

Before the High Court

Rethinking “On Just Terms”: *Commonwealth v Yunupingu*

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Abstract

Commonwealth v Yunupingu raises a number of constitutionally significant issues concerning the scope of the Commonwealth Parliament’s power under s 51(xxxi) of the *Australian Constitution* and its relationship to the territories power in s 122. One issue that is not directly raised by the questions before the High Court of Australia, but that will nevertheless inform the Court’s answers, concerns the meaning of ‘on just terms’. Is ‘on just terms’ a narrow and inflexible requirement to provide full market-based compensation? Or does it permit a broader and more flexible approach to determining the obligations of the Commonwealth and territory governments, which would allow for structural reparations and non-pecuniary remedies? We suggest that a broader and more flexible approach is generally to be preferred as a matter of both principle and prudence and that such an approach is especially relevant for the Court as it considers the consequences of its answers to the questions before it.

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I Introduction

In *Commonwealth v Yunupingu* (*‘Yunupingu’*),¹ the High Court of Australia will consider the scope of s 51(xxxi) of the *Australian Constitution*, which gives the Commonwealth Parliament the power to make laws for the acquisition of property ‘on just terms’. Specifically, the Court will be asked to consider: (1) whether laws

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¹ *Commonwealth v Yunupingu* (High Court of Australia, Case No D5/2023).

made exclusively under the territories power in s 122 attract the ‘on just terms’ requirement; and (2) whether laws that amount to the acquisition of native title rights attract the ‘on just terms’ requirement. (The case also involves interesting questions concerning the operation of the doctrine of precedent; this is addressed in another contribution and will not be taken up here.²)

The purpose of this contribution is to draw attention to a set of issues that underpin the High Court’s approach to questions about the scope of s 51(xxxi), but that has received insufficient attention: namely, issues concerning remedies and the character of the ‘on just terms’ requirement. It is clear that if a Commonwealth law acquires property that it must do so ‘on just terms’. But what does that requirement demand? What is the nature of the Commonwealth’s constitutional obligation?

II Not Just a Power: Duty-Based Dimensions of Section 51(xxxi)

In *Yunupingu*, questions concerning the scope of s 51(xxxi) arise in the context of a compensation application made by the Gumatj Clan or Estate Group under s 61 of the *Native Title Act 1993* (Cth) (‘*Native Title Act*’) on the basis that certain acts under the *Northern Territory (Administration) Act 1910* (Cth), including the reservation of minerals to the Crown,³ qualify as ‘past acts’.⁴ In general terms, ‘past acts’ are legislative acts prior to 1 July 1993 or any other act prior to 1 January 1994, which are invalid because of the existence of native title. The question of compensation in *Yunupingu* thus turns, inter alia, on whether the acts in question qualify as an ‘acquisition of property’ on other than ‘just terms’ within the meaning of s 51(xxxi), which would render them invalid (and therefore ‘past acts’ for the purposes of the compensation regime under the *Native Title Act*). The Full Court of the Federal Court of Australia held that they do,⁵ and the Commonwealth has appealed that decision. The Commonwealth’s principal submissions on appeal are that: (1) laws made under s 122 do not attract the ‘on just terms’ requirement under s 51(xxxi);⁶ and (2) native title rights are ‘inherently defeasible’ and therefore do not attract the ‘on just terms’ requirement under s 51(xxxi).⁷

Given this framing of the questions on appeal, issues concerning remedies and the character of the Commonwealth’s constitutional obligation do not, strictly speaking, arise. Remedies for the extinguishment of native title are statutorily defined, and it can be accepted that the *Native Title Act*’s compensation regime, however imperfect, satisfies the ‘on just terms’ requirement. However, the statutory regime for compensation created by the *Native Title Act* cannot displace the meaning

² See Ashleigh Barnes, ‘Stare Decisis and Constitutional Guarantees: *Commonwealth v Yunupingu*’ (2024) 46(3) *Sydney Law Review* (advance).

³ *Mining Ordinance 1939* (NT) s 107.

⁴ See *Native Title Act 1993* (Cth) s 228(2).

⁵ *Yunupingu v Commonwealth* (2023) 298 FCR 160.

⁶ Commonwealth, ‘Appellant’s Submissions’, Submission in *Commonwealth v Yunupingu*, Case No D5/2023, 28 March 2024, 6–8 [12]–[19] (‘Appellant’s Submissions’).

⁷ *Ibid* 22–3 [57]–[59].

of the requirement. Nor can it exhaust the ways of satisfying it — and, ultimately, the *Native Title Act*'s terms are subject to potential amendment.

Although s 51(xxxi) is a power-conferring provision, it has long been understood as a constitutional guarantee. Given the dual function of s 51(xxxi) and its status as a constitutional guarantee, the questions that the Court has to consider cannot be addressed as pure questions of legislative power. They are also questions about constitutional obligations. This aspect of s 51(xxxi) draws attention to the normative dimensions of legislative power, including the manner in which it is conferred, and the manner in which it is exercised.⁸

III A Broader and More Flexible Approach: Considerations of Principle and Prudence

The High Court has long assumed that the phrase ‘on just terms’ is a requirement to provide monetary compensation for any property rights that have been acquired, using fair market value as the benchmark. This, however, is not the only construction open to the Court. The phrase ‘on just terms’ in s 51(xxxi) arises in a distinctive context: that of a constitutional provision at once conferring power on the Commonwealth, and at the same time limiting that power by imposing a duty.⁹ Accepting, as the High Court has,¹⁰ that s 51(xxxi) is a constitutional guarantee and not merely a supplementary grant of legislative power means that the phrase should be interpreted like a constitutional guarantee.¹¹ That is, it should be interpreted in a broad and purposive manner that reflects both: (1) the *values* underpinning the constitutional protection of property; and (2) notions of *reasonable limitations* on the enjoyment of property rights that are implicit in the constitutionally prescribed system of government.

Values underpinning the constitutional protection of property include, at a minimum, values associated with preventing arbitrary confiscation. This is how Dixon J described the purpose of s 51(xxxi) in *Grace Bros v Commonwealth*,¹² and it is a view that many High Court justices have endorsed over time.¹³ Although not

⁸ See Lael K Weis, ‘The Constitutional Office of the Legislature’ (2020) 70 (Supplement 2) *University of Toronto Law Journal* 214; Rosalind Dixon and Lael K Weis, ‘Legislative Constitutional Duties and the Judicial Role’ [2023] (2) *Public Law* 311, 324.

⁹ Rosalind Dixon, ‘Overriding Guarantee of Just Terms or Supplementary Source of Power? Rethinking s 51(xxxi) of the Constitution’ (2005) 27(4) *Sydney Law Review* 638; Lael K Weis, ‘Property’ in Cheryl Saunders and Adrienne Stone, *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 1013.

¹⁰ *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 509 (Mason CJ, Brennan, Deane and Gaudron JJ).

¹¹ Lael K Weis, ‘“On Just Terms”, Revisited’ (2017) 45(2) *Federal Law Review* 223 (‘On Just Terms’).

¹² *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269, 291 (‘Grace Bros’).

¹³ See, eg, *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 169 (Mason CJ); *Health Insurance Commission v Peverill* (1994) 179 CLR 226, 255 (Toohey J) (‘Peverill’); *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 659 (Kirby J); *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1, 26 [44] (Toohey J) (‘WMC’); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 207 [176] (Heydon J) (‘ICM Agriculture’); *JT International*

always explicit, values associated with this purpose clearly inform the Court's analysis. For instance, in the course of asking whether the essential character of a law meets the description of an 'acquisition of property', notions of legitimate expectations often inform the High Court's analysis.¹⁴ Indeed, such considerations arguably underpin the notion of 'inherent defeasibility' or 'inherently susceptible to variation' as a disqualifying feature¹⁵ — a central issue in *Yunupingu*. Moreover, these values can be seen as connected to a broader set of constitutional values related to the rule of law.¹⁶

The High Court's s 51(xxxi) jurisprudence has also consistently recognised reasonable limitations on property — albeit here, too, often only implicitly through the lens of characterisation. For instance, in the course of upholding the water licensing regime in *ICM Agriculture v Commonwealth*, members of the majority emphasised that: water conservation is an important social policy;¹⁷ the regulation of water entitlements via a statutory licensing regime is a rational method for achieving that social policy;¹⁸ and the burden on property rights was reasonable, given the reciprocity of benefits and burdens inherent in such a regulatory scheme.¹⁹

A broader and more flexible approach to the 'on just terms' requirement would allow the Court to more openly articulate these kinds of considerations, rather than having to subsume them within the singular concept of an 'acquisition of property'.²⁰ Reasons for the result in cases such as *ICM Agriculture* would be better captured by openly articulating why, in the Court's view, the burden imposed on private property owners was justified.

SA v Commonwealth (2012) 250 CLR 1, 124 [354] (Kiefel J) ('*JT International*'); *A-G (NT) v Emmerson* (2014) 253 CLR 393, 446 [109], 449 [119], 452 [132] (Gageler J) ('*Emmerson*'); *Cunningham v Commonwealth* (2016) 259 CLR 536, 559–60 [57] (Gageler J) ('*Cunningham*').

¹⁴ See, eg, *Peverill* (n 13) 243–4 (Brennan J), 249 (Dawson J), 267 (McHugh J); *Airservices Australia v Canadian Airlines* (2000) 202 CLR 133, 179 [96], 181 [101] (Gleeson CJ and Kirby J), 255 [351]–[354] (McHugh J), 297–8 [492]–[493] (Gummow J); *Cunningham* (n 13) 547 [7]–[8], 554 [39], 557 [50] (French CJ, Kiefel and Bell JJ), 583 [151], 583–4 [153], 585–6 [166], 588 [169] (Keane J), 602–3 [224], 603 [226], 608–9 [237], 609 [239] (Nettle J). See also Simon Evans, 'When is an Acquisition of Property Not an Acquisition of Property? The Search for a Principled Approach to Section 51(xxxi)' (2000) 11(3) *Public Law Review* 183, 203.

¹⁵ Weis, 'Property' (n 9) 1027–9.

¹⁶ See *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J). See also *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 381 [89] (Gummow and Hayne JJ).

¹⁷ For instance, at the outset of the joint reasons of Hayne, Kiefel and Bell JJ, their Honours acknowledge that 'water and rights to use water are of critical importance ... to society as a whole': *ICM Agriculture* (n 13) 182 [90].

¹⁸ The history of the regulation of water entitlements is considered at length in both majority judgments: *ibid* 174–6 [58]–[67] (French CJ, Gummow and Crennan JJ), 191–5 [116]–[129] (Hayne, Kiefel and Bell JJ).

¹⁹ Arguably, important considerations here were the fact that the licence holders' rights were replaced rather than simply eliminated, and the fact that they received structural adjustment payments to help offset their losses: *ibid* 159–60 [6]–[7] (French CJ, Gummow, and Crennan JJ).

²⁰ For a general argument about the link between a focus on values and transparency, see Rosalind Dixon, 'The Functional Constitution: Re-Reading the 2014 High Court Constitutional Term' (2014) 43(3) *Federal Law Review* 455; Rosalind Dixon, 'Functionalism and Australian Constitutional Values' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 3.

A broader and more flexible approach would also open up the possibility that only some, and not all, acquisitions of property require compensation equivalent to full market-based value. This possibility might arise, for example, because the burdens imposed by a regulatory scheme are justified in light of the importance of the objective, the lack of reasonable and equally effective alternatives, and the overall reciprocity of benefits and burdens achieved by the scheme. Again, *ICM Agriculture* is arguably such an example.²¹ Moreover, a broader and more flexible interpretation of the ‘on just terms’ requirement also opens up the possibility of non-monetary remedies,²² either in addition to or else as an alternative to monetary compensation.²³ As discussed below, this possibility is particularly relevant to the native title context.

Considerations of both principle and prudence support such an approach.

Starting with considerations of principle, the approach just described would promote consistency and coherence in constitutional doctrine by bringing the analysis of s 51(xxxi) in line with the High Court’s well-established approach to other constitutional guarantees, such as the freedom of interstate trade (s 92) and the implied freedom of political communication.²⁴ In both of those contexts, the Court approaches the question of constitutional validity through a wider requirement of justification that encompasses both values and reasonable limitations — *not* through a narrow and inflexible approach that focuses exclusively on the law’s essential character.

The usual tools of constitutional construction — text, structure and purpose as discerned from drafting history — also support such an approach. The Commonwealth’s constitutional obligation is not described as a requirement for ‘compensation’ but a requirement that acquisitions of property be ‘on just terms’. As Dixon J once observed, ‘[u]nlike “compensation”, which connotes full money equivalence, “just terms” are concerned with fairness’.²⁵ Indeed, s 51(xxxi)’s description of this obligation is a distinguishing feature of the *Australian Constitution*: whereas reference to ‘compensation’ is commonplace (used in at least 167 constitutions), only five other constitutions use the phrase ‘on just terms’ (and only one other constitution *only* uses this phrase).²⁶ There is evidence that the framers of the *Constitution* selected the phrase ‘on just terms’ in order to incorporate notions of fair dealing that go beyond the payment of compensation.²⁷ Interpretation

²¹ See Weis, ‘On Just Terms’ (n 11) 253–4.

²² See Celia Winnett, ‘“Just Terms” or Just Money? Section 51(xxxi), Native Title and Non-Monetary Terms of Acquisition’ (2010) 33(3) *UNSW Law Journal* 776.

²³ See Weis, ‘On Just Terms’ (n 11) 246–9.

²⁴ On the call for even greater consistency in the application of proportionality-style logic and considerations across all areas of Australian constitutional jurisprudence, see Rosalind Dixon, ‘A New Australian Constitutionalism? Purpose, Proportionality and Process-Theory in the High Court of Australia’ (George Winterton Memorial Lecture, University of Western Australia, 11 April 2024).

²⁵ *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495, 569 (Dixon J) (‘*Nelungaloo 1948*’).

²⁶ See Weis, ‘On Just Terms’ (n 11) 228–9.

²⁷ See Duane L Ostler, ‘The Drafting of the Australian Commonwealth Acquisition Clause’ (2009) 28 *University of Tasmania Law Review* 211, 232–5.

of the obligation contained in s 51(xxxi) ‘must not be unmindful of its specially Australian character’.²⁸

In addition, there is strong historical support for interpreting the *Constitution* in a manner that allows the state to play a *positive* role in the protection of individual and social welfare.²⁹ This was a key commitment of the social liberal ideas and Chartist movement that influenced many of the framers, and is an enduring idea in Australian social and political thought.³⁰ A broad and flexible approach to the notion of ‘just terms’ supports this role. Often, the acquisition of property by the Commonwealth occurs in the context of programs that have a substantial public interest. Requiring the government to pay full market-based compensation for *any* acquisition of property has the potential to deter socially beneficial state action.³¹

Finally, there is High Court precedent that supports approaching the ‘on just terms’ requirement as a broader and more flexible demand for justification that admits of a wider range of remedial possibilities.³² Overall, it is fair to say that the possibility of a broader and more flexible approach has not been rejected, but has simply been neglected.³³ In *JT International v Commonwealth*, French CJ left open the possibility of adopting such an approach, deferring ‘careful consideration’ to ‘an appropriate occasion’.³⁴ We suggest that any future consideration of remedies following the decision in *Yunupingu* may provide such an occasion.

To be clear, in advancing this argument from principle, we are not suggesting that market-based compensation is never required under s 51(xxxi). There are cases where providing less than full market-based compensation could create other problems: for example, encouraging rent-seeking behaviour and resulting in programs that fail to meet a cost-benefit test, or that impose substantial injustice on individuals by asking them to bear a disproportionately high individual cost.³⁵ Our point is simply that in some cases less than full market-based compensation may be required to satisfy the requirements of justice. The Court’s approach to s 51(xxxi) should be flexible enough to accommodate that possibility.

²⁸ *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545, 600 (Kitto J) (*‘Nelungaloo 1952’*).

²⁹ Adrienne Stone, ‘More than a Rule Book: Identity and the Australian Constitution’ (High Court of Australia Public Lecture, High Court of Australia, 9 November 2022); Ashleigh Barnes, ‘Constitutional Dignity’ (2023) 46(3) *Melbourne University Law Review* 683; William Partlett, ‘Australian Popular Political Constitutionalism’ (2024) *Federal Law Review* (forthcoming); Will Bateman, ‘Federalising Socialism without Doctrine’ (2024) 52(3) *Federal Law Review* (forthcoming); Lynsey Blayden, ‘Active Citizens and an Active State: Uncovering the “Positive” Underpinnings of the Australian Constitution’ (2024) *Federal Law Review* (forthcoming).

³⁰ Blayden (n 29); Bateman (n 29).

³¹ Rosalind Dixon, ‘Fair Market Constitutionalism: From Neo-Liberal to Democratic Liberal Economic Governance’ (2023) 43(2) *Oxford Journal of Legal Studies* 221 (arguing that constitutions need to protect property rights, but in a relatively weak or flexible way that allows for less than full market-based compensation, in certain cases of clear social benefit) (*‘Fair Market Constitutionalism’*).

³² See, eg, *Grace Bros* (n 12) 279–80 (Latham CJ), 285 (Starke J), 290–1 (Dixon J); *Nelungaloo 1948* (n 25) 569 (Dixon J); *Nelungaloo 1952* (n 28) 600 (Kitto J); *Wurridjal v Commonwealth* (2009) 237 CLR 309, 424–5 [305], 426 [309] (Kirby J); *Emmerson* (n 13) 446 [109] (Gageler J).

³³ See *WMC* (n 13) 102–3 [262] (Kirby J) (observing that there has been very ‘little judicial elaboration of what the phrase means’).

³⁴ *JT International* (n 13) 64 [158] (French CJ).

³⁵ Dixon, ‘Fair Market Constitutionalism’ (n 31).

Turning to prudential considerations, there are arguments for adopting a broad and flexible approach to the ‘on just terms’ requirement that appeal to the Court’s institutional role. A strict requirement of market-based compensation may lead to outcomes that attract substantial public disapproval, and even political backlash — for example, because of a perception that the relevant compensation is too generous to individuals, relative to the public interest, or even because of a perception that monetary compensation is an inappropriate form of redress.

There is, of course, room for debate as to whether public perceptions should inform the Court’s approach to constitutional construction: some scholars suggest that it is a relevant, if not decisive, factor,³⁶ whereas others suggest that it is a consideration only in cases of immediate threat to a court’s institutional legitimacy.³⁷ Notwithstanding this debate, it is a factor that militates in favour of a broader and more flexible approach to the ‘on just terms’ requirement under s 51(xxxi).

Moreover, the potential impact of the ruling on the Court’s institutional legitimacy has clear relevance to *Yunupingu* itself. It is not improbable that a large-scale compensation award could attract substantial political backlash, given past responses to *Mabo v Queensland [No 2]*³⁸ and *Wik Peoples v Queensland*.³⁹ The Gageler Court has already experienced substantial backlash following its decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*.⁴⁰ Arguments for prudential flexibility in the Court’s approach to the constitutional questions presented in *Yunupingu* are thus especially timely and compelling.

The political stakes are put front and centre in the Commonwealth’s submissions, which emphasise the potentially ‘enormous financial ramifications’ of finding that there has been an acquisition of property within the meaning of s 51(xxxi):

If the Full Court is correct, then for almost seven decades a vast but indeterminate number of grants of interests in land in the Territory would have been invalid. Further, upon the validation of those grants by the *Native Title Act 1993* (Cth) ... the Commonwealth would have become liable to pay compensation of a vast but presently unquantifiable amount (including interest, potentially going back to 1911).⁴¹

This is not, in our view, a reason to accept the Commonwealth’s argument that laws made exclusively under the territories power in s 122 do not attract the ‘on just terms’ requirement. But it does provide an additional reason for the Court to endorse a broad and flexible approach to the content of this requirement that allows for consideration

³⁶ See, eg, Theunis Roux, ‘Principle and Pragmatism on the Constitutional Court of South Africa’ (2009) 7(1) *International Journal of Constitutional Law* 106; Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (Cambridge University Press, 2013); Rosalind Dixon, ‘The Forms, Functions, and Varieties of Weak(ened) Judicial Review’ (2019) 17(3) *International Journal of Constitutional Law* 904; Roni Mann, ‘Non-Ideal Theory of Constitutional Adjudication’ (2017) 7(1) *Global Constitutionalism* 14.

³⁷ Cf Richard H Fallon Jr, *Law and Legitimacy in the Supreme Court* (Harvard University Press, 2018).

³⁸ *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

³⁹ *Wik Peoples v Queensland* (1996) 187 CLR 1.

⁴⁰ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 415 ALR 254.

⁴¹ Appellant’s Submissions (n 6) 3 [3].

of whether monetary or in-kind forms of compensation (which, of course, could themselves be controversial) are more likely to be capable of winning ongoing democratic support.

IV ‘On Just Terms’ and Native Title

Yunupingu does not require the Court to decide the precise scope or content of any requirement of just terms under 51(xxxi), as applied to s 122. Instead, if the Court were to uphold the decision of the Full Court of the Federal Court, it would then be for the Commonwealth and the territory governments to decide whether to enact new legislation explicitly acquiring the relevant native title interests and providing just terms.

There are also good arguments for the Court to avoid pre-judging this question. It is not strictly necessary to decide and doing so would reduce the scope for the Commonwealth and territory executives and parliaments to contribute to answering this question. Moreover, the Court has not had the benefit of full argument on this issue. Nevertheless, the Court may still provide useful guidance regarding the process of executive and legislative deliberation, and reassure the broader public that there is scope for a broad and flexible approach to the ‘on just terms’ requirement that can accommodate a range of remedial possibilities suited to the specific issues that arise in the native title context.

In emphasising the benefits of a broader and more flexible approach to the ‘on just terms’ requirement in the native title context, we are not suggesting that such an approach should *only* apply to native title interests. This would clearly be problematic, and potentially even be in breach of commitments to racial non-discrimination of the kind found in the *Racial Discrimination Act 1975* (Cth). As discussed in Part III, above, we think that a broader and more flexible approach is supported as a matter of constitutional principle and would better capture the factors that the High Court routinely considers in s 51(xxxi) cases, which concern a range of different proprietary interests. Nevertheless, the native title context provides a powerful illustration of why such an approach is needed.

Native title is a distinctive form of proprietary interest, the attributes of which should inform any approach to the notion of ‘just terms’. First and foremost, as Celia Winnett notes, native title is a form of spiritual, non-commodified interest that is not readily valued in monetary terms and therefore demands consideration of non-monetary obligations.⁴² Second, and relatedly, because native title is a non-alienable, non-transferrable interest for which there is no direct market, there are conceptual difficulties in applying market-based notions of compensation. Although *Northern Territory v Griffiths*⁴³ has opened up the possibility of compensation for non-economic losses, the spiritual and cultural dimensions of native title cannot be captured through a narrow and inflexible approach to the just terms requirement, which reduces Country to ‘real estate’ and value to ‘monetary valuation’. Third,

⁴² Winnett (n 22) 798–801.

⁴³ *Northern Territory v Griffiths* (2019) 269 CLR 1.

native title is a form of collective property that is constitutive of community: figuratively speaking, communities hold native title for the benefit of current and future generations. This collective and inter-temporal nature of native title underpins the notion of custodianship and may inform the notion of just terms for any interruption to or change in that custodianship.

It is, therefore, quite likely that just terms for the acquisition of native title would include recognition of *spiritual* and *cultural* harms and encompass forms of spiritual and cultural redress, which recognise rather than repudiate the status of traditional native title holders and their connection to land and, wherever possible, find ways of facilitating that ongoing connection. Such redress might include, for example, memorials and public displays, land restitution and other land-related terms.⁴⁴

Just terms for the acquisition of native title would also likely include recognition that the relevant economic harms to First Nations take the form of a lost opportunity for economic self-sufficiency and the means of self-governance. Appropriate redress for such harm could, in turn, take the form of a requirement that previous native title holders receive priority in employment opportunities in any economic activity conducted on the relevant land, or else forms of revenue sharing in the context of taxes or royalties generated by that activity.

Equally, a broader and more flexible approach to just terms would highlight the importance of consultation by governments with First Nations, or ‘free, prior and informed consent’ to changes in the use and incidents of native title.⁴⁵ This reflects the broader context in which native title interests are embedded: a structure that includes a commitment to indigenous recognition and self-determination, including as understood and defined by international law.⁴⁶

There is no straightforward answer to how these considerations should be evaluated or balanced in any given case. Other countries have grappled with similar issues in the context of the award of compensation to indigenous peoples for a variety of harms, including harms associated with the wrongful removal of children, institutional abuse and under-funding of indigenous welfare programs. Canada, for example, has made several large-scale compensation awards to its First Peoples for harms of this kind. The most recent award, of over CAD23 billion, for harms associated with the under-funding of indigenous family welfare programs⁴⁷ also

⁴⁴ See *Winnett* (n 22) 802–3.

⁴⁵ See *ibid* 803–4.

⁴⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 19. See also United Nations High Commissioner for Human Rights, ‘Free, Prior and Informed Consent of Indigenous Peoples’ (Fact Sheet, September 2013).

⁴⁷ ‘Final Settlement Agreement on Compensation and Agreement-In-Principle for Long-Term Reform of First Nations Child and Family Services and Jordan’s Principle’, *Government of Canada* (Web Page, 20 March 2024) <<https://www.sac-isc.gc.ca/eng/1646942622080/1646942693297>>; Indigenous Services Canada, ‘Revised Settlement Agreement of \$23B Reached to Compensate First Nations Children and Families’ (News Release, 5 April 2023); Darren Major and Olivia Stefanovich, ‘Judge Approves Historic \$23B First Nations Child Welfare Compensation Agreement’, *CBC*

involves a mix of individual compensation and collective redress in the form of structural programs aimed at overcoming past harms and disadvantage, and empowering future generations through better funded and targeted forms of family support. The Canadian example also underscores the existence of comparative precedent for a broad and flexible approach to notions of collective compensation for past injustices.

At the same time, we acknowledge that there is no direct analogy between these harms and the harms associated with the past or future extinguishment of native title interests. We also do not suggest any precise answer to the way in which harms of this kind should be measured or addressed, including but not limited to providing monetary compensation. Our argument is simply that, should the Court in *Yunupingu* uphold the decision of the Full Court of the Federal Court, it should also lend its approval for a broad and flexible approach to the ‘on just terms’ requirement, which encompasses notions of fair dealing and allows for the consideration of these remedial issues.

V Conclusion

A fundamental principle of the common law is that there is no right without a remedy. The same can be said of constitutional guarantees. This column has suggested that although remedial questions do not, strictly speaking, arise in the questions before the High Court in *Yunupingu*, they nonetheless loom large. Conceptually and practically speaking, issues concerning remedies and the character of the Commonwealth Parliament’s constitutional obligation — what ‘on just terms’ requires — cannot be neatly separated from questions concerning the scope of the Commonwealth Parliament’s power under s 51(xxxi).

This is also true as a political matter: the Gageler Court has already weathered a political storm, which has arguably left its sociological legitimacy substantially diminished,⁴⁸ especially among political conservatives. Whether the Court is positioned to weather an even larger storm in the context of native title is a question that should be on the minds of all of those concerned with constitutionalism and the rule of law in Australia.

Perhaps the Court is live to these questions, in which case our arguments from principle and prudence may well converge: in order for the Court to recognise the past harms of an unconstitutional acquisition of property by the Northern Territory, it may need to anticipate at least the conceptual possibility of a remedial standard that political elites and the general public can live with. The Court’s answer to the constitutional questions in *Yunupingu* might therefore depend — albeit indirectly — on the meaning of the ‘on just terms’ requirement.

(online, 24 October 2023) <<https://www.cbc.ca/news/politics/judge-approves-23-billion-first-nations-child-welfare-agreement-1.7006351>>.

⁴⁸ On the concept of ‘sociological legitimacy’, see Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, 2023) 97–8.