



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

BETWEEN: **GOVERNMENT OF THE RUSSIAN FEDERATION**
Plaintiff
and
COMMONWEALTH OF AUSTRALIA
Defendant

PLAINTIFF'S SUBMISSIONS IN REPLY

- 10 1. These submissions are suitable for publication on the internet and adopt the terms defined in the Plaintiff's Submissions (PS) filed on 17 April 2025.
2. Notwithstanding the rhetoric surrounding the enactment of the *Home Affairs Act*, the Commonwealth does not seek to uphold the Act by reliance on any "national security" grounds. This is perhaps unsurprising when regard is had to the fact that it was the Commonwealth that offered the Plaintiff the Lease of the Land and, given that, it was implicit that the Commonwealth determined that the Land was an appropriate site for the Plaintiff to relocate its embassy.¹ Even though that the Land is within "*the area adjacent to Parliament House*" and, "[a]t its closest point, that land is approximately 300 metres from the Parliament House Building",² at all material times since August 2007, the Land was, and remains, designated for use as "*Diplomatic Mission*" and available for use by foreign nations notwithstanding the termination of the Lease³ and land adjacent to the Land is leased by the Commonwealth to other foreign nations for use as "*Diplomatic Mission*".⁴ Furthermore, there is no attempt to elucidate the nature or degree of the so-called security risk. The highest it rises is a statement in a media conference that the construction of the, yet unbuilt, Embassy building (which had been approved by the NCA) had a "*potential*" to cause interference with activities that occur within Parliament House.⁵
- 20 3. The central flaw in the Commonwealth's argument is the premise that the grant in section 122 is unlimited and unqualified in point of a subject matter and merely because the Land is within the Australian Capital Territory there is a sufficient nexus between the law and the Territory.⁶ There is no doubt that section 122 is a (rather than "*the*"⁷) source of power
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¹ Special Case at [17]

² Commonwealth's Submissions (CS) at [6]

³ Subsection 7(3) of the Act and [23] of the *Explanatory Memorandum* to the Act at page 77 of the SCB

⁴ SCB at pages 44, 46 and 57

⁵ SCB at page 70

⁶ CS at [14] to [16]

⁷ *Commonwealth of Australia v Yunupingu* [2025] HCA 6; (2025) 99 ALJR 519 at [197]

to make “laws for the peace, order and good government of [a] territory”.⁸ Such a power extends to enable Parliament to make laws for the direct administration of a Territory or some law with respect to the government activities of a Territory.⁹ However, for the reasons given at PS[28], there is no aspect of the *Home Affairs Act* that affects the direct administration or government activities of a Territory.

4. The power under section 122 is not properly described as being plenary¹⁰ nor is it disjoined from the other provisions of the Constitution. In that sense, because section 51(xxxi) includes a restriction on the power to legislate with respect to acquisitions of property, it “abstracts” that power from the other Commonwealth heads of power and no other legislative power is construed to include the power to acquire property because the “totality of the power” is found in section 51(xxxi) alone.¹¹ To the extent that termination of the Lease was an acquisition of property and not a law properly characterised as one “for the government of” the territory, the *Home Affairs Act* is not supported by section 122 of the Constitution.
5. The Commonwealth also contends that the *Home Affairs Act* is “wholly” supported by section 51(xxix) of the Constitution because it is asserted that the Act “affects or is likely to affect Australia’s relations with other countries”¹² and modifies the operation of several Acts “which regulate the rights and immunities of foreign states and their representatives in Australia”.¹³ The Commonwealth relies upon the submission that there is said to be an “obvious connection” between the *Home Affairs Act* and Australia’s diplomatic relations with the Plaintiff in support of these contentions.
6. Latham CJ explained in *R v Burgess; Ex parte Henry*¹⁴ the extent of the external affairs power. It is accepted that, since *R v Burgess*, the scope of the external affairs power has expanded and the pursuit and advancement of comity with foreign governments and the preservation of the integrity of foreign states may be a subject matter of a law with respect to external affairs.¹⁵ Though the Land was to be utilised to construct, and eventually declared as, the Plaintiff’s replacement Embassy in Australia, there is no constitutional fact presented to the Court to allow it to conclude that Act in any way “affects or is likely to affect Australia’s relations with other countries”. This is particularly so in circumstances where the Plaintiff’s diplomatic relations have continued notwithstanding the Act and the

⁸ CS at [14]

⁹ See, for example, *Yunupingu* at [22]

¹⁰ *Newcrest Mining (WA) Ltd v The Commonwealth* [1997] HCA 38; (1997) 190 CLR 513 at 604-605, 611-612

¹¹ *Yunupingu* at [17], [127] and [182] and the cases cited therein.

¹² CS at [18]

¹³ CS at [18]

¹⁴ [1936] HCA 52; (1936) 55 CLR 608 at 643 (Starke J agreeing at 658, Dixon J agreeing at 669, Evatt and McTiernan JJ agreeing at 684)

¹⁵ *Thomas v Mowbray* [2007] HCA 33; (2007) 233 CLR 307 at [151]

Commonwealth's attempts to terminate the Lease. Insofar as it is contended that the *Home Affairs Act* modifies¹⁶ the operation of several Acts "which regulate the rights and immunities of foreign states and their representatives in Australia", the Acts said to be modified are identified by the Commonwealth are the *Consular Privileges and Immunities Act 1972* (Cth) (**CPI Act**), the *Diplomatic Privileges and Immunities Act 1967* (Cth) (**DPI Act**) and the *Overseas Missions (Privileges and Immunities) Act 1995* (Cth) (**OM(PI) Act**) (collectively, the **Modified Acts**). Whilst each of the *Modified Acts* seek to give effect to various privileges and immunities conferred by the *Vienna Convention on Consular Relations*,¹⁷ given that the Land had not been declared as a diplomatic mission it is difficult to see how the *Modified Acts* have application let alone have been "modified".

7. Furthermore, and in any event, to the extent the *Home Affairs Act* removes or modifies one or more of the privileges or immunities conferred or recognised by the *Modified Acts*, the Act cannot be said to be a means by which Parliament is either implementing *bona fide* treaty obligations under international law or a law relating to a matter of international concern¹⁸ or advancing comity with a foreign government or preservation of the integrity of foreign state. As such, the *Home Affairs Act* does not fall within the scope of the external affairs powers.
8. With respect the Commonwealth's submissions at CS[22] to [27] concerning section 51(xxxi), the Commonwealth's position is that "just terms" are not engaged because there is no "acquisition" rather, there has only been "a negative taking or deprivation of property".¹⁹ The Commonwealth's position is misconceived.
9. As Dixon J said in *Bank of NSW v The Commonwealth*,²⁰ section 51(xxxi) extends to "innominate and anomalous interests" and includes "the assumption and indefinite continuance of exclusive possession and control for the purpose of the Commonwealth of any subject of property." It is accepted that there is an important distinction between a taking of property and its acquisition. Taking involves deprivation of property seen from the perspective of its owner. Acquisition involves receipt of something seen from the

¹⁶ The concept of "modifies" maybe an overstatement given that 7(2) of the *Home Affairs Act* which provides that "...this Act has effect despite anything contained in, or any rights, duties, obligations, powers, limitations, offences, privileges or immunities (however described, and whether actual, contingent or prospective) that would otherwise apply under, any of the following (including any regulations or other legislative instruments made under them): ...".

¹⁷ See, for example, section 5(1) of the *CPI Act*, section 7 of the *DPI Act* and section 6 of the *OM(PI) Act*

¹⁸ *Commonwealth v Tasmania* [1983] HCA 21;(1983) 158 CLR 1 at 101 (Gibbs CJ) 130-132 (Mason J) and 218-219 (Brennan J); *Victoria v The Commonwealth* [1996] HCA 56; (1996) 187 CLR 416 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ at 487

¹⁹ *Cf* CS at [24]

²⁰ [1948] HCA 7; (1948) 76 CLR1 at 349

perspective of the acquirer.²¹ Acquisition is therefore not made out by mere extinguishment of rights.

10. In an observation quoted and approved by the majority in *Australian Tape Manufacturers Association Ltd v The Commonwealth*,²² Mason J said in the *Tasmanian Dam* case²³ “to bring the constitutional provision into play ... there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.” Given the submissions advanced by the Plaintiff at PS[32], which are not engaged with by the Commonwealth at all, there has been an acquisition of property and no destruction of that property has otherwise occurred that might characterise the *Home*

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Affairs Act as a law for deprivation rather than an acquisition.

11. The status of section 51(xxxi) is as a “constitutional guarantee”²⁴ and a “very great constitutional safeguard”,²⁵ the purpose of which is to protect private property and prevent arbitrary exercises of power at the expense of a State or subject, being exercises of power giving rise to expropriation of property without adequate compensation.²⁶ It is for that reason that an acquisition without “just terms” is only permissible where “just terms” is an inconsistent or incongruous notion and it must be a necessary or characteristic feature of the means which the law selects to achieve an objective which is within power (such as levying taxes, seizing the property of enemy aliens, imposing fines and exacting penalties and forfeitures). In these cases, the “just terms” requirement does not apply because to characterise these exactions as an acquisition of property would be “incompatible with the very nature of the exaction”.²⁷ It cannot be realistically suggested that the *Home Affairs Act* is of a character or has any of the well-established necessary features that make the provision of “just terms” inconsistent or incongruous.

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12. If, contrary to the matters relied upon by the Plaintiff, the *Home Affairs Act* is supported by section 122 of the Constitution (whether or not it is supported by some other power), then, as was recognised in *Yunupingu*, “... the power conferred on the Commonwealth Parliament by s 122 of the Constitution to make laws for the government of a territory does not extend to making a law with respect to an acquisition of property otherwise than on

²¹ *Georgiadis v Australian Overseas Telecommunications Corporation* [1994] HCA 6; (1994) 179 CLR 297 at 304-305 per Mason CJ, Deane and Gaudron JJ, 315 per Dawson J, 320-321 per Toohey J.

²² [1993] HCA 10; (1993) 176 CLR 480 at 499-500 per Mason CJ, Brennan, Deane and Gaudron JJ.

²³ at 145

²⁴ *Clunies-Ross v The Commonwealth* [1984] HCA 65; (1984) 155 CLR 193 at 202; *Mutual Pools & Staff Pty Ltd v The Commonwealth* [1994] HCA 9; (1994) 179 CLR 155 at 168, 180, 184, 223; *Newcrest Mining (WA) Ltd v The Commonwealth* [1997] HCA 38; (1997) 190 CLR 513 at 568, 595.

²⁵ *Trade Practices Commission v Tooth & Co Ltd* [1979] HCA 47; (1979) 142 CLR 397 at 403. See also *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 385 [178]; *ICM* [2009] HCA 51; (2009) 240 CLR 140 at 169 [43]; *JT International SA v The Commonwealth* [2012] HCA 43; (2012) 250 CLR 1 at 95 [263].

²⁶ *Yunupingu* at [127] – [129]

²⁷ *Theophanous v The Commonwealth* [2006] HCA 18; (2006) 225 CLR 101 at [60]

just terms within the meaning of s 51(xxxi) of the Constitution.”²⁸ There is no principled reason why the same observations could not be made with respect to section 51(xxix).

13. With respect to the Commonwealth’s submissions at CS[39] to [41], insofar as they seek to invoke the seat of government as a power giving rise to expropriation of property without “*just*” compensation, it is to be observed that the seat of government is a physical place or area of land²⁹ albeit its limits have not been precisely determined by the Parliament, it does not encompass the Australian Capital Territory as a whole. The power to make laws with respect to the seat of government is a general one, limited only by relevance to the seat of government and activities conducted there³⁰ and such a power is concerned with the political or constitutional aspects of the seat of government, rather than with the government of the territory which it occupies.³¹ None of these matters makes the provision of “*just terms*” inconsistent or incongruous. The balance of the submissions at CS[39] to [41] ought to be disregarded for the reasons advanced in PS[29.h].
14. Furthermore, and in any event, it is the characterisation of the law which matters, not its subjective purpose. The characterisation of a law is determined by considering the operation and effect of the law³² or by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes.³³ By reference to what the *Home Affairs Act* operates to do, being the termination of the Lease and return of the exclusive possession of the Land to the Commonwealth, the Act cannot be properly characterised as anything other than one for the acquisition of property. At the very least, that acquisition forms its dominant character.³⁴
15. Finally, and contrary to the submissions made by the Commonwealth at CS[42], there is no basis for the Commonwealth to read down section 51(xxxi) to exclude the Plaintiff, as a foreign body politic, from receiving “*just terms*”. Section 51(xxxi) extends to acquisition of property from “*any person*”. The question whether the identity of such a person, as a foreign body politic, affects the way in which “*just terms*” produce a measure of compensation does not deny the requirement for “*just terms*”.
16. Accordingly, either the *Home Affairs Act* is beyond power or, if it is not, “*just terms*” are required to be provided.

²⁸ At [44], as see [114] and [189].

²⁹ *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89 at 97 (Barwick CJ), at 114 (Menzies J), at 125 (Windeyer J)

³⁰ *Worthing* at 101 (Barwick CJ) at 114 (Menzies J)

³¹ *Spratt v Hermes* (1965) 114 CLR 226 at 258 (Kitto J), at 262 (Taylor J), at 273 (Windeyer J), at 281-2 (Owen J)

³² *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 186 (Latham CJ); *Re Wakim; Ex parte McNally* [1999] HCA 27; (1999) 198 CLR 511 at [103] (Gummow and Hayne JJ).

³³ *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7 (Kitto J); *Grain Pool (WA) v Commonwealth* [2000] HCA 14 (2000) 202 CLR 479 at [16]

³⁴ *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 180 to 181.

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