HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Applicant

and

YUNUPINGU (ON BEHALF OF THE GUMATJ CLAN OR ESTATE GROUP)
First Respondent

and the other Respondents named in the Notice of Appeal

SUBMISSIONS OF THE TWENTY-FIFTH TO TWENTY-EIGHT RESPONDENTS (THE RIRRATJINGU PARTIES)

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PART I: CERTIFICATION

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

PART II: ISSUES

2 Native title rights are "rights of a communal nature based on occupation and a physical and spiritual connection between land and people that has endured for possibly millennia".[1] If First Nations people have those rights because of a connection with land located in a territory, does the Constitution permit the Commonwealth Parliament to deprive them of those rights without providing compensation?

3 If the Commonwealth were to succeed on Grounds 1 or 2 of this appeal, the answer to that question would be "yes". Whether the Commonwealth succeeds on those grounds depends on the resolution of two constitutional issues:

3.1 Does s 122 of the Constitution empower the Parliament to enact a law that is properly characterised as a law with respect to an "acquisition of property" within the meaning of s 51(xxxi) of the Constitution? (**Ground 1**). The Rirratjingu Parties submit the answer to that question is "no".

3.2 Is a law that extinguishes or impairs native title rights or interests properly characterised as a law with respect to an "acquisition of property" within the meaning of s 51(xxxi)? (**Ground 2**). The Rirratjingu Parties submit the answer to that question is "yes".

4 The appeal also presents a third issue (**Ground 3**). On that issue, the Twenty-Fifth to Twenty-Eighth Respondents (**Rirratjingu Parties**) adopt the submissions of the First Respondent (**Gumatj Respondent**), and the Northern Land Council and the Arnhem Land Aboriginal Land Trust (**NLC Parties**).

PART III: SECTION 78B NOTICE

5 The Commonwealth and the NLC Parties have each filed a notice under s 78B of the *Judiciary Act 1903* (Cth): **CAB 187**. No further notice is required.

1 *Western Australia v Fazeldean (No 2)* (2013) 211 FCR 150 at [34] (Allsop CJ, Marshall and Mansfield JJ).

PART IV: FACTS

6 The Rirratjingu Parties are four members of the Rirratjingu Clan: Bakamumu Alan Marika, Wanyubi Marika, Wurrulnga Mandaka Marika and Witiyana Matpupuyngu Marika. The Rirratjingu Parties make their own claims to native title over parts of the claim area, but on the separate questions they supported — and continue to support — the position of the Gumatj Respondent: see **CAB 45 [23], 76 [140], 99 [229], 112 [279], 139-140 [392]-[393]**.

7 The Rirratjingu Parties do not dispute the summary of facts at **Cth [7]-[11]**.

PART V: ARGUMENT

A INTRODUCTION

8 Grounds 1 and 2 of the Commonwealth's appeal both depend upon the operation of s 51(xxxi) of the Constitution. That being so, the general principles that govern the section are important: the specific issues raised by Grounds 1 and 2 must be resolved in a way that is consistent with them. We therefore begin by setting out those general principles (**Part A**).

9 We then turn separately to Ground 1 (**Part B**) and Ground 2 (**Part C**). In summary:

9.1 **Ground 1**: Section 122 of the Constitution does not empower the Parliament to make laws that are properly characterised as laws with respect to an "acquisition of property" within the meaning of s 51(xxxi). That follows from both the current state of authority and as a matter of principle.

9.2 **Ground 2**: A law that extinguishes or impairs native title rights or interests is properly characterised as a law with respect to an "acquisition of property" within the meaning of s 51(xxxi). For the purposes of characterising a law, native title rights and interests cannot be treated in the same way as a purely statutory right that, because of some characteristic inherent to the right (apart from its statutory basis), is susceptible to modification or extinguishment.

10 For those reasons, Grounds 1 and 2 must be dismissed. Ground 3 must also be dismissed for the reasons given by the Gumatj Respondent and the NLC Parties. The appeal must therefore be dismissed.[2]

[2] As to costs, see paragraph 171 below.

B GENERAL PRINCIPLES: SECTION 51(XXXI)

B.1 Introduction

11 At the outset, it must be acknowledged that, although many aspects of the s 51(xxxi) jurisprudence are settled, some of the finer details are not crystal clear. Some of those details are the subject of a wide variety of statements in the authorities, often contained in lengthy decisions with multiple judgments. Some of those statements are difficult to reconcile with one another, and the degree to which they have commanded majority support in this Court has fluctuated over time.

12 Bearing that in mind, our summary of the general principles represents our best attempt to synthesise those principles in a systematic way. We do so conscious of the potential pitfalls of constructing a taxonomy in this area, but also of the benefits that an analytical framework can provide to predictability and transparency of reasoning.[3]

B.2 Section 51(xxxi) reduces the scope of other heads of power

13 Section 51(xxxi) serves a "double purpose".[4]

13.1 It provides a *source* of legislative power to make laws with respect to the "acquisition of property … from any State or person for any purpose in respect of which the Parliament has power to make laws". The subject matter of that power can conveniently be described as an "**'acquisition of property' within the meaning of s 51(xxxi)**".

13.2 The exercise of that power is subject to the *condition* that the law provide for "just terms". That condition prevents "arbitrary exercises of the power" at the expense of the State or person.[5] It does so by protecting them from being deprived of their property except on just terms, and in that sense operates as a "**constitutional guarantee**".[6]

3 Cf ***Telstra*** *Corporation Ltd v Commonwealth* (2008) 234 CLR 210 at [49] (the Court); ***Palmer*** *v Western Australia* (2021) 272 CLR 505 at [146]-[147] (Gageler J). See also *Attorney-General (NT) v* ***Chaffey*** (2007) 231 CLR 651 at [36]-[37] (Kirby J); Simon **Evans**, "When is an Acquisition of Property Not an Acquisition of Property: The Search for a Principled Approach to Section 51(xxxi)?" (2000) 11 *Public Law Review* 183 at 184, 186-187, 202.

4 ***Bank of NSW*** *v Commonwealth* (1948) 76 CLR 1 at 349 (Dixon J).

5 ***Mutual Pools*** *& Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 168-169 (Mason CJ). See also ***Grace Bros*** *Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 290-291 (Dixon J).

6 ***Clunies-Ross*** *v Commonwealth* (1984) 155 CLR 193 at 202 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

14 Because of its dual nature, s 51(xxxi) also attracts the general principle of construction explained by Dixon CJ in *Attorney-General (Cth) v* ***Schmidt***:[7]

> 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.

15 An appreciation of that principle lies at the heart of how s 51(xxxi) intersects with other heads of power. In the absence of s 51(xxxi), the other heads of power would likely have been construed to empower the Parliament to make laws with respect to the acquisition of property "for use in carrying out or giving effect to legislation enacted under such powers" (including otherwise than on just terms).[8] However, the presence of s 51(xxxi) has meant that that "no other head of power" includes "a power to acquire property compulsorily for the purposes of that head of power because the totality of the power of compulsory acquisition" is "embodied" in s 51 (xxxi)".[9]

16 This operation of s 51(xxxi) is sometimes referred to as s 51(xxxi) "abstracting"[10] or "carving out"[11] content from other heads of power. The extent of the carve-out mirrors the extent of the power conferred by s 51(xxxi).[12] Accordingly, what is carved out from the other heads of power is the power to make laws that are properly characterised as laws with respect to an "acquisition of property" within the meaning of s 51(xxxi).[13]

7 (1961) 105 CLR 361 at 371-372. See also ***Wurridjal*** *v Commonwealth* (2009) 237 CLR 309 at [75] (French CJ), [176] (Gummow and Hayne JJ).

8 (1961) 105 CLR 361 at 371. See also ***Johnston*** *Fear & Kingham & Offset Printing Co Pty Ltd v Commonwealth* (1943) 67 CLR 314 at 317-318 (Latham CJ); *W H Blakeley & Co Pty Ltd v Commonwealth* (1953) 87 CLR 501 at 520 (the Court).

9 *Trade Practices Commission v* ***Tooth*** *& Co Ltd* (1979) 142 CLR 397 at 445 (Aickin J).

10 See *Tooth* (1979) 142 CLR 397 at 445 (Aickin J). See also *Mutual Pools* (1994) 179 CLR 155 at 177 (Brennan J); *Re Director of Public Prosecutions; Ex parte* ***Lawler*** (1994) 179 CLR 270 at 283 (Deane and Gaudron JJ); ***Theophanous*** *v Commonwealth* (2006) 225 CLR 101 at [55] (Gummow, Kirby, Hayne, Heydon and Crennan JJ); ***Cunningham*** *v Commonwealth* (2016) 259 CLR 536 at [61] (Gageler J).

11 *Attorney-General (NT) v* ***Emmerson*** (2014) 253 CLR 393 at [107] (Gageler J); *Cunningham* (2016) 259 CLR 536 at [271] (Gordon J).

12 See *Mutual Pools* (1994) 179 CLR 155 at 188-189 (Deane and Gaudron JJ); *Lawler* (1994) 179 CLR 270 at 283 (Deane and Gaudron JJ); ***JT International*** *SA v Commonwealth* (2012) 250 CLR 1 at [167] (Hayne and Bell JJ).

13 *Mutual Pools* (1994) 179 CLR 155 at 177 (Brennan J), 188 (Deane and Gaudron JJ).

17 The consequence is that s 51(xxxi) is the "sole" source of power to make a law that with the character of a law with respect to an "acquisition of property" within the meaning of s 51(xxxi).[14] And, when that power is exercised, it must comply with the condition that attaches to its exercise: "just terms" must be provided.[15]

18 Importantly, that constructional approach aligns with the underlying purpose of the condition requiring just terms identified above: preventing "arbitrary exercises of the power at the expense of a State or the subject".[16] That high constitutional purpose would be subverted were "laws with respect to the acquisition of property within the meaning and scope of s 51(xxxi) to fall also within the scope of other legislative powers to which
10 the same condition does not attach".[17]

19 In short, a law that is properly characterised as a law with respect to an "acquisition of property" within the meaning of s 51(xxxi):

19.1 cannot be supported by any other head of power in s 51; but

19.2 can be supported by s 51(xxxi) — if it provides for "just terms".[18]

20 Conversely, a law that does not have that character cannot be supported by s 51(xxxi). It may be supported by another head of power.[19] If so, "just terms" will not be required.[20]

B.3 A contrary intention?

21 Authority establishes that the logic of the "abstracting" approach extends to all of the other heads of power in s 51, as well as the heads of power in ss 52[21] and 96.[22] A key
20 issue raised by Ground 1 is whether the same logic applies also to the head of power

14 See *Tooth* (1979) 142 CLR 397 at 426-427 (Mason J), see also at 403 (Barwick CJ), 445 (Aickin J); *Johnston* (1943) 67 CLR 314 at 318 (Latham CJ), 325 (Starke J); *Cunningham* (2016) 259 CLR 536 at [63] (Gageler J).

15 *Lawler* (1994) 179 CLR 270 at 283 (Deane and Gaudron JJ). See also *Schmidt* (1961) 105 CLR 361 at 372 (Dixon CJ).

16 *Grace Bros* (1946) 72 CLR 269 at 291 (Dixon J).

17 *Emmerson* (2014) 253 CLR 393 at [109] (Gageler J).

18 *Mutual Pools* (1994) 179 CLR 155 at 176 (Brennan J). See also *Emmerson* (2014) 253 CLR 393 at [109] (Gageler J).

19 See *Mutual Pools* (1994) 179 CLR 155 at 176 (Brennan J); ***Newcrest*** *Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 533 (Brennan CJ); *Theophanous* (2006) 225 CLR 101 at [64], [68], [71] (Gummow, Kirby, Hayne, Heydon and Crennan JJ).

20 There is "no guarantee of 'just terms' outside the area in which s 51(xxxi) operates as a grant of power": see *Lawler* (1994) 179 CLR 270 at 284 (Deane and Gaudron JJ).

21 See *Cunningham* (2016) 259 CLR 536 at [64] (Gageler J)

22 ***ICM*** *Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at [46] (French CJ, Gummow and Crennan JJ), [174] (Heydon J); see also at [134]-[141] (Hayne, Kiefel and Bell JJ); ***Hornsby*** *Shire Council v Commonwealth* (2023) 97 ALJR 534 at [13] (the Court).

conferred by s 122. The Rirratjingu Parties submit that it does for the reasons explained in **Part C.5**. In short, it is correct to say that s 51(xxxi) "abstracts the power to support a law for the compulsory acquisition of property from *any other legislative power*" — without making exception for s 122.[23]

22 There are, however, some statements in the authorities that suggest that the "abstracting" logic does not necessarily apply to all other heads of power: **Cth [16], [45]**. The basis for those statements is that the general principle of construction identified by Dixon CJ in *Schmidt* is subject to a "contrary intention" that is "expressed or made manifest" in those other heads of power.[24] The search for a "contrary intention" is said to be necessary because "some laws which are expressly authorized under other grants of legislative power necessarily encompass acquisition of property unrestricted by any requirement of the quid pro quo of just terms".[25] The taxation and bankruptcy powers are typically given as examples.[26]

23 The course of authority is against the "contrary intention" approach advanced by the Commonwealth in so far as that approach is said to apply, in some blanket way, as between s 51(xxxi) and all other heads of power. It has been superseded by an approach that focuses on identifying any "inconsistency" between the operation of a *particular impugned law* (not head of power) and the notion of "just terms": see paragraph 43 below.[27]

24 In addition to authority, there are four reasons why the Court should not now embrace the Commonwealth's suggested approach.

25 *First*, it does not account for the expression "for any purpose in respect of which the Parliament has the power to make laws" in s 51(xxxi). That expression is unqualified. There is no basis to read it down so that it does not refer to (at least) every other head of

23 Cf *Mutual Pools* (1994) 179 CLR 155 at 177 (Brennan J) (emphasis added). See also *Cunningham* (2016) 259 CLR 536 at [271] (Gordon J).

24 See especially ***Nintendo*** *Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ).

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

26 See, eg, *Mutual Pools* (1994) 179 CLR 155 at 187 (Deane and Gaudron JJ); *Lawler* (1994) 179 CLR 270 at 284 (Deane and Gaudron JJ).

27 See especially *Theophanous* (2006) 225 CLR 101 at [60] (Gummow, Kirby, Hayne, Heydon and Crennan JJ). See also *Emmerson* (2014) 253 CLR 393 at [118] (Gageler J).

power in s 51: see further paragraph 34 below (generally) and paragraph 104 below (as to s 122).

26 *Second*, that textually sound approach aligns with the point made above regarding the purpose of the condition requiring just terms, and the potential for that purpose to be undermined. It indicates that if any "contrary intention" approach is to be applied, that must be done cautiously, and only where the requirement of just terms is "clearly inconsistent with"[28] the grant of legislative power — that is, it must be applied "only so far as is necessary"[29] to give effect to those other provisions.

27 *Third*, once it is recognised that the issue can instead be dealt with at the level of particular impugned laws, it is *unnecessary* to apply the "contrary intention" approach in a blanket fashion at the level of heads of power.[30]

28 *Fourth*, applying the abstraction approach to all other heads of power avoids any absurdities. To use the taxation power as an example: if s 51(xxxi) did not abstract from the taxation power — as the Commonwealth's articulation of the "contrary intention" approach would suggest — then what would prevent the Parliament acquiring a building for use as a taxation office without having to provide just terms?[31]

B.4 Laws with respect to "acquisition of property" within the meaning of s 51(xxxi)

29 Determining whether a law can be characterised as a law with respect to an "acquisition of property" within the meaning of s 51(xxxi) can be approached in two stages:

29.1 *first*, does the law meet three requirements — deprivation, acquisition, purpose — and therefore have that character on a **prima facie** basis?

29.2 *second*, does the law have any feature that "**displaces**" that prima facie character?

28 See, by way of analogy, *Attorney-General (Qld) v Australian Industrial Relations Commission* (2002) 213 CLR 485 at [52] (Gaudron, McHugh, Gummow and Hayne JJ); *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1 at [52] (Gageler J).

29 See similarly ***Lange*** *v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 (the Court).

30 Indeed, each of the references in **Cth [45] n 60** are properly understood as concerned with the question of characterisation of a *particular law*: see *Mutual Pools* (1994) 179 CLR 155 at 180 (Brennan J), 189 (Deane and Gaudron JJ), 219 (McHugh J).

31 See *Mutual Pools* (1994) 179 CLR 155 at 198 (Dawson and Toohey JJ), 217 n 94 (McHugh J). See also *Schmidt* (1961) 105 CLR 361 at 372 (Dixon CJ), discussing acquisition of a Bankruptcy Office.

30 Both stages raise questions of "substance and of degree".[32] As in other areas of constitutional adjudication, those questions require the formation of a "practical judgment".[33]

B.4.1 Prima facie characterisation: three requirements

31 For a law to properly be characterised as a law with respect to an "acquisition of property" within the meaning of s 51(xxxi), it is necessary (but not sufficient) that it meet three requirements. Each of those requirements emerges from the text of s 51(xxxi).

32 *First*, the law must deprive a person or State of "**property**". This is sometimes referred as a "taking" of property. It is to be approached "by looking to the position of the person who claims that he [or she] has been deprived of his [or her] property".[34] That requires the particular "property" to be identified with precision.[35]

32.1 Sometimes it may be helpful to speak of property as a "bundle of rights"; other times it may be more useful to identify property as a "legally endorsed concentration of power over things and resources".[36]

32.2 Either way, it must be borne in mind that the concept of "property" is to be construed "liberally"[37] and extends to "every species of valuable right and interest",[38] including "innominate and anomalous interests".[39] That being so, statutory rights are capable of being "property".[40]

32 *Smith v* ***ANL*** *Ltd* (2000) 204 CLR 493 at [22] (Gaudron and Gummow JJ). See also *JT International* (2012) 250 CLR 1 at [119] (Gummow J); *Cunningham* (2016) 259 CLR 536 at [59] (Gageler J).

33 See ***Vanderstock*** *v Victoria* (2023) 98 ALJR 208 at [154] (Kiefel CJ, Gageler and Gleeson JJ). See also *Cole v Whitfield* (1988) 165 CLR 360 at 407-408 (the Court); *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899 at [34] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [57], [61] (Gordon J), [91], [94] (Edelman J).

34 ***Georgiadis*** *v Australian and Overseas Telecommunications Co* (1994) 179 CLR 297 at 304 (Mason CJ, Deane and Gaudron JJ). See also *JT International* (2012) 250 CLR 1 at [42] (French CJ).

35 See *Chaffey* (2007) 231 CLR 651 at [23] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

36 *Telstra* (2008) 234 CLR 210 at [44] (the Court).

37 *Cunningham* (2016) 259 CLR 536 at [43] (French CJ, Kiefel and Bell JJ).

38 ***Australian Tape Manufacturers*** *Association Ltd v Commonwealth* (1993) 176 CLR 480 at 509 (Mason CJ, Brennan, Deane and Gaudron JJ).

39 *Bank of NSW* (1948) 76 CLR 1 at 349-350 (Dixon J).

40 See *Cunningham* (2016) 259 CLR 536 at [272] (Gordon J).

33 *Second*, the Commonwealth or another person must "**acquire**" a proprietary benefit.[41] This requirement directs attention "to whether something is or will be received".[42] The concept of acquisition is also to be construed "liberally".[43] What is received need not "correspond precisely with what was taken".[44]

34 *Third*, the acquisition of property must be for a "**purpose** in respect of which the Parliament has **power to make laws**".[45]

34.1 That expression "may fairly be interpreted as referring to *all other matters* with respect to which the Parliament has power to make laws and, therefore, as *including* the thirty-eight subjects referred to in the other paragraphs of s 51".[46] The expression thus "incorporates by reference all the other subject matters of the legislative power of the Commonwealth".[47]

34.2 In short, this requirement ensures that there is a connection between the acquisition of property and another head of legislative power.[48]

35 Meeting those three requirements is necessary if the law is to be characterised — on a prima facie basis only[49] — as one with respect to an "acquisition of property" within the meaning of s 51(xxxi).

36 However, a law that meets those three requirements may still not be properly characterised as a law with respect to an "acquisition of property" within the meaning of s 51(xxxi). There remains an "ultimate question of characterisation".[50] That ultimate question can only be answered once further analysis is undertaken. The point of that

41 *Mutual Pools* (1994) 179 CLR 155 at 185 (Deane and Gaudron JJ). See also *Commonwealth v Tasmania* (1983) 158 CLR 1 (***Tasmanian Dams***) at 145 (Mason J).

42 *Georgiadis* (1994) 179 CLR 297 at 304-305 (Mason CJ, Deane and Gaudron JJ). See also *JT International* (2012) 250 CLR 1 at [42] (French CJ)

43 *Mutual Pools* (1994) 179 CLR 155 at 185 (Deane and Gaudron JJ).

44 *Georgiadis* (1994) 179 CLR 297 at 305 (Mason CJ, Deane and Gaudron JJ).

45 This requirement reflects a limitation on the scope of the conferral of power by s 51(xxxi): see *Mutual Pools* (1994) 179 CLR 155 at 169 (Mason CJ). See also *ANL* (2000) 204 CLR 493 at [77] (Kirby J).

46 *Johnston* (1943) 67 CLR 314 at 317-318 (Latham CJ) (emphasis added), quoted in *Tooth* (1979) 142 CLR 397 at 446 (Aickin J, Mason J agreeing on "construction and effect of s 51(xxxi)" at 426) and *Mutual Pools* (1994) 179 CLR 155 at 186 (Deane and Gaudron JJ). See also *Newcrest* (1997) 190 CLR 513 at 595-596 (Gummow J).

47 *Johnston* (1943) 67 CLR 314 at 318 (Latham CJ). In making that statement, Latham CJ flagged the possibility that s 122 should be excepted from that proposition, but expressly reserved his position.

48 See *Tooth* (1979) 142 CLR 397 at 403 (Barwick CJ).

49 See *Mutual Pools* (1994) 179 CLR 155 at 169 (Mason CJ). See also *ANL* (2000) 204 CLR 493 at [102] (Kirby J).

50 *Cunningham* (2016) 259 CLR 536 at [60] (Gageler J).

further analysis is to determine whether the law has a feature that "displaces" its prima facie characterisation.[51]

B.4.2 Ultimate characterisation: displacing features

37 **The reason for ultimate characterisation:** As Brennan J observed in *Mutual Pools*: "Clearly there are some laws which, though they provide for what can properly be described as an acquisition of property, are not classified as laws falling within s 51(xxxi)".[52] That observation recognises that not every law that meets the three requirements identified above — being a law that authorises an "acquisition of property" in a general sense — is one that demands "a quid pro quo of just terms".[53] The existence of such laws arises because of an inherent tension between the dual purposes served by s 51(xxxi).[54]

38 On the one hand, the effect of the condition in s 51(xxxi) is that, ordinarily at least, where a law has the effect of acquiring a person's property (in a general sense), "just terms" will be required. The effect of that position is that the private individual is compensated for their loss, at the expense of the public. That is consistent with the view that whenever the Parliament acquires property from an individual, it will be in pursuit of some public benefit, and it is therefore fair for the public to bear the cost of obtaining that benefit.[55] That outcome reflects the nature of s 51(xxxi) as a "constitutional guarantee" of private property. And it reflects a vision of the relationship between private property and the State, whereby primacy is given to the view that private property is "inviolable".[56]

39 On the other hand, there is a "competing vision" of that relationship, whereby private property is treated as "subject to redistribution in the public interest".[57] That vision is primarily reflected in the conferral by s 51(xxxi) of a broad power to acquire property for a public purpose, by reference to other heads of legislative power which are to be

51 See *Mutual Pools* (1994) 179 CLR 155 at 169 (Mason CJ).
52 *Mutual Pools* (1994) 179 CLR 155 at 178 (emphasis in original).
53 *Mutual Pools* (1994) 179 CLR 155 at 189 (Deane and Gaudron JJ). See also *Tooth* (1979) 142 CLR 397 at 408 (Gibbs J).
54 See Lulu **Weis**, "Property" in Saunders and Stone (eds), *The Oxford Handbook of the Australian Constitution* (2018) at 1030, 1032.
55 See, eg, *ANL* (2000) 204 CLR 493 at [156] (Callinan J)
56 See Evans (2000) 11 *Public Law Review* 183 at 201.
57 See Evans (2000) 11 *Public Law Review* 183 at 201.

construed with "all the generality which the words used admit".[58] However, on occasion, there will be circumstances where it may be justified for the individual, rather than the public, to bear the cost of the public benefit that is sought to be obtained by the acquisition of his or her property. [59] To fail to recognise the existence of such occasions would reduce the Commonwealth's legislative power "to an extent which could not have been intended by those who framed and adopted the Australian Constitution".[60] It would "elevate the constitutional guarantee of just terms to a level which would so fetter other legislative powers as to reduce the capacity to exercise them effectively".[61] Here, as elsewhere, a construction that would lead to such legislative stultification is to be avoided.[62]

40 Ordinarily, the first of the "competing visions" just outlined prevails in the application of s 51(xxxi). That outcome pays proper respect to its status as a constitutional guarantee. And it is consistent with the importance placed on the protection of private property rights at the time the Constitution was drafted.[63] However, as with other constitutional guarantees, the guarantee in s 51(xxxi) is not "absolute".[64] There will be *exceptional* cases in which the second of the competing visions takes precedence. That is also consistent with our constitutional history: prior to Federation, "expropriation without compensation" was possible, but was regarded as "highly undesirable".[65] Such an approach does not threaten the underlying purpose of the inclusion of the condition requiring "just" terms: the limited nature of the exceptions, and their resulting confinement to truly exceptional cases, can be seen as a "reflection of the underlying purpose of the just terms condition",[66] being to prevent arbitrary acquisitions.

41 In those limited circumstances, the Parliament may authorise an "acquisition of property" (in a general sense) without providing for "just terms". The difficulty is in

58 ***Grain Pool*** *of Western Australia v Commonwealth* (2000) 202 CLR 479 at [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

59 See also Sean **Brennan**, "Native Title and the 'Acquisition of Property' under the Australian Constitution (2004) 28 *Melbourne University Law Review* 28 at 55.

60 *Mutual Pools* (1994) 179 CLR 155 at 189 (Deane and Gaudron JJ).

61 See also *Mutual Pools* (1994) 179 CLR 155 at 201 (Brennan J).

62 See, in the context of s 92, *SOS (Mowbray) Pty Ltd v Mead* (1972) 124 CLR 529 at 574-575 (Windeyer J).

63 See *ICM* (2009) 240 CLR 140 at [180]-[183] (Heydon J).

64 *Lange* (1997) 189 CLR 520 at 561 (the Court); *Palmer* (2021) 272 CLR 505 at [61] (Kiefel CJ and Keane J).

65 *ICM* (2009) 240 CLR 140 at [181] (Heydon J).

66 See *Emmerson* (2014) 253 CLR 393 at [119] (Gageler J).

identifying those circumstances.[67] There is "no set test or formula" or "universal discriminant" for doing so.[68]

42 **Three displacing features:** However, three "displacing" features can be identified in the authorities.[69]

43 *First*, a law will not be characterised as a law with respect to an acquisition of property within the meaning of s 51(xxxi) if the acquisition of property is of a kind that would be "inconsistent" or "incongruous" with the provision of "just terms" to the person or State.[70] Examples include laws that have the effect of levying taxation, imposing fines, exacting penalties or forfeitures, or enforcing statutory liens.[71] The reason for the existence of this feature is "grounded in the realisation that to characterise certain exactions of government" — including the examples just given — as an acquisition of property would be incompatible with the very nature of the exaction".[72] In other words, the feature is *necessary* to ensure the Parliament has power to make laws of that kind.

44 *Second*, "a law which is not directed towards the acquisition of property as such but which is concerned with the adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity is unlikely to be susceptible of legitimate characterisation as a law with respect to the acquisition of property for the purposes of s 51 of the Constitution".[73] The reason for the existence of this feature is that there are some "relationships or areas which *need* to be regulated in the common interest".[74]

67 See also Weis, "Property" (2018) at 1019-1020.

68 See *Mutual Pools* (1994) 179 CLR 155 at 189 (Deane and Gaudron JJ); *Cunningham* (2016) 259 CLR 536 at [60] (Gageler J). See also *Tooth* (1979) 142 CLR 397 at 408 (Gibbs J), 415 (Stephen J); *Commonwealth **WMC** Resources Ltd* (1998) 194 CLR 1 at [252] (Kirby J).

69 As to this type of exercise, see generally *Chaffey* (2007) 231 CLR 651 at [38]-[44] (Kirby J); Evans (2000) 11 *Public Law Review* 183 at 186-187.

70 See *Theophanous* (2006) 225 CLR 101 at [56]-[60] (Gummow, Kirby, Hayne, Heydon and Crennan JJ). See also *Lawler* (1994) 179 CLR 270 at 285 (Deane and Gaudron JJ); *Cunningham* (2016) 259 CLR 536 at [58] (Gageler J).

71 See also *Mutual Pools* (1994) 179 CLR 155 at 178 (Brennan J).

72 *Theophanous* (2006) 225 CLR 101 at [60] (Gummow, Kirby, Hayne, Heydon and Crennan JJ), quoted in *Emmerson* (2014) 253 CLR 393 at [77] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), see also at [110]-[112] (Gageler J).

73 *Nintendo* (1994) 181 CLR 134 at 161 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). See also *Australian Tape Manufacturers* (1993) 176 CLR 480 at 510 (Mason CJ, Brennan, Deane and Gaudron JJ); *Cunningham* (2016) 259 CLR 536 at [60] (Gageler J).

74 *Mutual Pools* (1994) 179 CLR 155 at 189-190 (Deane and Gaudron JJ) (emphasis added). See also *Tasmanian Dams* (1983) 158 CLR 1 at 283 (Deane J); *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at [497]-[500] (Gummow J).

45 *Third*, a law that acquires a right that (1) has "no basis in the general law" (a purely statutory right) *and* (2) "of its nature" is "susceptible" to modification or extinguishment, will not properly be characterised as a law with respect to an acquisition of property within the meaning of s 51(xxxi).[75] We refer to this as the **statutory susceptibility principle**. The reason for the existence of this feature, and its scope, is explored in detail in **Part D**. For now, it is sufficient to note that, in common with the first two features, its development was *necessary* to address a particular problem arising from the scope of s 51(xxxi).

46 Identifying the presence (or not) of a displacing feature "may require difficult questions of judgment".[76] If, upon making that judgment, a law has no displacing feature of the kind identified above, its prima facie character will be confirmed. The law will not "escape characterisation" as a law with respect to the acquisition of property within the meaning of s 51(xxxi).[77] Accordingly, for the law to be valid, it must provide for "just terms".

47 Conversely, if a law has a displacing feature, the law will not be properly characterised as a law with respect to an "acquisition of property" within the meaning of s 51(xxxi). It will have "the general characteristics of a law which acquires property without attracting [the just terms] condition".[78] That is because, having "escape[d]"[79] characterisation as a s 51(xxxi) law, it will be capable of being supported by other heads of power, which are not relevantly curtailed (abstracted) by the presence of s 51 (xxxi).[80]

48 **Further development of displacing features:** The above displacing features are merely examples. Further examples may emerge in the authorities over time. However, any creation of further features, or the modification of existing ones, must be based in principle.

75 *Georgiadis* (1994) 179 CLR 297 at 306 (Mason CJ, Deane and Gaudron JJ).

76 See *Theophanous* (2006) 225 CLR 101 at [60] (Gummow, Kirby, Hayne, Heydon and Crennan JJ). See also *Tooth* (1979) 142 CLR 397 at 415 (Stephen J).

77 See *Emmerson* (2014) 253 CLR 393 at [131] (Gageler J).

78 *Emmerson* (2014) 253 CLR 393 at [118] (Gageler J).

79 *Emmerson* (2014) 253 CLR 393 at [118], [131] (Gageler J).

80 A further question then potentially arises as to whether the law is supported by one or more other heads of power. That is the point of the further analysis in *Theophanous* (2006) 225 CLR 101 at [68]-[71] (Gummow, Kirby, Hayne, Heydon and Crennan JJ). However, that question will generally have been answered in addressing the issue of displacement (see *Emmerson* (2014) 253 CLR 393 at [114] (Gageler J), or in addressing the third requirement at paragraph 34 above (ie, the acquisition of property must be for a "purpose" in respect of which the Parliament has "power to make laws").

49 As a starting point, as is evident from the above, each of the existing features has been borne out of some necessity to accommodate the dual purpose of s 51(xxxi) and the two competing visions that underpin that section. Each of them reflects a principle that has been applied by the Court "to accommodate both the general power of the Commonwealth to regulate and control subjects within its power and the constitutional guarantee".[81]

50 However, consistent with the priority given to the first vision underlying s 51(xxxi) (see paragraphs 38 to 40 above), any further accommodation must pay proper respect to the status of s 51(xxxi) as a constitutional guarantee and cohere with the purpose of that guarantee. The effect of a displacing feature is to remove laws that have that feature from the scope of s 51(xxxi), and thereby *reduce* the circumstances in which a law must provide for just terms for what is prima facie an "acquisition of property". Thus, any expansion of displacing features (in number or scope) has the potential to "rob" the constitutional guarantee of its "efficacy" and to "depreciate" the rights it serves to protect.[82] That runs counter to the principle that s 51(xxxi) is to be given a "liberal construction" that is appropriate to its status as a constitutional guarantee.[83]

C GROUND 1: SECTION 51(xxxi) REDUCES THE SCOPE OF SECTION 122

C.1 Introduction

51 Properly framed, the issue "at the heart" of Ground 1 concerns the scope of the power conferred by s 122 of the Constitution: cf **Cth [12]**. Consistent with the general principles set out in **Part B.2**, the question is: does s 122 authorise the Parliament to make laws with respect to an "acquisition of property" within the meaning of s 51(xxxi)?: see **Cth [41]**.

52 If the answer to that question is "no", then the Parliament must rely on s 51(xxxi) to enact a law that, for the purpose of the government of any territory, authorises an "acquisition of property" within the meaning of s 51(xxxi). The Rirratjingu Parties submit that *Wurridjal* requires that answer.[84]

81 See James **Stellios**, *Zines and Stellios's The High Court and the Constitution* (7th ed, 2022) at 703.
82 See ***Kruger*** *v Commonwealth* (1997) 190 CLR 1 at 123 (Gaudron J).
83 *Clunies-Ross* (1984) 155 CLR 193 at 201-202 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).
84 (2009) 237 CLR 309.

53 If the answer to that question is "yes", then the Parliament may rely on s 122 to enact a law that effects an "acquisition of property" within the meaning of s 51(xxxi).

53.1 In ***Teori Tau*** *v Commonwealth*, the Court held that the question must be answered "yes".[85] However, in doing so, it drew no distinction between a law supported solely by the head of power in s 122 of the Constitution, and a law supported by s 122 and another head of power.

53.2 That distinction was subsequently drawn in *Newcrest*. The effect of *Newcrest* is that if:

(a) a law effects an "acquisition of property" within the meaning of s 51(xxxi);

10 **and**

(b) the law is supported by s 122 (as interpreted in *Teori Tau*); **and**

(c) if not for s 51(xxxi), the law would also be supported by another head of power in s 51;

then the law must provide for just terms.

54 Following *Wurridjal*, the overwhelming — if not universal understanding — was the one recorded in the headnote in the authorised report of the judgment in the Commonwealth Law Reports: "*Teori Tau v The Commonwealth* (1969) 119 CLR 564, overruled": see **CAB 99 [231], 111 [274]**. That understanding was reinforced in 2011, when six members of the Court described *Wurridjal* as part of a line of authority that

20 establishes that "s 122 is not disjoined from the body of the Constitution".[86]

55 That being so, by the time this proceeding was commenced, there should have been "no doubt as to the relationship between ss 51(xxxi) and 122 of the Constitution": **CAB 110 [269]-[270]**.[87] Indeed, for the approximately 15 years prior to the Commonwealth raising doubt in the Full Court, it is not clear that any existed. The Full Court correctly restored the prior understanding following a careful and nuanced analysis of the principles and authorities concerning precedent: **CAB 98-112 [227]-[279]**.

85 (1969) 119 CLR 564 at 570 (the Court).

86 *Queanbeyan City Council v ACTEW Corporation Ltd* (2011) 244 CLR 530 at [7] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *ICM* (2009) 240 CLR 140 at [135] (Hayne, Kiefel and Bell JJ). More recently, see *Vunilagi v The Queen* (2023) 97 ALJR 627 at [100] (Gordon and Steward JJ), [186] (Edelman J).

87 *Wurridjal* (2009) 237 CLR 309 at [325] (Heydon J).

56 The Commonwealth engages with that analysis only in a cursory way: see **Cth [50]-[52]**. It seeks to skip over issues of precedent, instead arguing that the case is more "appropriately resolved by reference to constitutional principle": **Cth [21]**. The Court should pause before taking that approach. Constitutional principle does not exist in a vacuum, disconnected from precedent.[88] The pages of the law reports are not "blank"; they record the judgments in *Teori Tau*, *Newcrest* and *Wurridjal*.[89]

57 There are, of course, no fixed rules that preclude the Commonwealth's preferred approach, and it might be appropriate in particular cases.[90] Here, however, there is a risk that taking that approach would gloss over how the stream of authority has developed. The flow of the stream is important because the Court is being asked to pick between several competing authorities.

58 On this point, the Commonwealth's position has evolved since *Wurridjal*. It now seeks to defend the compromise position reached in *Newcrest*, but at the same time preserve the authority of *Teori Tau*: see **Cth [12]-[13], [18]**. In contrast, in *Wurridjal*, the Commonwealth sought to restore the conceptual purity of *Teori Tau* by purging *Newcrest* from the record.[91] Nonetheless, a majority of the Court expressly overruled *Teori Tau* and, in doing so, rendered the *Newcrest* approach redundant.

59 That overruling forms part of the *ratio decidendi* of *Wurridjal*: **Part C.2**. The Commonwealth advances no good reasoning for re-opening the issue: **Part C.3**. In substance, it seeks to do no more than rerun the same arguments that were advanced and rejected in *Wurridjal*. Their "repetition on this occasion does nothing to enhance their cogency, despite the care and vigour with which they [have been] presented".[92] In those circumstances, no further analysis is called for and Ground 1 should be dismissed.[93]

60 Alternatively, if *Teori Tau* remains good law, it should be re-opened and overruled: **Part C.4**. The decision "not only stands isolated but has proven to be incompatible with

88 Cf *Vanderstock* (2023) 98 ALJR 208 at [843] (Jagot J). See also ***O'Toole*** *v Charles David Pty Ltd* (1990) 171 CLR 232 at 267 (Brennan J).
89 See *Queensland v Commonwealth* (1977) 139 CLR 585 at 599 (Gibbs J).
90 See *Jones v Bartlett* (2000) 205 CLR 166 at [206]-[207] (Gummow and Hayne JJ).
91 See *Wurridjal* (2009) 237 CLR 309 at 328 (Burmester QC).
92 See *Ha v New South Wales* (1997) 189 CLR 465 at 499 (Brennan CJ, McHugh, Gummow and Kirby JJ).
93 See, eg, *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311.

the ongoing development of constitutional jurisprudence".[94] In any event, on the proper construction of the Constitution, s 51(xxxi) reduces the scope of s 122: **Part C.5**.

61 After addressing those substantive arguments, it is necessary to deal with a final issue concerning an underlying premise of the Commonwealth's argument on Ground 1: **Part C.6**.

C.2 *Wurridjal* overruled *Teori Tau*

62 The Full Court's conclusion as to the precedential status of *Wurridjal* is correct for the reasons it gave. The Full Court faithfully adhered to various observations made by this Court about the similarity between separate questions and demurrers and, by analogy, applied the principles governing precedent in the former context to the latter: see **CAB 107-111 [263]-[265], [271]**. Largely replicating the submissions of the Rirratjingu Parties in the Full Court, we briefly expand on those principles, and then apply them to *Wurridjal*.

C.2.1 Demurrers and questions of law

63 As adapted for multi-member courts, Cross and Harris define the *ratio decidendi* of a decision as "any rul[ing on a point] of law expressly or implicitly treated by the [court] as a *necessary step* in reaching [its] *conclusion* having regard to the line of reasoning adopted by [it]".[95] That definition was at the forefront of the Commonwealth's argument in the Full Court: see **CAB 103 [251]-[252]**. It is unclear whether the Commonwealth continues to embrace it as whole-heartedly as it did below.[96] We adopt it here (as we did below), it being an uncontroversial and widely accepted definition.[97]

64 In identifying a *ratio decidendi* in cases involving multi-member courts, "the way in which a question comes before a court may be important".[98] It is therefore important that the "procedural framework" in *Wurridjal* involved the determination of a demurrer: **CAB 107 [261]**. As Kirby J observed of demurrers in *Wurridjal*, in constitutional cases, "it is sometimes useful to isolate a clear, short and confined question of constitutional law".[99] That observation recognises that the substantive effect of a demurrer is to isolate

94 *Wurridjal* (2009) 237 CLR 309 at [71] (French CJ), see also at [189] (Gummow and Hayne JJ).
95 R Cross and JW Harris, *Precedent in English Law* (4th ed, 1991) at 72 (emphasis added).
96 See **Cth [51] n 70**, where it is relegated to a footnote.
97 See, eg, *Vanderstock* (2023) 98 ALJR 208 at [430] (Gordon J).
98 Perry Herzfeld and Thomas Prince, *Interpretation* (2nd ed, 2020) at [34.120].
99 (2009) 237 CLR 309 at [279]. See also *South Australia v Commonwealth* (1962) 108 CLR 130 at 142 (Dixon CJ); *Levy v Victoria* (1997) 189 CLR 579 at 649 (Kirby J).

distinct questions of law for the Court's determination.[100] The Court's answers to those questions will, in turn, determine whether the demurrer is allowed or overruled: **CAB 107 [262]**.

65 However, an order allowing or overruling a demurrer does not dispose of the proceeding. That is, an order allowing or overruling a demurrer is not the same as a final order resolving a proceeding, even if its *practical* effect is "decisive of the whole litigation": **CAB 107 [262]**.[101] The point of the demurrer is to determine whether the discrete legal question that has been identified provides "a cause of action or a defence or reply to another party's pleading".[102] In that way, the resolution of the demurrer will influence how the proceeding is to progress, or otherwise be resolved by a final order of the Court.

66 For that reason, there is no analogy with grounds of appeal: cf **Cth [52]**. In general, "[t]he question in an appeal is whether or not it should be allowed, or, expressed more precisely, whether an order should be made dismissing it or an order allowing it".[103] That question will *decisively* be answered by reference to how the appellate court resolves one or more grounds of appeal. The relevant order will then be made, necessarily bringing an end to the appeal proceeding.

67 Instead, the resolution of a questions on a demurrer is analogous to the resolution of separate questions. The analogy between the nature of the two types of procedures was expressly recognised by this Court in *Bass v Permanent Trustee Co Ltd* (**CAB 107-108 [263]**):[104]

> Preliminary questions may be questions of law, questions of mixed law and fact or questions of fact. Some questions of law can be decided without any reference to the facts. Others may proceed by reference to assumed facts, *as on demurrer or some other*

100 See *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 125-126 (Barwick CJ), 135 (Gibbs J), 140 (Stephen J).

101 See *Chhua v Commissioner of Taxation* (2018) 262 FCR 228 at [6] (Logan, Moshinsky and Steward JJ), quoting *Ex parte Bucknell* (1936) 56 CLR 221 at 225-226 (the Court). See, eg, *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582, where the Court simultaneously made separate orders: (i) allowing the demurrer; and (ii) dismissing the proceeding.

102 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [50] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

103 *R v Ireland* (1970) 126 CLR 321 at 330 (Barwick CJ).

104 (1999) 198 CLR 334 at [52] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (emphasis added). See also *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135 at [32]-[34] (the Court); *R v Rolfe* (2021) 273 CLR 413 at [27] (the Court).

challenge to the pleadings. In those cases, the judicial process is brought to bear to give a *final answer on the question of law involved*.

68 In a case involving the determination of a separate question,[105] a *ratio decidendi* may be extracted from the reasoning of those judges who constitute the majority on the particular question: **CAB 108 [264]**. The approach should be adopted, by analogy, where a question of law is isolated by a demurrer: **CAB 108 [265]**.

69 Indeed, it appears that the Commonwealth may now accept the soundness of the analogy (at least in the alternative), for it observes that "[w]hether grounds of a demurrer may be akin to [separate] questions can only be ascertained by an assessment of whether there is, as a matter of substance, a single ultimate question or multiple self-standing questions that the Court must answer in a given case": see **Cth [52]**. The Rirratjingu Parties agree with that observation. It is therefore necessary to identify the questions of law that were raised by the demurrer in *Wurridjal*.

C.2.2 The questions of law in Wurridjal

70 In *Wurridjal*, the Commonwealth demurred to the whole statement of claim.[106] The demurrer contained three grounds, which French CJ summarised as follows (**CAB 102-103 [248]**):[107]

70.1 the impugned statutes were not relevantly subject to the just terms requirement contained in s 51(xxxi);

70.2 even if the impugned statutes were subject to the just terms requirement, they provided for compensation constituting just terms in relation to any acquisition of property effected under s 51(xxxi);

70.3 the property relied upon by the plaintiffs as having been acquired was not property within the meaning of s 51(xxxi), and alternatively was not property capable of being acquired or which had been acquired by the impugned statutes within the meaning of s 51(xxxi).

71 In that way, each ground of the demurrer crystallised a distinct question of law: **CAB 108 [265]**. Each of those questions could just as readily been posed as a separate

105 See *O'Toole* (1990) 171 CLR 232 at 244 (Mason CJ), 280 (Deane, Gaudron and McHugh JJ), 303 (Dawson J). See also Herzfeld and Prince, *Interpretation* (2nd ed, 2020) at [34.120].

106 It is unnecessary to set out the detail of that pleading; it is summarised sufficiently at **CAB 102 [247]**.

107 *Wurridjal* (2009) 237 CLR 309 at [12] (French CJ). See also 312 (background).

question for consideration by the Full Court.[108] Contrary to **Cth [52]**, there was not "only one question that the Court was required to answer". The Commonwealth could have framed the demurrer in that way, but it elected instead to raise three grounds raising three distinct questions of law. That explains why French CJ summarised the grounds in the way that he did, and why the other members of the Court approached them in that way.[109]

72 It is the first question identified at paragraph 70 above that is relevant for present purposes: were the relevant statutes subject to the just terms requirement in s 51(xxxi)? Five judges (French CJ, Gummow and Hayne JJ, Kirby J and Kiefel J) answered that question "yes": **CAB 108 [265]**. Adopting the language of Cross and Harris,[110] that is the relevant "conclusion" of the Court on the first question of law. Adopting the language of *Bass*,[111] the Court thereby gave a "final" — in the sense of authoritative and binding — "answer on the question of law involved".

73 For four of the judges who reached that conclusion (French CJ, Gummow and Hayne JJ, and Kirby J), it was a "necessary step" in their reasoning that *Teori Tau* be overruled.[112] The four judges were united on that point. In accordance with Cross and Harris's definition (see paragraph 63 above), the ruling of those four judges on that point of law is a *ratio decidendi* of *Wurridjal*. That is so even though those same four judges did not agree as to the order disposing of the demurrer — which, in any event, did not finally dispose of the *proceeding*[113]: **CAB 103 [249]-[250]**.

C.3 Leave to reopen *Wurridjal* should be refused

74 If *Wurridjal* overruled *Teori Tau*, the Commonwealth requires leave to have the Court reopen and overrule *Wurridjal*. On this hypothesis, the Commonwealth seeks to argue that the 2009 overruling (*Wurridjal*) of a 1969 decision (*Teori Tau*) should itself be overruled in 2024. If that hypothesis is correct, leave should be refused at the outset.[114]

108 *Judiciary Act 1903* (Cth), s 18.

109 See, eg, *Wurridjal* (2009) 237 CLR 309 at [147]-[149] (Gummow and Hayne JJ), [281], [287] (Kirby J), [318] (Heydon J), [353]-[355] (Crennan J).

110 Cross and Harris, *Precedent in English Law* (4th ed, 1991) at 72.

111 (1999) 198 CLR 334 at [52], see also [46], [47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

112 See *Wurridjal* (2009) 237 CLR 309 at [86] (French CJ), [189] (Gummow and Hayne JJ), [287] (Kirby J).

113 Paragraph 1 of the Court's Order was to allow the demurrer. But as paragraph 3 of the Order makes plain, the "[f]urther conduct of the action" was a matter for direction by a Justice.

114 See, eg, *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311; *Ha v New South Wales* (1997) 189 CLR 465 at 499 (Brennan CJ, McHugh, Gummow and Kirby JJ).

The Commonwealth should not be permitted to make an argument which, if accepted, would result in the Court's jurisprudence having ping-ponged between two diametrically opposed positions on three occasions over the past 50 years. That should count decisively against the Commonwealth's application. Nothing has occurred in the past 15 years since *Wurridjal* was decided that might temper that position.[115] In the circumstances, for the Court to reopen and reconsider *Wurridjal* would be anathema to the "law's objectives of consistency, predictability and fairness".[116]

75 That is particularly so where, in substance, the Commonwealth seeks to rerun the arguments it lost in *Wurridjal*.[117] Four judges considered those arguments, and united in rejecting them. Moreover, even by the time *Wurridjal* was decided, the Commonwealth's preferred position already stood "isolated" from the stream of jurisprudence.[118] Since then, the stream has continued to flow against that position: see **CAB 111 [275]-[276]**. The Commonwealth's arguments have not improved with age.[119]

76 If further analysis is required, the Court ought to carefully scrutinise the four matters the Commonwealth relies upon to support its application for leave to re-open *Wurridjal*. Those four matters are said to be "points of substance" that emerge from the familiar factors identified in *John v Commissioner of Taxation* (**Cth [53] n 74**).[120]

77 The *first* matter relied upon by the Commonwealth is that "the divergence in opinion between *Teori Tau*, *Newcrest* and *Wurridjal* demonstrates that there is an unsettled question about the relationship between ss 51(xxxi) and 122": **Cth [53]**. That matter can immediately be dismissed. The premise of any application to reopen *Wurridjal* must be that it *settled* the law as to the correct relationship between ss 51(xxxi) and 122. That is the "relevant judicial starting point from which further analysis may be undertaken".[121]

115 See *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569 at [162] (Keane J).

116 *Vanderstock* (2023) 98 ALJR 208 at [843] (Jagot J). See also ***NZYQ** v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at [17], [36]-[37] (the Court); *Wurridjal* (2009) 237 CLR 309 at [70] (French CJ).

117 See especially *Wurridjal* (2009) 237 CLR 309 at 326 ("Section 122 is a complete grant of power to legislate for the government of territories. It is as large a power as can be granted … Section 122 adopts the broadest of terms"), 327 ("Section 122 was intended to enable the Parliament to govern effectively whatever type of territory might be surrendered or allocated to it.") (Burmester QC). Compare the repeated references to "plenary", "breadth" and "flexibility" in **Cth [15], [19], [23], [25]-[28], [30]-[31], [41], [47]**. See also **GR [23]**.

118 *Wurridjal* (2009) 237 CLR 309 at [86], see also at [71] (French CJ), [189] (Gummow and Hayne JJ).

119 See *Vanderstock* (2023) 98 ALJR 208 at [856] (Jagot J).

120 A wide range of relevant considerations are set out at **GR [21]**.

121 *Vanderstock* (2023) 98 ALJR 208 at [845] (Jagot J).

From that starting point, the first *John* factor ought to be considered: did *Wurridjal* rest upon a principle carefully worked out in a significant succession of cases? The answer to that question is "yes". The correctness of *Teori Tau* was analysed carefully having regard to the Court's jurisprudence on s 51(xxxi) and s 122 more generally. That points strongly against leave being granted.

78 The *second* matter relied upon by the Commonwealth depends on the assumption that the judges in *Wurridjal* who overruled *Teori Tau* did so on the understanding that what Gummow J said in *Newcrest* about native title and s 51(xxxi) was correct: **Cth [54]**. This appears to be a spin on the third *John* factor: has *Wurridjal* achieved no useful result but instead led to considerable inconvenience? The matter should be given little weight. Three of the judges who overruled *Teori Tau* in *Wurridjal* (French CJ, Gummow and Hayne JJ) made no reference to this aspect of Gummow J's reasoning in *Newcrest*. Further, French CJ referred to "inherent susceptibility" only in the context of statutory rights.[122] The fourth judge (Kirby J) referred to parts of Gummow J's reasoning, including the relevant passage.[123] By doing so, Kirby J endorsed the analysis in that passage, noting his Honour had said as much in *Newcrest*. However, that does not take the matter very far. His Honour's observations in *Newcrest* about Gummow J's analysis must be read in context:[124]

> Various other arguments for holding to *Teori Tau* are collected in the opinions of Brennan CJ, Dawson and McHugh JJ in this matter. Some of them lay emphasis on the supposed consequences of the opposite theory for the validity of grants of freehold or leasehold title made by the Commonwealth in the Northern Territory after 1911. For the reasons given by Gummow J, I am not convinced that these apprehensions are well founded. *If they were, yet were the consequences of the operation of the Constitution properly understood, they could not provide a reason for withholding the meaning which the text required*.

79 This passage, read together with the totality of Kirby J's reasoning in *Newcrest*, reveals that Kirby J would have overruled *Teori Tau* in any event. It is therefore beside the point whether or not his Honour's reasoning in *Wurridjal* proceeded on a "wrong premise" about the correctness of Gummow J's reasoning in *Newcrest*: cf **Cth [54]**.

122 See *Wurridjal* (2009) 237 CLR 309 at [92]-[93] (French CJ).
123 See *Wurridjal* (2009) 237 CLR 309 at [283] n 424.
124 (1997) 190 CLR 513 at 651-652 (emphasis added)

80 The *third* matter relied upon by the Commonwealth is an assertion that the reasoning in *Wurridjal* is "unpersuasive": **Cth [55]**. The strength of the reasoning in a particular case may inform the question of whether the case should be reopened. But there is nothing "unpersuasive" about the reasoning in *Wurridjal*. Rather, it accords with an orthodox application of the principles governing constitutional construction: see **Part C.5**.

81 At this point, we mention the second *John* factor: was there a difference between the reasons of the majority in *Wurridjal* for overruling *Teori Tau*? The answer to that question is "no". There is no material difference between the reasons of French CJ, Gummow and Hayne J, and Kirby J.[125] That uniformity in reasoning points against leave being granted.

82 The *fourth* and final matter relied upon by the Commonwealth is that *Wurridjal* has not been relied upon in the determination of any justiciable controversy on the relationship between s 51(xxxi) and s 122: **Cth [56]**. That resembles the fourth *John* factor: whether *Wurridjal* has been independently acted on in a manner which militates against reconsideration. There is no evidence that it has been acted upon in that way.[126] This matter should be treated as neutral, for it is counterbalanced by the fact that *Teori Tau* itself "has not been relied upon by any member of a majority of the Court for the proposition that s 51(xxxi) does not constrain the power under s 122 to make laws for the acquisition of property".[127] That being so, although reopening and overruling *Wurridjal* would not disturb any later authority (being a matter that would weigh in favour of the Commonwealth's application), the only decision to be salvaged by doing so would be *Teori Tau* itself (being a matter that substantially reduces the importance of any reopening).

83 For those reasons, if *Wurridjal* is binding in so far as it concerns the relationship between s 51(xxxi) and s 122, leave to reopen it should be refused. In that event, Ground 1 should be dismissed.

125 Kirby J expressly agreed with certain aspects of the reasons of French CJ, and Gummow and Hayne: *Wurridjal* (2009) 237 CLR 309 at [284]-[286].

126 See *Wurridjal* (2009) 237 CLR 309 at [85] (French CJ). See also *Vanderstock* (2023) 98 ALJR 208 at [131] (Kiefel CJ, Gageler and Gleeson JJ), see also at [939] (Jagot J), cf at [437] (Gordon J).

127 See *Wurridjal* (2009) 237 CLR 309 at [82] (French CJ).

C.4 Alternatively, *Teori Tau* should be re-opened and overruled

84 As noted at paragraph 58 above, rather than standing its ground on the purity of *Teori Tau*, the Commonwealth has retreated to the compromise position reached in *Newcrest*. As will be explained later, that compromise position is untenable as a matter of principle: **Part C.5.3**. But it also reveals an incoherence in the Commonwealth's argument about the status of *Teori Tau*.

85 The Commonwealth's position is that, if *Wurridjal* did not overrule *Teori Tau*, then *Teori Tau* requires that Ground 1 be resolved in its favour because *Teori Tau* remains binding authority for the proposition that a law "that has no constitutional support other than s 122 of the Constitution [is] subject to the constraints of s 51(xxxi)": **Cth [12]-[13]**. The Commonwealth asserts that the result and reasoning in *Newcrest* "left undisturbed the authority of *Teori Tau* with respect to a law supported only by s 122": **Cth [39]**. But, on careful examination, the true position is to the contrary.

C.4.1 Teori Tau is not binding

86 The difficulty with the Commonwealth's position is that the proposition just identified does not emerge from the reasoning in *Teori Tau*. That is because, as noted at paragraph 53 above, the Court did not draw any distinction between a law supported "solely" by s 122 and a law supported by s 122 and another head of power. That distinction was not recognised until *Newcrest*.

87 More than that, the Court in *Teori Tau* reasoned in a way that is inconsistent with *Newcrest*. The Court reasoned that s 122 is "plenary in quality" and "is not limited or qualified by s 51(xxxi) *or, for that matter, by any other paragraph of that section*".[128] But that is the precisely the result of *Newcrest*: s 51(xxxi) and another head of power in s 51 may combine together in a way that limits the scope of s 122. In that way, *Newcrest* implicitly overruled the core strand (indeed, really the only strand) of reasoning in *Teori Tau* and replaced it with a "fresh doctrine".[129]

88 Ordinarily, in those circumstances, *Teori Tau* would have "no precedent value beyond its own facts".[130] However, properly understood, *Newcrest* must also be taken to have

128 *Teori Tau* (1969) 119 CLR 564 at 570 (the Court) (emphasis added). The emphasised words are omitted from the quote at **Cth [37]**.

129 See ***Shaw*** *v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at [36] (Gleeson CJ, Gummow and Hayne JJ).

130 See *Shaw* (2003) 218 CLR 28 at [35] (Gleeson CJ, Gummow and Hayne JJ).

overruled the result in *Teori Tau*. It concerned the making of ordinances under statutes concerned with the government of an external territory. The generally accepted view is that, for the purposes of s 122, there is no distinction between an internal territory and external territory: cf **NT [51]-[65]**. But because of *Newcrest*, the distinction takes on some relevance in so far as s 51(xxxi) is concerned, because of the potential application of the external affairs power (s 51(xxix)) to at least some external territories.

89 If the Territory of New Guinea (and later the Territory of Papua and New Guinea) was not part of the Australia",[131] the laws and the ordinances challenged in *Teori Tau* were with respect to "places, persons, matters or things outside the geographical limits of, that is, external to, Australia".[132] On the basis of authorities post-dating *Teori Tau*, they were therefore also laws within the "geographic externality" limb of the external affairs power.[133] Following *Newcrest*, that would be sufficient to attract the "just terms" condition and the question in the special case stated in *Teori Tau* ought to have been answered "yes":[134] cf **Cth [12]-[13]**.

90 In the end, even if *Newcrest* did not overrule the reasoning or result in *Teori Tau*, it substantially weakened its authority. That makes it ripe for reconsideration, notwithstanding the "strongly conservative principle" that such a course should not lightly be taken.[135] That issue is addressed in the next section.

C.4.2 Teori Tau should be reopened and overruled

91 If it is necessary to reopen *Teori Tau* and overrule it, that leave should be granted — as it was by Gaudron J, Kirby J and Gummow J in *Newcrest* and French CJ, Gummow and Hayne JJ, and Kirby J in *Wurridjal*.

92 The matters identified in the previous section illustrate its problems as a matter of authority. Here, we address the *John* factors. They must be assessed bearing in mind

131 That the territory was under Australian administration does not necessarily mean that it was a "constituent part of the Commonwealth either in a political *or in a geographic sense*": see *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 286 (Gaudron J) (emphasis added). See also ***Bennett*** *v Commonwealth* (2007) 231 CLR 91 at [35]-[36] Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Re MIMIA; Ex parte* ***Ame*** (2005) 222 CLR 439 at [5]-[6], [22], [30]-[33] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); and the authorities cited at **NLC [24] n 30**.

132 *XYZ v Commonwealth* (2006) 227 CLR 532 at [10] (Gleeson CJ), see also [44]-[45] (Gummow, Hayne and Crennan JJ); *Zurich Insurance Company Ltd v Koper* (2023) 97 ALJR 614 at [19] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

133 David **Jackson QC** and Stephen **Lloyd**, "Compulsory Acquisition" (1998) *AMPLA Yearbook* 75 at 81.

134 *Teori Tau* (1969) 119 CLR 564 at 566 (see paragraph 9), 569 and 571.

135 See *NZYQ* (2023) 97 ALJR 1005 at [17], [35].

that the constitutional question is of "vital" importance,[136] given it concerns a "constitutional guarantee".[137] Taken together, they weigh heavily in favour of reopening: see also **GR [24]-[25]**.

93 *First*, *Teori Tau* did not rest upon a principle carefully worked out in a significant succession of cases. To the contrary, it did not accord with a pre-existing "stream of authority" concerning the scope of s 122, nor with that concerning the nature of s 51(xxxi) and other heads of power. Nor does it accord with the subsequent flow of authority on those matters.[138]

94 *Second*, there was a unanimous joint judgment, which is a factor that tends against reopening. However, the significance of that factor is diminished by the brevity of the reasoning in that judgment, which is potentially explained by it being delivered *ex tempore* and without the benefit of time for "extended reflection" on the argument advanced by the plaintiff (and, indeed, in the absence of any argument from the Commonwealth).[139]

95 *Third*, the decision has not achieved any useful result. Rather, there are "potential absurdities and inconveniences resulting from it".[140] As to whether it has caused "considerable inconvenience", the observations of McHugh J in *Newcrest* are insightful. His Honour thought it "at least arguable" that overruling *Teori Tau* "would result in grants of freehold and leasehold in the Territory being invalid" because of s 51(xxxi). On that premise, his Honour went on to say:[141]

> If the decision in *Teori Tau* was plainly wrong, then justice for the dispossessed holders of native title might justify the Court overruling that decision despite the economic and probable social cost that such a step might bring on the people of the Territory and consequentially on the people of Australia.

96 McHugh J's focus on whether *Teori Tau* was "plainly wrong" was misplaced.[142] But his observation otherwise remains sound. Applied here, it suggests that if Ground 2 is

136 *Lange* (1997) 189 CLR 520 at 554 (the Court).
137 See *Wurridjal* (2009) 237 CLR 309 at [85] (French CJ); *Newcrest* (1997) 190 CLR 513 at 613 (Gummow J), 646 (Kirby J).
138 See *Wurridjal* (2009) 237 CLR 309 at [85] (French CJ), [178] (Gummow and Hayne JJ). See also **NLC [27]**.
139 See *Wurridjal* (2009) 237 CLR 309 at [85] (French CJ), [179]-[180] (Gummow and Hayne JJ).
140 *Wurridjal* (2009) 237 CLR 309 at [85] (French CJ).
141 *Newcrest* (1997) 190 CLR 513 at 576. See also **NLC [28]**.
142 See *Wurridjal* (2009) 237 CLR 309 at [70]-[71] (French CJ); *NZYQ* (2023) 97 ALJR 1005 at [35] (the Court).

resolved against the Commonwealth, that might *favour* reopening and overruling *Teori Tau* (or alternatively, against reopening *Wurridjal*): cf **Cth [54]**.

97 *Fourth*, at present, it remains to be seen whether the Commonwealth can identify any specific legislative or administrative reliance that militates against reconsideration.[143] In the absence of clear identification of such reliance, the only "responsible approach to be taken by the Court is to proceed on the basis" that there has not been any.[144] And, as noted at paragraph 82 above, there has been no judicial reliance in the relevant sense.[145]

C.5 Constitutional construction

98 Finally, if Ground 1 is not resolved by an application of precedent, the Court should dismiss Ground 1 by applying orthodox principles of constitutional construction.

99 The starting point must be the text of ss 51(xxxi) and 122. Of course, those provisions are not to be read in isolation. Everyone agrees that the question of construction must be "resolved upon a consideration of the text and of the purpose of the Constitution as a whole": see **Cth [15]-[16]**; **NT [12]; GR [26]; NLC [15]**.

100 Critically, however, it must also be resolved consistently with the general principles that govern s 51(xxxi), as outlined in **Part B.2**. As we explain below, those general principles, and the text of ss 51(xxxi) and 122, allow for only one answer to the question of construction. We then elaborate on why the people in the territories should not be deprived of the constitutional guarantee in s 51(xxxi). Finally, we explain why the *Newcrest* compromise is untenable as a matter of principle.

101 None of those matters can be overcome by invoking the discarded notion that s 122 is a "non-federal" and "disparate" power. In terms, the Commonwealth astutely disclaims any reliance upon it: **Cth [31]**. But the substance of much of the Commonwealth's argument ultimately depends upon the correctness of the notion: see **NT [32]-[26]**; **GR [39]-[43]**; **NLC [18]-[21]**.

102 The true position, however, is that s 122 is "but one of several heads of legislative power given to the *national* legislature of Australia".[146] For that reason, among others, no

143 Cf *NZYQ* (2023) 97 ALJR 1005 at [19]-[22], [36] (the Court).
144 *Vanderstock* (2023) 98 ALJR 208 at [131] (Kiefel CJ, Gageler and Gleeson JJ).
145 *Wurridjal* (2009) 237 CLR 309 at [82] (French CJ).
146 *Wurridjal* (2009) 237 CLR 309 at [184] (Gummow and Hayne JJ) (emphasis added).

analogy can be drawn with State legislative power: see **NT [15], [29], [46]-[50]**; cf **Cth [29], [48]-[49]**.

C.5.1 The text of ss 51(xxxi) and 122

103 At the level of principle, the logic that leads to the conclusion that s 51(xxxi) abstracts powers from the other heads of power in s 51 (and the heads of power in ss 52 and 96) applies equally to the relationship between s 51(xxxi) and s 122. Indeed, that logic applies to the relationship between s 51(xxxi) and "to all heads of the power of the Parliament".[147] The logic arises out of the text of s 51(xxxi), understood in light of the principle identified by Dixon CJ in *Schmidt*. The Commonwealth seeks to sideline that logic by advancing its "contrary intention" approach. But that approach is inapplicable for the reasons given in **Part B.3**.

104 That the same logic applies to s 122 is confirmed beyond any real doubt by the inclusion in s 51(xxxi) of the expression "for any purpose in respect of which the Parliament has the power to make laws": see further paragraph 34 above. There is nothing in that expression, or elsewhere in s 51(xxxi), that suggests "the power to make laws" does not encompass the power in s 122[148] or that the term "any purpose" is to be understood as encompassing only *some* of the purposes in respect of which the Parliament has the power to make laws.[149] The Commonwealth ignores that aspect of the text of s 51(xxxi),[150] despite it being an express identification of the relationship between s 51(xxxi) and other heads of power.

105 As for the text of s 122, there is nothing that distinguishes it from any other "power to make laws".[151] Like all of the heads of power in s 51, it refers to a particular "subject matter" — being "the government of any territory".[152] Further, "in empowering the Parliament to make laws 'for' the government of any territory", the section identifies "a purpose, in terms of the end to be achieved".[153] In that way, s 122 "states a purpose in

147 See *Wurridjal* (2009) 237 CLR 309 at [78] (French CJ), [185]-[186] (Gummow and Hayne JJ), [284] (Kirby J). See also *Newcrest* (1997) 190 CLR 513 at 654 (Kirby J); *ICM* (2009) 240 CLR 140 at [135] (Hayne, Kiefel and Bell JJ).

148 *Newcrest* (1997) 190 CLR 513 at 652 (Kirby J).

149 *Newcrest* (1997) 190 CLR 513 at 594-595 (Gummow J). See also **GR [32]**.

150 It is, perhaps, implicitly acknowledged in the final sentence of **Cth [48]**.

151 See *Newcrest* (1997) 190 CLR 513 at 594-595 (Gummow J).

152 *Lamshed v Lake* (1958) 99 CLR 132 at 141 (Dixon CJ). See also **GR [34(b)]**.

153 *Newcrest* (1997) 190 CLR 513 at 600 (Gummow J).

respect of which the Parliament has power to make laws" within the meaning of s 51(xxxi).[154]

106 Against the force of the above, there are two key textual matters relied upon by the Commonwealth.

107 The first is that s 51 is expressed to be "subject to this Constitution" whereas s 122 does not include that expression: **Cth [46]**. That point is of little assistance.[155] For example, the expression does not appear in s 96 either, but *ICM* establishes that s 51(xxxi) qualifies the scope of that power.[156] Moreover, the lack of the expression in s 122 has not precluded it being subjected to a range of other limitations arising from ss 90, 92, Ch III and the implied freedom of political communication:[157] **NT [26]**.

108 The other textual matter relied upon by the Commonwealth is the expression "laws *for* the peace, order, and good government of *the Commonwealth*" in the chapeau to s 51. The Commonwealth says that expression confines the operation of s 51(xxxi) "to laws made for the nation as a whole": **Cth [44]**. But that does not advance matters either, because "the Commonwealth" in that expression invokes "the courts, judges, and people of every State and of *every part of the Commonwealth*" as it appears in covering clause 5,[158] and extends to the courts, judges and people of (at least) the internal territories.[159]

109 Accordingly, the text of both ss 51(xxxi) and 122 point overwhelming in favour of the conclusion that s 51(xxxi) reduces the scope of s 122.

C.5.2 The constitutional guarantee in the territories

110 The status of s 51(xxxi) as a "constitutional guarantee" is significant in considering its relationship with any other heads of power.[160] Yet the word "guarantee" does not appear

154 *Newcrest* (1997) 190 CLR 513 at 600 (Gummow J). See also **NT [29]**, **GR [33]**.

155 See *Newcrest* (1997) 190 CLR 513 at 606 (Gummow J), 653 (Kirby J). See also **NT [26]**; **GR [34(a)]**; **NLC [26]**.

156 See *Hornsby* (2023) 97 ALJR 534 at [13] (the Court).

157 As to the potential application of s 116, see *Kruger* (1997) 190 CLR 1 at 123 (Gaudron J), 162 (Gummow J)

158 See *Wurridjal* (2009) 237 CLR 309 at [74] (French CJ), *Newcrest* (1997) 190 CLR 513 at 597 (Gummow J). See also **GR [30]-[31]**.

159 See further *Bennett* (2007) 231 CLR 91 at [35] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Ame* (2005) 222 CLR 439 at [30] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

160 See *Wurridjal* (2009) 237 CLR 309 at [79] (French CJ), [178] (Gummow and Hayne JJ), [285] (Kirby J).

once in the Commonwealth's submissions, and the purpose served by that guarantee is mentioned only in passing: see **Cth [43]**.

111 However, once the status of s 51(xxxi) as a guarantee is properly acknowledged, there is no room for any "principle" that "preference will be given to a construction of other provisions of the Constitution that does not deny s 122 the flexibility that the framers clearly intended it to have": **Cth [33]**. Assuming that such a principle exists (which must be doubted), the true position is reflected in the Gaudron J's observation in *Kruger* that:[161]

> the consideration that, unlike other Australians, residents of the Territories have neither a constitutional right to participate in the electoral processes for which the Constitution provides nor a constitutional right to self-government is, in itself, *a strong reason for reading s 122 as subject to express constitutional guarantees and freedoms unless their terms clearly indicate otherwise*.

112 That position accords with the Court's general approach to interpreting constitutional guarantees. It properly directs attention to the text of the relevant guarantee, not s 122. That drives the analysis back to the matters addressed in paragraphs 103 to 109 above. Those matters provide a strong reason for subjecting s 122 to s 51(xxxi) — not the other way around.

113 More generally, at the level of principle, there is no reason why s 122 should be subject to other constitutional guarantees, but not to the constitutional guarantee in s 51(xxxi). Like the constitutional guarantee in s 51(xxxi), neither s 92 nor the implied freedom confer "personal rights": see **Cth [36], [43]**. Yet, because both of those other guarantees are bounded by a "proportionality" requirement directed to a question of "justification", both have the effect of preventing "arbitrary" exercises of power by the Commonwealth in their respective fields of operation. That is the same end to which the constitutional guarantee in s 51(xxxi) is directed: see paragraph 13 above.

114 If anything, there would be stronger reasons for the Court to hold that s 122 is not subject to constitutional guarantees or constraints other than s 51(xxxi). Those other constraints directly limit the scope of Commonwealth legislative power. In that way, they impose

[161] (1997) 190 CLR 1 at 106-107 (emphasis added). To similar effect, see *Newcrest* (1997) 190 CLR 513 at 654 (Kirby J). See also **GR [36]-[37]**.

limits on the Parliament's "legislative options".[162] For example, the "consequence of the implied constitutional freedom is that there are some legitimate ends which cannot be pursued by some means, the result of which in some circumstances is that some ends will not be able to be pursued to the same extent as they might have been pursued absent the implied constitutional freedom".[163] In some cases, the law may be "refined" to avoid infringing the implied freedom; but in some cases the particular legislative goal may need to be "abandoned".[164]

115 There is no such difficulty with s 51(xxxi). As a matter of *power*, the Parliament's legislative options to implement a particular legislative goal will be the same regardless of whether s 122 is subject to s 51(xxxi). The difference will be practical only, namely the financial outlay required to achieve that goal. That outlay (or not) is a matter for the Parliament and the Executive. It is only in that indirect way that it can be said that s 51(xxxi) would confine the Parliament's legislative choice in respect of the government of the territories: see also **NT [41]**; **GR [54]-[57]**; cf **Cth [47]**.

116 This final point is important where, in substance, the Commonwealth's submissions reduce to a single objection about the subjugation of s 122 to s 51(xxxi) — namely, that the "breadth" and "flexibility" of s 122 will be reduced. That is the essential point expressed in varying language and varying degrees of emphasis at **Cth [15], [19], [23], [25]-[28], [30]-[31], [41]** and **[47]**. But the Commonwealth's concern about the reduction in breadth and flexibility can be seen to be misplaced, or at least significantly overstated, once the nature of the limitation on legislative power is understood.[165]

C.5.3 *Newcrest* is untenable as a matter of principle

117 It remains to mention *Newcrest*. The compromise position reached in that case, which the Commonwealth seeks to defend, is untenable as a matter of principle.

118 Consistent with the logic outlined in **Part B.2**, McHugh J explained in *WMC* that:[166]

> To speak in terms of whether the legislation at issue "breaches" or "contravenes" s 51(xxxi) misses the point. If s 51(xxxi) has withdrawn from every other head of

162 ***Tajjour*** *v New South Wales* (2014) 254 CLR 508 at [163] (Gageler J). See also *Brown v Tasmania* (2017) 261 CLR 328 at [322] (Gordon J); *Farm Transparency International Ltd v New South Wales* (2022) 96 ALJR 655 at [72] (Gageler J).

163 *Tajjour* (2014) 254 CLR 508 at [163] (Gageler J).

164 *Tajjour* (2014) 254 CLR 508 at [163] (Gageler J).

165 See also *Newcrest* (1997) 190 CLR 513 at 654 (Kirby J).

166 (1998) 194 CLR 1 at [131].

federal power the capacity to acquire the property in question, it is the only source of power that can support the acquisition. If the legislation acquiring the property can be supported by another head of federal power that has not relevantly been curtailed by the presence of s 51 (xxxi), s 51 (xxxi) cannot invalidate the legislation. If the legislation cannot be so supported, it fails for want of power to enact legislation in that form — not because it "contravenes" s 51(xxxi).

119 In the context of a law that may be supported by s 122,[167] that logic leaves open only two opposing positions:

119.1 If s 51(xxxi) does *not* abstract from s 122 — as *Teori Tau* held — then the law will be capable of being supported by s 122 and will be valid even if it does not provide just terms.

119.2 If s 51(xxxi) *does* abstract from s 122 — as *Wurridjal* holds — then s 51(xxxi) is the only source of power that can support an acquisition and, to be valid, the law must comply with just terms.

120 As a matter of principle, there is no third option. Although not entirely clear, the basis for the "intermediate" position advanced by the Commonwealth appears to reflect the misconception spoken of by McHugh J in the passage above — namely, that the issue is to be approached as a question of whether the legislation "breaches" or "contravenes" s 51(xxxi). But, as McHugh J said, that misses the point.

121 What is ultimately at issue is whether the legislation acquiring the property can be supported by another head of federal power that has not relevantly been curtailed by the presence of s 51 (xxxi). If s 122 is such a power, the fact that there would (but for the presence of s 51(xxxi)) be other heads of s 51 power that might also support the law is simply irrelevant. The essence of that point was acknowledged by Brennan CJ in *Newcrest*.[168] It is ignored entirely by the Commonwealth. The problem cannot be solved as a matter of constitutional construction.

C.6 A final issue: Ordinance-making powers and heads of power

122 Underlying the Commonwealth's approach to Ground 1 is an assumption that the relevant ordinance-making power "is clearly a law falling solely within s 122 of the Constitution": **Cth [22]**, see also **[4], [44]**. The correctness of the Commonwealth's

167 See *Newcrest* (1997) 190 CLR 513 at 533 (Brennan CJ).

168 See (1997) 190 CLR 513 at 534 (under the heading "Two heads of power").

assumption is, however, far from "clear".[169] The apparent reliance by the Parliament upon s 122 to enact particular ordinance-making powers does not deny that those powers may also supported by other heads of power, "the question being one not of intention but of power from whatever source it is derived".[170]

123 Before the Full Court, the Rirratjingu Parties submitted that the ordinance-making power in s 13 of the *Northern Territory (Administration) Act 1910* (Cth)[171] — the predecessor of s 21 and s 4U — was *not* a law supported *only* by s 122 of the Constitution. Instead, the Rirratjingu Parties submitted that s 13 of the *Northern Territory (Administration) Act 1910* (Cth) was supported by "every head of legislative power" that would have supported an ordinance that satisfied the criterion specified in s 13.[172] On that approach, it is necessary to examine "the rights, powers, liabilities, duties and privileges" created by a particular ordinance to determine whether it is supported only by s 122.[173] To use an example raised by Moshinsky J in oral argument:[174] if the Governor-General exercised the power in s 13 of the *Northern Territory (Administration) Act 1910* (Cth) to make a "Lighthouses Ordinance" the "lighthouses" power (s 51(vii)) would supply a source of power for s 13 and the Ordinance.[175]

124 In the Full Court, the Rirratjingu Parties advanced the above argument on Separate Question 1, which concerned the grant of the "Mission Lease". That lease was granted under s 14(1) of the *Aboriginals Ordinance 1918* (NT): see **CAB 76-80 [141]-[156],**

169 The Commonwealth correctly acknowledges that the proposition is not established by any binding authority: see **Cth [22] n 17**.

170 *Ame* (2005) 222 CLR 439 at [31] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ), citing *R v* ***Hughes*** (2000) 202 CLR 535 at [15] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), see also at [112] (Kirby J).

171 Section 13(1) provided: "Until the Parliament makes other provision for the government of the Territory, the Governor-General may make Ordinances having the force of law in the Territory".

172 See T319.43–320.5: Rirratjingu Parties' Book of Further Materials (**RP BFM**) at 3-4. See *Williams v Commonwealth [No 2]* (2014) 252 CLR 416 at [35]-[36] (French CJ, Hayne, Kiefel, Bell and Keane JJ); *Hughes* (2000) 202 CLR 535 at [40] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

173 *Grain Pool* (2000) 202 CLR 479 at [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See further *Williams [No 2]* (2014) 252 CLR 416 at [38]-[51] (French CJ, Hayne, Kiefel, Bell and Keane JJ), [101] (Crennan J); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [104] (Gummow J); *Palmer* (2021) 272 CLR 505 at [122]-[124] (Gageler J).

174 T328.39–329.3: **RP BFM** at 12-13.

175 See Gaudron J, analysing the proclamation-making power in s 7(2) of the Conservation Act, and the proclamations made under that provision, in *Newcrest* (1997) 190 CLR 513 at 563-564.

91-93 [200]-[207].[176] The ultimate contention was that s 14(1) of the Aboriginals Ordinance was supported by s 122 of the Constitution *and* was a law with respect to "the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws": s 51(xxvi).[177] On that hypothesis, the grant of the Mission Lease under the *Aboriginals Ordinance 1918* (NT) engaged s 51(xxxi) on the basis of *Newcrest*.

125 The Full Court did not need to rule on that issue because of its conclusion that s 51(xxxi) applies to laws made solely under s 122: **CAB 50 [49], 112 [279]**. Further, the Full Court concluded that the Mission Lease did not extinguish (or purport to extinguish) any native title rights in the claim area, and that conclusion is not the subject of an appeal to this Court: **CAB 52-53 [57]-[58]**.[178]

126 However, the same principles that the Rirratjingu Parties sought to apply to the Mission Lease may be applied to Special Mineral Leases 1–4 and 11, and s 107 of the *Mining Ordinance 1939* (NT), for the reasons given at **NLC [32]-[39]**. Of course, it will only be necessary to do so if the *Newcrest* compromise represents the law.[179] For the reasons given above, it does not.

D GROUND 2: NATIVE TITLE AND SECTION 51(xxxi)

D.1 Introduction

127 In *Georgiadis*, Mason CJ, Deane and Gaudron JJ said:[180]

> There is no acquisition of property involved in the modification or extinguishment of a right which has no basis in the general law **and** which, of its nature, is susceptible to that course. A law which effected the modification or extinguishment of a right of that kind would not have the character of a law with respect to the acquisition of property within s 51(xxxi) of the Constitution.

176 Section 14(1) provided: "The Administrator may grant to any aboriginal institution leases of any Crown Lands for any term not exceeding twenty-one years, at such rent and on such terms as he thinks fit". "Aboriginal Institution" and "Aboriginal" were defined in s 3.

177 This being the wording of s 51(xxvi) prior to its amendment by the *Constitution Alteration (Aboriginals) 1967*.

178 That conclusion is not challenged on this appeal. It can be noted, however, that the Commonwealth seeks to have the answer to Separate Question 1 amended so that instead of "No" it reads "No, because the Mission Lease did not extinguish any native title rights". If any revision is to be made to that answer, the preferable approach would be for Separate Question 1(a) to be answered "No"; and for Separate Question 1(b) to be answered "Unnecessary to answer". That accords with the explanation at **CAB 98 [226]**.

179 In that event, the NLC Parties' Notice of Contention should be upheld.

180 (1994) 179 CLR 297 at 306 (emphasis added).

128 By reference to that statement (among others), it is generally accepted that a law will not be characterised as one with respect to an "acquisition of property" within the meaning of s 51(xxxi) if the effects a "modification or extinguishment" of a right that:[181]

128.1 has "no basis in the general law" — a purely statutory right; **and**

128.2 is one "of its nature" that is "susceptible" to modification or extinguishment.

129 As noted at paragraph 45 above, we refer to this principle as the **statutory susceptibility principle**, being a label that is intended to recognise its two essential elements. As the Full Court correctly noted, that principle has been engaged only in circumstances where *both* elements have been present: **CAB 121-122 [319]**.

10 130 There is no dispute that native title rights and interests have a basis in the general law. They are therefore not within the statutory susceptibility principle. However, the Commonwealth seeks to expand the statutory susceptibility principle by discarding the first element. That is, it contends that a law that acquires any right — purely statutory or not — will not be a law characterised as respect to an "acquisition of property" within the meaning of s 51(xxxi) if the right is "of its nature" that is "susceptible" to modification or extinguishment: see **Cth [125]**.

131 The correctness of that submission is the threshold issue on Ground 2. It must be rejected. It is not merely a matter of coincidence that the principle has been developed in the context of purely statutory rights. The principle has been developed to address a
20 specific conceptual difficulty that exists only in relation to such rights. There is no basis for it to be expanded: **Part D.3**. It therefore cannot apply to native title rights and interests and Ground 2 must be dismissed: **Part D.4**. Alternatively, native title rights and interests are not "susceptible" to modification or extinguishment in the relevant sense: **Part D.5**.

132 Before addressing those points, it is necessary to say something about terminology and how the principle fits with the general principles outlined in **Part B.4**.

D.2 Terminology and analytical approach

133 There is a general tendency to refer to what we call the statutory susceptibility principle by using labels such as "inherent susceptibility" or "inherent defeasibility". However,

181 *Georgiadis* (1994) 179 CLR 297 at 306 (Mason CJ, Deane J and Gaudron J). See also *Wurridjal* (2009) 237 CLR 309 at [363]-[364] (Crennan J); *JT International* (2012) 250 CLR 1 at [102] (Gummow J).

the use of those labels can lead to confusion of thought. One problem is the use of the word "inherent". For example, in ordinary language, it may be said that all statutory rights are "inherently" susceptible to modification or extinguishment by the legislature.[182] Alternatively, it may be said that that some rights are "inherently" susceptible to modification or extinguishment because of some characteristic of the right "inherent at the time of its creation and integral to the property itself".[183]

134 Another problem is that a distinction can be drawn between "a right conferred by statute [that] is so slight or insubstantial that it may not constitute at general law what would be a proprietary interest at all"[184] (sometimes referred to as a "fragile" right), and one which is "susceptible" to modification: see **Cth [117]**. Yet that distinction is not always clearly made or recognised in the authorities[185] (or submissions: see **Cth [101]-[104]**).

135 In light of those problems, when considering the authorities (and submissions) that use the label "inherent susceptibility" (or similar), careful analysis is required to determine what concept is being invoked. Our own label must, of course, also be applied carefully.

136 Separately, but perhaps relatedly, there has been some confusion in the authorities about how where the statutory susceptibility principle fits into the characterisation exercise.[186] Utilising the framework we have set out in **Part B.4**, there are several possibilities (see **CAB 116 [296]-[297]**):

136.1 The first possibility is that a statutory right that is susceptible to modification is not "property" within the meaning of s 51(xxxi).

136.2 The second possibility is that where such a right is modified, there can be no "acquisition" within the meaning of s 51(xxxi).

182 See, eg, the Commonwealth's submission in *WMC* that that any right which has no existence apart from a law of the Commonwealth "is inherently subject to modification or diminution by later Commonwealth statute": (1998) 194 CLR 1 at [182] (Gummow J).

183 See *Cunningham* (2016) 259 CLR 536 at [66] (Gageler J).

184 *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 165 (Black CJ and Gummow JJ); See also *WMC* (1998) 194 CLR 1 at [253] (Kirby J); *ICM* (2009) 240 CLR 140 at [76] (French CJ, Gummow and Crennan JJ); *Cunningham* (2016) 259 CLR 536 at [153] (Keane J).

185 See, eg, *ICM* (2009) 240 CLR 140 at [147] (Hayne, Kiefel and Bell JJ); cf *WMC* (1998) 194 CLR 1 at [195]-[196] (Gummow J).

186 See Brennan (2004) 28 *Melbourne University Law Review* 28 at 55-59.

136.3 The third possibility is that it "displaces" the prima facie characterisation of that law as one with respect to the "acquisition of property" within the meaning of s 51(xxxi).

137 In the Full Court, the Rirratjingu Parties submitted that the first possibility was suggested by the current state of authority: see **CAB 119-120 [310]**. That submission was accepted: **CAB 121 [318]**. In contrast, the Commonwealth "did not clearly articulate" which of the above possibilities it considered to be correct: **CAB 116 [296]**. In its own words, it was "hesitant" to do so on the basis that "the cases seem to go back and forth all over the place": **CAB 115-116 [294]**.

10 138 Despite its ambivalence below, the Commonwealth now expressly rejects the first possibility on the basis that it is inconsistent with authority and, indeed, contends the Full Court was wrong to adopt it: see **Cth [70], [125]**.[187] That is contrary to the primary way in which the Commonwealth defended the case against it in *Cunningham*: see **CAB 121 [316]**. And the Commonwealth still does not clearly articulate which of the other two possibilities above it contends is correct.[188] Its new approach has, however, enabled it to concede in this Court that native title rights and interests are "property" for the purposes of s 51(xxxi): **Cth [59], [70]**. In the Full Court, the most that could be said was that it "appeared to move towards a tentative acceptance that native title rights and interests were proprietary in character": see **CAB 116 [295]**.

20 139 The Rirratjingu Parties maintain that the first possibility is open on the existing state of authority for the reasons given by the Full Court: see **CAB 118-122 [304]-[319]**. Given the Full Court's place in the judicial hierarchy, it appropriately followed that authority. And, if that understanding of existing authority is correct, the Commonwealth must either withdraw its concession that native title rights and interests are "property" for the purpose of s 51(xxxi), or embrace the concession and concede that its case on Ground 2 is fatally flawed: see **Cth [70]**.

140 However, consistently with what is set out in **Part B.4.2**, the Rirratjingu Parties contend that this Court ought to clarify the state of the law by adopting the third possibility: that the statutory susceptibility principle is a "displacing" feature. That approach has the

187 It is not the first time that the Commonwealth has changed tack on this point on an appeal to this Court: see *WMC* (1998) 194 CLR 1 at [45] (Toohey J), [207], [236(4)] (Kirby J).

188 **Cth [105]** appears to embrace the second possibility, but **Cth [59]** is more ambiguous.

benefit of avoiding disrupting the established principles around the breadth of both "property" and "acquisition" and avoiding the circularity problem that tends to arise when the notion of "inherent susceptibility" is transposed onto those elements.[189] The approach also assists in recognising that the effect of the principle is to reduce the scope of the protection afforded by s 51(xxxi): see paragraph 50 above.

141 Ultimately, however, little may turn on the precise framework adopted: see **GR [79]**. As the Full Court recognised, "the unwavering and important proposition for present purposes" is that the statutory susceptibility principle has "only been employed in relation to statutory rights": **CAB 121-122 [319]**, see also **CAB 161 [478]**. That is a reflection of the nature and scope of the principle itself.

D.3 The development and purpose of the statutory susceptibility principle

D.3.1 The dilemma

142 The Court did not develop the statutory susceptibility principle in a vacuum. The principle was developed in authorities where the Court was seeking to "place some limits around the kind of interference with existing rights that could attract s 51(xxxi)": **CAB 122 [320]**. That development began in the "trilogy" of cases decided in 1994, but did not settle until 2007.[190] The timing is important because it assists in understanding *why* the Court was seeking to place limits on s 51(xxxi).

143 By 1994, two things were abundantly clear in the jurisprudence: (1) a very wide range of rights and interests were capable of constituting "property" for the purpose of s 51(xxxi), including "every species of valuable right and interest"; and (2) s 51(xxxi) operated as a "constitutional guarantee". And, by this time, the "age of statutes" had dawned. Just two years later, Finn J was able to state uncontroversially that "we live in an age of statutes and that it is statute which, more often than not, provides the rights necessary to secure the basic amenities of life in modern society".[191] His Honour made that observation in the context of recognising that the "principle of legality" as an interpretive principle required adjustment in light of that reality, so as to afford a degree of protection to important statutory rights.

189 See Brennan (2004) 28 *Melbourne University Law Review* 28 at 56. See, eg, *ANL* (2000) 204 CLR 493 at [82] (Kirby J).

190 See *ANL* (2000) 204 CLR 493 at [53] (Gaudron and Gummow JJ); *Chaffey* (2007) 231 CLR 651.

191 *Buck v Comcare* (1996) 66 FCR 359 at 364. As to the current position, see Mark Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (2023) at 60-62.

144 Those developments posed a dilemma for the Court.[192]

144.1 On one view, a faithful and rigid application of existing jurisprudence would result in *all* statutory rights being protected by s 51(xxxi), such that any acquisition of such rights would require just terms.[193] However, if that approach were adopted, then s 51(xxxi) would substantially fetter legislative power.[194] In particular, it would undermine the uncontroversial proposition that the Parliament's power "to make laws includes a power to unmake them" and that "the powers conferred on the Parliament under s 51 extend to the repeal, in part or in whole, of what the Parliament has validly enacted".[195]

10 144.2 On another view, a faithful and rigid application of that "enact/repeal" proposition would result in *no* statutory rights being protected by s 51(xxxi).[196] However, if that approach were adopted, that would undermine to a significant degree the status of s 51(xxxi) as a constitutional guarantee[197] and the accepted understanding of the breadth of the term "property".

145 That dilemma can be understood as a specific manifestation of a more general dilemma posed by s 51(xxxi), namely the existence of the "competing visions of the functions of property and the state, one which treats property as inviolable and one which treats property as subject to redistribution in the public interest":[198] see paragraphs 37 to 41 above.

20 146 The statutory susceptibility principle was forged in the face of the specific manifestation of that general dilemma. Confronted with the two absolute positions identified above, it is evident that the purpose of the principle was to enable the Court to chart a course between them.[199] That the Court took the middle course it did is unsurprising: it is

192 See *WMC* (1998) 194 CLR 1 at [181] (Gummow J); *JT International* (2012) 250 CLR 1 at [30] (French CJ). See also Brennan at 53-54.

193 See, eg, *Smith v ANL* (2000) 204 CLR 493 at [181], [189], [193] (Callinan J). This potential problem was not unforeseen: see *Tooth* (1979) 142 CLR 397 at 434 (Murphy J); *Mutual Pools* (1994) 179 CLR 155 at 201 (Dawson and Toohey JJ).

194 See Stellios (2022) at 702; Weis, "Property" (2018) at 1028.

195 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [13] (Gummow and Hayne JJ). See also *WMC* (1998) 194 CLR 1 at [134] (McHugh J); *Chaffey* (2007) 231 CLR 651 at [3] (Gleeson CJ, Gummow, Hayne and Crennan JJ); *Cunningham* (2016) 259 CLR 536 at [63] (Gageler J); **GR [83]**.

196 See, eg, *WMC* (1998) 194 CLR 1 at [134], [145] (McHugh J).

197 See, eg, *ANL* (2000) 204 CLR 493 at [193] (Callinan J).

198 See Evans (2000) 11 *Public Law Review* 183 at 201. See also *WMC* (1998) 194 CLR 1 at [259] (Kirby J), *ANL* (2000) 204 CLR 493 at [188] (Callinan J); *ICM* (2009) 240 CLR 140 at [177]-[178] (Heydon J).

199 See Evans (2000) 11 *Public Law Review* 183 at 202.

"unlikely" that one of the "competing visions" underlying s 51(xxxi) "should give way completely to the other", given that "the modern liberal-democratic state requires stability of property for its markets *and* assumes the legitimacy of the redistribution of property to support (amongst many other things) welfare programs and environmental regulation".[200] The constitutional purpose of the condition imposed by s51(xxxi) accommodates that reconciliation. That is because the relevant "standard of justice" to be applied in respect of the concept of "just terms" is one of "fair dealing" considered in accordance with "the life and experience" of the Australian community, which includes the developments in the modern liberal-democratic state identified above.[201] Accommodating such laws does not involve acceptance of an "arbitrary" exercise of the power at the expense of a State or the subject: any enlarged encroachment on personal property rights is sufficiently explained by those considerations.

147 It must be noted that, contrary to an assumption that appears to have been made by the Commonwealth, the above analysis does not depend on accepting the correctness of either absolute position as matter of authority: cf **Cth [71]**. To the contrary, it depends on recognising that both absolute positions were, on the face of the existing authorities, theoretically *available*. Adding to the confusion, the Commonwealth misidentifies the two competing views: it correctly identifies the "broad view" in terms consistent with the position in paragraph 144.2 above (**Cth [71]**); but what the Commonwealth describes as the "narrow view" (**Cth [72]**) is in fact the middle-position, reflected in the statutory susceptibility principle. The true "narrow view" is that identified in paragraph 144.1 above. By that misidentification, the Commonwealth misses the fundamental point about why that principle has been developed and the nuanced purpose that it serves in our constitutional framework.[202]

D.3.2 Both elements of the principle are essential

148 When the development of the statutory susceptibility principle is understood in its proper historical context, it can be seen that both elements identified in paragraph 128 above are essential to its operation and scope.

200 See Evans (2000) 11 *Public Law Review* 183 at 201 (emphasis added). See also Weis, "Property" (2018) at 1019-1020.

201 *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545 at 600 (Kitto J); *Tasmanian Dams* (1983) 158 CLR 1 at 291 (Deane J); *Emmerson* (2014) 253 CLR 393 at [109] (Gageler J).

202 The "broad" and "narrow" language reflects its alternative submissions in *WMC*, not the opposing ends of the spectrum: see (1998) 194 CLR 1 at [144] (McHugh J).

149 The first element — a purely statutory right — accords with the recognised (and "useful") "dichotomy" between "between rights recognised by the general law and those which have *no existence apart from statute and whose continued existence* depends upon statute".[203] That expression highlights that the principle applies only in respect of *purely* statutory rights. It is only a right of that kind that depends "upon the will from time to time of the legislature" that "created" it for its "continued and fixed content".[204]

150 The dichotomy between statutory rights and general law rights is not a rigid one. But that reinforces the importance of the first element. That is because it is established that the statutory susceptibility principle is not applicable where a statutory right also has a general law dimension.[205] That may be the case where, for example, the statutory right is based on "antecedent proprietary rights recognised by the general law".[206] The same logic must apply *a fortiori* where the relevant right arises *only* at general law.

151 That is one reason why the first element is essential. But there is another reason: the presence of the first element (a purely statutory right) is the reason *why* the second element (susceptible to modification) must be considered at all. If the first element is not present, then the problem that the principle is designed to avoid — the dilemma posed at paragraph 144 above — does not arise. That is why the Full Court was correct to say that the statutory susceptibility principle "is plainly dependent on the premise that it was Parliament (directly, or indirectly through authorising legislation) that created the rights in the first place": see **CAB 133 [367]**. From that premise, the principle is applied to determine whether the sole "creator" of statutory rights (the Parliament) may act as the "destroyer" of those rights without engaging s 51(xxxi): see **CAB 139 [391]**; cf **Cth [69(b)]**.

152 To that end, the second element involves a "hunt for some distinguishing characteristic of non-defeasibility, some status which enables the right to transcend the fragility of its

203 See *Cunningham* (2016) 259 CLR 536 at [43] (French CJ, Kiefel and Bell JJ) (emphasis added). See also **GR [86]**.

204 *Chaffey* (2007) 231 CLR 651 at [25] (Gleeson CJ, Gummow, Hayne and Crennan JJ). See also **GR [81]**; **NLC [72]**.

205 See *Georgiadis* (1994) 179 CLR 297 at 305-306 (Mason CJ, Deane and Gaudron JJ); *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 237 (Mason CJ, Deane and Gaudron JJ); *Wurridjal* (2009) 237 CLR 309 at [364] (Crennan J); *JT International* (2012) 250 CLR 1 at [102] (Gummow J).

206 For example, where a federal law substitutes "a statutory right of property for property previously held under a State enactment or the general law": see *WMC* (1998) 194 CLR 1 at [133], see also at [145] (McHugh J). See also *Bienke v Minister for Primary Industries and Energy* (1996) 63 FCR 567 at 584-585 (Black CJ, Davies and Sackville JJ).

purely statutory origin".[207] That characteristic must be "inherent" at the time of the right's "creation" and be "integral to the property itself".[208] That "necessarily turns on the construction of the legislation creating the right: on its text, read in its total context and in a manner which best achieves its legislative purpose or object":[209] **CAB 138 [387]**.[210]

153 Once the historical and conceptual underpinnings of the statutory susceptibility principle are properly understood, there is no justification for that principle to be radically reworked into a general "modification" principle that applies to any and all rights that are capable of constituting "property" for the purposes of s 51(xxxi). To dissect the principle into its two elements, and then discard one of them entirely, would give the principle a significantly expanded operation. That expanded operation would lead to a corresponding reduction in the scope of the "constitutional guarantee": see paragraph 50 above.

154 In the context of statutory rights, some qualification of the guarantee was *necessary* to avoid the Court adopting an absolute position that would have had serious implications for the scope of the Commonwealth's legislative power: see paragraph 49 above. But, outside of that context, there is no such necessity. That is, there is no principled justification for reducing the protection afforded by the constitutional guarantee in respect of rights that do not depend on statute for their existence. That runs counter to the way in which any new "displacing" feature should be identified: see paragraphs 48 to 50 above. By unmooring that body of doctrine from the structural and textual imperatives that gave rise to it, the expansion proposed by the Commonwealth is no longer able to be explained consonantly with the constitutional purpose of the just terms condition. [211]

155 The Commonwealth does not even attempt to offer any such justification. Instead, it appears to start with the assumption that the statutory susceptibility principle applies to general law rights, and then suggests there is no reason why the scope of the principle

207 See Brennan (2004) 28 *Melbourne University Law Review* 28 at 57.

208 See *Cunningham* (2016) 259 CLR 536 at [66] (Gageler J).

209 *Cunningham* (2016) 259 CLR 536 at [66], see also at [67]-[68] (Gageler J), [43] (French CJ, Kiefel and Bell JJ), [229] (Nettle J), [273] (Gordon J); *Chaffey* (2007) 231 CLR 651 at [25] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

210 See *Cunningham* (2016) 259 CLR 536 at [46] (French CJ, Kiefel and Bell JJ).

211 See *Emmerson* (2014) 253 CLR 393 at [132] (Gageler J).

should be confined only to statutory rights: see **Cth [107]**, see also **[73]**. But that inverts the analysis. There should be no mistake — the Commonwealth is seeking to expand an existing principle: see **CAB 140 [395], 144 [412], 145-146 [418], 146 [421], 158 [467]-[468], 161 [478]**. It must demonstrate that is a step that is open as a matter of principle and authority, and why that step should be taken. It has not done so.

D.3.3 Existing authority

156 In the absence of any principled justification for expanding the principle, the Commonwealth seeks to rework the statutory susceptibility principle by reference to authority. At the outset, it can be noted that there is no authority that applies the principle to general law rights. In the Full Court, the Commonwealth tried to dress-up *Telstra* as such an authority. That misguided attempt was swiftly rejected by the Full Court: **CAB 139-140 [392]-[395]**. It appears now to have been abandoned: cf **Cth [59]**.

157 In this Court, the Commonwealth focuses on various statements made in *WMC*, *Chaffey* and *Cunningham* to support its attempt to expand the principle: see **Cth [107]-[125]**. One flaw in that approach is that none of those statements were made in a case where the relevant principle was sought to be applied to non-statutory rights. Therefore, they are not authority for the point the Commonwealth seeks to make.[212] Compounding that problem, the Commonwealth makes the error, not unknown in s 51(xxxi) cases, of "taking statements made in earlier decisions and fusing them into a proposition from which it was said to follow that there was or was not an acquisition of property without just terms".[213] By employing that method, they draw a conclusion that severs the statutory susceptibility principle from its "constitutional roots".[214]

158 That is sufficient to deal with the Commonwealth's argument based on authority. However, we mention finally the following two sentences in Gummow J's judgment in *Newcrest*, which are the genesis of the Commonwealth's argument on Ground 2 (see **CAB 115 [292]**):

> The characteristics of native title as recognised at common law include an inherent susceptibility to extinguishment or defeasance by *the grant* of freehold or of some lesser estate which is inconsistent with native title rights; this is so whether the grant

212 See *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214 at [42] (Kiefel CJ, Gageler and Gleeson JJ), [182] (Edelman J), [320] (Jagot J)

213 See *JT International* (2012) 250 CLR 1 at [190] (Hayne and Bell JJ).

214 See *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [137] (Hayne, Crennan, Kiefel and Bell JJ).

> be supported by the prerogative or by legislation. Secondly, legislation such as that considered in *Mabo v Queensland* and *Western Australia v The Commonwealth (Native Title Act Case)*, which is otherwise within power but is directed to the extinguishment of what otherwise would continue as surviving native title (or which creates a "circuitous device" to acquire indirectly the substance of that title), may attract the operation of s 51(xxxi).

159 Those two sentences represent the entirety of his Honour's analysis on the point. Their brevity corresponds to the nature of the argument to which Gummow J was responding — namely, an *in terrorem* argument advanced by the Commonwealth in response to an application to reopen and overrule *Teori Tau*: see **CAB 141 [397]-[398], 143-144 [406], [409]**. As in this proceeding (**Cth [3]**), the Commonwealth in *Newcrest* contended that to do so would "potentially invalidate every grant of freehold or leasehold title granted by the Commonwealth in the Territory since 1911 to the extent to which any such grant may be inconsistent with the continued existence of native title as recognised at common law".[215] That argument aside, the issues in *Newcrest* had nothing to do with native title: see **GR [103]**; cf **Cth [3], [58], [67]**. Thus, Gummow J did not have "the benefit of any submissions from any native title holding parties": **CAB 144 [409]**.

160 A core problem with Gummow J's reasoning is that it does not account for the analysis of the statutory susceptibility principle outlined above.[216] That is entirely understandable because, at the time his Honour wrote them in 1997, the jurisprudence concerning statutory rights was in its infancy. The 1994 authorities did not establish a clear picture about how the statutory rights dilemma was to be addressed: see especially **CAB 125 [333], 128 [346], 131 [359]**. Indeed, the statutory susceptibility principle did not crystallise in a form that commanded majority support of this Court until 2007.[217] Nonetheless, even around the time it was written, Gummow J's explanation of the connection between s 51(xxxi) and native title was fairly described as "perhaps elusive".[218] That remains an apt description: see **CAB 144 [412]-[413], 146 [419]**. It should not now be adopted.

215 *Newcrest* (1997) 190 CLR 513 at 523 (Shaw QC).
216 For a compelling critique, see Brennan (2004) 28 *Melbourne University Law Review* 28 at 65-77.
217 *Chaffey* (2007) 231 CLR 651.
218 Jackson QC and Lloyd, "Compulsory Acquisition" (1998) *AMPLA Yearbook* 75 at 97.

D.4 The statutory susceptibility principle is not applicable to native title

161 The limited scope of the statutory susceptibility principle means that it does not apply to native title rights and interests. The Full Court was correct to so conclude: see **CAB 156 [459], 158 [468]**.

162 That is because native title rights and interests are not purely statutory rights. They do not "depend for its existence on any legislative, executive or judicial declaration".[219] Rather, they are rights that have been recognised by the common law: see **CAB 151-156 [444]-[459]**.[220]

163 As noted earlier, the Commonwealth now concedes that such rights are "property" for the purpose of s 51(xxxi): **Cth [59], [70]**. In light of the nature of native title, that concession is plainly correct. [221]

164 That being so, using the language of the analytical framework set out in **Part B.4**, it straightforward to conclude that where a law:

164.1 by a grant or an appropriation of an interest in land, extinguishes or impairs native title rights and interests; and

164.2 in consequence, a person obtains the benefit of obtaining the land free from the burden of those rights and interests (being an "acquisition" for the purpose of s 51(xxxi));[222]

164.3 the acquisition of property is for a purpose that a "purpose" in respect of which the Parliament has power to make laws (relevantly, here, the government of a territory under s 122);

the law is properly characterised as a law with respect to an acquisition of property within the meaning of s 51(xxxi). There is no feature that would displace that prima facie characterisation.[223]

219 ***Wik** Peoples v Queensland* (1996) 187 CLR 1 at 84 (Brennan CJ).

220 As to the nature of that recognition, see **NLC [56]-[62]**.

221 See generally Brennan (2004) 28 *Melbourne University Law Review* 28 at 30-43. See also *ICM* (2009) 240 CLR 140 at [189] (Heydon J); *Love v Commonwealth* (2020) 270 CLR 152 at [339] (Gordon J); **GR [87]-[90], [123]; NLC [79], [83]-[87]**.

222 See generally Brennan (2004) 28 *Melbourne University Law Review* 28 at 62-64. See also **GR [74], [100]**; **NLC [82]**.

223 See also **GR [120]-[121], [124]**.

165 Accordingly, as the Full Court recognised (see **CAB 146 [421]-[423]**), Deane and Gaudron JJ were correct in *Mabo v Queensland [No 2]* to say:[224]

> There are, however, some important constraints on the legislative power of Commonwealth, State or Territory Parliaments to extinguish or diminish the common law native titles which survive in this country. In so far as the Commonwealth is concerned, there is the requirement of s. 51(xxxi) of the Constitution that a law with respect to the acquisition of property provide "just terms". Our conclusion that rights under common law native title are true legal rights which are recognized and protected by the law would, we think, have the consequence that any legislative extinguishment of those rights would constitute an expropriation of property, to the benefit of the underlying estate, for the purposes of s 51(xxxi).

166 Ground 2 must be dismissed.

D.5 Native title is not "susceptible" in the relevant sense

167 Alternatively, if the Court concludes that there is a "susceptibility" principle that is capable of applying to non-statutory rights, it is not applicable to native title rights and interests. The premise of the Commonwealth's argument is that, on Brennan J's approach in *Mabo [No 2]*, "from the moment native title was recognised by the common law, it was liable to be extinguished or impaired, without compensation, by an otherwise valid exercise of the Crown's sovereign power, embodied in its radical title, to grant interests in land or appropriate to itself unalienated land for Crown purposes": **Cth [91]**.

168 The premise of the argument can be assumed for present purposes.[225] But the argument fails at the very next step. It is asserted that the position was no different "when the sovereign power to alienate land became subject to the control of colonial legislatures": **Cth [92]**, see also **[104]**. At that point in time, it remained true that, unlike Crown tenures, native title was not "protected by the common law" impairment by subsequent Crown grant: see **Cth [99]**.[226] However, the common law did not protect either Crown tenures or native title from impairment by a subsequent grant made under *statute*. The colonial legislatures had *power* to impair both kinds of rights in the same way — either directly or through a conferral of statutory executive power. The role of the common law is confined to assisting in the construction of relevant statutory powers: see

224 (1992) 175 CLR 1 at 111. See also **GR [95]-[99]; NLC [68]-[71], [75]-[78]**; cf **Cth [62]-[63]**.
225 But see Brennan (2004) 28 *Melbourne University Law Review* 28 at 69-70.
226 *Wik* (1996) 187 CLR 1 at 85 (Brennan CJ).

Cth [93]. But the relevant interpretive principle says nothing about the scope of the underlying legislative power: **CAB 156 [458]**; cf **Cth [94]**.

169 There is one further step that the Commonwealth glides over: "[o]n federation, everything adjusted."[227] The "Commonwealth of Australia" was "called into existence upon the proclamation of the Constitution" as "distinct legal entity, the legislative, executive and judicial powers of which are conferred and limited by the Constitution".[228] It is a mistake to assume that the executive power of the Commonwealth has the "same ambit" or is to be "be exercised in the same way and same circumstances" as British executive power at common law, being "power exercised by the Executive of a unitary state having no written constitution".[229] It is also a mistake to equate Commonwealth legislative and executive power with State legislative and executive powers, because the States are themselves distinct legal entities, each with their own legislative, executive and judicial power.

170 Accordingly, even if native title was "susceptible" in some relevant sense to an exercise of British (or colonial) executive power prior to Federation, it cannot be assumed it was equally susceptible to an exercise of Commonwealth executive power (at least in the same way and in the same circumstances) after Federation. Further, it is wrong to say that when the Commonwealth Executive commenced the administration of land in the Northern Territory on 1 January 1911, it commenced exercising the "same powers" that were formerly vested in the South Australian Executive: cf **Cth [2]**. From that date, Commonwealth (not State) legislation conferred those powers, which were in the nature of Commonwealth (not State) executive power: see also **GR [93]-[94]; NLC [46], [52]-[55]**.

E ORDERS SOUGHT

171 The appeal should be dismissed. Irrespective of the outcome of the appeal, the Commonwealth: (a) does not seek to disturb the costs orders below (where the parties

227 *Burns v Corbett* (2016) 265 CLR 304 at [72] (Gageler J). See also **NLC [12]**.

228 *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1 at [75] (Kiefel CJ, Bell, Gageler and Keane JJ). See also *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* [2024] HCA 16 at [9] (Gageler CJ and Beech-Jones J), [78]-[81] (Gordon and Gleeson JJ), [140]-[143] (Edelman J), [243] (Steward J), [253] (Jagot J).

229 *Williams [No 2]* (2014) 252 CLR 416 at [79] (French CJ, Hayne, Kiefel, Bell and Keane JJ). See also *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214 at [77] (Gordon J), [127]-[129] (Edelman J)

bore their own costs[230]); and (b) has agreed to pay the Rirratjingu Parties' costs of the special leave application and the appeal.[231] The Court should make orders accordingly.

PART VI: ESTIMATE OF TIME

172 It is estimated that up to 1.75 hours will be required for the Rirratjingu Parties' oral argument.

Dated: 27 May 2024

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230 *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth (No 2)* (2023) 298 FCR 272.

231 This is consistent with the position it took on the special leave application: Commonwealth's Reply (20 July 2023) at [30]; replying to Response of the Rirratjingu Parties (11 July 2023) at [21]-[22], which sought an undertaking to that effect.

IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Applicant

and

YUNUPINGU (ON BEHALF OF THE GUMATJ CLAN OR ESTATE GROUP)
First Respondent

and the other Respondents named in the Notice of Appeal

ANNEXURE TO SUBMISSIONS OF THE TWENTY-FIFTH TO TWENTY-EIGHT RESPONDENTS (THE RIRRATJINGU PARTIES)

Pursuant to Practice Direction No 1 of 2019, the Rirratjingu Parties set out below a list of the constitutional provisions, statutes and statutory instruments referred to in its submissions.

10

No.	Description	Version	Provisions
1.	*Constitution*	Current	ss 51(ii), (xvii), (xxix), (xxxi), 52, 96, 122
2.	*Northern Territory (Administration) Act 1910* (Cth)	No. 20 of 1910, as at January 1911	s 13
3.	*Northern Territory (Administration) Act 1910-1931* (Cth)	No. 5 of 1931, as at 21 May 1931	s 21
4.	*Northern Territory (Administration) Act 1910-1947* (Cth)	No. 39 of 1947, as at 12 June 1947	s 4U