'JUST TERMS' OR JUST MONEY? SECTION 51(XXXI), NATIVE TITLE AND NON-MONETARY TERMS OF ACQUISITION

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> 'We have profoundly forgotten everywhere that *Cash-payment* is not the sole relation of human beings.'[1]

I INTRODUCTION

Section 51(xxxi) of the *Australian Constitution* empowers the Commonwealth Parliament to make laws with respect to:

> the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

In comparison with the close attention paid to the words 'property' and 'acquisition' in the case law and commentary, the meaning of 'on just terms' in section 51(xxxi) has not been thoroughly explored. In particular, little consideration has been given to the potential for 'just terms' to encompass non-monetary obligations. With few exceptions, the High Court ('the Court') has uncritically assumed 'just terms' to be coextensive with monetary compensation, and endorsed Commonwealth acquisition legislation drafted upon this premise. Even in *Wurridjal v Commonwealth*,[2] the first section 51(xxxi) case featuring an argument that 'just terms' extends to non-pecuniary recompense, the Court did not comprehensively explore the issue.

This uncertainty regarding the form of 'just terms' awards is problematic in the context of property whose loss may not be measurable in money – namely, native title interests. Although such rights are property for the purposes of section 51(xxxi), their 'value' to native title holders is primarily spiritual rather than economic.[3] An unsettled issue is whether section 51(xxxi) obliges the award of non-monetary terms, such as land restitution or land access permissions, if these would provide fuller recompense for acquisitions of native title interests than money alone.

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1 Thomas Carlyle, *Past and Present* (Bibliobazaar LLC, first published 1843, 2008 ed) 178 (emphasis in original).

2 (2009) 237 CLR 309 ('*Wurridjal*').

3 See Part IV(A) below.

This article aims to fill this gap in current understandings of section 51(xxxi) by answering two questions. Firstly, can 'just terms' granted under section 51(xxxi) include non-monetary obligations? To this end, Part II evaluates the case law discussing the meaning of 'just terms'. The Part highlights both the Court's overall failure to distinguish this concept from pecuniary payments, and its inconsistent readings of the doctrinal origins of section 51(xxxi) and their implications – problems which remain unresolved after *Wurridjal*. Part III then interprets 'just terms' from first principles, drawing on the history, text, purpose and doctrinal origins of section 51(xxxi) to propose a broad construction of this guarantee, encompassing non-monetary awards.

Secondly, what are the ramifications of this analysis for acquisitions of native title interests? Part IV examines the characteristics of native title rights warranting non-pecuniary recompense, suggests terms which could be provided, and demonstrates that such terms are compatible with the Commonwealth's acquisition power under section 51(xxxi). It then proposes changes to federal acquisition statutes to facilitate non-monetary awards in the native title context.

It should be noted that this article focuses on section 51(xxxi) acquisitions of property from persons, rather than States. In these circumstances, non-monetary terms have greatest relevance, and the interpretation of section 51(xxxi) as a guarantee of rights – the key basis for broadly construing 'just terms' to reflect property owners' needs – is most justifiable. Consequently, the article engages sparingly with federalist objections to a rights-oriented construction of the *Constitution*. As the Court has recognised, the 'just terms' requirement of section 51(xxxi) in its application to individuals arguably has rights-protective, not federalist, aims. This obligation limits Commonwealth legislative authority in order to safeguard private property, a purpose unrelated to federal power allocation.

II THE HIGH COURT'S APPROACH TO 'JUST TERMS'

This Part examines the case law's treatment of the 'just terms' obligation in section 51(xxxi). It demonstrates that the clause's scope to encompass non-monetary terms was not properly addressed by the Court prior to *Wurridjal*, due to an unexplained conflation of 'just terms' with 'compensation', and confusion over the nature and implications of the doctrinal origins of section 51(xxxi). Unfortunately, *Wurridjal* did not resolve this issue.

A 'Just Terms' in the Pre-*Wurridjal* Cases

The 'just terms' requirement of section 51(xxxi) qualifies the federal Parliament's power to acquire property compulsorily from States or persons.[4] As an express grant of power, section 51(xxxi) necessarily abstracts the authority to

4 See *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 169, 177, 185, 200, 219 ('*Mutual Pools*').

acquire property from other Commonwealth heads of power.[5] Thus, the Commonwealth must provide 'just terms' whenever federal legislation falls within the 'compound conception' of 'acquisition-on-just-terms'[6] – in other words, if it effects an acquisition for which 'just terms' is not an 'inconsistent or incongruous notion'.[7] Failure to do so renders the law invalid.

The key cases interpreting 'just terms' emerged during and immediately following the Second World War ('WWII'). They generally centred on federal regulations authorising property acquisitions to assist the war or reconstruction effort. The judges in these cases provided few global statements on the limitation's meaning, preferring to allow Parliament leeway in determining appropriate terms in individual scenarios. For example, in *Andrews v Howell*,[8] the Court held that a set method of calculation to be applied by an administrative body could afford 'just terms' for the Commonwealth's acquisition of growers' fruit.[9] Likewise, in *Grace Brothers*,[10] the Court unanimously upheld certain acquisition legislation despite the plaintiff's claims that it valued acquired land on an arbitrary date, according to market value rather than its value to the owner, and provided inadequate interest. In Chief Justice Latham's words, the Court cannot invalidate acquisition legislation merely because it could 'devise a more just scheme';[11] Parliament must have discretion to adjust community and individual interests unless a 'reasonable man could not regard the terms ... as being just.'[12]

Nevertheless, the Court did endorse minimum thresholds for 'just terms' during this period, indicating that a 'conclusive assessment of compensation'[13] by an administrative decision-maker, or fixed ceilings on awards, would infringe the requirement. In *Australian Apple and Pear Marketing Board v Tonking*,[14] a majority of judges stated in obiter that an *exhaustive* mechanism for assessing compensation would not provide 'just terms';[15] however, the regulations in this case permitted separate recourse to a court to determine adequate recompense.[16] Similarly, in *Johnston Fear & Kingham & the Offset Printing Co Pty Ltd v Commonwealth*[17] and *Minister of State for the Army v Dalziel*,[18] the Court

5 *Theophanous v Commonwealth* (2006) 225 CLR 101, 124. This includes s 122 of the *Australian Constitution*: *Wurridjal* (2009) 237 CLR 309, 359, 383–6, 418–19.

6 *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269, 290 ('*Grace Brothers*'); *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210, 230 ('*Telstra*').

7 *Theophanous v Commonwealth* (2006) 225 CLR 101, 124. Acquisitions for which the notion of 'just terms' is incongruous include taxes or fines: at 126.

8 (1941) 65 CLR 255.

9 Ibid 264, 270–1, 283–4, 288.

10 (1946) 72 CLR 269.

11 Ibid 280.

12 Ibid. See also at 295 (McTiernan J), 285 (Starke J), 291 (Dixon J).

13 Gabriël Moens, John Trone and Richard Darrell Lumb, *Lumb and Moens' The Constitution of the Commonwealth of Australia Annotated* (LexisNexis Butterworths, 7th ed, 2007) 180.

14 (1942) 66 CLR 77 ('*Tonking*').

15 Ibid 99, 107.

16 Ibid 101, 105.

17 (1943) 67 CLR 314 ('*Johnston Fear*').

rejected regulations fixing maximum compensation awards for specific acquisitions. It held that 'just terms' can sometimes require more than payment of a set price; for instance, where the property owner has sustained business losses because their acquired goods were not readily replaceable,[19] or lost profits following a land acquisition.[20]

In recent decades, the Court has not moved far beyond the picture of 'just terms' emerging from the wartime cases. One possible reason is that many section 51(xxxi) cases since the 1970s have been used by a High Court majority to mark the boundaries of the 'acquisition' concept,[21] meaning that only the dissenters have considered 'just terms'. Where judges have discussed this limitation, they have generally asserted their conclusion on its application to the facts with little elaboration;[22] or stated slightly different tests using broad language such as 'just', 'fair' or 'full compensation'.[23] For example, in *Smith v ANL Ltd*,[24] the majority judges variously held that acquisition legislation must ensure 'full compensation for what ... [is] lost',[25] the 'assessment of compensation in an appropriate way',[26] a 'fair and just standard of compensat[ion]',[27] and an award 'approximately equivalent'[28] to the claimant's loss. Such cases echo the Court's earlier reluctance to prescribe universal requirements for the content of 'just terms'. As Deane J stated in the *Tasmanian Dam Case*,[29] '[t]here is no precise definition of the meaning of ... [this] phrase ... [I]t is for the Parliament to determine ... appropriate compensation ... [for] an acquisition' – and for the Court to review it on a case-by-case basis.

B Analysis of Pre-*Wurridjal* Cases

The pre-*Wurridjal* cases display two traits which prevent them from clarifying whether 'just terms' can comprise non-monetary awards: a tendency to

18 (1944) 68 CLR 261 ('*Dalziel*').

19 *Johnston Fear* (1943) 67 CLR 314, 323–4, 330, 334.

20 *Dalziel* (1944) 68 CLR 261, 286, 296–7, 308–9.

21 See *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 ('*Tooth*'); *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*'); *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 ('*Tape Manufacturers*'); *Mutual Pools* (1994) 179 CLR 155; *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 ('*WMC*'); *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133; *Theophanous v Commonwealth* (2006) 225 CLR 101; *A-G (NT) v Chaffey* (2007) 231 CLR 651 ('*Chaffey*').

22 See *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 308 ('*Georgiadis*'); *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 635 ('*Newcrest*'); *Telstra* (2008) 234 CLR 210, 230.

23 See *Georgiadis* (1994) 179 CLR 297, 311; *WMC* (1998) 194 CLR 1, 102–3; *Commonwealth v Western Australia* (1999) 196 CLR 392, 455, 490.

24 (2000) 204 CLR 493.

25 Ibid 501 (Gleeson CJ).

26 Ibid 557 (Callinan J).

27 Ibid 513 (Gaudron and Gummow JJ).

28 Ibid 531 (Kirby J).

29 (1983) 158 CLR 1, 289.

conflate 'just terms' with monetary compensation, and disagreement regarding the doctrinal origins of section 51(xxxi).

1 *Conflation of 'Just Terms' with 'Compensation'*

The Court has generally assumed that 'just terms' equates to pecuniary compensation, without explaining why this is so. Admittedly, in many of the cases the challenged legislation granted property owners 'compensation' for Commonwealth acquisitions, and the claimants objected to the allotted amount or the manner of assessment.[30] Therefore, the judges understandably framed their reasoning with monetary compensation in mind. However, they made no attempt to define the content of 'just terms' separately from 'compensation', which has a legal meaning, akin to damages, of an 'amount' given to repay a loss suffered.[31] Firstly, this is evident from their terminology. In numerous cases, the Court has described 'just terms' using language with monetary connotations, equating the phrase to a requirement of 'just', 'full' or 'adequate' 'compensation';[32] an obligation to provide 'payment ... of the value of the property';[33] or a condition of 'economic fairness'.[34] Secondly, many judges have endorsed the assessment of 'just terms' using common law compensation principles. On this basis, the Court's starting point for an award is the market value of the acquired property; or, where no market exists, the pecuniary value in the circumstances.[35] In *Tonking*, for instance, the Court awarded compensation for the plaintiff's goods according to general principles of assessment; Rich J in the majority stated that '[e]ach individual grower has a legal right to be paid the full value of his fruit'.[36] Even where the Court has held that 'just terms' require greater recompense than general compensation principles afford, it has conceived of the extra requirements in monetary terms – for example, further payments for lost profits.[37] Consistently with this pecuniary understanding of 'just terms', and with the endorsement of the Court,[38] recent Commonwealth acquisition legislation has

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30 See *Andrews v Howell* (1941) 65 CLR 255; *Tonking* (1942) 66 CLR 77; *Johnston Fear* (1943) 67 CLR 314; *Grace Brothers* (1946) 72 CLR 269; *Tasmanian Dam Case* (1983) 158 CLR 1; *Telstra* (2008) 234 CLR 210.

31 Peter E Nygh and Peter Butt (eds), *Butterworths Concise Australian Legal Dictionary* (Butterworths, 2nd ed, 1998) 80.

32 See *Andrews v Howell* (1941) 65 CLR 255, 264 (Rich ACJ), *Johnston Fear* (1943) 67 CLR 314, 323 (Latham CJ), 324 (Rich J), 333 (Williams J); *Commonwealth v Huon Transport Pty Ltd* (1945) 70 CLR 293, 326 (Dixon J) ('*Huon*'), *Georgiadis* (1994) 179 CLR 297, 308 (Mason, Deane and Gaudron JJ), 311 (Brennan J); *Newcrest* (1997) 190 CLR 513, 591 (Gummow J); *Commonwealth v Western Australia* (1999) 196 CLR 392, 455 (Kirby J); *Smith v ANL Ltd* (2000) 204 CLR 493, 501 (Gleeson CJ).

33 *Huon* (1945) 70 CLR 293, 306 (Rich J); see also *Grace Brothers* (1946) 72 CLR 269, 302 (Williams J).

34 *WMC* (1998) 194 CLR 1, 102 (Kirby J).

35 See *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495, 547–8 ('*Nelungaloo*').

36 *Tonking* (1942) 66 CLR 77, 107. See also *Huon* (1945) 70 CLR 293, 326; *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 343 ('*Bank Nationalisation Case*'); *Nelungaloo* (1948) 75 CLR 495, 537, 547–8.

37 See *Johnston Fear* (1943) 67 CLR 314, 322–3.

38 See *Commonwealth v Western Australia* (1999) 196 CLR 392, 461; *Telstra* (2008) 234 CLR 210, 230.

increasingly used the phrase 'reasonable compensation' to satisfy the requirement.[39]

There are two exceptions to this overall trend.

Firstly, in *Nelungaloo* – a post-WWII case involving compulsory acquisition of wheat under a pooling scheme – Dixon J argued that 'just terms' required a balancing exercise to be conducted. In his view, '[u]nlike "compensation", which connotes full money equivalence, "just terms" are concerned with fairness' between the community and the property owner.[40] This reading could theoretically support a non-monetary 'just terms' award where such recompense was central to the fair treatment of the owner – for example, where money was not a valuable equivalent for the acquired property.

However, although several judges endorsed Justice Dixon's statement,[41] it was never cited by a High Court majority or used to support an argument respecting non-monetary 'just terms'. Furthermore, even when agreeing that 'just terms' contemplates fairness, judges have disagreed over the way the scales should tip when individual and public interests conflict.[42] In *Nelungaloo*, Dixon J seemed to maintain that fairness to the individual must be accounted for even where the acquisition occurs for an important public purpose (here, helping the community to recover from wartime losses). He indicated that this consideration restrained the Commonwealth from assessing 'just terms' entirely in its favour – for instance, in a scheme compensating growers from a pool of wheat profits, the Commonwealth could not sell the wheat 'upon terms ... unfair ... to the growers without any indemnification to the pool'.[43] Conversely, Latham CJ suggested that individuals must submit to the public interest, holding that the 'just terms' obligation does not 'compel the community to submit to the exaction of the uttermost farthing'[44] for the property owner's benefit. Finally, other judges have decried the notion of conducting a balancing exercise at all, contending that section 51(xxxi) obliges the community to compensate the individual *in full* for their loss of property.[45] Accordingly, the scope for Justice Dixon's statement in *Nelungaloo* to permit non-monetary 'just terms', and the related question of *whose* interests should take priority when determining the terms' measure and form, have not been properly explored.

Regarding the second exception, various judges in the pre-*Wurridjal* cases have implied that compensation paid under section 51(xxxi) can attract procedural fairness obligations, including the following:

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39 See legislation cited in *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151, 165.

40 *Nelungaloo* (1948) 75 CLR 495, 569. See also *Grace Brothers* (1946) 72 CLR 269, 290.

41 *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545, 600 (Kitto J); *Tasmanian Dam Case* (1983) 158 CLR 1, 291 (Deane J).

42 See Tom Allen, 'The Acquisition of Property on Just Terms' (2000) 22 *Sydney Law Review* 351, 369–74.

43 *Nelungaloo* (1948) 75 CLR 495, 567.

44 Ibid 541.

45 See *Georgiadis* (1994) 179 CLR 297, 310–11 (Brennan J); *Smith v ANL Ltd* (2000) 204 CLR 493, 501 (Gleeson CJ).

- *Compensation cannot be determined pursuant to an administrative entity's uncontrolled discretion, without independent investigation, consultation with the property owner or recourse to a court.* In *the Bank Nationalisation Case*, the Court unanimously held that provisions authorising the management takeover of private banks contravened section 51(xxxi). Four judges found the terms of acquisition unjust for allowing government-appointed directors to sell the property at a price fixed by them and the Commonwealth Bank, and pay compensation from these proceeds, without independent scrutiny or the owners' involvement.[46]
- *A rightholder must be heard during the acquisition process.* In *Nelungaloo*, Starke J held the pooling arrangement invalid partly because the property owners 'had no voice in the matter'.[47]
- *Lengthy delays in providing 'just terms' should not go uncompensated.* In the *Tasmanian Dam Case*, Deane J held certain acquisition legislation invalid for 'forc[ing the property owner] to wait years' before allowing access to a body to determine the compensation payable under section 51(xxxi), and failing to provide interest.[48]

These statements support the existence of certain non-monetary obligations as part of the 'just terms' guarantee. Taken to their logical conclusion, they suggest that 'just terms' can mandate a broader range of awards than money in circumstances where a mere compensation payment would not ensure fairness to the property owner. However, a High Court majority has never expressly endorsed this conclusion.

2 *Uncertainty Regarding the Doctrinal Origins of Section 51(xxxi)*

The pre-*Wurridjal* cases also evidence the judges' discord regarding the doctrinal origins of section 51(xxxi).[49] Such discord has polarised their views on the scope of 'just terms'; specifically, concerning the degree to which the obligation requires the Commonwealth to meet individuals' particular needs following acquisitions of their property.

Some judges have held that the words 'just terms' derive from the *United States Constitution* Amendment V's 'takings clause', which provides that private property cannot be 'taken ... without just compensation'.[50] In Justice Rich's view, for instance, given that both constitutional provisions are 'designed to protect

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46 (1948) 76 CLR 1, 216–18, 319, 350–1, 395. See also *Tonking* (1942) 66 CLR 77, 107; *Nelungaloo* (1948) 75 CLR 495, 547, 567.

47 (1948) 75 CLR 495, 547. See also *Johnston Fear* (1943) 67 CLR 314, 322, 324, 332; *Commonwealth v Western Australia* (1999) 196 CLR 392, 463.

48 *Tasmanian Dam Case* (1983) 158 CLR 1, 291. See also *Huon* (1945) 70 CLR 293, 307, 337.

49 For a discussion of the guidance on the operation of s 51(xxxi) which can be obtained from both English and American jurisprudence, see Simon Evans, 'When is an Acquisition of Property Not an Acquisition of Property?' (2000) 11 *Public Law Review* 183, 199–202.

50 See Part III(D)(2) below for greater detail on this provision.

citizens from being deprived of their property by the Sovereign State',[51] American authorities are useful tools for interpreting section 51(xxxi).[52] However, others have rejected all links between the provisions,[53] or expressed caution regarding the application of American cases in this Australian context.[54]

Alternatively, certain members of the Court have understood section 51(xxxi) as deeply rooted in the British common law tradition – although this approach is further complicated by their reliance on different parts of this tradition, resulting in different readings of the provision's object. Justice Rich attributed section 51(xxxi) partly to the common law's 'great doctrine ... protecti[ng] ... private property'.[55] Others have endorsed English authorities discussing compensation requirements,[56] or followed British principles of parliamentary sovereignty in stating that section 51(xxxi) leaves the acquisition's terms for 'legislative judgment'.[57] Regardless of the particular approach advocated, the use of British doctrine to construe section 51(xxxi) has also been criticised.[58]

These conflicting theories have influenced judges' views on the nature of the 'just terms' mandate, particularly regarding the extent it obliges Parliament to take steps beyond minimum compensation obligations to rectify individual losses. A good example is the Court's discussion in *Huon* of whether 'just terms' requires interest payments. Justices Rich and Williams, both proponents of the American ancestry of section 51(xxxi), would have awarded interest. They construed the phrase consistently with the United States ('US') Supreme Court's interpretation of 'just compensation', stating that section 51(xxxi) required a person to be placed in 'the same position as though he had not been dispossessed'.[59] Conversely, Dixon and Starke JJ interpreted 'just terms' consistently with '"compensation" as ... understood in English law',[60] holding that section 51(xxxi) did not oblige Parliament to grant interest in this case.[61] Such inconsistencies have presented further obstacles to resolving the capacity of 'just terms' to encompass non-monetary obligations.

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51 *Dalziel* (1944) 68 CLR 261, 285.

52 *Tonking* (1942) 66 CLR 77, 104–7. See also *Andrews v Howell* (1941) 65 CLR 255, 282 (Dixon J); *Tooth* (1979) 142 CLR 397, 418 (Stephen J); *Newcrest* (1997) 190 CLR 513, 649 (Kirby J).

53 See *Andrews v Howell* (1941) 65 CLR 255, 270 (Starke J).

54 See *Dalziel* (1944) 68 CLR 261, 294–5 (McTiernan J); *Johnston Fear* (1943) 67 CLR 314, 318–19 (Latham CJ); *Mutual Pools* (1994) 179 CLR 155, 169 (Mason CJ), 202 (Dawson and Toohey JJ).

55 *Tonking* (1942) 66 CLR 77, 104 quoting Joseph Story, *Commentaries on the Constitution of the United States* (Little, Brown, 3rd ed, 1858) vol 2, 596.

56 See *Huon* (1945) 70 CLR 293, 326 (Dixon J); *Bank Nationalisation Case* (1948) 76 CLR 1, 300 (Starke J), 343 (Dixon J).

57 *Grace Brothers* (1946) 72 CLR 269, 285 (Starke J). See also at 295 (McTiernan J).

58 See *Huon* (1945) 70 CLR 293, 336 (Williams J); *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545, 570 (Dixon J, suggesting that s 51(xxxi) is 'exotic to those who have enjoyed only a unitary form of government').

59 *Huon* (1945) 70 CLR 293, 335 (Williams J); see also at 306–7 (Rich J).

60 Ibid 326 (Dixon J). See also at 315 (Starke J).

61 Ibid. Chief Justice Latham and McTiernan J did not decide the point.

It was against this backdrop that *Wurridjal* unfolded – the first case in which claimants argued for an interpretation of section 51(xxxi) permitting a non-monetary 'just terms' award.

C *Wurridjal*

In 2007, the federal government launched the 'Northern Territory Intervention' – an emergency response to concerns about levels of child abuse, drug abuse, alcoholism, pornography and gambling within Northern Territory ('NT') Aboriginal communities.[62] Five statutes were enacted; most relevantly, the *Northern Territory National Emergency Response Act 2007* (Cth) ('*NTNER*') and the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) ('*FaCSIA Act*').

Section 31 of the *NTNER* imposed compulsory five-year leases in the Commonwealth's favour over certain NT land containing Aboriginal communities, including scheduled land held for Aboriginal people by land trusts under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('*Land Rights Act*').[63] If the leases effected section 51(xxxi) acquisitions of property, the *NTNER* required the Commonwealth to pay 'a reasonable amount of compensation'[64] which property owners could recover in court absent agreement regarding the amount payable.[65] The *NTNER* preserved existing rights in the leased land,[66] excluding native title interests,[67] although the preserved rights were terminable by the Commonwealth.[68]

The *FaCSIA Act* enacted changes to the 'permit system' in place on NT Aboriginal land. Schedule 4 inserted new sections into the *Land Rights Act* abolishing requirements for permits to access common areas of main townships and roads linking them. This Act also contained a 'reasonable compensation' obligation regarding any acquisition of property it effected.[69]

On 25 October 2007, two traditional owners of land in the Maningrida township (the subject of a five-year lease) and an Aboriginal corporation brought a High Court action against the Commonwealth and the Arnhem Land Aboriginal Trust, which held the Maningrida land under the *Land Rights Act*. They alleged that the lease and changes to the permit system constituted section 51(xxxi) acquisitions of property otherwise than on 'just terms'. Additionally, the traditional owners submitted that section 37 of the *NTNER* suspended their rights

62 This facts summary is partially adapted from *Wurridjal* (2009) 237 CLR 309, 333–6 (French CJ).

63 *NTNER* s 4.

64 *NTNER* s 60(2).

65 *NTNER* s 60(3).

66 *NTNER* s 34(3).

67 *NTNER* s 34(2). Pursuant to s 51(2) of the *NTNER,* these interests became subject to the 'non-extinguishment principle' contained in s238 of the *Native Title Act 1993* (Cth). In other words, native title rights over the land were not extinguished, but became wholly ineffective to the extent of their inconsistency with the granting of a lease under s 31 or other relevant acts authorised by the *NTNER*.

68 *NTNER* s 37(1)(a).

69 *FaCSIA Act* sch 4 item 18.

under section 71 of the *Land Rights Act* ('the section 71 rights') to use the land in accordance with Aboriginal tradition, thereby acquiring these rights without providing 'just terms'. The Commonwealth demurred to the plaintiffs' claim.

The plaintiffs' principal submission concerning 'just terms' was that the Acts provided inadequate *financial* recompense for the acquisitions.[70] However, they also submitted that the legislation failed to provide certain non-monetary terms – namely, obligations to consult with the traditional owners and use the land for their benefit;[71] to compensate for 'non-financial ... deprivations' caused by the acquisitions;[72] and to allow the traditional owners unfettered rights to perform their traditional activities on the land.[73]

In the result, the Court held 5:2 that the compulsory lease constituted an acquisition of property;[74] however, five judges[75] found that the *NTNER* provided 'just terms' for the acquisition.[76] Five judges also ruled that the *NTNER*'s preservation of pre-existing interests through section 34(3) meant that no acquisition of the section 71 rights occurred.[77]

The majority judges were reluctant to analyse the 'just terms' obligation's scope in detail, particularly on the question of non-monetary awards. The key reason for this was their construction of the plaintiffs' pleadings and the relevant legislation in a manner which circumvented the need to consider such terms.[78] On these judges' understanding, the section 71 rights were the only traditional rights which the first two plaintiffs alleged necessitated non-monetary recompense; native title interests were not pleaded.[79] Yet, the majority judges held that the *NTNER* preserved these statutory rights. In their view, then, the question of whether certain property was not compensable in money did not arise for consideration.[80] In their brief comments on the subject, these judges did not resolve prior uncertainties in section 51(xxxi) jurisprudence but raised a new problem: the potential for non-monetary 'just terms' to limit the

70 *Wurridjal v Commonwealth*, Written Submissions of the Plaintiffs (1 September 2008) 17–21[84]–[87], especially [85(a)].
71 Ibid 18 [85(h)].
72 Ibid 21 [87(h)].
73 Ibid 22 [92].
74 *Wurridjal* (2009) 237 CLR 309, 365, French CJ, Gummow and Hayne JJ, Kirby J, Kiefel J; Crennan J dissenting, Heydon J not deciding. Only French CJ stated that the permit system amendments effected acquisitions of property; however, a majority held that just terms were provided in any event.
75 Chief Justice French, Gummow and Hayne JJ, Heydon J, Kiefel J (subsequently referred to as 'the majority judges').
76 Justice Kirby dissenting, Crennan J not deciding.
77 *Wurridjal* (2009) 237 CLR 309, 366 (French CJ), 378 (Gummow and Hayne JJ), 457 (Crennan J), 467 (Kiefel J). Also relevant to this outcome was s 69 of the *Land Rights Act*, which prohibited entry onto a NT sacred site except in accordance with Aboriginal tradition: at 379–81, 467–8.
78 Another possible reason was the Court's determination of the case on the Commonwealth's demurrer rather than after a full trial: see ibid 367, 436.
79 See ibid 375–77, 434, 467–8.
80 Ibid 390, 434, 467–8. Heydon J (with French CJ agreeing) and Kiefel JJ indicated that they might have held differently if native title rights were pleaded, or if evidence showed that the legislation impaired traditional rights to sacred sites (at 433–4, 467–8).

Commonwealth's acquisition power by mandating 'something less than a complete acquisition'.[81]

Given their view that the only acquired rights were those flowing from the Land Trust's statutory fee simple – an interest well within the contemplation of previous section 51(xxxi) cases[82] – the majority judges resolved the 'just terms' question on the basis of precedent. Accordingly, they held that the *NTNER*'s provision for 'reasonable compensation', calculated by a court in the event of the parties' disagreement, satisfied this obligation.[83] In Justice Heydon's opinion (with French CJ agreeing), even if particular losses arising from the lease's imposition were non-financial, authority dictated that monetary compensation could ameliorate them appropriately.[84]

By contrast, Kirby J in dissent discussed non-monetary terms in more detail. He found that the plaintiffs had pleaded traditional rights beyond the section 71 rights, including usufructuary or native title interests, which section 34(3) of the *NTNER* did not necessarily preserve.[85] It was therefore important to consider whether the legislation afforded 'just terms' for such interests. Echoing Justice Dixon's remarks in *Nelungaloo* regarding the concern of section 51(xxxi) with fairness, Kirby J argued that traditional Indigenous interests were potentially 'cherished' in a non-financial way rarely seen 'in the general Australian community'.[86] If this were established at trial, 'just terms' for their acquisition could require 'consultation [with the traditional owners] before action; special care in the execution of the laws; and active participation in performance'.[87] However, Justice Kirby's remarks were restricted by an absence of evidence given the demurrer procedure.[88] They also proceeded partly from a constitutional interpretive theory grounded in contemporary international law principles;[89] an approach not widely accepted at present. Arguably, a different interpretive foundation is necessary to give his arguments broader appeal.

D Concluding Observations

Although some threads of the pre-*Wurridjal* cases support the extension of 'just terms' to non-monetary compensation, overall neither they nor *Wurridjal* satisfactorily settle this issue.

Part III undertakes this task, using constitutional analysis from first principles.

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81 Ibid 390 (Gummow and Hayne JJ); see also at 472 (Kiefel J), 434 (Heydon J). See further Part IV(C) below.

82 This interest mirrors the full ownership rights afforded by ordinary registered fee simple estates: *Wurridjal* (2009) 237 CLR 309, 363–4 (French CJ), quoting *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24, 63.

83 *Wurridjal* (2009) 237 CLR 309, 364–5, 389–390, 428–9, 469–70.

84 Ibid 433.

85 Ibid 403–5.

86 Ibid 425.

87 Ibid 426.

88 See ibid 423–4.

89 See ibid 410–12.

III FINDING SUPPORT FOR NON-MONETARY 'JUST TERMS' THROUGH CONSTITUTIONAL INTERPRETATION

This Part employs principles of constitutional interpretation to argue that the 'just terms' obligation in section 51(xxxi) should be broadly construed to encompass non-monetary awards, where necessary, to rectify individual rightholders' losses. Although constitutional interpretation is a contested subject,[90] the Court and commentators generally accept that sound interpretation draws from multiple sources,[91] including the constitutional text,[92] context, purpose[93] and history.[94] Accordingly, this Part examines the Convention Debates; the text, structure and purpose of section 51(xxxi); and the provision's doctrinal origins in both British and American jurisprudence.

A Convention Debates

Section 52(31A), the placitum which became section 51(xxxi), was inserted into the draft *Constitution* during the Australasian Federal Convention's Melbourne Session.[95] Proposed on 25 January 1898 by Edmund Barton as a means of expressly empowering the Commonwealth to acquire property,[96] the provision was subsequently withdrawn for the delegates' consideration, reintroduced by Richard O'Connor with minor amendments,[97] and agreed to with minimal discussion. No alterations to its text were made prior to the final draft *Constitution*'s enactment in the *Commonwealth of Australia Constitution Act 1900* (Imp).[98]

In Evans' words, debate on section 52(31A) was 'brief and ... unrevealing',[99] particularly regarding the Framers' understanding of 'just terms'. Some delegates apparently assumed that terms provided under the subsection would be in monetary form. For example, George Turner expressed a fear that property

90 See *New South Wales v Commonwealth* (2006) 229 CLR 1, 301–3 ('*WorkChoices*'); *Singh v Commonwealth* (2004) 222 CLR 322, 347–8 ('*Singh*'); Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27 *Sydney Law Review* 29, 41.

91 See *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 75 (Gummow J); Stone, above n 90, 41.

92 See *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 142–3, 161–2; *McGinty v Western Australia* (1996) 186 CLR 140, 231; *WorkChoices* (2006) 229 CLR 1, 103; *Wurridjal* (2009) 237 CLR 309, 353.

93 See *Tape Manufacturers* (1993) 176 CLR 480, 503; *Cheng v The Queen* (2000) 203 CLR 248, 292; *Singh* (2004) 222 CLR 322, 336.

94 See *Cole v Whitfield* (1988) 165 CLR 360, 385; Simon Evans, 'Property and the Drafting of the Australian Constitution' (2001) 29 *Federal Law Review* 121, 122.

95 See John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 923.

96 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 25 January 1898, 151 (Edmund Barton). See also at 152 (John Quick).

97 Barton's phrase 'for the purposes of the Commonwealth' was changed to 'for any purpose in respect of which the Parliament has power to make laws': ibid, 4 March 1898, 1874 (Richard O'Connor).

98 See Williams, above n 95, 1082–3, 1128, 1219, 1247.

99 Evans, Property and the Drafting of the Australian Constitution', above n 94, 132.

would be acquired 'out of states' money',[100] and Barton implied that the provision would require the payment of 'compensation'.[101] Yet, despite these assumptions, section 52(31A) was inserted into the draft seemingly on the understanding that the content of 'just terms' would be left to the legislature. Immediately before the delegates agreed to O'Connor's proposed subsection, he declared, 'you do not want to state the terms in the Constitution. ... [A]n Act will have to be passed by the Commonwealth Parliament elaborating this enactment'.[102] Accordingly, if the Framers had a clear vision as to the meaning of 'just terms', it was never expressly articulated.[103] The key to this clause's interpretation must lie in other sources.

B Constitutional Text

1 *General Interpretive Principles*

In *Jumbunna Coal Mine No Liability v Victorian Coal Miners' Association*,[104] O'Connor J stated:

> we are interpreting a Constitution ... general in its terms, intended to apply to the varying conditions which the development of our community must involve. For that reason, where the question is whether the *Constitution* has used an expression in the wider or ... narrower sense, the Court should ... always lean to the broader interpretation unless there is something in the context or in the rest of the *Constitution* to indicate that the narrower interpretation will best carry out its object and purpose.[105]

This frequently-cited passage ('the *Jumbunna* principle') has become an established interpretive principle for the construction of Commonwealth heads of power.[106] Arguably, the tenet should also apply to the 'just terms' restriction on power in section 51(xxxi), as its rationale – that constitutional interpretation must take into account new denotations of terms so the *Constitution* can speak to circumstances unforeseen by the Framers[107] – is equally applicable to the construction of limitations. Just as Parliament's acquisition power should extend to new forms of 'property',[108] logically, so should section 51(xxxi) accommodate changing notions of what constitutes 'just terms', particularly for acquisitions of these novel interests. Support for this view can be found in the Court's recent

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100 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 25 January 1898, 152 (George Turner).

101 Ibid (Edmund Barton). See also *Official Record of the Debates of the Australasian Federal Convention*, 4 March 1898, 1874 (Richard O'Connor).

102 *Official Record of the Debates of the Australasian Federal Convention*, 4 March 1898, 1874 (Richard O'Connor).

103 See Evans, Property and the Drafting of the Australian Constitution', above n 94, 132–3.

104 (1908) 6 CLR 309.

105 Ibid 367–8.

106 See *A-G (NSW) v Brewery Employes Union of NSW* (1908) 6 CLR 469, 533, 611–12 ('*Brewery*'); *Bank Nationalisation Case* (1948) 76 CLR 1, 298, 332; *XYZ v Commonwealth* (2006) 227 CLR 532, 550–1.

107 See Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 13, 15.

108 And has been interpreted by the High Court accordingly: see Part III(C) below.

interpretation of another constitutional limitation, section 92, in *Betfair Pty Ltd v Western Australia*.[109] Citing the *Jumbunna* principle, the six-member joint judgment considered modern developments in trade and commerce in determining the meaning of protectionism for the purposes of section 92.[110]

2 *The Language of Section 51(xxxi)*

Applying the *Jumbunna* approach to the interpretation of section 51(xxxi), what does the phrase 'just terms' mean? Given that these words have no specific legal significance, they must be accorded their natural sense. The *Macquarie Dictionary* defines 'just' in ways referring to considerations of equity and what is due as of right: for instance, 'actuated by truth, justice, and lack of bias', 'equitable', 'even-handed' and 'proper or right'.[111] Regarding 'terms', it offers both a narrower definition referring to monetary concepts ('conditions with regard to payment, price ... etc')[112] and a broader one encompassing any kind of condition ('conditions or stipulations').[113] Therefore, adopting the broader interpretation, 'just terms' signifies conditions granted according to considerations of fairness and rightful entitlement. This construction coheres with Quick and Garran's description of the clause as an obligation to provide 'fair and equitable terms'.[114]

In contrast to 'just terms', 'compensation' – the word utilised in the *United States Constitution*'s Amendment V – has an established legal meaning[115] of 'payment',[116] or '[a]n amount[,] given or received as recompense for a loss suffered.'[117] Even on a broad construction, this definition entails a pecuniary award. Thus, unlike 'compensation', 'just terms' seemingly contemplates the grant of any conditions, monetary *or* non-monetary, in accordance with moral notions of right.

The language of other Australian constitutional provisions supports this broader reading of 'just terms' as a phrase lacking the monetary connotations of 'compensation'. In two other sections, sections 84 and 85, the *Constitution* provides recompense for losses caused by the Commonwealth; however, in contrast to section 51(xxxi), these provisions contemplate monetary payment. Section 84 applied to the retrenchment of state public servants whose

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109 (2008) 234 CLR 418.

110 Ibid 452–4. See also *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 577, 623; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 633.

111 Colin Yallop et al (eds), *Macquarie Dictionary* (Macquarie Library, 4th ed, 2005) 771. See also Bruce Moore (ed), *The Australian Oxford Dictionary* (Oxford University Press, 2nd ed, 1999) 718 ('morally right or fair'; 'deserved').

112 Yallop et al, above n 111, 1453.

113 Ibid.

114 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, first published 1901, 1995 ed) 641.

115 This meaning must be adopted unless the context requires a contrary construction: *Brewery* (1908) 6 CLR 469, 531.

116 Daniel Oran, *Oran's Dictionary of the Law* (West Publishing, 2nd ed, 1991) 89.

117 Nygh and Butt, above n 31, 80.

departments were transferred to the Commonwealth after Federation. The provision required the relevant State to pay the officer 'any pension, gratuity or other compensation' payable under State law. Section 85 governs the transfer of State property to the Commonwealth in connection with the transfer of government departments. The section provides two alternative bases for recompense: an award made by reference to the 'value' of land or a land interest under state compulsory acquisition laws,[118] or 'compensat[ion]' for 'the value of the property'.[119] Both sections use monetary language, which is absent from s 51(xxxi). Pursuant to the interpretive maxim *expressio unius est exclusio alterius*,[120] it should be presumed that the *Constitution*'s express references to pecuniary payments for losses in two sections, but use of a more general formulation in another section involving similar subject matter, is deliberate. Accordingly, the 'just terms' requirement in section 51(xxxi) differs from the compensation obligations in sections 84 and 85.

This analysis demonstrates that the 'just terms' language of section 51(xxxi) encompasses a broad range of conditions, not necessarily in monetary form. Indeed, the text would support a non-monetary award where necessary for the equitable treatment of the acquired property's owner.

C Purpose

The leading statement of the purpose of section 51(xxxi) was made by Dixon J in the *Bank Nationalisation Case*. In his words,

> [s]ection 51(xxxi) serves a double purpose. It provides the Commonwealth Parliament with a legislative power of acquiring property: at the same time as a condition upon the exercise of the power it provides the individual or the State, affected with a protection against governmental interferences with his proprietary rights without just recompense.[121]

Although Dixon J contended that both purposes required the Court to give section 51(xxxi) a 'full and flexible ... operation',[122] later cases have emphasised the need for a liberal approach particularly to achieve the second object: the protection of property rights. Pursuant to Justice Dixon's pronouncements in the *Bank Nationalisation Case* and *Schmidt*, the Court has prevented the Commonwealth from using any 'circuitous device'[123] to exercise the acquisitions power indirectly without the fetter of 'just terms' – for example, by acquiring property under another head of power.[124] Furthermore, successive High Court benches have affirmed that the protection's content should not be 'pedantically'

118 *Australian Constitution* s 85(ii).

119 *Australian Constitution* s 85(iii); see Evans, 'Property and the Drafting of the Australian Constitution', above n 94, 131–2.

120 On this maxim's applicability in the constitutional context, see *Brewery* (1908) 6 CLR 469, 503.

121 *Bank Nationalisation Case* (1948) 76 CLR 1, 349, repeated and expanded by Dixon J in *A-G (Cth) v Schmidt* (1961) 105 CLR 361, 370–1 ('*Schmidt*').

122 *Bank Nationalisation Case* (1948) 76 CLR 1, 349.

123 Ibid.

124 See *Tape Manufacturers* (1993) 176 CLR 480, 510; *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134, 160 ('*Nintendo*').

or 'narrowly' confined,[125] construing the concepts of 'property' and 'acquisition' to cover all legislative acts amounting to property acquisitions in substance rather than form. As Evans notes,[126] judges have defined 'property' as extending to 'innominate and anomalous interests',[127] whether falling within common law proprietary categories or otherwise,[128] including everything from the right to exclusive possession during a lease term,[129] to a vested common law cause of action,[130] to a burden on radical title.[131] Regarding 'acquisition', although the Court has distinguished between this concept and mere regulation, extinguishment or adjustment of rights,[132] it has still broadly construed the *form* an acquisition may take.[133] Thus, myriad activities have been deemed 'acquisitions', including 'the assumption ... of exclusive possession ... of any subject of property',[134] obtaining a release from liability to pay damages,[135] and rendering Commonwealth land free from mining tenements.[136] In recent decades, the Court has further emphasised the rights-protective aspect of section 51(xxxi), and the liberal interpretive approach it demands, by describing the section as a constitutional 'guarantee'.[137]

'Just terms' has not received the same broad interpretation as the other elements of section 51(xxxi). Yet, to achieve the purpose of section 51(xxxi) as a protection for property rights, an expansive construction of 'just terms' is crucial.[138] The phrase is the *essence* of the guarantee. Granted, the Parliament enjoys some discretion in setting an acquisition's terms.[139] However, if it could apply a blanket policy of affording only a circumscribed form of recompense, rightholders would not necessarily be justly 'compensated' for their particular

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125 See *Bank Nationalisation Case* (1948) 76 CLR 1, 349; *Smith v ANL Ltd* (2000) 204 CLR 493, 500, 520, 542; *Theophanous v Commonwealth* (2006) 225 CLR 101, 126; *Wurridjal* (2009) 237 CLR 309, 359.

126 Simon Evans, 'Constitutional Property Rights in Australia: Reconciling Individual Rights and the Common Good' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights*: *Institutional Performance and Reform in Australia* (Ashgate, 2006) 197, 200.

127 *Bank Nationalisation Case* (1948) 76 CLR 1, 349.

128 See *Dalziel* (1944) 68 CLR 261, 285, 290, 295; Allen, above n 42, 354.

129 *Dalziel* (1944) 68 CLR 261.

130 *Georgiadis* (1994) 179 CLR 297.

131 *Newcrest* (1997) 190 CLR 513.

132 See cases cited above n 21.

133 See *Mutual Pools* (1994) 179 CLR 155, 184; *Georgiadis* (1994) 179 CLR 297, 303; *Telstra* (2008) 234 CLR 210, 230.

134 *Bank Nationalisation Case* (1948) 76 CLR 1, 349.

135 *Georgiadis* (1994) 179 CLR 297.

136 *Newcrest* (1997) 190 CLR 513.

137 See *Clunies-Ross v Commonwealth* (1984) 155 CLR 193, 201–2; *Tape Manufacturers* (1993) 176 CLR 480, 509; *Georgiadis* (1994) 179 CLR 297, 303, 320; *Newcrest* (1997) 190 CLR 513, 560, 561, 589, 653; *Smith v ANL Ltd* (2000) 204 CLR 493, 500, 520, 542; *Chaffey* (2007) 231 CLR 651, 663; *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 169, 196, 212 (*'ICM'*). However, the guarantee only applies where the Commonwealth exercises power under the section: see *Mutual Pools* (1994) 179 CLR 155, 185.

138 See *WMC* (1998) 194 CLR 1, 90 (Kirby J); *Smith v ANL Ltd* (2000) 204 CLR 493, 533 (Hayne J); *ICM* (2009) 240 CLR 140, 213 (Heydon J); Sean Brennan, 'Native Title and the "Acquisition of Property" under the *Australian Constitution*' (2004) 28 *Melbourne University Law Review* 28, 47.

139 *Grace Brothers* (1946) 72 CLR 269, 291.

losses. In such circumstances, private property interests would not be protected from governmental interference. Consequently, a liberal interpretation of 'just terms', encompassing any monetary or non-monetary award necessary to fairly reflect a rightholder's interest in acquired property, coheres with the rights-protective purpose of section 51(xxxi).

One objection to this analysis would be that the *Constitution* aims to divide power between governments rather than protect rights.[140] According to this view, only the elements of section 51(xxxi) *facilitating* Commonwealth power should be broadly construed. However, whilst the federal distribution of powers is undeniably one of the *Constitution*'s central aims, it is doubtful that this document – a product of political compromise between many delegates at a series of Conventions – embodies any single overriding purpose, federalism included. As Alfred Deakin, an influential Framer, said in a 1902 speech, the *Constitution* involves not one but 'a series of compacts' – including a compact 'between the Commonwealth and its people' which 'affects the [people's] present and future privileges'.[141]

Even if the *Constitution* as a whole is principally a political compact between Commonwealth and States, it does not follow that every provision functions exclusively as a tool of federalism. For section 51(xxxi)'s part, this provision's 'just terms' requirement – at least in its application to individuals – is far more consistent with a rights-protective rationale than with a federalist purpose. Firstly, this is the explanation preferred by most judges in recent years.[142] Secondly, this reading is defensible on the face of section 51(xxxi): the provision expressly qualifies Commonwealth power for individuals' benefit, a goal unconnected with the scheme of governmental power distribution.[143] As Gleeson CJ stated in *Theophanous v Commonwealth*, if section 51(xxxi) were only intended to empower the Commonwealth to acquire property, 'that would not explain the presence of the qualification'.[144]

Given this express constraint, and consistent with the Court's approach in the recent 'acquisition' cases,[145] the proper threshold for achieving the purpose of section 51(xxxi) as a plenary power is the process of characterising whether an 'acquisition' has occurred. Enforcing the distinction between acquiring and merely affecting proprietary interests permits Parliament to function without having to pay for 'every ... change in the general law' indirectly concerning 'values incident to property'.[146] However, *once* the Commonwealth has acquired

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140 See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 182 (Dawson J).

141 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10965 (Alfred Deakin, Attorney-General).

142 See above n 137; *Tooth* (1979) 142 CLR 397, 403, 407, 426, 452; *WMC* (1998) 194 CLR 1, 15, 34, 90; *Wurridjal* (2009) 237 CLR 309, 355–6, 359, 385, 421, 437.

143 See *Newcrest* (1997) 190 CLR 513, 595 (Gummow J).

144 *Theophanous v Commonwealth* (2006) 225 CLR 101, 113.

145 See above n 21.

146 Evans, 'Constitutional Property Rights in Australia', above n 126, 201, citing *Pennsylvania Coal Co v Mahon*, 260 US 393, 413 (1922) ('*Pennsylvania*'). See Part III(D)(2)(a) below for support for this view in American jurisprudence.

private property, the purpose of section 51(xxxi) as a guarantee requires 'just terms' to be given full operation.

D Doctrinal Origins

1 *British Common Law Tradition*

As French CJ emphasised in *Wurridjal*, the *Constitution* 'began its life as a statute of the Imperial Parliament'.[147] Principles from the British common law tradition clothe the document's text with context and purpose.[148] It is argued that the origins of section 51(xxxi) in this tradition cohere with an interpretation of 'just terms' which values property as an inherent individual right, and provides full recompense – including any appropriate non-monetary awards – for losses caused by compulsory acquisitions. However, unlike the position in Britain, the *Australian Constitution* elevates the protection of private property beyond governmental interference – a departure further strengthening the argument for an expansive construction of 'just terms', extending beyond 'compensation'.

The foundation of British common law property rights is *Magna Carta*, the list of concessions to Crown powers obtained from King John in 1215 and subsequently adopted into common law and statute.[149] Clause xxix of the 1297 version provides, 'NO Freeman shall be ... disseised of his Freehold ... but by lawful judgment of his Peers, or by the Law of the Land',[150] thereby granting every Englishman 'free use ... of all his acquisitions, without any control or diminution'[151] except as provided by Parliament.

In Britain, the tradition of protecting private property dating from *Magna Carta* has imposed qualifications on both executive and statutory power. Motivated primarily by this tradition, English courts narrowed the Crown's prerogative to acquire property without compensation to wartime emergencies, emphasising the unfairness of subjecting individuals to proprietary loss where unnecessary for the King's defence of the community.[152] Even in wartime, the understanding that public burdens should be 'distributed over the whole nation',[153] rather than amongst individuals, has led the Crown invariably to compensate for acquisitions.[154] In the statutory sphere, the ancient protection has become the well-established interpretive principle that, absent clear words to the contrary, Acts should not be construed as depriving individuals of property

147 *Wurridjal* (2009) 237 CLR 309, 355.

148 See *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 126–7, 153, 198–9; Zines, above n 110, 567–9.

149 See William Blackstone, *Commentaries on the Laws of England* (first published 1765–69, 1983 ed) vol 1, 123–4, 134.

150 *Magna Carta Act 1297*, 25 Edw 1, c 9, s xxix. This statute remains in force.

151 Blackstone, above n 149, 134.

152 See *R v Hampden* (1637) 3 St Tr 825, 1083–4, 1129–30, 1195; *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508, 524, 552–3, 569 ('*De Keyser*'); *Burmah Oil Company (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 100, 148, 156 ('*Burmah Oil*').

153 *De Keyser* [1920] AC 508, 553.

154 Ibid 525, 539, 553.

without compensation.[155] Instead, legislation is presumed to give property owners 'full indemnification and equivalent for the injur[ies]'[156] arising from compulsory acquisitions.

This discussion illustrates that the 'just terms' obligation in section 51(xxxi) was framed in the context of a legal tradition which acknowledges individuals' inherent property rights, cherishes the protection of these rights as an end in itself, and requires the community to bear the full cost of acquiring them for public purposes.[157] Quick and Garran agree, describing the clause as a manifestation of the common law 'immunity of private ... property'.[158] The rights-protective object underpinning this common law foundation is most consistent with a broad construction of 'just terms', encompassing any monetary or non-monetary award necessary to rectify proprietary losses sustained by individuals for the community's benefit.

Such a reading is all the more compelling given the status of section 51(xxxi) as a constitutionally-entrenched limitation on federal power.[159] While Britain's interpretive principle is displaced by the contrary legislative intention of its Parliament, an institution enjoying absolute supremacy,[160] the Australian 'just terms' guarantee is beyond attack from any arm of federal government. Accordingly, the incorporation of the common law origins of section 51(xxxi) into a federal constitutional framework further supports an interpretation of 'just terms' as a robust guarantee of full recompense, whatever form such an award may require.

2 *American Fifth Amendment Jurisprudence*

The takings clause of the *United States Constitution*'s Amendment V reads, 'nor shall private property be taken for public use, without just compensation'. Despite certain historical and structural differences, this clause and section 51(xxxi) (at least as it pertains to individuals) arguably have broadly similar theoretical underpinnings. Both facilitate the central government's 'eminent domain' over property in its realm;[161] confine this power for individuals' benefit;

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155 See *Western Counties Railway Co v Windsor and Annapolis Railway Co* (1882) 7 App Cas 178, 188; *London and North Western Railway Co v Evans* [1893] 1 Ch 16, 28 ('*Evans*'); *Newcastle Breweries Ltd v The King* [1920] 1 KB 854, 866; *Burmah Oil* [1965] AC 75, 139–40, 167.

156 Blackstone, above n 149, 135.

157 See ibid; *De Keyser* [1920] AC 508, 554; *Burmah Oil* [1965] AC 75, 140, 145.

158 Quick and Garran, above n 114, 641.

159 On the High Court's power to invalidate legislation exceeding constitutional limitations, see *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 514; James Stellios, 'Using Federalism to Protect Political Communication: Implications from Federal Representative Government' (2007) 31 *Melbourne University Law Review* 239, 246.

160 See *Evans* [1893] 1 Ch 16, 27; Butterworths, *Halsbury's Laws of England*, vol 8(2) (at 6 September 2010) Constitutional Law and Human Rights, '3 Parliament' [232].

161 Although the takings clause is not, unlike s 51(xxxi), framed as a grant of power, it has been described as a 'tacit recognition of a pre-existing power': *United States v Carmack*, 329 US 230, 241 (1946). See also Congressional Research Service, Library of Congress, *National Eminent Domain Power* (2005) US Supreme Court Center <http://supreme.justia.com/constitution/amendment-05/19-national-eminent-domain-power.html>.

and define its limits by reference to what is 'just'. This shared philosophy is particularly evident in the 'just terms'/ 'just compensation' element of each provision. As Treanor notes, the takings clause as drafted by James Madison reflects the emerging 'liberal ideology' of the American post-independence movement: that governments should safeguard individuals' liberty by protecting their rights, including property interests.[162] Madison intended the 'just compensation' limitation on power to secure property rights by 'explicitly bar[ring] ... uncompensated taking[s of property] by the national government'.[163] As for section 51(xxxi), this provision was drafted in an age which Heydon J describes as the 'apogee of liberalism', 'steeped in respect for property rights'.[164] While this liberal ideal was not expressly articulated by the Framers during their debate on the clause,[165] the Court of recent decades has consistently affirmed the rights-protective rationale of the 'just terms' restriction in section 51(xxxi).[166]

In light of these similar philosophical foundations, the US Supreme Court's characterisation of the balancing act between community and individual operating within the takings clause is instructive for revealing the scope of section 51(xxxi) 'just terms' to remedy the full brunt of individuals' losses within that balance. However, an important difference between the provisions is that the takings clause's 'compensation' language has precluded awards in non-monetary form. This point of contrast highlights the Australian provision's broader possibilities.

(a) The Philosophy Underlying the Takings Clause

The US Supreme Court's interpretation of the takings clause's 'just compensation' guarantee is most consistent with a Kantian conception of property rights: inherent entitlements which cannot be exploited by the government without full recompense.[167] Numerous cases have described the clause as a prohibition against 'forcing some people alone to bear public burdens

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162 William Treanor, 'The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment' (1985) 94 *Yale Law Journal* 694, 694. Note that Story traces this ideology in part to British common law principles, describing the takings clause as an 'affirmance' of the British doctrine of private property protection: Joseph Story, *Commentaries on the Constitution of the United States* (Little, Brown, and company, 5th ed, 1891) vol II, 569, citing Blackstone, above n 149, 128–9.

163 Treanor, above n 162, 710.

164 *ICM* (2009) 240 CLR 140, 211.

165 Justice Heydon suggests this is attributable to the Framers' 'naive' assumption that future governments would not infringe property rights, rather than to a view that such rights did not deserve legal protection: ibid.

166 See Part III(C) above, particularly above n 137 and accompanying text.

167 See Anthony Ogus, 'Property Rights and Freedom of Economic Activity' in Louis Henkin and Albert Rosenthal (eds), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Columbia University Press, 1990) 125, 127; Evans, 'Constitutional Property Rights in Australia', above n 126, 205.

which, in all fairness ... should be borne by the public as a whole',[168] and a requirement to provide 'a full and perfect equivalent'[169] for any property taken. The obligation encompasses all elements of compensation,[170] having regard to 'all ... proximate effects of the taking'.[171] Consistently with this focus on full recompense, the US Supreme Court seems not to balance public welfare with private loss in assessing 'just compensation', except to the extent that a proprietor may receive only 'the value of what he has been deprived of, and no more'.[172] For example, in the wartime-era case of *United States v Cors*,[173] the Supreme Court refused to award full market value for requisitioned tugboats as the government's demand had inflated this standard; it therefore did not reflect the goods' value to the owner.[174]

Instead of considering the community interest at the 'just compensation' threshold, the US Supreme Court has treated the clause's 'taking' element as the limiting principle facilitating the legislature's effective governance for the public benefit. United States Fifth Amendment jurisprudence distinguishes between direct physical *invasions* of property, which are compensable takings, and government *regulation* of private property, which is not compensable unless it is 'so onerous' that it amounts to 'direct appropriation'.[175] In deciding whether regulatory action constitutes a taking, the Supreme Court contemplates factors including the regulation's purposes and public benefits versus the rightholder's losses.[176] Underpinning this approach is the notion that the government may 'redefine' society's structure of rights;[177] but once it effects a proprietary interference of sufficient magnitude, it must provide complete recompense unmitigated by considerations of the common good.

The US Supreme Court's method of ameliorating individuals' losses under the 'just compensation' head and recognising public needs through the 'taking' criterion provides useful guidance for the interpretation of section 51(xxxi). Indeed, certain High Court judges have already endorsed elements of this philosophy in the Australian setting. Using similar Kantian language to the

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168 *Armstrong v United States*, 364 US 40, 49 (1960). See also *Monongahela Navigation Co v United States*, 148 US 312, 325 (1893) ('*Monongahela*'); *YMCA v United States,* 395 US 85, 90 (1969); *Webb's Fabulous Pharmacies Inc v Beckwith*, 499 US 155, 163 (1980); *Palazzolo v Rhode Island*, 533 US 606, 618 (2001).

169 *Monongahela*, 148 US 312, 326 (1893); *United States v Miller*, 317 US 369, 373 (1943); *Regional Rail Reorganization Act Cases*, 419 US 102, 150 (1974).

170 *Jacobs v United States*, 290 US 13, 17 (1933).

171 *Bauman v Ross*, 167 US 548, 579 (1897), citing *State v Hudson County Board of Chosen Freeholders*, 55 NJL 88, 92 (1892).

172 *Bauman v Ross*, 167 US 548, 574 (1897). See also *McCoy v Union Elevated Railroad Co*, 247 US 354, 366–7 (1918).

173 337 US 325 (1949).

174 Ibid 333.

175 See *Lingle v Chevron USA Inc*, 544 US 528, 537–9 (2005) and cases cited therein.

176 Ibid.

177 *Lucas v South Carolina Coastal Council*, 505 US 1003, 1014–15 (1992). See also *Pennsylvania*, 260 US 393, 413 (1922).

American decisions, Gleeson CJ[178] and Brennan J[179] have described 'just terms' as the community's obligation to compensate fully for its interference with private property.[180] Even more recently, in *ICM*, Heydon J drew from the US Supreme Court's reasoning in *Armstrong v United States*[181] to explain the rationale of section 51(xxxi), stating that public initiatives should be undertaken at public, not private, expense.[182] Regarding 'acquisition', although the High Court has rejected the US 'regulation-versus-taking' distinction, in recent years the policy underlying its characterisation of the limits of the 'acquisition' concept has mirrored that of the American cases: Parliament's capacity to function depends on its ability to alter rights and interests.[183] For instance, in *Nintendo,* the Court unanimously affirmed that a law directed towards 'the adjustment of the competing rights ... in a particular ... area of activity'[184] is unlikely to constitute a section 51(xxxi) 'acquisition'.[185]

Given the similar theoretical underpinnings of the takings clause and section 51(xxxi), the latter's 'just terms' obligation should be interpreted consistently with the rationale of the former's 'just compensation' element: as a requirement of full recompense without compromising in favour of the public. This rationale's logical consequence is that 'just terms' should encompass non-monetary awards where necessary to provide complete recompense to a rightholder.

(b) Divergence of the Two Provisions: 'Compensation'

Although the takings clause jurisprudence helps to clarify the *function* of 'just terms' within section 51(xxxi), the clause cannot determine the *forms* of recompense permitted by section 51(xxxi) as its different language of 'compensation' has confined awards to pecuniary payments. This is evident from the term's plain meaning[186] and the weight of authority. Having decided in *Monongahela* that 'compensation' under the takings clause denoted an 'equivalent' for property,[187] the US Supreme Court has deemed only transferrable value to be compensable.[188] Therefore, 'compensation' must be measured according to a 'common standard'[189] apt for transferring value between individuals – namely, money. Accordingly, judges have defined 'just compensation' as an award putting the owner 'in as good a position pecuniarily'

178 *Smith v ANL Ltd* (2000) 204 CLR 493, 501.
179 *Georgiadis* (1994) 179 CLR 297, 310–11.
180 See Evans, 'Constitutional Property Rights in Australia', above n 126, 205.
181 *Armstrong v United States*, 364 US 40, 49 (1960).
182 *ICM* (2009) 240 CLR 140, 207–9.
183 See Evans, 'Constitutional Property Rights in Australia', above n 126, 201–2.
184 *Nintendo* (1994) 181 CLR 134, 161.
185 See ibid 161 n 45 and cases cited therein, 167.
186 See Part III(B)(2) above.
187 *Monongahela*, 148 US 312, 326 (1893).
188 *Kimball Laundry Co v United States*, 338 US 1, 5 (1949).
189 *Vanhorne's Lessee v Dorrance*, 2 US (2 Dall) 304, 315 (1795).

as if the taking had not occurred,[190] normally involving payment of 'fair market value'.[191] The US Supreme Court has only once suggested that awards other than money are permissible, and only because the compensation in that case was in the form of shares – which could be precisely calculated in money.[192]

In contrast to 'just compensation', 'just terms' does not necessarily signify equivalence or monetary value. This distinction supports the view that the forms of award available under section 51(xxxi) extend beyond the monetary limits prescribed by the takings clause.

E Concluding Observations

This Part has drawn from multiple constitutional sources to argue that section 51(xxxi) 'just terms' can encompass non-monetary obligations. Endorsing a broad interpretation of 'just terms' which emphasises fairness to individuals and requires full recompense for their proprietary losses, the Part has contended that non-monetary terms should be available where necessary to achieve these outcomes.

Part IV explores the ramifications of this conclusion for acquisitions of native title rights.

IV NON-MONETARY 'JUST TERMS' AND NATIVE TITLE

This Part has four sections. It demonstrates the need for non-monetary recompense as an available option in the native title context, proposes possible terms in this setting, and assesses whether such terms would impair the Commonwealth's acquisition power as implied in *Wurridjal*. The Part then suggests amendments to relevant Commonwealth legislation to reflect a conception of 'just terms' encompassing non-monetary requirements.

A Are Indigenous Property Interests Measurable in Money?

Native title interests are communal, group or individual rights in relation to land or waters, held by Indigenous people who have a continuing connection to the land or waters under their traditional laws and customs.[193] Such interests are recognised and 'ascertained in the common law universe',[194] but derive their

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190 *Phelps v United States*, 274 US 341, 344 (1927); *United States v Miller*, 317 US 369, 373 (1943); *United States v General Motors Corp*, 323 US 373, 379 (1945). See also *United States v Reynolds*, 397 US 14, 16 (1970); *United States v 50 Acres of Land*, 469 US 24, 29 (1984).

191 *United States v Miller*, 317 US 369, 374 (1943); *United States v Cors*, 337 US 325, 332 (1949).

192 *Regional Rail Reorganization Act Cases*, 419 US 102, 150 n 37 (1974).

193 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 57 (Brennan J) ('*Mabo*'); *Native Title Act 1993* (Cth) s 223(1) ('*NTA*').

194 Robert French, 'Native Title: A Constitutional Shift?' (Speech delivered at the University of Melbourne Law School JD Lecture Series, Melbourne, 24 March 2009) 16. See also *NTA* s 223(1)(c).

content from the traditional law and custom of the relevant Indigenous group.[195] They are valuable legal rights, whether they correspond to common law proprietary categories (such as the right of exclusive possession) or not (such as the right to access land for spiritual purposes).[196] Therefore, consistent with the Court's broad interpretation of 'property' within section 51(xxxi),[197] the 'weight of constitutional authority' indicates that native title rights constitute property for these purposes.[198]

The significance of this framework is that the Australian property law system counts within its spectrum of recognisable interests certain rights whose meaning is derived from a 'fundamentally different cultural perspective'[199] to that system's common law foundation. In the 'common law universe', private property's importance largely lies in its economic value. This tradition's defining characteristics of proprietorship – the rights to 'use or enjoy', 'exclude others', and 'alienate'[200] – all allow rightholders to obtain wealth from their property: they may exploit it for profit, prevent others from doing so, and sell it for financial gain. Even property of emotional significance, such as a family home, is ultimately a material possession, usually replaceable with money notwithstanding its owner's sadness in losing it. As reflected in the common law principle of solatium,[201] non-financial attachments to such property are generally compensable through supplementary payments, which enable the rightholder to rectify any special losses – for example, by rebuilding the home in a certain location, or with particular features.

Conversely, the significance of Indigenous land interests is 'essentially spiritual'.[202] Land is sacred because it is the 'material form' of the Dreaming, the state in which spirit-beings created life.[203] Against this background, Indigenous land interests can be understood as manifestations of an Indigenous group's links to its creation beliefs, and a means of preserving the land for the spirit-beings and

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195 *Mabo* (1992) 175 CLR 1, 58, 85, 195; *Western Australia v Commonwealth* (1995) 183 CLR 373, 452; *NTA* s 223(1)(a).

196 See *Mabo* (1992) 175 CLR 1, 61, 110–11; *Commonwealth v Yarmirr* (2001) 208 CLR 1, 49; *Yanner v Eaton* (1999) 201 CLR 351, 373.

197 See Part III(C) above.

198 Brennan, above n 138, 31. See also *Mabo* (1992) 175 CLR 1, 111 (Deane and Gaudron JJ); *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232, 245 ('*Griffiths*').

199 Samantha Hepburn, 'Feudal Tenure and Native Title: Revising an Enduring Fiction' (2005) 27 *Sydney Law Review* 49, 81.

200 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 272.

201 See *King v Minister for Planning and Housing* [1993] 1 VR 159, 187–9. The Commonwealth's general land acquisition statute adopts this principle for compulsory acquisitions of private homes: *Lands Acquisition Act 1989* (Cth) s 61(2).

202 *Western Australia v Ward* (2002) 213 CLR 1, 64. See also *Yanner v Eaton* (1999) 201 CLR 351, 373; Peter Sutton, *Native Title in Australia: An Ethnographic Perspective* (Cambridge University Press, 2003) 22.

203 R M Berndt, 'Traditional Concepts of Aboriginal Land' in R M Berndt (ed), *Aboriginal Sites, Rights and Resource Development* (University of Western Australia Press, 1982) 2, 9, cited in Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Lawbook, 3rd ed, 2003) 88.

future generations.[204] Experiencing an affinity with 'country' far stronger than mere emotional attachment, Indigenous people 'trace their very identity to the land[;] ... it is life itself[, and] [a]ny threat ... to relationships to land becomes a threat to social existence and to the [custodians'] well-being'.[205] In Noel Pearson's words, '[t]he loss or impairment of ... [native] title is not simply a loss of real estate, it is a loss of culture.'[206]

Accordingly, whilst monetary compensation would likely constitute 'just terms' for the acquisition of most non-Indigenous interests,[207] it may not fully remedy native title rightholders' loss of cultural and spiritual interests which have no pecuniary worth. Unfortunately, as Nau notes, much Australian literature on recompense for loss of native title rights attempts to 'quantify ... these cultural and spiritual aspects so as to incorporate them into a monetary compensation framework'[208] – usually by recognising them under a separate compensation head. Nau compellingly argues that this approach is 'ethnocentric and reductionist',[209] failing as it does to recognise that money cannot re-establish the ruptured spiritual links to land underpinning all Indigenous land interests.

Despite this disjuncture between 'ordinary' and Indigenous property, several judges in *Wurridjal* criticised the contention that a compulsory acquisition of the latter could not be remedied in money. Suggesting that money is the law's mechanism for redressing all losses, three judges cited the native title case of *Griffiths*[210] to indicate that even non-financial deprivations can be adequately compensated in pecuniary terms.[211] However, the bare generalisation that money can compensate everything constitutes a weak basis for precluding non-monetary recompense of *sui generis* Indigenous interests. Moreover, the judges' suggestion that *Griffiths* provided a precedent for compensating native title holders

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204 Ibid. This includes rights appearing to have an economic dimension – for instance, rights to forage for bush tucker. Indigenous people view such interests as examples of their responsibility to care for their country: Sutton, above n 202, 28.

205 Diane Bell, 'Sacred Sites: The Politics of Protection' in Nicolas Peterson and Marcia Langton (eds), *Aborigines, Land and Land Rights* (Australian Institute of Aboriginal Studies, 1983) 282 (describing the belief system of the Arandic people of central Australia), cited in Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Lawbook, 3rd ed, 2003) 89. See also W E H Stanner, *White Man Got No Dreaming: Essays 1938-1973* (Australian National University Press, 1979) 230, cited in Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Lawbook, 3rd ed, 2003) 90; Neva Collings and Virginia Falk, 'Water: Aboriginal Peoples in Australia and their Spiritual Relationship with Waterscapes' in Elliot Johnston, Martin Hinton and Daryle Rigney, *Indigenous Australians and the Law* (Routledge-Cavendish, 2nd ed, 2008) 131, 131.

206 Noel Pearson, 'Law Must Dig Deeper to Find Land Rights', *The Australian* (Sydney), 8 June 1993, 11.

207 Theoretically, were a non-Indigenous right holder to demonstrate a deep spiritual, rather than emotional, attachment to acquired property, this may not be the case. Although this issue falls outside this article's scope, it is argued that such instances would be rare. Note, however, that 'just terms' for acquisitions of non-Indigenous property probably still includes procedural fairness requirements: see Part II(B)(1) above.

208 Tracy Nau, 'Looking Abroad: Models of Just Compensation Under the *Native Title Act*' (2009) 93 *Reform* 55, 55–6.

209 Ibid 56, quoting D E Smith, 'Valuing Native Title: Aboriginal, Statutory and Policy Discourses About Compensation' (Discussion Paper No 222, Centre for Aboriginal Economic Policy Research, 2001) 32.

210 (2008) 235 CLR 232.

211 *Wurridjal* (2009) 237 CLR 309, 433 (Heydon J), 390 (Gummow and Hayne JJ). See also 470–1 (Kiefel J).

exclusively in money, following the compulsory acquisition of their rights, is inaccurate. In *Griffiths*, the Northern Territory's compulsory acquisition of particular native title interests was held to trigger section 24MD(2) of the *NTA*. This subsection mandates the provision of 'just terms', under either the relevant acquisition Act or Division 5 of the *NTA*. Although a High Court majority in the case assumed that acquisition of native title rights on 'just terms' was possible, it said nothing about the requisite *content* of such terms. That issue was not agitated before the Court.

Neither do outcomes of compensation claims under the *NTA* corroborate the capacity for native title interests to be compensated in money alone. Although the *NTA* adopts the wording of 'just terms',[212] this scheme's language is already weighted towards pecuniary payments.[213] By setting monetary compensation as the default recompense for the loss or impairment of native title rights, the Act itself constrains both the awards available to Indigenous people, and the arguments relied upon during the claim process. This may explain why the few publicly-reported *NTA* compensation claims have been framed exclusively in money terms – for example, the settlement between the Dunghutti people and NSW,[214] and Justice Sackville's obiter comments regarding the monetary award potentially payable in *Jango v Northern Territory*,[215] to date the only litigated *NTA* compensation claim to proceed to hearing and judgment on the merits.[216]

For these reasons, the case law provides no convincing argument disputing the need for non-monetary terms of acquisition as an option in the native title setting.

B Examples Of Non-Monetary 'Just Terms'

There exists a range of non-monetary terms which could provide fuller recompense for acquisitions of native title rights than money alone. The suitability of any, or a mixture, of such terms in an individual case will depend on the nature of the Commonwealth's acquisition, the interests it impairs or extinguishes, and the circumstances of the relevant Indigenous group. A group whose rights to traditional lands have been wholly extinguished will have markedly different needs from native title holders who have only lost, for instance, their right to forage or perform ceremonies in one particular area.

It is acknowledged that, for some acquisitions of native title interests, compensation may constitute the most suitable remedy. For instance, where an Indigenous group has a disparate or diminished population and its remaining land is sufficient for its current purposes, the most just recompense for a compulsory

212 See *NTA* s 51.

213 See Nau, above n 208, 55. See also Part IV(D)(1) below for more detail on this compensation framework.

214 See Richard H Bartlett, *Native Title in Australia* (Butterworths, 2000) 429–30.

215 (2006) 152 FCR 150, 292, 350; affirmed in *Jango v Northern Territory* (2007) 159 FCR 531.

216 See Nau, above n 208, 55. In *Walmbaar Aboriginal Corporation v State of Queensland* (2009) 177 FCR 42, as yet the only other judgment delivered in a litigated *NTA* compensation claim, the Federal Court struck out the application under s 84C of the *NTA*. Accordingly, the issue of the appropriate compensation award in the circumstances did not arise for consideration.

acquisition of particular land may be funding for community or employment programs. The key point is that non-monetary 'just terms' – such as those suggested below – should be afforded to dispossessed native title rightholders where appropriate in the circumstances.

1 *Land Restitution*

In the Woodward Inquiry's second report, Commissioner Woodward emphasised monetary compensation's inability to answer Indigenous peoples' 'legitimate land claims' and desire to 'maintain their separate identity'.[217] He concluded that 'the only appropriate direct recompense for those who have lost their traditional lands is other land'.[218] As Nau notes,[219] this view of land restitution as the preferred remedy for extinguishment of Indigenous land interests is echoed in the *United Nations Declaration on the Rights of Indigenous Peoples* ('the Declaration'),[220] for which Australia has issued a statement of support.[221]

Unlike compensation, land-based recompense for section 51(xxxi) acquisitions of native title rights would provide a material and spiritual source for sustaining an Indigenous group's cultural practices and way of life. As article 28(2) of the Declaration recognises, such restitution should ideally grant land and resources 'equal in quality, size and legal status' to the acquired land. More importantly, the Commonwealth should determine the land grant by negotiation with the relevant Indigenous group, taking into account the nature of the group's traditional activities and its spiritual ties to sites in a particular region.[222]

A land restitution model has been successful in New Zealand and Canada,[223] countries where, as in Australia, Indigenous peoples with spiritual affiliations to specific lands[224] have suffered dispossession. Government settlements in these countries have provided for the transfer of Crown lands to Indigenous tribes.[225] They have also contributed financial aid to foster Indigenous peoples' self-sufficiency on the transferred land within the broader economy – for instance, in New Zealand's Fisheries Settlement, Maori communities received a percentage of the commercial fishing quota.[226] Although substitute land never wholly equates to the land an Indigenous group has lost, by providing a physical place in

217 Commonwealth, *Aboriginal Land Rights Commission Second Report*, Parl Paper No 69 (1974) 9.
218 Ibid.
219 Nau, above n 208, 56.
220 GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/61/L.67 (2007) art 28.
221 Australian Human Rights Commission, 'United We Stand: Support for United Nations Indigenous Rights Declaration a Watershed Moment for Australia' (Press Release, 3 April 2009).
222 See Nau, above n 208, 56.
223 Ibid.
224 See Justice Kirby's discussion of Indigenous peoples' spiritual relationship with land in New Zealand and Canada in *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232, 261.
225 For example, New Zealand's Waikato-Tainui and Ngai Tahu settlements: Tom Bennion, 'New Zealand: Indigenous Land Claims and Settlements' in Bryan Keon-Cohen (ed), *Native Title in the New Millennium* (Aboriginal Studies Press, 2001) 367, 371–2.
226 Ibid 373; Nau, above n 208, 56.

which the group's spiritual and community life may be restored, appropriate restitution may remedy the group's dispossession more completely than compensation.

2 *Other Land-Related Terms*

For compulsory acquisitions affecting only a subset of native title rights, other non-monetary terms may be suitable. Depending on the rights acquired, these obligations may include:

- allowing Indigenous monitoring of government works on the acquired land;
- permitting traditional hunting or fishing;
- granting access to sacred sites for spiritual purposes;
- providing representation for the group on bodies whose powers affect the acquired rights; and
- creating collaborative roles for the traditional owners in the land's resource management.[227]

An agreement adopting many of these terms exists in relation to Kakadu National Park, an area held by an Aboriginal land trust under the *Land Rights Act*. Pursuant to a framework established by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBCA*'),[228] the Director of National Parks and Wildlife enjoys a compulsory lease over the Park,[229] which is managed by a Board containing a majority of Aboriginal members.[230] The Board prepares and monitors the Park's management plan, which governs issues from environmental and cultural protection to infrastructure and tourism.[231] The lease agreement permits traditional owners to live in the Park and use it for customary purposes, subject to the Board's directions,[232] and implements quotas for the employment of local Aboriginal people.[233]

3 *Procedural Fairness*

Finally, non-monetary terms could include requirements to consult with native title holders and request their comment on proposals involving the

227 For instance, in the Murray Darling Basin, the Commonwealth has established a partnership with Indigenous groups to conduct 'cultural mapping' of Indigenous activities, which will be used to reform resource management practices: Steven Ross and Neil Ward, 'Mapping Indigenous Peoples' Contemporary Relationships to Country: The Way Forward for Native Title and Natural Resources Management' (2009) 93 *Reform* 37, 39–40.

228 Repealing *National Parks and Wildlife Conservation Act 1975* (Cth).

229 See the Lease Memorandum: Director of National Parks and Kakadu Board of Management, *Kakadu National Park Management Plan 2007–14* (Department of Environment, 2007) 152 <http://www.environment.gov.au/parks/publications/kakadu/pubs/management-plan.pdf>.

230 Ibid 7; *EPBCA* s 377(4).

231 Director of National Parks, above n 229, 7.

232 Ibid 153 cl 2(2).

233 Ibid 165 cl 21(1).

acquired land.[234] As Bartlett observes, the consultation process itself constitutes 'an aspect of empowerment [and] fulfilment'[235] for Indigenous peoples whose land interests have been extinguished.

C Are Non-Monetary 'Just Terms' Incompatible with the Commonwealth's Acquisition Power?

So far, this Part has identified a sphere of proprietary interests in which money may have limited relevance, and examples of terms able to provide fuller redress in this context than cash alone. It remains necessary to assess this framework against the concern expressed by *Wurridjal*'s majority judges: that a requirement under section 51(xxxi) to grant non-monetary terms would unacceptably limit the Commonwealth's acquisition power.[236]

Unlike these judges' construction of the ramifications of the plaintiffs' pleadings in *Wurridjal*, this article does not suggest that the 'just terms' obligation in section 51(xxxi) restricts the Commonwealth's power to acquire any property. Rather, it contends that non-monetary terms can be provided without altering the acquisition's nature. This argument's first step is that section 51(xxxi) mandates the award of the fullest possible recompense to rightholders *without* impairing the federal acquisition power. This is because the section's logic necessitates that acquisitions occur. As discussed earlier,[237] the twin purposes of section 51(xxxi) are to facilitate Commonwealth acquisitions, and protect property rights by requiring adequate recompense in return – rather than imposing terms so onerous that they thwart the chosen acquisition. Accordingly, in some situations Indigenous rightholders' ideal terms of acquisition will not be available. For example, if the Commonwealth acquired a fee simple over land to which native title rights attach, an obligation to refrain from activities on the land unless they benefitted the traditional owners would diminish the Commonwealth's property interest.

However, the non-monetary terms suggested above constitute a spectrum of options which can be selected and adapted to individual scenarios compatibly with the Commonwealth's acquisition. Land restitution creates new rights over that land but leaves unimpaired the Commonwealth's interests in the acquired property. Likewise, access permissions and consultation obligations do not necessarily burden the acquisition with other proprietary interests. Rights to access, monitor and use the acquired land for designated purposes can be framed in the parties' agreements as positive covenants, enforceable against the

234 This suggestion coheres with judges' indications in several s 51(xxxi) cases that 'just terms' encompasses procedural fairness obligations: see Part II(B)(1) above.

235 Bartlett, above n 214, 430.

236 See Part II(C) above.

237 See Part III(C) above.

Commonwealth only as personal rights under contract law and equity.[238] As for consultation requirements, these are procedural fairness obligations rather than property rights. Importantly, even subject to the rider that 'just terms' awards must cohere with the Commonwealth's acquisition, such non-monetary terms can provide fuller recompense for native title rightholders' special losses than money alone.

D Ramifications for Commonwealth Legislation

1 NTA

Section 51(1) of the *NTA* prescribes 'just terms' as the default standard for assessing entitlements under that Act for the loss or impairment of native title rights by way of compulsory acquisition. Section 24MD(2)(e) extends the 'just terms' requirement to any extinguishment of native title rights arising from a compulsory acquisition under Commonwealth, State or Territory law. Section 53 creates a further layer of protection in relation to section 51(xxxi) acquisitions under the *NTA*, purportedly guaranteeing the provision of any 'just terms' not otherwise afforded by this statute. However, despite its references to the 'just terms' standard, the *NTA* effectively equates this obligation with monetary payment. This result would contravene section 51(xxxi) if Part II's interpretation is accepted.

As well as adopting the monetary language of 'compensation' when referring to recompense for compulsory acquisitions,[239] the *NTA* limits such recompense's content by requiring it to consist of money unless the rightholder requests a non-monetary award – a request which need not be granted.[240] Moreover, a non-monetary award under the Act can comprise *either* a property transfer *or* the provision of goods or services, with no possibility for a mixture of terms, or non-monetary terms coupled with financial assistance.[241] To limit the potential for invalidity, the *NTA* should be amended to place the options of monetary and non-monetary terms on an equal footing with respect to section 51(xxxi) acquisitions; provide an open definition of non-monetary awards; and modify wording that associates section 51(xxxi) 'just terms' exclusively with 'compensation'.

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238 See Butterworths, *Halsbury's Laws of Australia*, vol 22 (at 4 January 2010) 355 Real Property, 'V Easements, Profits, Rentcharges and Covenants' [355-12500], [355-12525]. Note that if the Commonwealth conveyed the acquired land to a third party, under ordinary contractual principles it would remain liable for any breaches of covenant by that third party: see Brendan Edgeworth, C J Rossiter and Margaret A Stone, *Sackville and Neave: Property Law: Cases and Materials* (LexisNexis Butterworths, 7th ed, 2004) 901.

239 *NTA* ss 51(2), 24MD(2)(d)–(e), 24MD(4), 53(1).

240 *NTA* ss 51(5)–(7). See also s 24MD(2)(d).

241 *NTA* ss 51(6), 51(8).

2 *Other Commonwealth Statutes*

It is argued that both general acquisition statutes,[242] and legislation specifically acquiring native title rights, should be amended to guarantee such reasonable monetary and/or non-monetary terms for acquisitions of native title interests as the circumstances require. The *NTNER* may be an example of the latter. This issue was not resolved in *Wurridjal*; the plaintiffs disavowed any claim based upon native title rights, and the majority judges held that section 34(3) of the *NTNER* preserved the plaintiffs' section 71 rights.[243] However, as Kirby J stressed, section 71 does not necessarily cover the entire terrain of native title interests.[244] It is a statutory formulation enacted prior to the recognition of native title in *Mabo*, and does not mirror the common law or *NTA* understandings of this concept. This point is significant because, pursuant to section 34(2) of the *NTNER*, section 34(3) does *not* preserve native title rights. Instead, they remain wholly ineffective to the extent of their inconsistency with acts carried out under this legislation.[245] Furthermore, by declaring the *NTA*'s 'future act' provisions inapplicable,[246] the *NTNER* removes native title holders' entitlement to compensation or 'just terms' under the *NTA* for losses arising from the suspension of their interests. Accordingly, it is possible that the *NTNER*'s imposition of compulsory leases on Aboriginal land effects acquisitions of native title rights. It would therefore be prudent to amend this Act in the manner suggested.

V CONCLUSION

This article has argued that the 'just terms' guarantee in section 51(xxxi) requires the award of non-monetary terms where necessary to make full recompense to individuals for the compulsory acquisition of their property. Applying this analysis in the native title context, it has contended that non-monetary terms are key to providing complete redress for acquisitions of native title interests.

These findings have significant practical implications. If accepted by the Court and the Commonwealth, they will improve outcomes for Indigenous people in compulsory acquisition negotiations, requiring new creativity in crafting 'just terms' awards and promoting greater sensitivity to native title holders' spiritual and cultural needs. This development represents an important step on the path towards reconciliation.

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242 For example, the *Lands Acquisition Act 1989* (Cth). Similar to the *NTA*, this Act uses monetary language to describe recompense for compulsory acquisitions of property, requiring the Commonwealth to pay 'compensation' (s 52) in an 'amount' determined by reference to factors including the property's 'market value' (s 55(2)).

243 See Part II(C) above.

244 *Wurridjal* (2009) 237 CLR 309, 403.

245 *NTNER* s 51(2); *NTA* s 238; see also above n 67.

246 *NTNER* s 51(1).

On a theoretical note, the article's constitutional argument reflects the time-honoured view that the *Constitution* speaks to contemporary society as well as federation-era Australia,[247] and to traditionally marginalised groups such as Indigenous Australians, as well as the Western mainstream. Several of the majority judges in *Wurridjal* emphasised that no different treatment is accorded to Aboriginal claimants by virtue of their Aboriginality, consistently with the principle of equality before the law.[248] By facilitating truly 'just' recompense for the loss of native title rights under section 51(xxxi), this article's interpretation of section 51(xxxi) 'just terms' provides a means of matching the judges' contentions with substantive equality.

247 See *Brewery* (1908) 6 CLR 469, 533 (O'Connor J).
248 *Wurridjal* (2009) 237 CLR 309, 369 (Gummow and Hayne JJ), 337 (French CJ).