

Hidden Shield

The National Gun Buyback Scheme — Constitutional Grounds and the Defence-Capability Question

Whether the Commonwealth's participation in the New South Wales buyback engages s 51(xxxi), and the one configuration in which defence-capability evidence is legally useful

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Companion papers: *"Criminological Analysis — Vincent O'Dempsey and the Police-Impersonation Ruse"* and *"Protecting Travellers on Australia's Remote Highways."*

SECTION 01

Purpose, and how the grounds are graded

This note asks a narrow question: whether the Commonwealth's co-funding of the New South Wales gun buyback is open to constitutional challenge, and whether the defence-capability material has any legal use. It is not a submission that the Scheme is unwise. Sections 02 and 03 are context; their confined legal utility is identified at Section 08 and its limits stated there.

Grounds are graded so the reader can weigh them:

- **STRONGEST** assessed as the most arguable, and not dependent on any policy contention.
- **CONTINGENT** reached only if an earlier ground succeeds, or turning on facts not yet obtained.
- **DO NOT LEAD WITH** useful in one narrow configuration only, and damaging to the case if advanced more broadly.

SECTION 02

Context — the warning-time assumption has been abandoned

For most of the post-war period Australian defence planning rested on an assumption of ten years' strategic warning of a major conventional attack. That assumption did the work of a standing army: it meant a small peacetime force could be maintained on the understanding that there would be time to expand, equip and train it.

- **2020 Defence Strategic Update.** Expressly abandoned the assumption, stating that a ten-year warning time was no longer an appropriate basis for planning, and that reduced warning times mean defence plans can no longer assume time to adjust capability gradually.

- **2023 Defence Strategic Review (Smith and Houston).** Went further — Australia cannot rely on geography or warning time; the ADF was assessed as not fully fit for purpose; the Defence of Australia doctrine on which force structure rested was found no longer fit for purpose.
- **Accepted across the aisle.** Governments of both persuasions have adopted the assessment, the Defence Minister repeatedly characterising the present period as the most dangerous Australia has faced since 1945.
- **The implication is about people, not platforms.** Where extended warning time no longer applies, what is required is a contingency force with surge capacity — and Australia has no conscription, a small permanent force, and no standing capacity to deliver marksmanship training at scale on short notice. Whatever proficiency exists in the civilian population on the day a conflict begins is, in practical terms, the proficiency available.

SECTION 03

Context — the contemporary relevance of civilian shooting disciplines

The assumption that civilian marksmanship is militarily obsolete has been overtaken by events in Ukraine.

- **The threat resists the systems built for it.** FPV attack drones and Shahed-type munitions have proved resistant to systems designed for larger targets. Autocannon such as the 35 mm Oerlikon is physically and economically ill-suited to low-cost FPV drones, and electronic warfare carries cost and coverage limits at the individual level. Part of the response has been a return to the shotgun.
- **The skills are those of clay target disciplines.** Marco Angelelli, President of the Italian Federation of Clay Shooting's relevant Commission and a competitor of ten years' standing in the national military clay pigeon team, describes the transfer directly: experience tracking and hitting targets travelling at 90 km/h informed his counter-UAS approach, which treats drones as clay targets carrying a payload. He identifies the shotgun, within a layered defence, as an inexpensive and accessible last-resort option, and cautions against viewing shotguns as relics rather than adaptable tools.
- **It has been institutionalised.** Ukraine's 413th Separate Raid Battalion runs a dedicated shotgun training program incorporating traditional skeet technique alongside training for the unpredictable movement of drones. Training systems developed for civilians, soldiers and special units begin with clay pigeons, progress through static and then horizontally moving targets, and teach the estimation of lead and preemption that clay disciplines exist to develop.

The limit, stated plainly. Shotguns are one element of a layered counter-drone defence and no serious commentator suggests otherwise. The narrow point is that the underlying human skill — acquiring and leading a fast, erratically moving aerial target — is acquired over years in the sporting disciplines, and Australia has no other setting in which it is acquired at scale.

SECTION 04

The facts

- **The State legislation.** Following the Bondi Beach attack of 14 December 2025, New South Wales enacted the Terrorism and Other Legislation Amendment Act 2025 (NSW): numerical limits on ownership (four per licence holder generally, ten for primary producers), reclassification of certain firearms, tighter eligibility, and licence terms reduced from five years to two.
- **Scale.** Approximately 274,000 registered firearms — around 24 per cent of the State's registered total — held by approximately 50,000 licence holders.
- **Phase 1, from 2 November 2026.** Administered by NSW Police, expected to run initially for twelve months, compensated by fixed price schedule: \$1,000 for revolvers and centrefire rifles, \$850 for semi-automatic handguns and double-barrel shotguns, \$650 for single-barrel shotguns, \$600 for rimfire rifles, \$450 for air rifles, with a flat fee for ammunition.
- **Phase 2, from early 2027.** A pathway to compensation, for a fee, for eligible firearms with an indicative market value above \$3,000 — capped at \$10,000 per firearm.
- **The Commonwealth's role.** Compensation cost shared 50:50; 50 per cent of administration costs; destruction of surrendered firearms fully funded. The Scheme is stated to be informed by Recommendations 13 and 14 of the Interim Report of the Royal Commission on Antisemitism and Social Cohesion.
- **Other jurisdictions.** New South Wales is the first and, at the date of this note, only participating State. Queensland and Victoria have declined; the Northern Territory has declined to fund a buyback; South Australia has indicated in-principle support; negotiations continue with Tasmania and the ACT; Western Australia has indicated interest, having completed its own scheme in January 2026. The absence of national uniformity may be relevant to characterisation and to any argument based on the National Firearms Agreement.

SECTION 05

Questions on which advice is sought

1. Does the surrender and destruction of firearms constitute an acquisition of property within s 51(xxxi), or a deprivation only, following *JT International SA v Commonwealth* (2012) 250 CLR 1?
2. If it is an acquisition, does the Commonwealth's co-funding and participation in the design of the Scheme engage s 51(xxxi), notwithstanding that the acquisition is effected by State law — having regard to *P J Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, *Pye v Renshaw* (1951) 84 CLR 58 and *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140?
3. If s 51(xxxi) is engaged, do the fixed price schedule, the \$10,000 cap and the fee charged for access to the Phase 2 valuation pathway, individually or together, fail the requirement of just terms?
4. Independently of s 51(xxxi), does the Commonwealth's expenditure have a valid head of power and sufficient statutory authority, having regard to *Williams v Commonwealth* (No 1) (2012) 248 CLR 156 and (No 2) (2014) 252 CLR 416, and *Pape v Commissioner of Taxation* (2009) 238 CLR 1?

5. If the Commonwealth asserts a national security or defence characterisation, is evidence as to the Scheme's actual operation on defence-relevant civilian capability admissible and material on characterisation, following *Australian Communist Party v Commonwealth* (1951) 83 CLR 1?
6. Who would have standing, what relief would be appropriate, and what is the practical limitation created by destruction of the subject property?

SECTION 06

Ground One — s 96 and ICM Agriculture

STRONGEST — and it does not depend on any policy argument. New South Wales is not bound by s 51(xxxi). *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 confirms that a State may acquire property and cap compensation below value without constitutional restraint, and the Court there declined to find a deeper rule-of-law limitation. The Land Acquisition (Just Terms Compensation) Act 1991 (NSW) is an ordinary statute directed to land and does not assist. The Commonwealth, however, is bound. The question is whether its funding of a State acquisition imports the condition.

- **Magennis** invalidated a Commonwealth–NSW agreement under which NSW was to acquire land otherwise than on just terms.
- **Pye v Renshaw** upheld the same substance re-effected by an unconditional s 96 grant, the Commonwealth having removed the acquisition condition from the arrangement.
- **ICM Agriculture** materially narrowed Pye: a majority indicated that s 96 cannot be used to require a State to acquire property otherwise than on just terms, and doubted that s 61 could support an intergovernmental agreement making unjust acquisition a condition of Commonwealth financial support.
- **Spencer v Commonwealth (2010) 241 CLR 118** confirms such an argument is at least arguable enough to survive summary dismissal, the High Court having set aside summary judgment against a plaintiff advancing a comparable contention on NSW native vegetation legislation.

The determinative question is factual, not doctrinal: how far did the Commonwealth direct the design of the NSW Scheme, and in particular the price schedule, the \$3,000 threshold and the \$10,000 cap? If those parameters were imposed or required as conditions of Commonwealth funding, ICM is squarely engaged. If New South Wales set them independently and the Commonwealth merely reimbursed half the cost, *Pye v Renshaw* is likely to survive and the ground fails.

Recommended first step. Obtain the underlying documents — the National Cabinet materials, the Commonwealth–NSW funding agreement and associated correspondence. Available routes are freedom of information, a Senate order for production of documents, and discovery in any commenced proceeding. This is the single most useful preparatory step and it is comparatively inexpensive.

SECTION 07

Ground Two — just terms, if engaged

CONTINGENT — reached only if Ground One succeeds. The measure is that stated in *Spencer v Commonwealth* (1907) 5 CLR 418: the price a willing but not anxious purchaser would

pay a willing but not anxious vendor, assessed on the individual asset. *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495 requires fair dealing between the nation and the individual — a standard deliberately distinct from the “just compensation” of the Fifth Amendment, which does not invariably require full market value, but does require terms bearing an ascertainable relationship to what is taken.

What s 51(xxxi) is, in plainer terms. It is Australia’s counterpart to the takings clause of the Fifth Amendment to the United States Constitution — the same constitutional idea, that the state may take private property from a citizen but may not take it for nothing. Here it carries more weight than the comparison suggests, because Australia has no bill of rights: s 51(xxxi) is one of very few express constitutional guarantees an individual can raise against the Commonwealth, and the High Court has long treated it as a guarantee rather than a mere limit on power.

But the wording is deliberately different. The framers wrote “just terms”, not the Fifth Amendment’s “just compensation”, and the difference is not cosmetic. It cuts both ways: “just terms” does not guarantee full market value, so an American takings authority cannot simply be transplanted — but neither is it confined to an accounting exercise, and it looks to the fairness of the whole dealing between the nation and the individual. That is the standard the three features below have to meet.

Three features are vulnerable.

- **(a) The fixed schedule.** For most firearms affected a flat rate will approximate value adequately, and standardised scales are not in themselves objectionable — the 1996–97 national scheme used one and was not successfully challenged. The difficulty is at the margins: \$1,000 for any centrefire rifle takes no account of provenance, condition, calibre, competition specification, custom work or scarcity. Applied to a purpose-built target rifle or a graded competition shotgun, the schedule ceases to be a valuation at all.
- **(b) The \$10,000 cap.** A cap does not approximate value; it truncates it. Its operation is systematically one-directional, falling only on owners whose property is worth most, and the shortfall grows as the value grows. It is difficult to identify a principle by which the fairness of compensation improves as the deficiency widens.
- **(c) The Phase 2 fee.** A person required to surrender property should not be required to purchase access to a proper assessment of its worth. Any such fee is in substance a deduction from compensation and falls to be brought to account against it. This is the narrowest of the three points and, for that reason, possibly the most winnable.

Also relevant: the Scheme is described as a “buyback”, implying a voluntary sale. Continued possession having been rendered unlawful, the owner’s alternatives are surrender for the scheduled sum or surrender for nothing. The Court looks to substance — *Minister of State for the Army v Dalziel* (1944) 68 CLR 261.

SECTION 08

Ground Three — characterisation, and the defence-capability material

DO NOT LEAD WITH, and do not advance as free-standing. Courts do not review whether Parliament correctly weighed a policy’s costs and benefits. A submission that the Scheme is unwise, or that it degrades a national asset, is a submission for a parliamentary committee. The

material has legal utility in one configuration only: as rebuttal on characterisation, if the Commonwealth defends its expenditure by reference to national security or defence.

The Commonwealth's participation requires a head of power and, after *Williams (No 1)* and *(No 2)*, specific statutory authority; a bare appropriation or intergovernmental agreement will not suffice. The nationhood aspect of s 61 was confined in *Pape* to matters peculiarly adapted to the government of a nation and not otherwise able to be carried on for the nation's benefit — a description sitting awkwardly with firearms regulation, a subject the States have administered since Federation and which four of them are presently declining to administer this way. Should the Commonwealth reach for s 51(vi), *Australian Communist Party v Commonwealth* becomes directly relevant: the power is purposive, its engagement is determined by the Court on the facts, and Parliament cannot establish the factual predicate by recital.

At that point the material at Sections 02 and 03 would go to whether the law is capable of being seen as conducive to the asserted end, in particular:

- the abandonment of the ten-year warning time assumption in the 2020 Update and its reaffirmation in stronger terms in the 2023 Review — both being the Commonwealth's own documents, which is what gives the point its force;
- the demonstrated contemporary military relevance of clay target and moving-target disciplines in counter-UAS engagement, and the fact that such proficiency is developed over years rather than weeks;
- the absence of any alternative Australian setting in which that proficiency is developed at scale, there being no conscription and no standing mass marksmanship training capacity;
- the absence of any announced expansion of the standing force or of reserve training capacity to offset the reduction.

Frank assessment. This material is not proof that the Scheme damages national security; that is a contested judgement. It is evidence going to whether a law with this operation is capable of being seen as conducive to defence — a lower and different question, and the only one a court will entertain. The Commonwealth will almost certainly characterise the Scheme as public safety and counter-terrorism regulation rather than defence, in which case the ground does not arise. It should be preserved against the possibility that the Commonwealth's own pleadings open it, and not relied upon otherwise.

SECTION 09

The principal obstacle — acquisition, not deprivation

Section 51(xxxi) is engaged only where there is an acquisition: someone must obtain an identifiable and measurable proprietary benefit or interest. Mere deprivation, extinguishment or regulation, however severe the economic consequence, does not suffice — *Commonwealth v Tasmania* (1983) 158 CLR 1; *JT International*.

JT International is the difficulty. The tobacco companies were deprived of the entire value of their registered marks and recovered nothing, because the Commonwealth obtained no proprietary interest. Firearms surrendered and destroyed present the same shape: no person ends up holding a usable firearm, and the destruction is the object of the exercise.

The available answer, which should be assessed rather than assumed: Dalziel establishes that acquisition does not require the taking of full beneficial ownership, and the State does take title to the surrendered firearm, does assume the rights of an owner, and does exercise the most complete of those rights in destroying it. Whether that constitutes an identifiable proprietary benefit within the JT International formulation is genuinely open — but it is the point on which any challenge is most likely to fail, and it should be addressed first in any opinion. An advocate who presents this argument without confronting JT International at the outset will lose credibility immediately.

SECTION 10

Practical requirements for a challenge

- **Plaintiff selection.** A plaintiff holding a small number of high-value, individually documented firearms with a large and demonstrable shortfall against the schedule — for example a competition or collector's firearm independently valued well above the \$10,000 cap. A plaintiff holding several ordinary firearms marginally over the numerical limit does not present the question compellingly. One well-chosen plaintiff is worth considerably more than a large body of affected owners.
- **Timing.** Phase 1 opens 2 November 2026. Proceedings seeking declaratory relief should be commenced while the subject property still exists. Once firearms are surrendered and destroyed the claim degrades from a challenge to validity into a claim for money, and the forensic force of the case is substantially reduced.
- **Evidence.** Independent valuation of the plaintiff's firearms; the Commonwealth–NSW funding agreement and design correspondence; the National Cabinet materials.
- **Cost.** Original jurisdiction constitutional proceedings of this character are properly budgeted in the hundreds of thousands of dollars, and costs follow the event. No organisation should commence without a written opinion from senior counsel and a funding commitment sufficient to see the matter through.

SECTION 11

The more probable and more useful outcome

Invalidation of the Scheme is unlikely. Amendment of it is not.

Each of the three features identified at Section 07 — the flat schedule at the top of the range, the cap, and the fee — is a defensible target for submissions to a parliamentary committee or Senate inquiry, where the evidentiary material at Sections 02 and 03 can be advanced in full without any justiciability barrier, and where the relief sought is modest: an individual valuation pathway, without fee, without ceiling, for firearms the schedule materially undervalues.

That is a change governments make. It is comparatively inexpensive, it addresses the sharpest grievance, and it does not require anyone to succeed in the High Court. A challenge and a submission are not alternatives: preparatory work on Ground One — obtaining the funding documents — strengthens both, and should proceed regardless of whether litigation is ultimately pursued.

SECTION 12

Sources

STRATEGIC

1. **Defence Strategic Update 2020 (Cth)** — abandonment of the ten-year strategic warning time assumption.
2. **National Defence: Defence Strategic Review 2023 (Cth)**, Smith and Houston — “we cannot rely on geography or warning time”; ADF assessed as not fully fit for purpose. [wa.gov.au/system/files/2023-11/defence_strategic_review.pdf](https://www.wa.gov.au/system/files/2023-11/defence_strategic_review.pdf)
3. **ASPI, The Strategist**, “What the defence strategic review got right — and got wrong” (May 2023) — contingency force and surge capacity; mobilisation as a gap. aspistrategist.org.au
4. **ASPI, The Strategist**, “War-warning assessment in Australia’s ‘most dangerous times’” (August 2026). aspistrategist.org.au
5. **CSIS**, “Unpacking Australia’s 2023 Defence Strategic Review” (September 2023). [csis.org](https://www.csis.org)

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6. **Soldier of Fortune**, “Shotguns vs. Drones: A Clay Shooter’s Guide to Defeating Enemy Swarms” (October 2025) — interview with Marco Angelelli, Italian Federation of Clay Shooting. sofmag.com
7. **EurAsian Times**, “Ukraine’s Anti-Drone Arsenal Evolves; Shotguns Complement EW & AD Missiles” (October 2025) — 413th Separate Raid Battalion training program; layered defence caveat. eurasianimes.com
8. **Defense Tech for Ukraine**, “Ukraine’s Shotgun Doctrine: A Blueprint for the FPV Battlefield” (June 2026) — training progression from clay pigeons to live drone scenarios. defensetechforukraine.org

THE SCHEME

9. **Department of Home Affairs**, National Gun Buyback Scheme. homeaffairs.gov.au
10. **NSW Government**, National Gun Buyback Scheme — NSW. nsw.gov.au/legal-and-justice/gun-buyback
11. **Prime Minister of Australia**, “NSW first to get national gun buyback underway” (August 2026). pm.gov.au

Source caution. The counter-UAS sources are trade and specialist press rather than primary military doctrine. They are adequate to establish that the practice exists and is institutionalised, but a party intending to rely on this material evidentially should seek primary sources or expert evidence.

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