisition of property as an incident of any s 51 head of power is: (i) relocated to s 51(xxxi); or (ii) made subject to the condition of just terms in

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138 (1953) 87 CLR 501 at 520-521.

139 (1979) 142 CLR 397 at 445-448.

140 (1948) 76 CLR 1 at 350 (emphasis added).

141 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 370-371.

142 See *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 445 [107]; *The Commonwealth v Yunupingu* (2025) 99 ALJR 519 at 531 [17]; 421 ALR 604 at 611.

143 See *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 445; *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 124 [55], quoting *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 283; *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 67 [167].

s 51(xxxi). But once the theory of "carving out" or "abstracting" is extended beyond s 51 then problems can arise and confusion can ensue. This is such a case.

94 In an attempt to bring clarity to this difficult area of metaphor, at one point in oral submissions senior counsel for the Russian Federation challenged the metaphor of "carved out", saying instead that s 51(xxxi) is "superimposed on every exercise of legislative power which purports to effect an acquisition of property". A superimposition of the s 51(xxxi) condition of just terms upon other heads of power is the simpler second route to dealing with a conflict in powers. That second route is consistent with the proper interpretation of express powers. It is consistent with history. And, when applied beyond s 51 heads of power, as this case requires, the second route also avoids anomalies and absurdities.

The second route involves the proper interpretation of express powers

95 During the 1898 Convention, Mr Isaacs expressed the view that for the purposes of express powers "for everything necessary and incidental to them [the Commonwealth Parliament] will be unlimited in its acquisition of means to carry out those powers".[144] It is now well established that the powers within s 51 are to be interpreted "with all the generality which the words used admit".[145] This principle of interpretation is not a cry for literalism at the expense of understanding the purpose and context of the words of the express powers in s 51. Nor does it deny that, however generally the words are expressed, there are limits to all powers. But it does deny an interpretation that unnecessarily cuts down some of the applications of express powers, including their incidental aspects, as well as the express incidental power in s 51(xxxix).

96 This principle of interpretation is consistent only with the second route to reconciling s 51(xxxi) with the application of other heads of power in s 51 to acquisitions of property. That second route limits the other powers in s 51 only to the extent necessary to avoid conflict with the just terms condition in s 51(xxxi). Hence, there is no tension with those instances where other heads of power in s 51 can incidentally permit the acquisition of property without just terms. In these exceptional instances, the conflict between: (i) the incidental aspect of any power that permits the acquisition of property without any express condition, and (ii) the specific power to acquire property on the condition of just terms, is resolved without imposing a condition upon the general power. For instance, s 51(xxxi)

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144 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 28 January 1898 at 260.

145 *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225, quoted in *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16].

"does not affect acquisition by way of forfeiture or penalty or for the purpose of provisional tax, [or] by the condemnation of prize".[146]

97 In *Re Director of Public Prosecutions; Ex parte Lawler*,[147] Deane and Gaudron JJ said that this was because s 51(xxxi) "applies only to acquisitions of a kind that permit of just terms" and that it is "incongruous" or "inconsistent" with a requirement of just terms for s 51(xxxi) to apply to laws such as those imposing or authorising fines, penalties, forfeitures, seizure of the property of enemy aliens, or the condemnation of prize. In other words, although these laws would otherwise be acquisitions of property, such laws had long existed before Federation without any requirement of just terms and "[i]t cannot therefore have been the purpose of s 51(xxxi) to apply to such exactions an obligation to provide 'just terms'".[148]

The second route is a correct application of history

98 In *Andrews v Howell*,[149] Dixon J said that "[t]he source of [s] 51(xxxi) is to be found in the fifth amendment of the Constitution of the United States, which qualifies the power of the United States to expropriate property by requiring that it should be done on payment of fair compensation". The Takings Clause of the Fifth Amendment prohibits private property being "taken for public use, without just compensation". Although there are numerous differences between the Takings Clause and s 51(xxxi) both in expression and in the development of authority, Dixon J was right to recognise one commonality in that the Takings Clause, in its operation upon federal heads of power, restricts or "qualifies" the existing powers of Congress to take property; it does not "abstract" from those powers: "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end."[150]

99 Prior to Australian Federation it was well established that the Takings Clause of the Fifth Amendment to the *Constitution of the United States*, by itself, was "intended solely as a limitation on the exercise of power by the government of the United States, and [was] not applicable to the legislation of the states".[151]

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146 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372-373 (citations omitted).

147 (1994) 179 CLR 270 at 285.

148 *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 126 [60].

149 (1941) 65 CLR 255 at 282.

150 *Berman v Parker* (1954) 348 US 26 at 33.

151 *Barron v The Mayor and City Council of Baltimore* (1833) 32 US 243 at 250-251.

The power to take property was "implied from the express grants" of power in the *Constitution of the United States* with implied "recognition" by the Takings Clause of that "right belonging to a sovereignty".[152] In other words, the Fifth Amendment confirmed the natural sovereign power that otherwise existed in other express heads of power and extended that sovereign power insofar as it was necessary to do so to ensure that there was no restriction upon the acquisition of property for any purpose in respect of which Congress had the power to pass laws.

100 The same view was taken at the 1898 Melbourne Convention when the progenitor clause to s 51(xxxi) was proposed for the *Constitution.* That clause was first raised on 25 January 1898 by Mr Barton. When Mr Barton proposed the clause, Mr Isaacs queried whether the clause was necessary since there was an express conferral of power upon the Commonwealth Parliament to make laws that were incidental to the exercise of any power. Mr Isaacs repeatedly expressed the view that, like in the United States, the power of eminent domain was an inherent and implied power.[153] Mr Barton doubted whether the express or implied incidental aspects of express power were sufficiently clear to authorise the acquisition of property.[154] Similar doubts were expressed by Dr Quick and Mr Glynn.[155] The purpose of the clause that became s 51(xxxi) was not to subtract or abstract any of the content of any express head of power. Rather it was to remove doubt and to ensure that just terms were provided for any acquisition. As Quick and Garran observed in 1901, "all possible doubt as to the right of the Commonwealth to acquire property for federal purposes has been removed by this sub-section".[156]

101 Hence, although it was accepted that s 51(xxxi) imposed a condition of just terms upon any Commonwealth legislation to acquire property, nobody at the 1898 Convention thought that s 51(xxxi) had subtracted or abstracted from other heads of power to acquire property. Indeed, Mr Barton effectively denied such a proposition when he introduced the clause. Mr Barton referred to the express provisions which an acquisition power would complement, including the

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152 *Kohl v United States* (1876) 91 US 367 at 372, 373-374.

153 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 25 January 1898 at 152, 154; 28 January 1898 at 260.

154 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 25 January 1898 at 151, referring to what is now s 51(xxxix).

155 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 25 January 1898 at 152.

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

progenitor provision to s 52(i) (which includes a power to make laws for "all places acquired by the Commonwealth for public purposes").[157]

Extending the mistake beyond s 51 creates anomalies and absurdities

102 Although it was an error for this Court to adopt the first route to reconciling the conflict between the incidental aspect of general powers in s 51 that permit the acquisition of property and the specific power to acquire property on just terms in s 51(xxxi), there was no practical difference between the first and second routes. On either route, a head of power within s 51 supplies the authority for legislation related to the acquisition of property. On either route, that power is subject to the condition of just terms. And on either route, there are instances where a law related to the acquisition of property, but incongruent with a requirement of just terms, can be made under the incidental aspect of general powers without just terms. Whichever route was preferred, no authority would need to be re-opened. Whichever route was preferred, no authority would need to be reconsidered.

103 But as soon as the different routes are sought to be applied beyond s 51, differences can arise. For instance, it is now established that an exercise of power under s 96 of the *Constitution* is subject to the requirement of just terms including for any law related to an acquisition of property.[158] Financial assistance to the States cannot be provided on terms and conditions that would permit the States to acquire property without just terms. That result is achieved by imposing the condition of just terms upon the exercise of power under s 96. Section 96 is not cut down, with the power of financial assistance carved out, or abstracted, from s 96, if the financial assistance is related to an acquisition.

104 Another example concerns the combined operation of s 52(i) and s 111. The former is a power to make laws for "the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes". The latter provides a power for a State to "surrender any part of the State to the Commonwealth" and for the Commonwealth to accept such a surrender with the effect that "such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth". A progenitor clause to these provisions was a power to make laws for "[t]he government of any territory which, by the surrender of any state or states, and the acceptance of the Commonwealth, becomes the seat of government of the Commonwealth, and the exercise of like authority over all places acquired by the Commonwealth, with the consent of the state in which such

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157 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 25 January 1898 at 151.

158 *Hornsby Shire Council v The Commonwealth* (2023) 276 CLR 645 at 663 [13].

places are situate, for the public purposes of the Commonwealth".[159] It would be an absurdity for s 51(xxxi) to cut down, abstract, or carve out an acquisition from the powers of the Commonwealth to acquire property surrendered under s 111 and to make laws in relation to that property under s 52(i). As will be seen below, the same ought to be true of s 122 which must be read with s 111.[160]

The first issue: Is the *Home Affairs Act* supported by the head of power in s 122 of the *Constitution*?

105 As explained above, unlike the lack of practical effect in the route chosen to reconcile conflict between the specific terms of s 51(xxxi) and general powers that incidentally permit acquisitions of property, there can be significant practical effects of the route chosen to reconcile conflict between heads of power outside s 51 and s 51(xxxi). The relevant head of power outside s 51 in this case is s 122. The head of power in s 122 is as follows:

> "The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit."

106 In *The Commonwealth v Yunupingu*,[161] this Court was unanimous in concluding that a Commonwealth law made under s 122 could not acquire property without just terms. Four members of this Court preferred the first route[162] but no submissions were made as to which of the two routes discussed above should be preferred. Nor were any submissions made to that effect in this case, although the issue was raised.

107 One significant practical difference between the two routes may be that if a law made under s 122 were cut down by s 51(xxxi) so that it could not apply to acquisitions of property, then it is doubtful whether there would be a source of power for territorial self-government provisions which empower the making of

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159 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898 at 1874.

160 *Svikart v Stewart* (1994) 181 CLR 548 at 563.

161 (2025) 99 ALJR 519; 421 ALR 604.

162 *The Commonwealth v Yunupingu* (2025) 99 ALJR 519 at 531 [17]; 421 ALR 604 at 610-611.

laws to acquire property on just terms.[163] The gap would arise because if s 122 did not extend to acquisitions of property on just terms then s 122 could not be a source of power for self-government provisions for the acquisition of property on just terms. And it is also hard to see how s 51(xxxi) could confer power to delegate the making of legislation by a territorial legislature for the acquisition of property on just terms.[164]

108 In *P J Magennis Pty Ltd v The Commonwealth*,[165] it was argued that there was "an acquisition 'with respect to' which the Commonwealth legislates when it passes a law authorizing the execution of [an] agreement containing the State's undertaking" to exercise its powers of acquisition. Dixon J described Commonwealth legislation to this effect as a law that "could hardly be more remote from the real purpose of s 51(xxxi)". That real purpose was seen to be for the Commonwealth to acquire property, or to provide for the acquisition of property, on just terms.[166] In other words, there was seen to be a world of difference between, on the one hand, a law that acquires property or relates to the acquisition of property and, on the other hand, a law that provides for a State to undertake to acquire property. Even more distant from that view of s 51(xxxi) would be a law that provides for a self-governing territory to have the *power* to acquire property.

109 In circumstances in which there may be real practical differences for heads of power outside s 51 in the choice of route to reconcile conflict between those heads of power and s 51(xxxi), it is necessary to conclude in this case that, for the reasons expressed in the discussion of the anterior issue above, the correct route is the second route, which does not cut down the power in s 122 but merely subjects its exercise to the same just terms condition as is contained in s 51(xxxi). As was said in *Clunies-Ross v The Commonwealth*[167] of legislation that involved the acquisition of property in a territory:

> "the power to acquire property for a public purpose ... is not conferred merely in pursuance of the legislative power contained in s 51(xxxi). It is also conferred in pursuance of s 122 of the Constitution in that, in relation

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163 *Northern Territory (Self-Government) Act 1978* (Cth), ss 6, 50; *Australian Capital Territory (Self-Government) Act 1988* (Cth), ss 22, 23(1)(a).

164 *The Commonwealth v Yunupingu* (2025) 99 ALJR 519 at 585-586 [266]-[268]; 421 ALR 604 at 678-679.

165 (1949) 80 CLR 382 at 411.

166 *P J Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 at 411.

167 (1984) 155 CLR 193 at 201.

to land in a Territory, the purpose for which the land may be acquired includes 'any purpose in relation to that Territory'."

110 For these reasons, the power in s 122 of the *Constitution* is not cut down by s 51(xxxi) so as to exclude any laws relating to an acquisition of property. Hence, the first issue in this case reduces to the denial by the Russian Federation that the location in the Australian Capital Territory of the land which was the subject of the Lease provides "a sufficient nexus or connection between the [*Home Affairs Act*] and the Commonwealth's territories power under [s] 122 of the *Constitution*".

111 The head of power in s 122 is "unlimited by reference to subject matter" and a "complete power to make laws for the peace, order and good government of the territory".[168] Section 122 extends to legislation to carry on operations on territory land.[169] The legislative acquisitions of property to which s 122 extends also include "a power to acquire land by agreement".[170] No more connection is required than a direct effect on the rights and powers of a person in relation to land in a territory.[171] The head of power in s 122 must extend to the termination of a lease of land in a territory in the terms of the *Home Affairs Act*. It is therefore unnecessary to consider the Commonwealth's contention that the *Home Affairs Act* is independently supported by s 51(xxix) of the *Constitution* as well.

The second issue: Does an acquisition in s 51(xxxi) for a "purpose in respect of which the Parliament has power to make laws" exclude acquisitions without any particular purpose?

112 Since s 122 is qualified by the condition in s 51(xxxi), requiring just terms for an acquisition of property, the second issue is directed to whether the *Home Affairs Act* is a law related to an acquisition of property within s 51(xxxi). Both the Russian Federation and the Commonwealth submitted that the *Home Affairs Act* was not a law related to an acquisition of property. The Russian Federation made this submission in the course of its claim that the *Home Affairs Act* lacked a head of power. The Commonwealth made this submission in the course of its claim that s 51(xxxi) (and hence the condition of just terms) did not apply to the *Home Affairs Act* because the *Home Affairs Act* was not an acquisition involving any need for, or proposed use or application of, the land which was the subject of the Lease.

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168 *Spratt v Hermes* (1965) 114 CLR 226 at 242. See also *Bennett v The Commonwealth* (2007) 231 CLR 91 at 110 [43].

169 *Northern Land Council v The Commonwealth* (1986) 161 CLR 1 at 6.

170 *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201.

171 See *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 157 [335]-[337].

None of these submissions should be accepted. Although s 51(xxxi) is a compound concept, the components of that concept have meaning. The submissions involve confusion about the concepts of "acquisition" and "property" in s 51(xxxi) and their application.

113 In legal parlance, the word "property" is used in numerous different, sometimes conflicting, ways. So too it is used in different ways in cases concerning s 51(xxxi).[172] Perhaps the most precise use of "property" is as a description of a legal relationship with a thing.[173] In this sense, property refers to the *rights* to a thing rather than the thing itself. The concept of property in s 51(xxxi) has been applied in this sense: rights to land[174] and rights to chattels.[175] More broadly, "property" (or sometimes "quasi-property"[176]) can be used to describe some personal rights (that is, rights against a person) such as a debt or other cause of action or chose in action (in the sense of a right exigible at common law[177]). The concept of property in s 51(xxxi) has also been applied in this sense.[178] More broadly still, the word "property" has been used also to describe value or financial

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172 *The Commonwealth v Yunupingu* (2025) 99 ALJR 519 at 594 [304]; 421 ALR 604 at 689-690.

173 *La Perouse Local Aboriginal Land Council v Quarry Street Pty Ltd* (2025) 99 ALJR 1285 at 1309 [99]; 424 ALR 391 at 417-418, quoting *Yanner v Eaton* (1999) 201 CLR 351 at 365-366 [17].

174 *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269; *P J Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382.

175 *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth* (1943) 67 CLR 314; *Minister of State for the Navy v Rae* (1945) 70 CLR 339; *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495.

176 See *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 572 [123], quoting *Attorney-General for NSW v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 at 294-295. See also *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 576-577 [134].

177 *Clayton v Bant* (2020) 272 CLR 1 at 26 [67].

178 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297; *Smith v ANL Ltd* (2000) 204 CLR 493. See also *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509; *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 245.

benefit generally, even if legal rights are strictly unaffected. So too in s 51(xxxi) has "property" been applied in this sense.[179]

114 In legal parlance, an acquisition usually requires a transfer of rights. The transferee "acquires" the right which is given up by the transferor. But, consistently with the broad concept of "property", an "acquisition" in s 51(xxxi) is not limited to a transfer of rights. The transfer might be of value generally, although not every reduction and corresponding increase in value will amount to an acquisition of property.[180] Hence, it can sometimes be sufficient for an acquisition to fall within s 51(xxxi) that a right has been extinguished and the Commonwealth has obtained a corresponding "direct benefit or financial gain",[181] which need not "correspond precisely with what was taken",[182] although it cannot be merely a benefit to the public generally rather than a "proprietary" benefit to the body politic of the Commonwealth.[183] Moreover, "a law might leach the economic value of a plaintiff's chose in action whilst conferring a financial benefit upon the defendant"; even if the plaintiff remains legally free to exercise the right, the law might be proscribed by s 51(xxxi).[184]

115 There was no acquisition of legal rights in this case. The Russian Federation lost its right of exclusive possession under the Lease. The Commonwealth's right of reversion meant that the Commonwealth's prior right to exclusive possession was re-enlivened. No right was transferred. But value was transferred. The Russian Federation lost the value of its leasehold estate in the land. The Commonwealth acquired the corresponding value of a right to exclusive possession. An analogy is

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179 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 290 where the acquisition concerned the temporary reduction in the value of Mr Dalziel's rights to land.

180 For instance, *Health Insurance Commission v Peverill* (1994) 179 CLR 226; *The Commonwealth v Yunupingu* (2025) 99 ALJR 519 at 594-595 [306]-[308]; 421 ALR 604 at 690-691.

181 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305; *Smith v ANL Ltd* (2000) 204 CLR 493 at 499 [3], 548-549 [173].

182 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305.

183 *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 34 [42], 61-64 [144]-[154], 70-73 [180]-[189]. See also *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 145-146, 181-182, 248.

184 *Smith v ANL Ltd* (2000) 204 CLR 493 at 504 [21]. See also *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1.

the corresponding value lost to a plaintiff and gained by the Commonwealth when a right to mine for minerals from land vested in the Commonwealth is extinguished.[185]

116 Once it is accepted that an acquisition of property, such as that which occurred in this case, can be the corresponding benefit to the value lost from extinguishment of a right, it makes little sense to require a particular purpose for something other than the acquired benefit. The submission that there must be a "need for, or proposed use or application of, the property that has been acquired" involves a confusion of concepts. The Commonwealth submitted that s 51(xxxi) would only apply in this case if the Commonwealth had "a need for, or proposed use or application of, the [l]and" which was the subject of the forfeited lease. But the "property" (or, more accurately, the object of the property rights) acquired was not the land that was the subject of the Lease. Nor was the leasehold of that land the subject of the acquisition. The acquisition was of the *value* of the right to exclusive possession obtained by the Commonwealth.

117 The Russian Federation and the Commonwealth relied upon a passage in the decision of six members of this Court in *Clunies-Ross*[186] where their Honours said, without "form[ing] or express[ing] any concluded view", that:

> "one can find in cases in this Court statements of high authority which would seem to be framed on the assumption that the legislative power conferred by par (xxxi) should be confined to the making of laws with respect to acquisition of property for some purpose related to a need for or proposed use or application of the property to be acquired".

118 In none of the cases and passages cited by their Honours in *Clunies-Ross*, did the author, Dixon J[187] or Dixon CJ,[188] express a concluded view that an acquisition of property under s 51(xxxi) required a need for, or proposed use or application of, the object of the property rights to be acquired. The closest to such a suggestion are the statements by Dixon J in the first of those cases that "it may be possible to maintain" that s 51(xxxi) did not apply to cases where the Commonwealth Executive did not desire to use the property acquired "for any

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185 See, eg, *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513; *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1.

186 (1984) 155 CLR 193 at 200-201.

187 *Andrews v Howell* (1941) 65 CLR 255 at 281-282.

188 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372; *Jones v The Commonwealth* (1963) 109 CLR 475 at 483.

governmental purpose"[189] and by Dixon CJ in the second of those cases that "[t]he expression 'for any purpose' is doubtless indefinite. But it refers to the use or application of the property in or towards carrying out or furthering a purpose comprised in some other legislative power."[190]

119 The suggestion in *Clunies-Ross* is also not established by the reasoning of this Court in *W H Blakeley & Co Pty Ltd v The Commonwealth*[191] upon which the Commonwealth also sought to rely. In one of the matters considered in that case, the plaintiff assumed that a "purpose in respect of which the Parliament has power to make laws" meant "any intended use which a valid law of the Commonwealth could authorise".[192] In addressing this argument, the Court held that: (i) "the word 'purpose' [in s 51(xxxi)] ... is referring to the object for which the land is acquired"; and (ii) "[t]hat object ... must be one falling within the Commonwealth's power to make laws". Hence, the compound expression in s 51(xxxi) "seems rather to demand that the acquisition must be relevant to one or more of the subjects of Federal legislative power than to insist on the necessity as a condition of the power of a specific intent in the Executive Government or other acquiring authority".[193] In other words, the relevance of the object for which the land is acquired is only to establish a connection with a head of power other than s 51(xxxi).

120 The Commonwealth also relied, by rough analogy, upon pre-Federation United States authorities that held that there was no taking of land for public purposes by the exercise of the police power in the regulation (including destruction) of the object of property rights.[194] But, in this respect, there is an important distinction between the terms of s 51(xxxi) of the *Constitution* and the terms of the Takings Clause of the Fifth Amendment to the *Constitution of the United States*. In s 51(xxxi) the "purpose" is simply the purpose of Parliament—that is, the object of the law (hence the purpose being one "in respect of which the Parliament has power to make laws"). By contrast, in the Takings Clause there is a requirement that the taking be "for public use", which has been held to be a public purpose[195] but not one for "regulation" provided that the regulation does not go

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189 *Andrews v Howell* (1941) 65 CLR 255 at 282.

190 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372.

191 (1953) 87 CLR 501.

192 *W H Blakeley & Co Pty Ltd v The Commonwealth* (1953) 87 CLR 501 at 506.

193 *W H Blakeley & Co Pty Ltd v The Commonwealth* (1953) 87 CLR 501 at 518-519.

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

195 See *Berman v Parker* (1954) 348 US 26.

"too far".[196] That distinction is one which has not been easy to apply.[197] Without any textual or contextual basis for it in s 51(xxxi), the distinction should not be introduced into Australian law other than as part of the outworking of the issue (which does not arise in this case) of whether there has been an acquisition of a "proprietary" benefit.

121 The *Home Affairs Act* thus fell within the terms of s 51(xxxi) and therefore, subject to any incongruity, required that, as an exercise of power under s 122, the acquisition of property be subject to the condition of just terms.

The third issue: Would it be incongruous for just terms to be required under s 51(xxxi) for any acquisition of the Lease by the *Home Affairs Act*?

122 The third and final issue concerns whether the condition of a requirement of just terms would be incongruous with the *Home Affairs Act* as an exercise of power under s 122. As explained above, in circumstances of incongruity the condition of just terms in s 51(xxxi) would not be imposed on the exercise of power to acquire property. The best recognised examples of incongruity include exercises of power to impose taxes or to forfeit rights or entitlements.

123 In an ingenious submission, senior counsel for the Russian Federation challenged the premise of the existing approach, contending that no incongruity or inconsistency need ever arise in such cases because the "just terms" of such acquisitions are that no compensation is required. Hence, a requirement of just terms is imposed upon acquisitions of property under any head of power in the *Constitution* with cases in which the condition of just terms was previously regarded as incongruous treated as instances where justice does not require the imposition of any terms, at least any terms of compensation.

124 This submission is very attractive. Whilst in many cases it might lead to the same result as the traditional approach to incongruity, and whilst the test for when no compensation is required might bear some resemblance to the present authority, the submission removes the tension with the *Australian Communist Party v The Commonwealth*[198] which arises in the present law. Under the present law, the Commonwealth Parliament can exclude the constitutional guarantee of just terms

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196 *Lucas v South Carolina Coastal Council* (1992) 505 US 1003 at 1014, quoting *Pennsylvania Coal Co v Mahon* (1922) 260 US 393 at 415.

197 See *Penn Central Transportation Co v New York City* (1978) 438 US 104 at 124, discussed in *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 247-248; *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 53 [117].

198 (1951) 83 CLR 1.

by creation of its own statutory norm by which acquisition of property without just terms is "a necessary or characteristic feature of the [appropriate and adapted] means which the law selects to achieve its objective [within power and not solely or chiefly being the acquisition of property]".[199]

125 Without any detailed submissions on such a significant departure from present authority, and in circumstances in which the result in this case would be no different, it suffices to proceed on the prevailing approach that treats an acquisition of property without compensation (and possibly without other terms required by justice) in the circumstances identified above "as authorized by the exercise of specific powers otherwise than on the basis of just terms".[200] The first circumstance that must exist for such cases of incongruity with s 51(xxxi) is that an acquisition of property without just terms must be a necessary or characteristic feature of the means selected by the law to achieve its objective.

126 The objective of the *Home Affairs Act* is described in the Explanatory Memorandum as being "to protect Australia's national security interests with regard to land within the area adjacent to Parliament House".[201] As the Solicitor-General of the Commonwealth put the point in oral submissions, it is incongruous to require the Commonwealth to compensate the Russian Federation for steps taken by the Commonwealth to defend itself against a threat to the security of Australia posed by the presence of the Russian Federation on land 300 m from Parliament House.

127 If there were an agreed or proved fact that the forfeiture of the Lease was a response for the defence of the Commonwealth to an established threat, then the absence of just terms could readily be seen to be a necessary or characteristic feature of the *Home Affairs Act*, just as the absence of just terms is a necessary or characteristic feature of the forfeiture of the property of enemy aliens as reparations.[202] Alternatively, if there were an agreed or proved fact that the forfeiture of the Lease was a response to the commission of an offence, then the absence of just terms could readily be seen to be a necessary or characteristic

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199 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 180-181. See also *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 180 [98]; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 448-449 [118]-[119].

200 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 171.

201 Australia, House of Representatives, *Home Affairs Bill 2023*, Explanatory Memorandum, Outline.

202 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361.

feature of the *Home Affairs Act*.[203] But the legislatively recited objective of protecting Australia's national security interests does not establish any such fact.[204] In the absence of agreed or proved facts of such a nature, the *Home Affairs Act* is legislation that is in no materially different position from the forfeiture of a lease for defence purposes, where the condition in s 51(xxxi) of just terms applies.[205]

Conclusion and the approach to costs of the special case

128 The result that I reach, in common with the other members of this Court, is that the *Home Affairs Act* is supported by a head of power but that the forfeiture of the Lease requires just terms under s 6(1) of the *Home Affairs Act*. This means that the answer to the first question in this special case (as set out below) is determined in favour of the Commonwealth and the answer to the second question (and third question which naturally follows, and was properly conceded by the Commonwealth to follow, from the second) is determined in favour of the Russian Federation.

129 The usual exercise of discretion as to costs, that costs should follow the event,[206] does not have easy application on a special case "where separate issues have fallen in different ways".[207] Indeed, it has been held that the separate issues on a special case or case stated are separate events with separate rationes decidendi.[208] Hence, where separate issues are resolved in favour of different parties on a special case or case stated this Court has sometimes abstained from attempting to conflate the separate issues into a confused single event, and instead has resolved questions of costs by reference to the result of the issues[209] or has

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203 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393.

204 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

205 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261.

206 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97 [67].

207 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 393 [241]. See also *Firebird Global Master Fund II Ltd v Republic of Nauru [No 2]* (2015) 90 ALJR 270 at 271 [6]; 327 ALR 192 at 193.

208 *Yunupingu v The Commonwealth* (2023) 298 FCR 160 at 223 [264], citing *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 244-245, 280, 303.

209 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 514 [107], 538 [177], 539; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 676; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 182 [26], 204 [103], 228.

made no order as to the costs of some or all of the special case.[210] In apportioning costs, the Court will usually have regard to the relief sought as well as the question or questions with which the bulk of argument and written submissions were concerned.[211]

130 In the present case, the first question in the special case reflected the primary relief sought by the Russian Federation in its statement of claim, which was a declaration of the invalidity of the *Home Affairs Act* on the basis that it was not supported by a Commonwealth head of power. The Russian Federation thus sought to preserve its leasehold. Nearly five of the Russian Federation's ten-page written submissions in chief, and ten of the 12 paragraphs of the Russian Federation's outline of oral argument, were addressed to argument on this head of power issue, compared with less than a page of written submissions, and only two paragraphs of the outline of oral argument, which were addressed to argument on the issue of just terms. Although the Russian Federation succeeded in what it described as its "fallback case" on compensation, the first question was a separate issue, and its primary case upon which it placed a heavy focus. The Russian Federation has been unsuccessful on that issue. If the calculation of any compensation required by "just terms" were ultimately determined to be minimal then the Russian Federation's success on the issue of just terms would truly be a pyrrhic victory.

131 Although each party sought their costs in the event of success on all issues, neither party made any submissions to the effect that they should have their costs in the event of success on one of the two contentious issues only. No further submissions were sought from the parties.[212] In all these circumstances, it is arguable that each party should bear its own costs. On balance, and in light of the success of the Russian Federation's case on one of the separate issues and in circumstances in which there is no present suggestion that such success will be merely nominal, I consider that the Russian Federation should have one half of its costs of the special case.

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210 *Unions NSW v New South Wales* (2023) 277 CLR 627 at 663-664. See also *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 394 [246].

211 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 675 [76]; *Firebird Global Master Fund II Ltd v Republic of Nauru [No 2]* (2015) 90 ALJR 270 at 271 [6]; 327 ALR 192 at 193.

212 Compare *Firebird Global Master Fund II Ltd v Republic of Nauru [No 2]* (2015) 90 ALJR 270; 327 ALR 192.

132 The four questions in the special case should be answered as follows:

Question 1: Is the *Home Affairs Act 2023* (Cth) invalid in its entirety on the ground that it is not supported by a head of Commonwealth power?

Answer: No.

Question 2: If the answer to Question 1 is "no", does the operation of the *Home Affairs Act 2023* (Cth) result in the acquisition of property from the plaintiff to which s 51(xxxi) of the *Constitution* applies?

Answer: Yes.

Question 3: If the answer to Question 2 is "yes", is the Commonwealth liable to pay to the plaintiff a reasonable amount of compensation pursuant to s 6(1) of the *Home Affairs Act 2023* (Cth)?

Answer: Yes.

Question 4: Who should pay the costs of the special case?

Answer: The defendant should pay half of the costs of the plaintiff.