Wurridjal v The Commonwealth: The Intervention and The Acquisition

Chris Horan*

The decision in *Wurridjal v The Commonwealth*¹ was handed down just over 1 year ago, on the first day of the High Court’s sittings in 2009. On one view, this might almost put the decision outside the reach of this session, which is devoted to ‘recent cases’. Nevertheless, the decision remains of ongoing interest to constitutional lawyers: first, as one of the relatively rare occasions on which a majority of the Court departed from previous authority; second, as providing confirmation of the ongoing ‘integration’ of the territories power with the rest of the Constitution; and finally as a further addition to the jurisprudence on s.51(xxxi) of the Constitution.

The issues in the case concerned the limitation derived from s.51(xxxi) of the Constitution whereby laws with respect to the acquisition of property must provide ‘just terms’ for any such acquisition. In particular, the case raised the question whether the ‘just terms’ limitation in s.51(xxxi) qualifies the power to make laws for the government of territories conferred by s.122 of the Constitution. In this regard, the Court revisited the stalemate that had been reached in *Newcrest Mining (WA) Ltd v The Commonwealth*² concerning whether or not the decision in *Teori Tau v The Commonwealth*³ should be overruled. The decision also provides an illustration of the application of s.51(xxxi) in the context of a particular statutory regime, in this case the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (*Land Rights Act*). The Court was required to decide whether the challenged legislation, pursuant to which the Commonwealth was granted a 5-year lease over Aboriginal land, should be characterised as a law with respect to the acquisition of property, and whether the ‘just

---


3  (1969) 119 CLR 564.
terms’ requirement was satisfied by the creation of a statutory entitlement to reasonable compensation for any acquisition of property within the meaning of s.51(xxxi).

BACKGROUND

The case arose out of the Commonwealth Government policy titled the ‘Northern Territory National Emergency Response’, but perhaps more widely known to as the ‘intervention’, by which the government sought to address a range of social problems involving Aboriginal children in communities in the Northern Territory.

In order to implement a range of administrative measures aimed at improving living conditions in Aboriginal townships, the Commonwealth sought to assume temporary control of land in those townships, the ownership of which was vested in Aboriginal Land Trusts established under the Land Rights Act. The principal means of obtaining control of the land was by a legislative grant of 5-year leases to the Commonwealth.

The challenged legislation comprised:

- the *Northern Territory National Emergency Response Act 2007* (Cth) (*Emergency Response Act*), which provided for the grant of 5-year leases to the Commonwealth over specified areas of land; and

- the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (*FCSIA Act*), which amended the Land Rights Act to allow persons to enter and remain on certain ‘common areas’ and access roads without obtaining a permit from the Land Council under the *Aboriginal Land Act* (NT).

The first and second plaintiffs were traditional Aboriginal owners of land in the township of Maningrida in the Arnhem Land region, about 500 km east of Darwin. The Maningrida land comprised an area of about 10.5 square kilometres located within a larger area of just under 90,000 square kilometres which had been granted to the
Arnhem Land Aboriginal Land Trust under the Land Rights Act.

The Land Trust was joined as the second defendant. While the Trust supported the plaintiffs on some issues – in particular, on the application of s.51(xxxi) to the acquisition of the leases by the Commonwealth – the Trust did not contend that the legislation failed to provide just terms for the acquisition. It also argued for a construction of the legislation which preserved the rights of traditional Aboriginal owners in relation to the land covered by the lease. The plaintiffs, on the other hand, were driven to contend for a less beneficial construction of the relevant provisions in order to advance their challenge to the constitutional validity of the legislation. As senior counsel for the Land Trust, Brett Walker QC, said during oral argument: ‘In a nutshell, things are not as bad under this legislation as the plaintiffs fear’.

THE DECISION

A majority of the Court held that the territories power in s.122 is subject to the just terms guarantee derived from s.51(xxxi), overruling the earlier decision in Teori Tau v The Commonwealth. The Court also held by majority that the challenged legislation involved an acquisition of the Land Trust’s property by the Commonwealth. In particular, the imposition of the 5-year lease amounted to an acquisition of the fee simple held by the Trust under the Land Rights Act. However, the Court held that the legislation provided just terms for the acquisition. Under the legislation, the Trust was entitled to be paid rent of a reasonable amount determined by the Valuer-General. Further, each of the Acts contained a ‘fail-safe’ entitlement to reasonable compensation, which protected the legislation from invalidity in the event that it was held to attract s.51(xxxi) and the just terms requirement.

Accordingly, the Commonwealth’s demurrer to the statement of claim was allowed, which presumably led to judgment in the proceedings being given in favour of the defendants. However, the decision was not an entirely adverse outcome for the plaintiffs, nor for
the Land Trust (whose arguments were essentially accepted by the Court). First, the Court accepted the argument that s.51(xxxi) is applicable to the territories and overruled *Teori Tau*. This removes a potential obstacle to compensation proceedings in the event that the payment of rent by the Commonwealth were inadequate to compensate the Trust or the traditional owners for the acquisition of the 5-year lease. Also, the Court confirmed that traditional rights were not affected by the imposition of the lease or the grant of access rights to the land. In other words, the Commonwealth’s lease was subject to the exercise by the plaintiffs and other Aboriginals of their statutory entitlements (conferred by s.71 of the Land Rights Act) to enter, use or occupy the land in accordance with Aboriginal tradition. In addition, the legislation preserved any prior interests that might have been granted by the Land Trust to third parties, including the income derived from those interests.

Nevertheless, the Court’s decision was not immediately greeted with enthusiastic support by some observers. The newspapers reported that ‘an angry group of about 60 people stormed the High Court’ following the decision, and had to be removed from the building by police. Such a response no doubt reflected broader opposition to the Government’s intervention policy, perhaps without a full understanding of the issues raised for decision by the Court.

Justice Kiefel was dismissive of any gains achieved by the plaintiffs in bringing the challenge. In concluding remarks, her Honour noted that the case had been brought ‘in the face of provisions for fair and reasonable compensation’ and that it ‘was not useful to clarify any substantial issue’. This observation possibly understates the significance of overturning *Teori Tau*, a decision which had stood for almost 40 years. As discussed below, Kiefel J did not consider it necessary to express a view on that issue, which perhaps helps to explain her Honour’s comments. In contrast, Kirby J

---


5 (2009) 237 CLR 309 at 472 [470].
(who was in favour of overruling Teori Tau) stated that the proceedings had ‘established an important constitutional principle affecting the relationship between ss.51(xxxi) and 122’ and that ‘it was in the interests of the Commonwealth, the Territories and the nation to settle that point’.6

SECTION 122 AND S.51(XXXI)

In 1969, the High Court decided in Teori Tau v The Commonwealth that s.51(xxxi) was not applicable to a law for the government of a territory enacted under s.122. In 1996, in Newcrest Mining (WA) Ltd v The Commonwealth, the Court heard full argument on an application for leave to re-open the decision in Teori Tau. The outcome was inconclusive. Three Justices (Brennan CJ, Dawson and McHugh JJ) refused leave to re-open Teori Tau, and affirmed its correctness. Three Justices (Gaudron, Gummow and Kirby JJ) disapproved the decision, and considered that it should be overruled. Toohey J declined to use his casting vote to overrule Teori Tau. Although he acknowledged the force of Gummow J’s ‘critical analysis’ of Teori Tau, Toohey J considered that ‘it would be a serious step to overrule a decision which has stood for nearly 30 years and which reflects an approach which may have been relied on in earlier years’.7

Instead, Toohey J based his decision on an alternative, intermediate approach: if a law could be supported as a law with respect to a head of power contained in s.51, the limitation in s.51(xxxi) was applicable even if the law was also for the government of a territory under s.122. This became the ratio of the decision in Newcrest Mining, supported by a majority of Toohey, Gaudron, Gummow and Kirby JJ. Section 51(xxxi) would apply unless the relevant law was supported only under the territories power. It is not entirely clear from the judgment of Toohey J whether he should be taken as having positively decided that Teori Tau should not be overruled

---

6 (2009) 237 CLR 309 at 426 [311]. Accordingly, Kirby J would have required the plaintiffs to pay only half of the Commonwealth’s costs.
7 (1997) 190 CLR 513 at 560.
(leading to a 4-3 majority affirming that decision), or as having refrained from reaching a final view on that question because it was unnecessary to do so in the light of his alternative approach (leaving a 3-3 split on the authority of Teori Tau). But given his apparent acceptance of the criticisms of Teori Tau, the latter construction is probably the preferable view.

The intermediate position adopted in Newcrest Mining was conceptually unsatisfying – if the power conferred by s.122 is not itself qualified by s.51(xxxi), as was held in Teori Tau, it is difficult to see why that power should not be available to support a law which is applicable to a territory, provided that this is open as a matter of construction and characterisation of the particular law. Under the orthodox approach to characterisation, if a law can be upheld as a law with respect to a subject matter within power, it does not matter that the law might also be characterised as a law with respect to a different subject matter (in this example, the acquisition of property for a purpose falling within a subject-matter contained in s.51 of the Constitution), even if the other subject-matter is outside Commonwealth power (for example, because the acquisition is not on just terms). The position inevitably becomes more complicated when dealing with express limitations within a particular head of power, raising the question whether and how that limitation affects other available powers. Questions of this nature were addressed in Bourke v State Bank of New South Wales (in relation to s.51(xxiii)) and in the Work Choices Case (in relation to s.51(xxxv)), both of which were touched upon in the judgment of Gummow and Hayne JJ in Wurridjal. But the alternative approach in Newcrest Mining does not appear to have been based on reasoning analogous to that adopted in Bourke, and was self-evidently designed to avoid answering the question whether s.122 was qualified by s.51(xxxi). In many respects, the intermediate approach had a flavour of a compromise reached in the interests of

---

11 (2009) 237 CLR 309 at 384 [176].
expediency.

The approach on which the decision in *Newcrest Mining* rested was potentially applicable in *Wurridjal*, in so far as the challenged legislation could be characterised as a law with respect to a subject matter contained in s.51 of the Constitution, such as the people of a particular race for whom it was deemed necessary to make special laws (s.51(xxvi)). Accordingly, it was not surprising that the Commonwealth ultimately sought to re-open the decision in *Newcrest Mining*.12

Although it had not been overruled, the authority of *Teori Tau* appeared to be somewhat weakened by *Newcrest Mining*. This was perhaps even more so following the departure of its supporters from the Court, with the successive retirements of Brennan CJ, Dawson and McHugh JJ.13 As was the case with the cross-vesting legislation following *Gould v Brown*,14 in which the Court was also equally divided on the critical constitutional issue, it was only a matter of time before another challenge was brought seeking to overturn the earlier decision. Such an opportunity presented itself in *Wurridjal*.

On this occasion, a majority of four judges delivered the final blow to *Teori Tau* – Gummow and Kirby JJ now joined by French CJ and Hayne J. Notably, it is necessary to rely on the judgment of Kirby J, who dissented in the result (he would have overruled the demurrer and allowed the matter to proceed to trial). Unlike *Newcrest Mining*, there was no judge in *Wurridjal* who was prepared to follow, let alone to support and defend, the decision in *Teori Tau*. Heydon, Crennan and Kiefel JJ found it unnecessary to express a view on the question.

Nevertheless, the decision has now settled for the future the proposition that s.51(Grün) applies in the territories. The reasons given by the majority for reaching this

13 Gaudron and Toohey JJ also retired over the intervening period.
conclusion largely repeat the arguments that were put forward in *Newcrest*. This time, there was no-one to present the opposing arguments which had been forcefully pressed by Brennan CJ, Dawson and McHugh JJ. Although those arguments must now be regarded as superseded, they still repay some consideration in the absence of any dissenting view in *Wurridjal*.

**REASONS WHY S.51(XXXI) SHOULD APPLY TO THE TERRITORIES POWER**

Perhaps the most obvious reason to apply s.51(331) to laws enacted under s.122 is a textual one: ‘the government of a territory’ referred to in s.122 can be regarded as one of the purposes in respect of which the Parliament has power to make laws, and therefore falls directly within the terms of s.51(331). As recognised in *Lamshed v Lake*,15 laws made under s.122 are enacted by the Commonwealth Parliament in its capacity as a national legislature, and not in some different or distinct capacity.

On the other hand, various matters distinguish the power conferred by s.122 from other legislative powers exercisable throughout the whole of the Commonwealth. As well as the structural separation of s.122, which is contained in a different Chapter of the Constitution from the legislative powers conferred by Part 5 of Chapter I (including those contained in ss.51 and 52), the power for territories is unrestricted in subject-matter, in the sense that there is no federal division of powers as is the case between the Commonwealth and the States. While self-government has now been established in the Australian Capital Territory and the Northern Territory, this has itself been done pursuant to s.122 and does not derogate from the overriding constitutional powers of the Commonwealth Parliament in respect of those territories. The conclusion in *Teori Tau* that s.122 is not subject to s.51(331) did not necessary involve treating the former section as ‘disjoined’ from the rest of the Constitution – the territories power may not be ‘disparate’, but on this view it is nevertheless ‘non-federal’.

In rejecting the conclusion in *Teori Tau*, the majority in *Wurridjal* relied on several key

arguments, which are briefly summarised below.

(i) **The principle of interpretation derived from Attorney-General (Cth) v Schmidt.**

Under the principle of construction adopted in *Attorney-General (Cth) v Schmidt*, the other subject matters of legislative power in s.51 should be read down so as not to include a power to make laws for the acquisition of property. This is because such a power is conferred by s.51(xxxi) subject to an express limitation or safeguard, which has come to be regarded as a constitutional guarantee. Of course, this principle has its exceptions or qualifications – such as where the other head of power manifests a contrary intention so as to include laws for the acquisition of property other than on just terms (e.g. the taxation power in s.51(ii)), or where the notion of just terms for the acquisition would be incongruous (such as the imposition of fines or penalties).

The majority in *Wurridjal* concluded that the approach in *Schmidt* should be equally applicable to s.122. In other words, there was no reason not to read down the power to make laws for a territory so as to exclude the power to make laws with respect to the acquisition of property, or at least the acquisition of property otherwise than on just terms. Accordingly, the primary question becomes whether the law can be properly characterised as a law with respect to the acquisition of property within the meaning of s.51(xxxi). If so, the territories power in s.122 cannot be relied on as a source of power to acquire property without the just terms requirement contained in s.51(xxxi).

It is interesting to note that the Court in *Teori Tau* did not overlook the principle in *Schmidt* when arriving at its conclusion. Thus, the Court expressly acknowledged that:

‘It has been held with respect to the heads of legislative power granted by s.51 of the Constitution that by reason of the presence in that section of par.(xxxix) none

\[\text{\textsuperscript{16}} (1961) 105 CLR 361.\]

\[\text{\textsuperscript{17}} (1969) 119 CLR 564 at 570.\]
of the other heads of power, either of itself or aided by the incidental power, embraces a power to make laws for the acquisition of property.’

Nevertheless, the Court declined to apply such a principle to the power conferred by s.122.

In his judgment in Newcrest Mining,18 Brennan CJ pointed out that the application of Schmidt to s.122 may be problematic. If the power to make laws for the acquisition of property were ‘abstracted’ from s.122, it would cast doubt on the Parliament’s ability to confer such a power on the legislature of a self-governing territory. The point raised by Brennan CJ in Newcrest (which was echoed by McHugh J) was that Schmidt would arguably preclude the conferral of any power to acquire property on a territory legislature, whether or not on just terms. While this conceptual problem is not directly addressed by the majority in Wurridjal, one possible answer might be suggested in the judgment of Gummow and Hayne JJ.

In their Honours’ view, Teori Tau had been argued and decided on the basis that the plaintiffs were required to establish that s.51(xxxi) was the only source of power to make laws for the acquisition of property in a territory. Accordingly, the proposition rejected by the Court as ‘unsupportable’ was that s.122 did not include any power to acquire property. Gummow and Hayne JJ, however, did not seem to regard the ‘abstraction’ doctrine in Schmidt as having this ‘either/or’ effect, so as to require a single characterisation as either a law under s.51(xxxi) or a law under s.122. This would suggest that s.122 might properly be regarded as including a power to make laws for the acquisition of property (and to confer such a power on a self-governing legislature), but that such a power remains qualified by the limitation derived from s.51(xxxi). Such an approach becomes closer to that adopted in Bourke v State Bank of New South Wales, rather than a strict ‘abstraction’ of power as contemplated by Schmidt.

As it turns out, the self-government legislation in both the Northern Territory and the Australian Capital Territory do encompass the conferral of legislative power to acquire property, but impose a just terms restriction on that power analogous to that contained in s.51(xxxi). In other words, the Territory legislatures do not have power to acquire property otherwise than on just terms. After *Wurridjal*, it is likely that such limitations are now mandated by the Constitution – given the limits on the power conferred by s.122. However, as a territory legislature does not exercise delegated legislative power, it might perhaps remain arguable that the Commonwealth Parliament could still in theory create a local legislature for a self-governing territory that is not subject to the just terms limitation, as is the case with the Parliaments of each State. However, this question is unlikely to arise in practice, at least in the case of the Northern Territory and ACT legislatures.

**(ii) Lamshed v Lake – the operation of s.122 laws outside the boundaries of the territories.**

The majority in *Wurridjal* identified another significant flaw or defect with *Teori Tau* in that the decision was ‘at odds’ with the principles accepted in *Lamshed v Lake*, which established that laws enacted under s.122 could operate outside the boundaries of a territory, and were ‘laws of the Commonwealth’ for the purposes of covering clause 5 and s.109 of the Constitution. The spectre was raised of a law enacted under s.122 which provided for the acquisition of property located outside the territory, including property in a State – such an example had also been advanced in support of the arguments put by the plaintiff’s counsel in *Teori Tau*.20

In *Newcrest Mining*, Brennan, Dawson and McHugh JJ had sought to answer this argument on the basis that the territories power could not extend to an acquisition of property outside the limits of territory. Such a law would not have the required nexus to be a law for the government of the territory. In this regard, the fact that a territory

19 See *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248.

20 (1969) 119 CLR 564 at 568.
law may operate outside the territory does not necessarily differentiate it from the power of any State Parliament to enact legislation with extra-territorial effect.

However, in the light of *Lamshed v Lake*, one potentially significant difference is that laws enacted under s.122 can have overriding force under both covering clause 5 and s.109 of the Constitution. In this respect, at least, the operation of laws enacted under s.122 can have possible implications for the federal relationship between the Commonwealth and the States.

**(iii) Section 51(xxxi) is not relevant only to the federal distribution of powers.**

The essence of the reasoning in *Teori Tau* was that s.51(xxxi) formed part of the federal distribution of legislative powers between the Commonwealth and the States. Section 122, on the other hand, dealt with laws for the government of a territory, in which there was no such division of powers. The elevation of s.51(xxxi) into a ‘constitutional guarantee’ has not impacted on the powers of State Parliaments to acquire property otherwise than on just terms, unless perhaps the acquisition is conditioned on an intergovernmental agreement involving the provision of financial assistance by the Commonwealth under s.96. Accordingly, the people of each State do not have an absolute protection against the unjust acquisition of their property – only a protection against such an acquisition under a law of the Commonwealth.

By the time *Teori Tau* was decided, the influence of the ‘disparate power’ theory in relation to s.122 had greatly diminished. As pointed out in *Wurridjal*, several key judgments (notably of Dixon J) had recognised that s.122 should not be ‘disjoined’ from the rest of the Constitution, and that it could be affected by other constitutional provisions. As Kitto J stated in the *Australian National Airways* case, the Constitution was to be construed as ‘one coherent instrument for the government of the federation’, including the territories. Barwick CJ, who delivered the Court’s judgment in *Teori Tau*, had himself acknowledged in *Spratt v Hermes* that s.122 was not segregated from

---

21 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at [13]-[14].
13.

the rest of the Constitution, and that it was an error to ‘compartmenalize’ the Constitution. Nevertheless, the Court in *Teori Tau* had no hesitation in confirming that s.51(xxxi) was not among the provisions that applied to s.122.

The approach of the majority in *Wurridjal* does not accept that s.51(xxxi) is relevant only to the federal distribution of power. Rather, it confirms and extends the long line of authority giving s.51(xxxi) the status of a constitutional guarantee of fundamental rights. French CJ also observed that the just terms guarantee ‘relates not only to States but also to persons’, so that ‘[t]he result of its application to s.122 is that no person anywhere within the Commonwealth of Australia can be subjected to a law of the Commonwealth acquiring the property of that person otherwise than on just terms’. While this does not deny the power of State Parliaments to acquire property without just terms, French CJ emphasised the expectation of the founders that such a power would not ordinarily be resorted to. Thus, French CJ invoked ‘common law interpretive principles protective of individual property rights’, recognised at the time of federation, which were said to be relevant to the construction of ss.51(xxxi) and 122 on the basis that the Constitution ‘began its life as a statute of the Imperial Parliament’.

(iv) Absurdities and incongruities.

In both *Newcrest* and *Wurridjal*, attention was drawn to so-called ‘absurdities and incongruities’ arising from the fact that the internal or mainland territories (the Northern Territory and the ACT) were formerly part of a State. Accordingly, it was said that it would be odd if the people of those territories had ‘lost’ the protection of

---

22 See ICM Agriculture Pty Ltd v The Commonwealth [2009] HCA 51.

23 This line of authority is illustrated by a detailed footnote in the judgment of Heydon J in *ICM Agriculture* [2009] HCA 51 at [185], where no less than 15 cases are cited in support of the proposition.

24 (2009) 239 CLR 309 at 357 [79].

the constitutional guarantee when they were surrendered to the Commonwealth.

Against this, it might be argued that the people of the territories had no greater protection prior to the establishment of the territory, as they had always been subject to the acquisition of property on unjust terms under State laws. Further, as Dawson J pointed out in *Newcrest Mining*, the people of the newly surrendered territory were not deprived of all protection of s.51(xxxi), in so far as the Commonwealth purported to acquire property under a law of general operation enacted under s.51 (and not intended to have an independent operation in the territories).

In addition, Chapter 6 of the Constitution envisages the possibility that a territory such as the Northern Territory might at some stage be admitted as a new State, at which time its legislature would presumably possess powers that are commensurate with those of the original States, free from any just terms limitation. The people of the new State would thereby ‘lose’ the protection of the guarantee that they had enjoyed while they remained people of a Territory. In such circumstances, the application of s.51(xxxi) to s.122 arguably gives rise to its own potential anomalies.

In *Newcrest Mining*, Gummow J described the outcome in *Teori Tau* as giving s.51(xxxi) a ‘capricious’ operation in so far as a law enacted under s.51 could be supported in a Territory under s.122, so as to exclude the just terms limitation from that part of the law. However, this apparent problem is essentially a reflection of general questions concerning characterisation which are not confined to the operation of the guarantee in s.51(xxxi). In many cases, the problem can be addressed as a question of construction and severance – whether the relevant law is intended to operate in the relevant territory or territories under s.122 irrespective of its validity throughout the rest of the Commonwealth.

---

26  (1997) 190 CLR 513 at 559.
28  See *Spratt v Hermes* (1965) 114 CLR 226 at 278.
(v) **Developments in the position of Territory electors.**

A final factor that was taken into account in applying s.51(xxxi) to the territories was the alteration in the status of electors in the mainland territories: first, by the statutory provisions for the representation of the ACT and the Northern Territory in the Commonwealth Parliament; second, by the constitutional amendment to include Territory electors in the referendum process under s.128 of the Constitution.

It is true that each of these developments took place after the decision in *Teori Tau*. However, it is not immediately clear how they supersede or overtake the reasoning or the conclusion reached in *Teori Tau*. Of course, this also raises a potential point of distinction in relation to external, non-self-governing territories – does there remain any scope for the Commonwealth to legislate for the acquisition of property in such territories without providing just terms for the acquisition?

**Whether *Teori Tau* should be overruled**

Notwithstanding the above reasons to extend s.51(xxxi) to the territories, the decision in *Teori Tau* remained an obstacle to the application of s.51(xxxi) to the territories power. That decision was a unanimous decision in emphatic terms, in which the Court rejected the plaintiff’s submission as ‘clearly unsupportable’, and had ‘no doubt whatever’ in reaching a clear conclusion without needing to hear argument from the defendants.

One interesting aspect of the decision in *Wurrudjal* is that the Court does not appear to have explicitly addressed, either in argument or in its reasons for decision, the rule of practice pursuant to which a party is required to obtain leave to re-open a previous decision of the Court.29 Although Gummow and Hayne JJ adverted to this requirement

---

in passing,\(^{30}\), it was not given separate consideration in any of the judgments.\(^{31}\) Perhaps the Court regarded it as unnecessary to address this requirement as a discrete issue, given that it had been evenly divided on the correctness of *Teori Tau* in *Newcrest Mining*. In any event, the considerations relevant to the grant of leave to reopen a previous decision will ordinarily overlap to a considerable extent with the considerations relevant to whether that decision should be overruled, as set out by the Court in *John v Federal Commissioner of Taxation*.\(^{32}\)

The majority in *Wurridjal* overcame the authority of *Teori Tau* by isolating it from both the prior and subsequent jurisprudence of the Court. Thus, Gummow and Hayne JJ considered that *Teori Tau* did not accord with a pre-existing stream of authority, largely because it was at odds with the ‘integrationist’ approach to s.122 that had been adopted in cases such as *Lamshed v Lake*. This stands in direct contrast with the view expressed by Brennan CJ in *Newcrest Mining*,\(^{33}\) who regarded *Teori Tau* as consistent with a ‘uniform line of authority’ going back to *Buchanan* (in relation to s.55) and *Bernasconi* (in relation to s.80), and resting on a principle ‘worked out in significant succession of cases’. Although many of the earlier cases came from an era in which the ‘disparate power’ theory was in full effect, *Teori Tau* was not necessarily inconsistent or incompatible with the more recent cases – it was based more on the ‘non-federal’ aspects of the territories power, rather than its ‘disparate’ nature.\(^{34}\) Even Kirby J in *Newcrest*, despite concluding that *Teori Tau* should be overruled, nevertheless treated it as consistent with preceding decisions and not as ‘an anomalous exception to the Court’s jurisprudence with respect to the s.122 power’.\(^{35}\)

---

\(^{30}\) (2009) 239 CLR 309 at 376 [146].

\(^{31}\) For example, French CJ noted that the Court had been ‘invited’ to overrule *Teori Tau*, and proceeded to discuss the considerations relevant to overruling a previous decision without any reference to the requirement to obtain leave to re-open: (2009) 239 CLR 309 at 347 [54], 350-353 [65]-[71].

\(^{32}\) (1989) 166 CLR 417 at 438-439.

\(^{33}\) (1997) 190 CLR 513 at 539-540.

\(^{34}\) Compare Barwick CJ in *Spratt v Hermes* (1965) 114 CLR 226 at 242.

\(^{35}\) (1997) 190 CLR 513 at 650-652.
Just as important to the *Wurridjal* majority, however, was the fact that the decision had not been directly relied on by a majority of the High Court in any subsequent case. Of course, this must put to one side the defence of the outcome and reasoning in *Teori Tau* presented by Brennan CJ, Dawson and McHugh JJ in *Newcrest Mining*. The judgment of French CJ in *Wurridjal* directly takes issue with the proposition stated by Brennan CJ in *Newcrest Mining* that ‘*Teori Tau* [had] been followed, uniformly and unquestioningly’, in subsequent decisions of the Court.\(^{36}\) French CJ addresses each of the subsequent cases cited in support of that proposition, with a view to distinguishing any apparent acceptance of the decision in *Teori Tau*, and concludes that the decision had ‘not entered the mainstream of constitutional jurisprudence’.\(^{37}\)

Other considerations used to diminish the authority of *Teori Tau* included that the judgment was given *ex tempore*, without hearing argument from the defendants. In this way, the very confidence with which the Court dismissed the plaintiff’s challenge became its Achilles heel, being used to weaken its authority. As French CJ stated, the decision ‘was not informed by extended reflection upon the constructional issues thrown up by s 51(xxxi) and s 122’.\(^{38}\) The members of the Court in *Teori Tau* would be likely to take exception to this criticism. The judgment in *Teori Tau* noted that, although the Court had not decided the question whether s.122 was subject to s.51(xxxi), ‘the topic to which it relates is by no means unfamiliar to it’. The Court also noted that counsel for the plaintiff had ‘recalled to our attention all the reported decisions which in his submission bear on the resolution of the question’, and some of the judges on the Court had themselves sat in the immediately preceding cases. Further, even if it the decision in *Teori Tau* could be criticised as having been reached with undue haste or without full consideration of the issues, any such deficiency was arguably remedied by the detailed reasoning contained in the judgments of Brennan CJ, Dawson and McHugh JJ in *Newcrest Mining*.

\(^{36}\) (1997) 190 CLR 513 at 540.
\(^{37}\) (2009) 239 CLR 309 at 358 [84].
\(^{38}\) (2009) 239 CLR 309 at 358 [85].
Nevertheless, it would probably be difficult to characterise the outcome in *Teori Tau* as having achieved a ‘useful result’, irrespective of whether or not it could be justified as a matter of constitutional principle. In *Newcrest Mining*, it had been suggested that overruling *Teori Tau* could cause great inconvenience, calling into question many legislative and executive acts in the territories, although such suggestions were doubted by some judges such as Toohey and Gummow JJ. There was little elaboration of such matters in *Wurridjal*. French CJ observed that there was no evidence that the decision in *Teori Tau* had been ‘independently acted upon’, noting that the *Northern Territory (Self-Government) Act 1978* (Cth) had made provision for any acquisition of property in the Territory to be on just terms.39

On the general approach to overruling, Gummow and Hayne JJ focussed on demonstrating that the decision in *Teori Tau* involved ‘an error in basic constitutional principle’. French CJ gave more explicit emphasis to the need for caution in reconsidering past decisions, having regard to the need for continuity and consistency. Thus, an earlier decision was entitled to ‘careful and respectful consideration’, and the balancing of factors for and against overruling was informed by a ‘strong conservative cautionary principle’.40 The Chief Justice was also diplomatic in arriving at the ultimate conclusion that *Teori Tau* should be overruled. He acknowledged that the linkage between s.51(xxxi) and s.122 was not ‘plain and unambiguous in the text of the Constitution’,41 and that the case presented ‘constructional choices’ upon which reasonable minds might differ. In overruling an earlier decision, it was not necessary to assert that the decision was erroneous, but simply that it had proven ‘to be incompatible with the ongoing development of constitutional jurisprudence’, given subsequent decisions or experience.42

---

39 (2009) 239 CLR 309 at 358-359 [85].
40 (2009) 239 CLR 309 at 352 [70].
41 (2009) 239 CLR 309 at 356 [78].
42 (2009) 239 CLR 309 at 353 [71].
The approach of Heydon, Crennan and Kiefel JJ

On one view, the challenge to the constitutional validity of the legislation in Wurridjal could have been dismissed on a narrower basis – for example, that just terms had been provided for any acquisition of property – without deciding the question whether s.122 was subject to s.51(xxxi). Three judges adopted such a cautious approach, finding it unnecessary to determine whether or not s.51(xxxi) applied.

Thus, Heydon J concluded that the legislation provided just terms for any acquisition, although he nevertheless appeared content to accept the outcome that Teori Tau had been overruled by a majority of the Court, so that ‘there will in future be no doubt as to the relationship between ss 51(xxxi) and 122’. In contrast, while French CJ, Gummow and Hayne JJ all reached a similar ultimate conclusion that just terms had been provided by the challenged legislation, they did so only after finding that s.51(xxxi) applied and considering whether there had been an acquisition of property. Crennan J concluded that it was unnecessary to consider whether the limitation in s.51(xxxi) applied because the legislation did not involve an acquisition of property within s.51(xxxi), and invoked ‘the settled practice of this Court to decline to answer unnecessary constitutional questions’. Kiefel J relied on the alternative approach in Newcrest Mining, so that that Teori Tau was not determinative of the case, and also went on to find that the legislation provided just terms for the acquisition of property.

These varying approaches illustrate the range of decisional choices that may be made by each individual judge in identifying the issues that properly fall for decision. A comparable divergence in approach can be seen in the more recent decision in ICM Agriculture, which concerned the scope of s.96 of the Constitution and the legislative

---

43 (2009) 239 CLR 309 at 427 [318], 429 [325].
44 (2009) 239 CLR 309 at 437 [355], 465 [446].
45 (2009) 239 CLR 309 at 468-469 [456]-[460]. In contrast, Kirby J addressed these issues in a different order, and found it unnecessary to rely on the alternative approach in Newcrest Mining because he considered that Teori Tau should be overruled: (2009) 239 CLR 309 at 419-420 [288].
46 (2009) 239 CLR 309 at 469-472 [461]-[469].
and executive power to enter Commonwealth-State arrangements involving the acquisition of property. In that case, the Court ultimately concluded that there was no acquisition of property within the meaning of s.51(xxxi). Nevertheless, French CJ, Gummow and Crennan JJ confirmed that s.51(xxxi) qualified the power conferred by s.96 and 51(xxxvi). Hayne, Kiefel and Bell JJ, on the other hand, declined to express a final view on the question, stating that ‘because it is not necessary to decide questions about the intersection of s.96 and s.51(xxxi), it is necessary not to decide them’. It is interesting to observe that, in *ICM Agriculture*, Crennan J did not follow the ‘settled practice’ on which she had relied in *Wurridjil*, notwithstanding that such a practice was expressly invoked by Hayne, Kiefel and Bell JJ. Conversely, Hayne J had gone out of his way in *Wurridjil* to overrule *Teori Tau*, despite concluding that there was no acquisition of property otherwise than on just terms, but in *ICM Agriculture* adopted the more cautious approach of deciding constitutional questions only when necessary to do so.

It is debatable whether or not it is appropriate for a judge to adopt the conservative practice of refraining from expressing any view on a constitutional question in cases where the question is addressed and decided by a majority of the Court. If a judge elects to stay silent on the question, he or she may thereby lose the opportunity to express a different, and possibly dissenting, view. When the question is presented in a future case, the judge would ordinarily be expected to follow and apply the majority reasoning in the preceding case, even though that reasoning might not have been strictly essential to the decision (*e.g.* if the decision can be supported on a narrower basis).

---

47 [2009] HCA 51 at [46]. Heydon J, who dissented in the result, agreed with this conclusion at [174].
48 [2009] HCA 51 at [141].
49 One distinction between *Wurridjil* and *ICM Agriculture* which might go some way to explain this difference in approach is that, in the former case, the majority found that there had been an acquisition of property within s.51(xxxi), albeit one for which just terms were provided. In *ICM Agriculture*, on the other hand, the Court concluded that there was no acquisition of property, which arguably provides a stronger basis on which to refrain from deciding whether or not s.51(xxxi) was applicable.
THE APPLICATION OF S.51(XXXI) TO THE PARTICULAR CASE

Was there an acquisition of property?

A majority of the Court, with Crennan J dissenting, concluded that the imposition of the 5-year lease under the challenged legislation did give rise to an acquisition of property by the Commonwealth from the Land Trust.

The relevant property owned by the Land Trust was a fee simple title to Aboriginal land granted under the Land Rights Act. Although that Act contains many statutory restrictions on dealings with Aboriginal land, the Court had previously recognised that the title to such land was, for almost all practical purposes, equivalent to full ownership. 50 Section 31(1) of the Emergency Response Act provided that a lease of the relevant land was, by force of the subsection, granted to the Commonwealth by the owner of the land. Section 35(1) provided that such a lease gave the Commonwealth exclusive possession and quiet enjoyment of the land while the lease was in force, subject to specified provisions.

The majority rejected the Commonwealth’s argument that the fee simple under the Land Rights Act was inherently susceptible to an adjustment of the rules governing control of the land. The Land Rights Act imposed a range of conditions and limitations on the power of the Land Trust to deal with the land. In particular, the Trust was subject to written directions from the Land Council, which was in turn required to engage in consultation with traditional owners and other affected Aboriginals. In some circumstances, Ministerial consent was required. It was accepted that the Land Trust’s title was not ‘a fee simple in its purest form’. 51 Nevertheless, Gummow and Hayne JJ held that the statutory restrictions ‘did not render the fee simple grant to the Land Trust so unstable or defeasible by the prospect of subsequent legislation … as to deny any operation of s 51(XXXI) of the

50 Northern Territory v Arnhem Land Aboriginal Land Trust (2008) 236 CLR 24 (the Blue Mud Bay Case) at [50].
51 (2009) 239 CLR 309 at 382 [171] (Gummow and Hayne JJ).
Similarly, French CJ concluded that the fee simple estate in the Maningrida land ‘lay well within the class of “property” to which s.51(xxxi) applies’, and that the legal effect of the lease was to diminish the ownership rights conferred by that estate and to confer on the Commonwealth the essential rights of a lessee abstracted from that estate. However, French CJ acknowledged that there was scope for some legislative adjustment of the provisions regulating the powers of the Land Trust to deal with its land without giving rise to an acquisition of its property.

Crennan J reached a different conclusion. While she did not endorse the broadest proposition advanced by the Commonwealth (that the Land Trust’s fee simple was susceptible to any statutory change in control), Crennan J concluded that the relevant provisions of the Emergency Response Act could not be characterised as effecting an acquisition of property from the Land Trust. In arriving at that conclusion, she relied significantly on the background and context to the legislation, and in particular its objects and the nature of the social problems it was designed to address. It was inherent in the legislative scheme that control of the land might be temporarily adjusted as and when the need arose. The Land Trust’s title was inherently susceptible to a ‘limited legislative adjustment of the control of the land’ in order to deal with problems such as those addressed by the Emergency Response Act. The provisions of that Act were directed to achieving the purposes of the Land Rights Act, rather than benefiting the Commonwealth or depriving traditional Aboriginal owners of prior rights and interests. It is interesting to observe that French CJ relied on the objects of the Land Rights Act to reach an opposite conclusion that the imposition of the lease was inconsistent with the rights and benefits of ownership intended to be conferred on the Land Trust.

---

52 (2009) 239 CLR 309 at 382 [171]; see also Kirby J at 420 [289]
53 (2009) 239 CLR 309 at 364 [101]-[103].
54 (2009) 239 CLR 309 at 464 [441].
55 (2009) 239 CLR 309 at 465 [446].
56 (2009) 239 CLR 309 at 363 [98]-[100].
The plaintiffs had also argued that the amendments to the ‘permit system’, which allowed persons to enter and remain on certain areas within Aboriginal land without a permit, amounted to an acquisition of property because it removed the right to exclusive possession of the land. The Court concluded that the right to exclude had already been removed by the creation of the 5-year lease, so that the amendment of the permit requirements had no additional effect on the Land Trust’s property. In any event, the relevant amendments made by the FCSIA Act conferred a statutory entitlement to reasonable compensation for any acquisition of property within s.51(xxxi).

Finally, the plaintiffs had argued that the legislation acquired their statutory rights under s.71 of the Land Rights Act to enter upon, use or occupy land in accordance with Aboriginal tradition. The argument ultimately turned on the proper construction of the relevant provisions of the Emergency Response Act. The Court accepted arguments advanced by the Land Trust that the section 71 rights were preserved by s.34(3) of the Emergency Response Act, and could not be terminated by the Commonwealth under s.35 of that Act. Accordingly, the 5-year lease was subject to continued exercise of s.71 rights, and there was no acquisition of property from any persons who held such rights.

**Did the challenged legislation provide just terms?**

Each of the Acts created a statutory entitlement for reasonable compensation in the event that the legislation would ‘result in an acquisition of property to which paragraph 51(xxxi) of the Constitution applies from a person otherwise than on just terms’. Provisions of this kind are sometimes referred to as ‘Historic Shipwrecks’ provisions, reflecting their origin in the *Historic Shipwrecks Act 1976* (Cth). Such provisions are commonly included in legislation that is considered to have any risk of giving rise to an acquisition of property, unless the provision of additional ‘safety net’ compensation would be incompatible with the legislative policy (e.g. the scheme considered in *ICM*

---

Agriculture or the access regime in Telstra Corporation).

In Wurridjal, a majority of the Court held that the entitlement to reasonable compensation was sufficient to satisfy the ‘just terms’ requirement, rejecting the plaintiffs’ arguments that the entitlement was ‘contingent’ on the need to commence proceedings in order to establish that compensation was payable.\(^{58}\) It was accepted that the relevant court could require the payment of interest on any compensation awarded.

The effectiveness of such provisions to provide just terms and to preserve validity reduces the need for direct challenges to the constitutional validity of legislation on s.51(xxxi) grounds where such a compensation entitlement has been provided. Nevertheless, the threshold constitutional issues concerning the application of s.51(xxxi) may still arise in the context of a compensation claim commenced in a court of competent jurisdiction.\(^{59}\) And there may always be cases in which the potential application of s.51(xxxi) is for some reason overlooked, so that the legislation fails to include a provision for compensation in the event that the legislation is characterised as one for the acquisition of property.

The decision in Wurridjal does not provide great encouragement for arguments that monetary compensation might not be adequate to provide just terms for the acquisition of some kinds of property. Nevertheless, the question was left open. Gummow and Hayne JJ noted an argument by the plaintiffs that there might be cases ‘where something less than a complete acquisition might be mandated by the Constitution so as to minimise the prejudice suffered by the holders of rights not readily compensable in money terms’, but considered that such matters did not arise on the facts of the case.


\(^{59}\) Compare, e.g., Commonwealth v WMC Resources Ltd (1998) 194 CLR 1.
and ‘could be left for another day’. Heydon J acknowledged that such arguments could have ‘considerable force’ in relation to traditional Aboriginal rights and interests relating to spiritual matters, including the use of sacred sites, but considered that it was unnecessary to examine such a contention in this case. While Kirby J accepted that ‘monetary “compensation” will arguably be sufficient for most property interests of a commercial, financial or economic kind’, he considered that it was arguable that the question of ‘just terms’ could extend beyond monetary compensation, requiring a wider enquiry into notions of ‘fairness’. In his Honour’s view, such arguments would be of particular relevance in cases involving the acquisition of legal interests in property belonging to Aboriginal people which may be essential to their identity, culture and spirituality.

Accordingly, while the provisions for rent and monetary compensation were sufficient to provide just terms in *Wurridjali*, there may still be scope for arguments that additional matters can be relevant to the determination of just terms, at least in relation to legislation that effects an acquisition of traditional rights and interests held by Aboriginal people. It would be difficult to argue that the legislature is incapable of providing ‘just terms’ for the acquisition of such rights and interests, for this would amount to a denial of the power of acquisition itself. However, the provision of just terms could arguably extend to the process involved in the acquisition, for example by requiring negotiation or consultation in relation to any acquisition, or to the conditions on which any acquisition is effected (resulting in ‘something less than a complete acquisition’, to use the words of Gummow and Hayne JJ), for example by preserving or protecting some aspects of the traditional rights such as in relation to sacred sites.

Of course, there may still be a prior issue as to whether the extinguishment or impairment of traditional rights and interests involves an acquisition of property. In

---

60. (2009) 239 CLR 309 at 390 [198].
this regard, it may be noted that *Wurridjal* did not raise any question concerning the effect of the challenged legislation on native title. In *Newcrest Mining*, Gummow J made some obiter remarks in relation to the common law susceptibility of native title to extinguishment or defeasance by the grant of an inconsistent estate. On the other hand, Kirby J in *Wurridjal* commented that ‘property’ for the purposes of s.51(xxxi) would extend to the traditional rights of Aboriginals in relation to land, whether under common law or statute, provided that those rights are ‘permanent, stable and capable of ongoing enjoyment’.

**REMAINING QUESTIONS?**

The decision in *Wurridjal* has now settled that the just terms limitation in s.51(xxxi) is applicable to laws enacted under s.122. However, are there any questions that might be explored further in future decisions?

One potential issue concerns the question whether there is any relevant distinction between internal and external territories. Some of the arguments relied on by the majority in *Wurridjal* as reasons to overrule *Teori Tau* were related to the specific position of the mainland territories such as the Northern Territory and the Australian Capital Territory. First, given that the area of those territories had formed part of the Original States at federation, it was regarded as absurd and incongruous not to apply s.51(xxxi) to Commonwealth laws enacted for the territory after its surrender to the Commonwealth. Second, the majority referred to the statutory and constitutional developments in those territories, in relation to the establishment of self-government and the representation of their electors in the Commonwealth Parliament and in the constitutional amendment process. Notwithstanding these arguments, however, there is no suggestion in the judgments in *Wurridjal* that any distinction should be drawn between internal and external territories in the application of s.51(xxxi). The fact that the majority in *Wurridjal* overruled *Teori Tau*, rather than confining the decision to the

---

64 (1997) 190 CLR 513 at 613.

65 (2009) 239 CLR 309 at 422 [296].
27.

facts of that case (involving an external territory) implies that it would be difficult to argue in a future case that s.51(xxxi) should not apply to s.122 in so far as it deals with external territories.

The decision in *Teori Tau* had presented the converse scenario. While the legislation in that case concerned the Territory of Papua and New Guinea, the Court emphasised that its decision ‘applies to all the territories, those on the mainland of Australia as well as those external to the continent of Australia’. The outcome in *Teori Tau* might have been influenced by factors relating to the diverse and different circumstances that could exist in external territories. Similar considerations had been influential in resisting the extension of other constitutional provisions to territories, such as the requirement of trial by jury in s.80 or the requirements as to appointment, tenure and remuneration of judges of federal courts under s.72. However, while such matters might influence whether or not a particular constitutional provision should apply to the territories, they do not necessarily provide a basis on which to distinguish between internal and external territories in the application of the provision.

On the other hand, the fact that the Northern Territory and the Australian Capital Territory were within the areas of the Original States at federation may still be of particular significance in some contexts, such as the application of s.90 of the Constitution to the ‘free trade area’ as determined in *Capital Duplicators*. And there might be special considerations applicable to the Australian Capital Territory, which contains the seat of government specifically dealt with in s.125 of the Constitution. More generally, however, there is unlikely to be any general differentiation drawn between internal and external territories, at least for the purposes of s.51(xxxi). External territories are also parts of the Commonwealth, and it is almost inevitable that they will be encompassed by the ruling in *Wurridjal* (just as internal territories were previously encompassed by the decision in *Teori Tau*).

---

66 (1969) 119 CLR 564 at 570-571.
67 *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248.
Another question is whether the decision in *Wurridjal* has any implications for the application of other constitutional provisions to the territories, or for the application of s.51(xxxi) to any other heads of Commonwealth legislative power. In relation to the former, the Court has previously been unwilling to re-open some of the previous decisions in relation to the territories – for example, the position that territory courts established under s.122 are not federal courts for the purposes of Chapter III and are not subject to the requirements of s.72 of the Constitution.\(^69\) The decision in *Wurridjal* is unlikely to lead to a wholesale reconsideration of the existing authorities on the application of particular constitutional provisions to the Territories.

The decision in *Wurridjal* confirms that s.51(xxxi) has the status of a constitutional guarantee which limits each of the Commonwealth’s other legislative powers, unless the terms of the other power manifest a contrary intention to encompass the acquisition of property otherwise than on just terms. Such a contrary intention will not be readily found – the Court did not accept a suggestion made by the Commonwealth during argument that s.122 revealed a contrary intention on the basis that ‘it would destroy the essence of the power in section 122 if one were to abstract from s.122 in every instance the power to acquire property’.\(^70\) The Commonwealth relied heavily on an analogy with the legislative powers possessed by State governments, which include a power to acquire property that is not subject to a requirement of just terms. An interesting question arises as to whether the States can refer that power to the Commonwealth – in other words, does the limitation derived from s.51(xxxi) also qualify the power conferred by s.51(xxxvii) to make laws with respect to matters referred to the Commonwealth Parliament by one or more State Parliaments?

Notwithstanding that the States have power to acquire property otherwise than on just terms, it would seem to follow from *Wurridjal* that a power referred to the Commonwealth by a State or States would not be completely free of the just terms

---

\(^{68}\) See *Berwick Ltd v Gray* (1976) 133 CLR 603.

\(^{69}\) See *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322.

\(^{70}\) [2008] HCATrans 349 at p.130.
requirement. This issue was considered by the Queensland Court of Appeal in *Pauls Ltd v Dwyer*.\textsuperscript{71} In that case, the Court rejected a challenge to provisions in the national *Corporations Act 2001* (Cth), which was enacted following referrals of power by each of the State Parliaments under s.51(xxxvii). The Court did not consider that the relevant provisions could be characterised as laws with respect to the acquisition of property otherwise than on just terms. However, observations were also made about whether the limitation in s.51(xxxi) was applicable to a law enacted under s.51(xxxvii). Davies JA considered that s.51(xxxi) did not apply to the *Corporations Act* as a law enacted under the referrals power, noting that ‘[w]hat was referred … was not a general subject matter (such as “corporations”) but the power to enact the Corporations Bill 2001 (Cth) to the extent that its provisions were not already within Commonwealth powers’. Because the terms of the proposed law specifically included the challenged provisions, any acquisition of property otherwise than on just terms was specifically authorised by the referred power. In other words, to the extent that the referred law involved an acquisition of property otherwise than on just terms, the subject matter of power contained in s.51(xxxvii) (read with the terms of the referral) manifested a contrary intention to the just terms limitation in s.51(xxxi). Davies JA observed that ‘a guarantee of just terms in such a case as this would impair the Parliament’s capacity to enact a law pursuant to the referred power’. Jerrard JA disagreed, however, concluding that a power referred pursuant to s.51(xxxvii) could not overcome s.51(xxxi) so as to include the acquisition of property otherwise than on just terms.

The approach adopted by Davies JA in *Pauls Ltd* does not require treating s.51(xxxvii) as unaffected by s.51(xxxi). For example, if a State Parliament refers a general subject matter to the Commonwealth, it is likely that the Commonwealth’s power to make laws with respect to the referred subject matter would not extend to the acquisition of property otherwise than on just terms within the meaning of s.51(xxxi). However, this should not necessarily deny to the States the ability to refer to the Commonwealth a power which includes the acquisition of property otherwise than on just terms, where

\textsuperscript{71} [2002] QCA 545 at [38]-[39], [66].
the intention to do so is made clear. This may be regarded as consistent with the existing jurisprudence on s.51(xxxi), which contemplates that the guarantee will not apply where another legislative power reveals a contrary intention to acquire property without just terms.

CONCLUSION

While it is clear that s.122 is not disjoined from the rest of the Constitution, it remains the case that some constitutional provisions do not apply to laws enacted under the territories power. Prior to the decision in Wurridjal, a possible rationale might have been suggested to distinguish those provisions and limitations which were applicable to s.122 from those which were not applicable. Thus, if a constitutional provision or limitation applies to both the Commonwealth and the States, it should also apply in relation to the territories – for example, the denial of power to impose customs and excise duties under s.90, the implied freedom of political communication, or the application of Chapter III to territory courts (which are not federal courts but are capable of exercising federal jurisdiction). On the other hand, constitutional limitations that do not apply to the States have not generally been extended to the territories – for example, the requirement of trial by jury in s.80, or the formal requirements for taxation laws under s.55. Nevertheless, this rationale is not necessarily capable of explaining all cases.72 Further, in so far as it rests on an assumption that the powers of the Commonwealth Parliament in relation to the territories are akin to the powers of a State Parliament in relation to that State, such an approach was not accepted by the majority in Wurridjal, who regarded it as ‘at odds’ with the decision in Lamshed v Lake. Accordingly, the people of a territory now have complete protection against laws for the acquisition of property otherwise than on just terms, even though their State neighbours remain potentially exposed to an unjust acquisition of property under a law enacted by the State Parliament.

72 For example, Svikart v Stewart (1994) 181 CLR 548, in which the Court held that s.52(i) did not extend to Commonwealth places in a territory.
Few will mourn the demise of *Teori Tau*, which had come to be regarded as an obstacle to the extension of one of the few guarantees of individual rights contained in the Constitution. The application of the guarantee of just terms to the territories is unlikely to involve any significant practical restraint in relation to the mainland territories, which had already been subjected to an analogous statutory restriction contained in the self-government legislation. Even in the States, the power to acquire property without just terms is rarely used, and is generally regarded as contrary to fundamental common law principles. While the decision in *Teori Tau* might have been based on a sound rationale, that the power in relation to the territories was ‘non-federal’ in character, that rationale has now been largely abandoned by the Court.