The Acquisition of Indigenous Property on Just Terms: Wurridjal v Commonwealth

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Abstract

Wurridjal v Commonwealth challenged the Northern Territory intervention legislation, alleging there had been an 'acquisition of property' without 'just terms', contrary to s 51(xxxi) of the *Commonwealth Constitution*. This case note addresses four matters. First, whether there had been an 'acquisition of property' within s 51(xxxi); second, whether 'just terms' had been provided; third, whether s 51(xxxi)'s requirement of 'just terms' applied to an exercise of Commonwealth legislative power in the territories; and, fourth, whether the High Court's earlier decision in *Teori Tau v Commonwealth* was overruled. Three issues for the future are identified: the potential for 'just terms' to apply differently to Indigenous property rights; the significance of the court's recognition of the evolving position of the territories within Australian constitutional arrangements; and the adoption by the court of a new approach to determining whether a previous decision has been overruled.

I Introduction

In *Wurridjal v Commonwealth*,[1] two Aboriginal elders of the Dhukurrdji people, Reggie Wurridjal and Joy Garlbin, alleged that legislation giving effect to the Northern Territory intervention breached s 51(xxxi) of the *Commonwealth Constitution*.[2] This case note addresses four matters, and their consequences: whether there had been an 'acquisition of property' within s 51(xxxi); whether 'just terms' had been provided; whether s 51(xxxi) applied to the territories; and whether the court's earlier decision in *Teori Tau v Commonwealth*[3] was overruled.

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1 (2009) 237 CLR 309 ('*Wurridjal*').

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

3 (1969) 119 CLR 564 ('*Teori Tau*').

II Acquisition of Property

Where the Liverpool River estuary opens to the Arafura Sea on the northern coast of Arnhem Land lies the town of Maningrida, home to just over 2000 people.[4] The Arnhem Land Aboriginal Land Trust ('the Land Trust') held an estate in fee simple (subject to certain statutory restrictions) over this land under s 12 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('the fee simple').[5] The plaintiffs claimed that three legislative interferences with the fee simple each amounted to an 'acquisition of property' by the Commonwealth. As the Land Trust disagreed with two of these arguments by the plaintiffs, it was joined as a second defendant (despite the case relating to alleged acquisitions of its property).

A Statutory Five-Year Lease

Sections 31(1) and 31(2)(b) of the *Northern Territory National Emergency Response Act 2007* (Cth) ('the *NER Act*') created a five-year statutory lease[6] of 10.456 square kilometres of land at Maningrida,[7] which granted exclusive possession (subject to limitations) to the Commonwealth.[8] The Commonwealth denied that there had been an 'acquisition of property' within s 51(xxxi): the fee simple was subject to numerous statutory controls, and was said to be 'inherently defeasible … not capable of being acquired by a readjustment of the statutory framework around it'.[9] This called for an application of the test stated by Mason CJ, Deane and Gaudron JJ in *Georgiadis v Australian and Overseas Telecommunications Corporation* that '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' will not amount to an 'acquisition of property' within s 51(xxxi).[10]

A majority of Justices applied this test,[11] holding that the Commonwealth's statutory lease involved an 'acquisition of property'. Gummow and Hayne JJ (with

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4 The 2006 census population of Maningrida was recorded as 2,068: Maggie Walter, 'Lives of Diversity: Indigenous Australia' (Occasional Paper No 4, Census Series #2, Academy of the Social Sciences in Australia, April 2008) 19. A comprehensive demographic picture of Maningrida is offered at 19–24. The 2001 census population was recorded as 1,645, indicating a 26 per cent population growth from 2001–06, which followed a 24 per cent increase from 1996 to 2001: Australian Bureau of Statistics, *Census of Population and Housing: Selected Characteristics for Urban Centres, Australia, 2001* (cat no 2016.0) 'URBAN CENTRES, Ranked by rate of increase in number of persons enumerated' (25 March 2003) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/2016.02001?OpenDocument>.

5 See, eg, *Wurridjal* (2009) 237 CLR 309, 340 (French CJ).

6 'A lease of the following land is, by force of this subsection, granted to the Commonwealth by the relevant owner of the land': s 31(1).

7 *Wurridjal* (2009) 237 CLR 309, 335, 340 (French CJ).

8 'A lease of land granted under section 31 gives the Commonwealth exclusive possession and quiet enjoyment of the land while the lease is in force (subject to section 34, subsection 37(6) and section 52 of this Act or sections 70C to 70G of the *Aboriginal Land Rights (Northern Territory) Act 1976*)': *NER Act* ,s 35(1).

9 Transcript of Proceedings, *Wurridjal v Commonwealth* [2008] HCATrans 349 (3 October 2008) (H Burmester QC).

10 *Georgiadis* (1994) 179 CLR 297, 306 (Mason CJ, Deane and Gaudron JJ). See also *Health Insurance Commission v Peverill* (1994) 179 CLR 226, 237.

11 Heydon J did not address this issue, on the basis that 'just terms' had been provided in any event: *Wurridjal* (2009) 237 CLR 309, 427 (Heydon J).

whom Kirby J agreed on this point)[12] accepted that the fee simple differed 'in some important ways from the interest ordinarily recorded under the Torrens system as an estate in fee simple', but held that it nonetheless 'must be understood as granting rights of ownership that "for almost all practical purposes, [are] the equivalent of full ownership"'.[13] Their Honours noted that 'throughout Australia … the exercise of the incidents of freehold titles is subjected to a range of statutory controls',[14] and those imposed on the fee simple were not such as to render it 'so unstable or defeasible by the prospect of subsequent legislation … as to deny any operation of s 51(xxxi) of the Constitution.'[15] Similar approaches were taken by French CJ[16] and Kiefel J.[17] The Chief Justice observed that the *Georgiadis* test might have excluded from s 51(xxxi) amendments to the powers of the Land Trust in respect of the fee simple,[18] but would not prevent the creation of a lease granting exclusive possession to the Commonwealth from being an 'acquisition of property' under s 51(xxxi).

Crennan J applied the same test, but dissented. Her Honour noted that the Commonwealth's statutory lease was not for its own benefit,[19] and did not result in the Land Trust's tenants being dispossessed, or affect traditional use rights or sacred sites.[20] For Crennan J, the fee simple 'was always susceptible to an adjustment of the kind affected by the challenged provisions'.[21] Her Honour elaborated:

> [T]he fee simple … is directed to supporting successive generations of traditional Aboriginal owners. It is inherent in the Land Rights Act that there can be a limited legislative adjustment of the control of the land if a need for such an adjustment arises and if that limited adjustment is directed to achieving the purposes of the Land Rights Act, namely supporting the traditional Aboriginal owners.[22]

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12 Ibid 420.

13 Ibid 370–1, quoting *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24, 63 (Gleeson CJ, Gummow, Hayne and Crennan JJ) ('*Blue Mud Bay Case*'), itself quoting *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635, 656 (Deane, Dawson and Gaudron JJ).

14 *Wurridjal* (2009) 237 CLR 309, 382.

15 Ibid.

16 Ibid 364. His Honour also considered the alternative exception to s 51(xxxi), that a law 'not directed to the acquisition of property as such, but … concerned with the adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity' would not involve an 'acquisition of property' within s 51(xxxi): *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134, 161 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). This was held not to apply in this case, French CJ adding the caution that '[a]n acquisition of property is no less an acquisition of property because it also has a regulatory or other public purpose': *Wurridjal* (2009) 237 CLR 309, 364.

17 *Wurridjal* (2009) 237 CLR 309, 467.

18 Ibid 364.

19 Ibid 464.

20 Ibid.

21 Ibid.

22 Ibid 465. This decision by her Honour has been criticised in: Tessa Meyrick, *Spirit Matters* (12 August 2009) *Australian Policy Online* <http://www.apo.org.au/commentary/spirit-matters>. Conversely, Kirby J pondered in *Wurridjal* (2009) 237 CLR 309, 412 (without finally determining) whether Indigenous traditional use rights might be a special kind of property not inherently subject to legislative adjustment, with the result that:

For French CJ, Gummow, Kirby, Hayne and Kiefel JJ, therefore, the creation of a statutory lease in favour of the Commonwealth resulted in an 'acquisition of property' within s 51(xxxi); Crennan J dissenting on this point.

B Abolition of the Permit System and Interference with Traditional Use Rights

Two alternative arguments were also made to establish an 'acquisition of property'. The first related to 'the permit system'. Section 4(1) of the *Aboriginal Land Act* (NT) relevantly provided that 'a person shall not enter onto or remain on Aboriginal land or use a road unless he has been issued with a permit to do so'. The *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) ('the *FaCSIA Act*')[23] removed the requirement of a permit to visit 'common areas in the main townships' and travel via 'the road corridors, barge landings and airstrips connected with them.'[24] This change was intended to end the perceived existence of 'closed communities which can, and do, hide problems from public scrutiny'.[25] The Land Trust submitted that this modification of the permit system did not bring about any acquisition of its property beyond what had already occurred under the statutory lease, and French CJ, Crennan and Kiefel JJ (the only Justices to examine this issue) agreed.[26] Whatever broader significance modification of the permit system might have for issues of self-determination and cultural protection,[27] it was of no assistance to the plaintiffs' challenge under s 51(xxxi).

The second argument related to the plaintiffs' rights as traditional owners under s 71(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) to 'enter upon Aboriginal land and use or occupy that land … in accordance with Aboriginal tradition' ('traditional use rights'). A direct 'acquisition of property' was alleged on the basis that the Commonwealth's lease under s 31 of the *NER Act* enlivened the proviso in s 71(2) that traditional use rights do not authorise acts 'that would interfere with the use or enjoyment of an estate or interest in the land held by a person not being a Land Trust'. However, Gummow and Hayne JJ found that s 34

> the diminution or abolition of pre-existing legal interests of indigenous peoples with respect to land, communal and personal existence, culture, habits and traditions … could only be achieved by express provisions … that conform to the Australian constitutional norm of "just terms".

This was a rejection by Kirby J of the approach of Crennan J; for the future, it indicated a possibility of Indigenous rights enjoying some measure of protection greater than other property rights under s 51(xxxi).

23 Which modified s 70 of, and inserted new ss 70A–70H into, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

24 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 20 (Mal Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs).

25 Ibid.

26 *Wurridjal* (2009) 237 CLR 309, 365-6 (French CJ), 463 (Crennan J), 468 (Kiefel J).

27 For example, the view that the permit system was 'a key feature of land ownership laws' that allowed 'Indigenous groups to control access to sacred sites; an essential requirement for the preservation of the stories, laws and customs that surround these sites': Erin Mackay, 'Recent Developments: Copyright and the Protection of Indigenous Art' (2008) 7(2) *Indigenous Law Bulletin* 11, 11.

of the *NER Act* specifically provided for the continuation of traditional use rights,[28] as did French CJ, Crennan and Kiefel JJ.[29] Alternatively, an indirect impact was alleged, in that s 37 of the *NER Act*[30] made the traditional use rights subject to ministerial termination. Again, this was rejected: Gummow and Hayne JJ found that s 37, properly interpreted, did not grant a ministerial power to terminate traditional use rights,[31] and French CJ[32] and Crennan J[33] agreed.

Having established that there was an 'acquisition of property' through the statutory lease, losing these arguments did not defeat the plaintiffs' case. The plaintiffs should not be too harshly judged for making the second of these arguments, as they feared a broad Commonwealth power to extinguish traditional use rights—the outcome on this point left the plaintiffs 'very content'.[34] The first argument, however, appears to have had little chance of success—a s 51(xxxi) challenge was not the appropriate vehicle for objecting to a significant modification of the permit system.

III Just Terms

A Application of the 'Historic Shipwrecks' Clause

The granting of the statutory lease being an 'acquisition of property' within s 51(xxxi) (except in the opinion of Crennan J), 'just terms' were required for constitutional validity. Section 35(2) of the *NER Act* excluded the payment of rent,[35] but there was an *Historic Shipwrecks* clause:[36] s 60(2) provided that in the

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28 *Wurridjal* (2009) 237 CLR 309, 378.

29 Ibid 366 (French CJ), 456 (Crennan J), 468 (Kiefel J).

30 'The Commonwealth may, at any time, terminate … a right, title or interest that is preserved under section 34': s 37(1)(a).

31 *Wurridjal* (2009) 237 CLR 309, 379. Their Honours stated that 'clearer words would be expected of the Parliament were it to authorise the Executive Branch to repeal, *pro tanto*, the operation of s 71 of the Land Rights Act.' In addition to the wording of the statute, their Honours relied (without explicit reference or citation of authority) upon the 'presumption against the modification or abrogation of fundamental rights': *Coco v R* (1993) 179 CLR 427, 437 (Mason CJ, and Brennan, Gaudron and McHugh JJ). The classic statement of this presumption is: 'It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness': *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J); and see: *Bropho v Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, and Deane, Dawson, Toohey, Gaudron and McHugh JJ).

32 *Wurridjal* (2009) 237 CLR 309, 366–7.

33 Ibid 456–7.

34 'May I say quite clearly and explicitly, as far as the traditional owners are concerned, if this Court interprets the Emergency Response Act in the way contended for, namely, that it does not authorise any access to sacred sites and it is not capable of interfering directly or indirectly with section 71 rights, the traditional owners would be very content with that outcome': Transcript of Proceedings, *Wurridjal v Commonwealth* [2008] HCATrans 349 (3 October 2008) (R Merkel QC).

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

36 The name comes from the appearance of a similar clause in s 21 of the *Historic Shipwrecks Act 1976* (Cth). See Chris Horan, '*Wurridjal v The Commonwealth*: The Intervention and The Acquisition' (paper presented at the Gilbert & Tobin Centre of Public Law Conference on Constitutional Law, University of New South Wales, Sydney, 19 February 2010) 23. This type of clause has also been referred to as a 'constitutional saving clause': Peter Prince and Andrew Buckland, 'Sharing Australia's Telecommunications Network: An Unjust Acquisition of Telstra's

event of 'an acquisition of property to which paragraph 51(xxxi) of the Constitution applies … otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation'.[37] This clause was given judicial endorsement as a 'fail-safe', 'a sensible legislative precaution',[38] and 'an example of prudent anticipation by the Parliament … thereby avoiding the pitfall of invalidity'.[39] As Kiefel J stated: '[t]he provision of compensation, expressed as an amount that is fair and reasonable in all the circumstances, prima facie complies with the requirement of s 51(xxxi)'.[40]

The plaintiffs sought to displace this prima facie provision of 'just terms' with two narrow arguments. First, that compensation was 'contingent' on taking legal action that required a decision of the High Court to overrule *Teori Tau*.[41] This was rejected, as requiring a judicial decision to determine and award compensation was acceptable[42] even if court action might result in 'exposure … to adverse costs orders' and require prosecution without any 'entitlement … to any form of legal aid'.[43] Second, it was objected that interest would not be paid 'from the date of acquisition to the date when compensation was paid';[44] but their Honours found that interest was available.[45] Kirby J broadly agreed with the approach of the majority,[46] but did not finally determine these issues,[47] for reasons that will now be examined.

B Is Monetary Compensation Sufficient?

In the application of s 51(xxxi) to non-Indigenous property in *South Australia v Slipper*, Selway J of the Federal Court did not accept that the requirement of 'just

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Property?' in *Australian Government Solicitor: Litigation Notes* (No. 16, 12 June 2008) <http://www.ags.gov.au/publications/agspubs/legalpubs/litigationnotes/litnote16.htm>.

37 This clause was in 'the well-recognised and preferable form': *Wurridjal* (2009) 237 CLR 309, 389 (Gummow and Hayne JJ). See also: at 470 (Kiefel J). If the modification of the permit system had resulted in an 'acquisition of property', the *FaCSIA Act* sch 4, item 18(2) also contained a *Historic Shipwrecks* clause requiring the payment of 'reasonable compensation.'

38 *Wurridjal* (2009) 237 CLR 309, 424 (Kirby J).

39 Ibid 389 (Gummow and Hayne JJ). A similar provision, s 152EB of the *Trade Practices Act 1974* (Cth) was regarded as effective in *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210, 229–30 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ), although the court held that there had been no 'acquisition of property' in any event.

40 *Wurridjal* (2009) 237 CLR 309, 470.

41 Ibid 428–9 (Heydon J).

42 '[P]ayment of "reasonable compensation" determined, in the absence of agreement, by exercise of the judicial power of the Commonwealth, satisfies the requirement of "just terms"': *Wurridjal* (2009) 237 CLR 309, 389 (Gummow and Hayne J). See also: at 429 (Heydon J), 364–5 (French CJ). Justice Heydon added that 'a court will endeavour to give a speedy remedy to a claimant who is not tardy in using the court's procedures': at 429–30.

43 Ibid 430 (Heydon J). His Honour added: 'For better or worse, many claimants to legal remedies are exposed to adverse costs orders if their claims fail, and without assistance from the public purse in prosecuting those claims'.

44 Ibid 431 (Heydon J).

45 For Gummow and Hayne JJ, interest was available as part of the 'reasonable compensation' provided for by the *Historic Shipwrecks* clause: ibid 389–90. For Heydon J it was available under applicable court rules, although his Honour left open the question of whether s 51(xxxi) required interest: at 431. Other minor arguments were also dismissed on the basis of statutory interpretation: at 430–2 (Heydon J).

46 Ibid 424.

47 Ibid 426.

terms' demanded that any particular process be followed, so long as the quantum of monetary compensation was sufficient.[48] In *Wurridjal*, the issue of whether monetary compensation alone might be insufficient to provide 'just terms' for the acquisition of traditional use rights of Indigenous people was agitated in the Plaintiffs' written submissions, and received consideration from Kirby, Heydon and Kiefel JJ.

Justice Kirby accepted that compensation, if 'measured in monetary value, is objectively ascertainable in most cases',[49] but suggested that 'just terms' might 'import a wider concept of fairness such that … financial recompense alone would … not necessarily, constitute "just terms".'[50] Specifically, his Honour noted that Indigenous traditional use rights might be 'essential to the identity, culture and spirituality of the Aboriginal people concerned.'[51] If evidence showed that Indigenous people 'do indeed love their traditional "property" interests in a way that conventional "property" is rarely if ever cherished in the general Australian community', then 'just terms' might require more than monetary compensation.[52]

Whether 'just terms' might require more than monetary compensation also received apparently sympathetic consideration from Heydon J, who noted that the argument that 'Aboriginal rights and interests in land cannot be readily replaced, nor readily compensated for by the payment of money … would prima facie have considerable force where the relevant rights and interests were related to spiritual matters, for example use of sacred sites'.[53] Indeed, Heydon J accepted that this proposition 'may also be thought prima facie to have some force in relation to matters which are not strictly spiritual'.[54] *Wurridjal*, however, was not a case calling for the resolution of this question,[55] as Gummow and Hayne JJ also found.[56]

Conversely, Kiefel J indicated that the idea that 'it may not be possible to attribute a market value to [sacred] sites … should not be readily accepted'.[57] On the facts of the case, it was not necessary for her Honour to proceed further.[58]

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48 *South Australia v Slipper* (2003) 203 ALR 473, 485. Selway J stated:

> It may be that 'just terms' may require that the Commonwealth provide a fair mechanism for the determination of compensation … although I would still treat that question as an open one. However, in my view it is clear that 'just terms' in s 51 (xxxi) is directed to the compensation payable upon an acquisition. It does not apply to the acquisition process itself. In my view there is no constitutional obligation to afford a fair hearing before the acquisition is completed.

On appeal, the Full Court decided that consideration of the argument based on s 51(xxxi) should 'await a case that calls for it to be determined': *South Australia v Slipper* (2004) 136 FCR 259, 275 (Branson J, with whom Finn and Finkelstein JJ agreed).

49 *Wurridjal* (2009) 237 CLR 309, 425.

50 Ibid 414.

51 Ibid 425.

52 Ibid.

53 Ibid 426.

54 Ibid. Heydon J did, however, note that 'the law can provide compensation for money losses even though there is no market for the thing lost and even though the attraction of the thing lost to the person who lost it rests on non-financial considerations': at 433. For his Honour, an example of this was native title itself, which the court had determined could be extinguished on just terms (Heydon J here referred to *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232).

55 *Wurridjal* (2009) 237 CLR 309, 427. His Honour gave three reasons for not pursuing this issue: first, it had not been pressed in oral argument; second, it had not been sufficiently pleaded in the statement of claim; and third, there had been in this case no interference with the protection afforded to sacred sites.

56 Ibid 390.

57 Ibid 471.

C Just Terms for Indigenous Traditional Use Rights

Given that a different content to the requirement of 'just terms' for Indigenous traditional use rights was supported by Kirby J and considered by Heydon J, it is worth examining some options that would be available to achieve this outcome.[59]

Kirby J's suggestion was that 'just terms' for the acquisition of Indigenous traditional use rights might require a 'careful consultation and participation procedure',[60] extending to 'consultation before action; special care in the execution of the laws; and active participation in performance'[61] in addition to monetary compensation. The advantage of finding this procedural content is that it alleviates the difficulty of quantifying the value of traditional use rights, which might otherwise take the court again into the realm of 'unprovable predictions, metaphysical assumptions and rationalized empiricism'.[62] However, difficulty is not normally regarded as a bar to the calculation of damages: as Kirby J himself said in *Cattanach v Melchior*, 'the calculation of damages in tort is an inexact activity "accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe"'.[63] The disadvantage of this procedural content is that monitoring the processes envisaged (careful consultation, special care in execution, participation in performance) might well be beyond the facilities of the High Court.[64]

If the court wished instead to extend 'just terms' by requiring greater compensation for the acquisition of Indigenous traditional use rights, two options would be available. Either option might result in the invalidity of s 51A of the *Native Title Act 1993* (Cth), which limits the amount of compensation payable under that legislation to the value of a freehold interest in the acquired property.[65] First, a conventional sum could be awarded, this being the solution adopted to the problem of calculating damages for loss of expectation of life, which is 'invaluable in the sense that it is beyond monetary value or monetary valuation'.[66] The advantage of this approach is its relative simplicity; the disadvantage is that it would give only a very small increase in compensation.[67] Second, the court could use the mechanism of the law of compulsory acquisition: the payment of an

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58 Ibid 471–2.

59 The plaintiffs had suggested that 'something less than a complete acquisition might be mandated by the Constitution so as to minimise the prejudice suffered by the holders of rights not readily compensable in money terms': ibid 390 (Gummow and Hayne JJ). None of the Justices took this approach: while 'just terms' might be flexible enough to require some different provision in the context of Indigenous traditional use rights, it is unlikely that 'acquisition' could be interpreted differently according to context.

60 Ibid 425.

61 Ibid 426.

62 *Skelton v Collins* (1965) 115 CLR 94, 136 (Windeyer J).

63 *Cattanach v Melchior* (2003) 215 CLR 1, 42, quoting *Watson, Laidlaw and Co Ltd v Pott, Cassels and Williamson* (1914) 31 RPC 104, 118 (Lord Shaw).

64 Cf *SGIC v Trigwell* (1978) 142 CLR 617, 633 (Mason J).

65 'The total compensation payable under this Division for an act that extinguishes all native title in relation to particular land or waters must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters.'

66 *Cattanach v Melchior* (2003) 215 CLR 1, 132 (Heydon J).

67 A collection of conventional sum payments, the highest being $10 000, the average less than $5000, is recorded in: Lawbook, *The Laws of Australia* (at 22 April 2009) 33 Torts, '33.10 Damages' [850] n 5.

additional percentage above market value by way of solatium—'a sum of money paid over and above the actual damages as solace for injured feelings'.[68] This approach would again be relatively simple; but faces the difficulties that solatium is not part of the current Commonwealth legislation for the acquisition of property[69] because it was rejected by the Australian Law Reform Commission,[70] and (if an originalist interpretation of 'just terms' is taken) that solatium was first implemented in Australia *after* Federation.[71]

Options that merely increase monetary compensation are attractive because of their simplicity, but they only superficially engage with the basis on which Kirby J suggested a unique requirement for Indigenous traditional use rights: that these are rights of especial cultural, personal and communal significance to the individuals and communities concerned. Implication of a procedural content of 'just terms' is preferable in that the unique connections to the rights in question can be more fully explored, but the challenge for the future—if Indigenous traditional use rights are again threatened with acquisition—is to convert Kirby J's tentative speculation in *Wurridjal* about a procedural content of 'just terms' into a concrete legal principle capable of enforcement in accordance with the ordinary judicial process.

D The Danger of Early Disposition of s 51(xxxi) Cases

In *Wurridjal*, Kirby J objected that the demurrer procedure gave 'peremptory legal relief to the Commonwealth'[72] because evidence of the special nature of the Indigenous rights affected should have been given at trial and weighed in a consideration of whether 'just terms' required more than monetary compensation.[73]

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68 *March v City of Frankston* [1969] VR 350, 356.

69 There is the possibility, in respect of case of dwellings constituting a person's principal place of residence, of invoking s 61 of the *Lands Acquisition Act 1989* (Cth) which provides for the payment of an additional sum of $10 000 as well as conferring an entitlement to an increase in the payment if necessary to ensure that a 'reasonable equivalent dwelling' can be obtained by the person.

70 Australian Law Reform Commission, *Lands Acquisition and Compensation*, Report No 14 (1980) 143–5.

71 This first implementation was in *Public Works Act 1902* (WA) s 63(c).

72 *Wurridjal* (2009) 237 CLR 309, 391. His Honour stated that instead there should have been a 'trial to facilitate the normal curial process and to permit a transparent, public examination of the plaintiffs' evidence and legal argument': at 394. Justice Kirby specifically referred to the plaintiffs' 'right to have any doubts and uncertainties in the proceedings resolved at trial, on the basis of a full consideration of all of the admissible evidence that the plaintiffs tender, rather than by the pre-emptive procedure of demurrer based solely on the pleadings, now invoked by the Commonwealth': at 407. His Honour wrote that: 'History, and not only ancient history, teaches that there are many dangers in enacting special laws that target people of a particular race and disadvantage their rights to liberty, property and other entitlements by reference to that criterion': at 393. Cf 'History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power': *Australian Communist Party v Commonwealth* (1950) 83 CLR 1, 187 (Dixon J).

73 Although Kirby J was the only Justice to object to the use of a demurrer in this case, the process of refining a Statement of Claim to which the Commonwealth would demur had occupied some months, eventually leading to Hayne J entertaining the possibility of remitting the case for trial, a process outlined in the reasons for his Honour's order vacating the original hearing dates: Transcript of Proceedings, *Wurridjal v Commonwealth* [2008] HCATrans 92 (11 February 2008) (Hayne J). Disagreement over the use of the demurrer procedure left Kirby J in dissent, and caused some controversy (albeit scarcely the 'blaze of controversy' suggested in the press: Leo Shanahan and

This is not the first occasion on which concern has been raised about the dangers of the early disposition of s 51(xxxi) cases. In *Commonwealth v Mewett*—which was an appeal against the dismissal of a strike-out application by the Commonwealth—Gaudron J objected to the Full Court of the Federal Court's disposition of the matter on the basis that its resolution depended on factual findings that had not yet been made and was reached in advance of applications that could have altered its conclusions.[74]

Difficulties were also experienced in *Trade Practices Commission v Tooth & Co Ltd*,[75] which came before the court as an appeal from a special case stated for the Full Court of the Federal Court.[76] There, Aickin J noted that the 'vital matter' of whether 'just terms' had been provided had not been considered in the formulation of the special case, his Honour observing that:

> [i]t cannot be regarded as satisfactory that a case should be dealt with by the Court adopting an unexpressed assumption common to the parties. The mode of procedure adopted appears unsuitable for raising a constitutional issue.[77]

Although partly explained by differences of statutory interpretation, Barwick CJ and Aickin J proceeded as if 'just terms' had not been provided,[78] while Gibbs, Stephen, Mason and Murphy JJ held that 'just terms' had been provided:[79] a confusing result.

In the light of these previous difficulties, Kirby J's objection to the demurrer procedure in *Wurridjal* serves as a reminder of the care that is required, when adopting early resolution procedures (including demurrer, special case and strike-out application) in s 51(xxxi) cases, to ensure that the court is in possession of sufficient factual information to determine whether 'just terms' have actually been provided.

Andra Jackson, 'Kirby's last dissent: my fellow judges racially biased', *The Age* (Melbourne), 3 February 2009, 1). The following exchange appeared between French CJ and Kirby J:

> If any other Australians, selected by reference to their race, suffered the imposition on their pre-existing property interests of non-consensual five-year statutory leases, designed to authorise intensive intrusions into their lives and legal interests, it is difficult to believe that a challenge to such a law would fail as legally unarguable … The Aboriginal parties are entitled to have their trial and day in court. We should not slam the doors of the courts in their face. This is a case in which a transparent, public trial of the proceedings has its own justification: *Wurridjal* (2009) 237 CLR 309, 394–5 (Kirby J).
>
> The conclusion at which I have arrived does not depend upon any opinion about the merits of the policy behind the challenged legislation. Nor, contrary to the gratuitous suggestion in the judgment of Kirby J, is the outcome of this case based on an approach less favourable to the plaintiffs because of their Aboriginality: at 337 (French CJ).
>
> The issue for decision is not whether the "approach" of the majority is made on a basis less favourable because of Aboriginality. It is concerned with the objective fact that the majority rejects the claimants' challenge to the constitutional validity of the federal legislation that is incontestably less favourable to them upon the basis of their race and does so in a ruling on a demurrer. Far from being "gratuitous", this reasoning is essential and, in truth, self-evident: at 395 (Kirby J).

74 *Commonwealth v Mewett* (1996) 191 CLR 471, 531.

75 (1979) 142 CLR 397 ('*TPC v Tooth*').

76 The special case was stated under s 25(6) of the *Federal Court of Australia Act 1976* (Cth) and is reproduced in: *TPC v Tooth* (1979) 142 CLR 397, 435-7 (Aickin J).

77 *TPC v Tooth* (1979) 142 CLR 397, 444.

78 Ibid 401 (Barwick CJ) (his Honour wrote that this had been conceded), 444 (Aickin J).

79 Ibid 407, 409 (Gibbs J), 422 (Stephen J), 433 (Mason J), 434 (Murphy J).

IV Applicability of s 51(xxxi) to the Territories

For the plaintiffs to succeed, it also had to be established that legislation under the territories power (s 122)[80] was subject to s 51(xxxi)'s requirements. It is necessary to give a brief outline of the treatment of the relationship between these two powers in *Teori Tau* and *Newcrest Mining (WA) Ltd v Commonwealth*[81] to facilitate understanding of its resolution in *Wurridjal*.

A Teori Tau

The unanimous judgment of Barwick CJ, McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ in *Teori Tau* was delivered *ex tempore* by the Chief Justice, and occupies a mere two pages (and two lines) in the *Commonwealth Law Reports*. Their Honours were able 'without any doubt' to reach 'a clear conclusion', 'without troubling the defendants for their assistance',[82] the argument that s 51(xxxi) applied to restrict the territories power being 'clearly unsupportable'.[83] The court's reasoning, perhaps more attractive in the context of an external territory (Papua New Guinea), was that ss 51 and 122 operate in different spheres: s 51 is concerned with 'federal legislative powers as part of the distribution of legislative power between the Commonwealth and the constituent States', whereas s 122 was 'for the government of Commonwealth territories in respect of which there is no such division of legislative power'.[84] Section 122 was given the broadest possible interpretation:

> The grant of legislative power by s. 122 is plenary in quality and unlimited and unqualified in point of subject matter. In particular, it is not limited or qualified by s. 51 (xxxi.) or, for that matter, by any other paragraph of that section.[85]

On this account, ss 51 and 122 of the *Commonwealth Constitution* are unrelated. The court did, however, leave open the possibility that s 122 might be subject to other sections of the constitution, giving the example of s 116.[86]

B Newcrest Mining

In *Newcrest Mining*, which related to the Northern Territory, the court was asked to overrule *Teori Tau*. Justices Gaudron, Gummow and Kirby wished to do so.[87] Conversely, Brennan CJ, Dawson and McHugh JJ held that *Teori Tau* was

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

81 (1997) 190 CLR 513 ('*Newcrest Mining*').

82 *Teori Tau* (1969) 119 CLR 564, 569.

83 Ibid 570.

84 Ibid.

85 Ibid.

86 Ibid.

87 *Newcrest Mining* (1997) 190 CLR 513, 614 (Gummow J), 565 (Gaudron J), 661 (Kirby J).

'manifestly correct'.[88] The result was determined by Toohey J, who acknowledged 'the force of the critical analysis to which Gummow J has subjected the judgment in *Teori Tau*' but hesitated to take the 'serious step to overrule a decision which has stood for nearly thirty years'.[89] In the end, his Honour had an 'each way bet',[90] not overruling *Teori Tau*, but indicating that it was 'almost inevitable' that *Teori Tau* could be distinguished in every future case, with the result 'that any acquisition of property by the Commonwealth will now attract the operation of s 51(xxxi)'.[91] Toohey J contented himself that 'any implications overruling *Teori Tau* would have would likely be for the past rather than the future',[92] optimism proved sadly unfounded by *Wurridjal*: Toohey J's refusal in *Newcrest Mining* to overrule *Teori Tau* left the case on a precarious intellectual footing, but continued its force as a binding authority.

C Wurridjal

In *Wurridjal*, the plaintiffs (with the support of the Attorney-General for the Northern Territory, intervening) argued that *Teori Tau* should be overruled. Four Justices (French CJ, Gummow and Hayne JJ, and Kirby J)[93] agreed, concluding that s 51(xxxi)'s requirement of 'just terms' *did* restrict the territories power, with none of the other Justices supporting *Teori Tau*.[94] For Gummow and Hayne JJ, *Teori Tau* was 'an anomaly' involving 'an error in basic constitutional principle'.[95]

The real basis for this decision was that there had been an evolution of the position of the territories within Australian constitutional arrangements.[96] Gummow and Hayne JJ noted 'a retreat' from the view that there was a '"disjunction" … between s 122 and the remainder of the structure of government established and maintained by the Constitution.'[97] Their Honours emphasised that

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88 Ibid 552 (Dawson J). See also: 544 (Brennan CJ), 576 (McHugh J).

89 Ibid 560.

90 Peter Hanks, Patrick Keyser and Jennifer Clarke, *Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 7th ed, 2004) 949. The relevant paragraph has been omitted from the newer edition: Jennifer Clarke, Patrick Keyzer and James Stellios, *Hanks' Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 8th ed, 2009) 1178.

91 *Newcrest Mining* (1997) 190 CLR 513, 561.

92 Ibid.

93 *Wurridjal* (2009) 237 CLR 309, 359 (French CJ), 388 (Gummow and Hayne JJ), 419 (Kirby J).

94 For Heydon J, 'just terms' had been provided in any event: ibid 427; Crennan J held that there had been no 'acquisition of property': at 465; and Kiefel J thought that *Teori Tau* could be distinguished: at 468–9, and that 'just terms' had been provided in any event: at 469–72.

95 Ibid 388.

96 Kirby J also referred to the additional reasons given by his Honour in *Newcrest Mining,* which will not be repeated here: ibid 418.

French CJ relied on three additional, but arguably subsidiary, grounds. First, the text of s 51(xxxi) itself indicates that the 'guarantee' applies to acquisitions of property 'for any purpose in respect of which the Parliament has power to make laws', and laws for the government of a territory under s 122 are clearly laws fitting within that expression of purpose: at 356. Second, it was desirable that 'an integrated approach to the availability of legislative powers and limits on them throughout the Commonwealth' be taken 'where the language of the *Constitution* so permits': at 354. Third, that the Constitution 'began its life as a statute of the Imperial Parliament' and 'absent clear language, statutes are not to be construed to effect acquisition of property without compensation': at 355. The only commentary on this final aspect of French CJ's judgment has read it down as merely emphasising 'the expectation of the founders' that a power to acquire property without compensation 'would not ordinarily be resorted to': Horan, above n 36, 13.

97 *Wurridjal* (2009) 237 CLR 309, 387 (Gummow and Hayne JJ).

the 1977 referendum had 'engaged electors in the territories' by allowing them to vote in constitutional referenda.[98] Justice Kirby expressed this ground most clearly:

> It would be to adopt an extremely artificial interpretation of the *Constitution* to accept that Australian nationals and electors of the Commonwealth who live in the Territories are, for constitutional purposes, somehow disjoined from the Commonwealth.[99]

Section 51(xxxi) would limit the legislative power granted by s 122 in the same way, and for the same reason,[100] that it limits the powers granted by the other placita of s 51: as Gummow and Hayne JJ put it, 's 122 is but one of several heads of legislative power given to the national legislature of Australia'.[101]

This recognition of the place of the territories is an 'expression of national unity'[102] and part of the 'ongoing "integration" of the territories power':[103] the territories have come of age. In *Wurridjal*, this meant that s 51(xxxi)'s requirement of 'just terms' limited the legislative power granted by s 122. Kirby J hoped that this would be the first step in a process by which the court will '[o]ne day … correct the unsatisfactory state of its doctrines in relation to the territories, their people and courts',[104] although his Honour's reference here to *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*[105] is probably overly-optimistic. Kirby J's lone dissent could not be accepted without overcoming the spectre raised in that case by the Northern Territory, that 'every judicial appointment in the Australian Capital Territory and Northern Territory since at least 1971 would be invalid. Every conviction thereafter would be invalid, and could not be retrospectively validated by the Parliament'.[106] For this reason, it is difficult to see

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98 Ibid 387–8.

99 Ibid 419.

100 The reason adopted by their Honours was that given by Dixon CJ in *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361, 371–2:

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

See *Wurridjal* (2009) 237 CLR 309, 354–5 (French CJ), 384–5 (Gummow and Hayne JJ), 418 (Kirby J).

This passage from *Schmidt* dealt with the impact of s 51(xxxi) on other heads of power contained in s 51, in that case the defence power (s 51(vi)). Its extension to s 122 in *Wurridjal* relied on the additional determination that s 51 and s 122 grant legislative powers in the same context. This passage was noted by Brennan CJ in *Newcrest Mining* (1997) 190 CLR 513, 532-3 but his Honour held that *Teori Tau* was correctly decided, not regarding s 51 and s 122 legislative powers as arising in the same context: at 544. Similarly, the passage was not overlooked in *Teori Tau* itself: Horan, above n 36, 9-10.

101 *Wurridjal* (2009) 237 CLR 309, 386.

102 Pamela Tate SC, 'The High Court on Constitutional Law: The 2008 Term' (2009) 32 *University of New South Wales Law Journal* 169, 180. See also: at 171.

103 Horan, above n 36, 1.

104 *Wurridjal* (2009) 237 CLR 309, 419.

105 (1999) 200 CLR 322 ('*Ex parte Eastman*').

106 Ibid 328–9 (TI Pauling QC) (during argument). The potential for invalidation of all criminal convictions in the territories was referred to by Gleeson CJ, and McHugh and Callinan JJ: at 330, but downplayed by Kirby J: at 383.

Wurridjal as a catalyst for overturning *Ex parte Eastman*;[107] whether the Court's acceptance in *Wurridjal* of the significant position of the territories within Australian constitutional arrangements will be applied in other areas of its s 122 jurisprudence remains to be seen.

V Did *Wurridjal* Overrule *Teori Tau*?

A majority of the Justices in *Wurridjal* rejected the approach taken in *Teori Tau*, with French CJ, Gummow and Hayne JJ, and Kirby J all finding that s 51(xxxi)'s requirement of 'just terms' applied to legislation under the territories power (s 122). Does this mean that *Teori Tau* was formally overruled?[108]

The requirement that dissenting Justices not be counted in the determination of a ratio decidendi is well-established: 'it would not be proper to seek to extract a binding authority from an opinion expressed in a dissenting judgment'.[109] Even though Kirby J's dissent turned on the unrelated question of the suitability of the case for disposition on a demurrer, a strict application of this requirement would discard his Honour's view, leaving only three Justices expressly deciding to overrule *Teori Tau*. It would not, then, be overruled.

The traditional rule for establishing a binding ratio decidendi, as stated by Kirby J, is:

> It is fundamental to the ascertainment of the binding rule of a judicial decision that it should be derived from (1) the reasons of the judges agreeing in the order disposing of the proceedings; (2) upon a matter in issue in the proceedings; (3) upon which a decision is necessary to arrive at that order.[110]

If this rule applied, Kirby J's emphatic passage in *Wurridjal* would be insufficient:

> *Teori Tau* should be overruled. In this respect I agree in the conclusions stated in the reasons of Gummow and Hayne JJ. Because a like conclusion is expressed by French CJ in his reasons, this will be the first holding of this Court in the present case. It is a holding that is essential to my reasoning that follows.[111]

Although Kirby J stressed the second and third of the traditional requirements for identifying a binding ratio decidendi, his Honour's reasons do not

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[107] '*Wurridjal* is unlikely to lead to a wholesale reconsideration of the existing authorities on the application of particular constitutional provisions to the Territories': Horan, above n 36, 28.

[108] I am indebted to Stephen McDonald of Hanson Chambers (Adelaide) for first discussing with me the question of whether or not *Teori Tau had* been overruled. This is a different question from whether or not *Teori Tau should* have been overruled, as to which see Horan, above n 36, 15–18.

[109] *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303, 314 (Mason CJ, Wilson, Dawson and Toohey JJ). See also *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177, 188 (Barwick CJ); *Great Western Railway Co v Owners of SS Mostyn* [1928] AC 57, 73–4 (Viscount Dunedin).

[110] *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 417. See also: *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 79–80 (Kirby J).

[111] *Wurridjal* (2009) 237 CLR 309, 419.

satisfy the first requirement: Kirby J was not 'agreeing in the order disposing of the proceedings'.[112]

This raises two possibilities: either *Teori Tau* was not overruled by *Wurridjal*, or their Honours have adopted a *new* rule for identifying the existing of a binding ratio decidendi to overrule a previous decision of the Court.

All commentary on *Wurridjal* suggests that *Teori Tau* was overruled,[113] as does the head note in the *Commonwealth Law Reports*[114] and the Court's own media release.[115] Moreover, five Justices in *Wurridjal* expressly stated that *Teori Tau* was overruled. In addition to the four who decided the issue, Heydon J wrote that 'in consequence of the approach of the plurality judgment in this case, there will in future be no doubt as to the relationship between s 51(xxxi) and s 122 of the Constitution'.[116] Even if Kirby J is discarded as a dissenting judge, the views of French CJ, Gummow and Hayne JJ, and Heydon J provide a majority for

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[112] It might also be thought that Kirby J was incorrect to assert that it was 'essential' to determine whether s 51(xxxi) applied: ibid 419, given the apparent majority acceptance that the *Historic Shipwrecks* clause provided 'just terms'. Indeed, Crennan J expressly held that it was 'unnecessary': at 437. Her Honour, however, was alone in finding that there had not been an 'acquisition of property' within s 51(xxxi): at 465. Moreover, as s 60(2) of the *NER Act* provided for reasonable compensation *only* if s 51(xxxi) applied, the controversy could not be finally resolved without determining if the placitum applied. The plaintiffs had sought only declaratory relief in their Statement of Claim, rather than compensation; but a claim for compensation would likely have followed rapidly, and would have required a decision on whether s 51(xxxi) limited the power granted by s 122. Indeed, the plaintiffs' counsel had argued that: 'Because the jurisprudence about the relationship between ss 51(xxxi) and 122 is unsettled … proceedings for compensation in a lower court could not be expected to resolve those issues': at 319 (R Merkel QC) (during argument).

[113] Luke Beck, 'Clear and Emphatic: The Separation of Church and State under the Australian Constitution' (2008) 27(2) *University of Tasmania Law Review* 161, 172-3; 'Developments' (2009) 20 *Public Law Review* 84, 84; Tate, above n 102, 180; Meyrick, above n 22; Kristen Walker, 'The Constitution and the Northern Territory Intervention: *Wurridjal v The Commonwealth*' (paper presented at the Centre for Comparative Constitutional Studies 21st Anniversary Conference: International and Comparative Perspectives on Constitutional Law, University of Melbourne, 27 November 2009); Robert French CJ, 'Theories of Everything and Constitutional Interpretation' (Speech delivered at the Gilbert & Tobin Centre of Public Law Conference on Constitutional Law Dinner, University of New South Wales, Sydney, 19 February 2010) 1–2; '*Wurridjal v Commonwealth*' (2009) 13(1) *Australian Indigenous Law Review* 160, 161; Clarke, Keyzer and Stellios, above n 90, 493; Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) 244.

The closest commentators have come to addressing this issue are observations made in the context of stating that *Wurridjal* overruled *Teori Tau*: that there was 'no majority on this issue within the majority judgments': David Bennett QC and Adam Kirk, 'Northern Territory Emergency Response Legislation Valid' in *Australian Government Solicitor: Litigation Notes* (No 19, 28 October 2009) 12, 14, and that 'notably, it is necessary to rely on the judgment of Kirby J, who dissented in the result': Horan, above n 36, 7 (that *Teori Tau* was overruled is also stated at 3–4).

[114] *Wurridjal* (2009) 237 CLR 309, 311.

[115] 'A majority of the Justices overruled a 1969 decision of the High Court, *Teori Tau v The Commonwealth*, which held that the just terms requirement in section 51(xxxi) did not apply to laws made by the Commonwealth for the governing of the territories. Therefore, section 122 of the Constitution is subject to the just terms requirement in section 51(xxxi)': Public Information Officer, High Court of Australia, '*Reggie Wurridjal, Joy Garlbin and Bawinanga Aboriginal Corporation v The Commonwealth of Australia and Arnhem Land Aboriginal Land Trust*' (Media Release, 2 February 2009) <http://www.hcourt.gov.au/assets/publications/judgment-summaries/2009/hca2-2009-02-02.pdf> Of course, the Media Release also contains the disclaimer that: 'This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the court's reasons.'

[116] *Wurridjal* (2009) 237 CLR 309, 429.

overruling the Court's previous approach to overruling. In any event, since 'rules of precedent are not rules of law, but only rules of practice' it has been said that they 'can therefore be changed simply by the adoption of a different practice'.[117] It seems that the Court in *Wurridjal* has adopted just such a different practice.

The new rule of practice is that where there is a clear decision by a majority of Justices on an issue that it is necessary to resolve in order to dispose of a matter, this can form a binding ratio decidendi and overrule previous decisions to the contrary. Indeed, a similar approach was suggested in *Shaw v Minister for Immigration and Multicultural Affairs*:

> [T]he Court should be taken as having departed from a previous decision, particularly one involving the interpretation of the Constitution, only where that which purportedly has been overthrown has been replaced by some fresh doctrine, the elements of which may readily be discerned by the other courts in the Australian hierarchy.[118]

The reasoning in *Teori Tau* was replaced by four Justices in *Wurridjal* with a clearly discernable approach that s 51(xxxi) applies to legislation passed under s 122. This is sufficient, under this new approach to ratio decidendi, to overrule *Teori Tau*, notwithstanding that Kirby J dissented from the final result on an unrelated point.

This new approach confirms that *stare decisis* is not to be applied unthinkingly.[119] It would be ridiculous to expect lower Australian courts to continue to apply *Teori Tau* notwithstanding that it was expressly disapproved by four Justices, and not supported by any Justice, in *Wurridjal*.[120] It has been acknowledged that 'in its nature, law requires the exercise of judgment … judges are not automatons'.[121] The new rule recognises that Justices are capable of determining where a prior doctrine has been rejected and replaced with a fresh doctrine accepted by a majority of Justices. The outcome is that *Teori Tau* was finally overruled in *Wurridjal*, and a new rule of practice has been adopted to determine when a binding ratio decidendi exists to overrule a previous decision of the court. It remains to be seen whether this new test, of clear replacement with fresh doctrine, will be followed consistently by the Court.

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117 Blackshield and Williams, above n 113, 585.

118 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 44 (Gleeson CJ, Gummow and Hayne JJ).

119 The doctrine, after all, has been memorably described as 'a maxim among ... lawyers, that whatever has been done before may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind': Jonathan Swift, *Gulliver's Travels* (Dodd Mead, first published 1726–7, 1950 ed) 256.

120 A questionable way out under the traditional rule would be to distinguish *Teori Tau*, as Toohey J suggested in *Newcrest Mining* (1997) 190 CLR 513, 561 and Kiefel J suggested in *Wurridjal* (2009) 237 CLR 309, 468-9.

121 Anthony Murray Gleeson, 'A Core Value' (Speech delivered at the Judicial Conference of Australia Annual Colloquium, Canberra, 6 October 2006). Similarly: 'Judges are not automatons; they exercise judgment': George M Cohen, 'The Fault That Lies Within Our Contract Law' (2009) 107 *Michigan Law Review* 1445, 1459.

VI Conclusion

The majority view that there had been an 'acquisition of property' within the meaning of s 51(xxxi) was arrived at by applying the principle that '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 will not amount to an 'acquisition of property'.[122] For the majority, the Land Trust's fee simple was not susceptible to the very severe modifications imposed by the grant of the Commonwealth's statutory lease under s 31 of the *NER Act*, and there had been an 'acquisition of property'. The lone dissentient on this point, Crennan J, applied the same test but found in the statutory scheme establishing the fee simple sufficient indications of its liability to subsequent modification to hold that there had been no 'acquisition of property'.

As the majority held that there had been an 'acquisition of property' within s 51(xxxi), 'just terms' were required. The Justices found that the 'reasonable amount of compensation' demanded by the *Historic Shipwrecks* clause satisfied s 51(xxxi), even if legal action was required to enforce it. The 'acquisition of property' had therefore been 'on just terms' and the plaintiffs' challenge to the legislation failed on the application by the Court of orthodox interpretations of s 51(xxxi). As the challenge failed because of the application of settled approaches, the unsuccessful Plaintiffs were ordered to pay the Commonwealth's costs in full.[123]

As a challenge to the Northern Territory intervention, the fact *Wurridjal* was based only on s 51(xxxi) meant it was very narrowly focused: the Court could not deal with the broader objection that Aboriginal people feel that they were 'isolated on the basis of race and subjected to collective measures that would never be applied to other Australians'.[124] Further, the decision was handed down after a change of government and after a wide-ranging review of intervention policies.[125]

Wurridjal ultimately is a decision whose significance turns not on its application of orthodox interpretations of s 51(xxxi) to the legislation in question, but on its identification of novel approaches in three areas that may be of future importance.[126]

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[122] *Georgiadis* (1994) 179 CLR 297, 306 (Mason CJ, Deane and Gaudron JJ).

[123] Kirby J disagreed, suggesting that because the case had 'established an important constitutional principle affecting the relationship between ss 51(xxxi) and 122 of the Constitution' which it 'was in the interests of the Commonwealth, the Territories and the nation to settle' the unsuccessful plaintiffs should only have been ordered to meet half the Commonwealth's costs: *Wurridjal* (2009) 237 CLR 309, 426. Cf 'The plaintiffs' case was brought in the face of provision for fair and reasonable compensation … [and] was not useful to clarify any substantial issue': at 472 (Kiefel J).

[124] Commonwealth of Australia, *Report of the Northern Territory Emergency Response Review Board* (2008) 8.

[125] Ibid. The review did not recommend changes to the lease provisions, merely admonishing the Commonwealth to 'ensure the expeditious payment of just terms compensation': at 14.

[126] Five other issues may be noted. First, an unsuccessful application by Professor Kim Rubenstein and Ernst Willheim (both of the Australian National University) for leave to file written submissions as *amici curiae* has somewhat clarified the court's approach to that issue, and suggestions for future changes have been made. See Ernst Willheim, 'Comments: An Amicus Experience in the High Court: *Wurridjal v Commonwealth'* (2009) 20 *Public Law Review* 95, 104–111. Second, the extensive use of international law in the interpretation of the *Commonwealth Constitution*, displayed by Kirby J in *Wurridjal* (2009) 237 CLR 309, 408-13 is likely to be evident less frequently and to a lesser extent in the immediate future. Surely Kirby J is correct that the greater use of international law in constitutional interpretation is 'inevitable': at 410, but his Honour's view that this is also

First, s 51(xxxi)'s requirement of 'just terms' may apply differently to Indigenous traditional use rights and sacred sites. This idea was suggested by Kirby J, and enjoyed some support from Heydon J (although rejected by Kiefel J). The challenge is to determine how this additional content of 'just terms' would apply—options for merely increasing monetary compensation for invaluable rights appear not to resolve the problem, but further exploration is required to determine how any procedural content to the requirement of 'just terms' would be monitored and enforced by the Court given its institutional constraints. In *Wurridjal*, statutory interpretation resulted in the finding that Indigenous traditional use rights had not been impacted by the legislation in question, so this issue remains for the future.

Second, a changing view of the position of the territories within Australian constitutional arrangements played an important part in the Court's decision that the legislative power conferred by s 122 is limited by the requirement of 'just terms' imposed by s 51(xxxi). The issue for future cases to determine is to what extent this coming of age of the territories requires modification of the Court's other doctrines affecting the territories.

Third, the Court adopted a new rule of practice to determine whether one of its previous decisions has been overruled. Gone is the requirement that only judges concurring in the Court's final order are to be considered. Instead, where there is a decision by a majority of Justices that establishes a clearly discernable new doctrine on an issue that is necessary to resolve in order to dispose of the matter, this forms a binding ratio decidendi and overrules previous decisions to the contrary. It remains to be seen whether this new rule of practice is applied consistently in future cases.

'desirable, natural and legally correct': at 410 is likely to remain controversial in the interim. Third, there is no reason to think the outcome in *Wurridjal* would differ in external territories: see Horan, above n 36, 26–7. Fourth, s 51(xxxi)'s application to the reference power (s 51(xxxvii)) may also be of future interest: see Horan, 28–30. Fifth, the Court continues to make extensive use of extrinsic materials in statutory interpretation. In *Wurridjal*, their Honours referred extensively to the Second Reading Speech of the *Northern Territory National Emergency Response Act 2007* (Cth): 333 (French CJ), 372–3 (Gummow and Hayne JJ), 400-3, 417 (Kirby J), 445–7 (Crennan J); to the Second Reading Speech of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth): 363 (French CJ), 448–9, 456–7 (Crennan J); and to the Woodward Royal Commission's Report: 363 (French CJ), 449, 464 (Crennan J). This continues the modern approach of treating extrinsic materials as essential to the interpretation of statutes, as to which see: Matthew T Stubbs, 'From Foreign Circumstances to First Instance Considerations: Extrinsic Material and the Law of Statutory Interpretation' (2006) 34 *Federal Law Review* 103.