Constitutional Protection Against Uncompensated Expropriations of Property

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SUMMARY

Section 51(xxxi) of the Constitution guarantees "just terms" for "the acquisition of property". The recent High Court decisions in Newcrest Mining (WA) Ltd v Commonwealth and Commonwealth v WMC Resources Ltd have lit, but not illuminated, the extent of the power, particularly as it applies to Commonwealth laws extinguishing mining and exploration rights. It is trite that the power only applies to laws which have an independent character as laws "with respect to" acquisition, but the language of characterisation is of open and uncertain texture. It remains uncertain what may constitute an acquisition for the purposes of the power. And there is a confirmed lack of clarity in the application of s 51(xxxi) to laws extinguishing purely statutory rights. The divided majorities in these two cases expose the lack of defined principle in explanations for the scope of the power and identification of acquisitions which fall outside it.

Newcrest also exposes the movement of the court to overturn the established view that s 122 (the Territories power) is not subject to the acquisitions power. Certainly three of the seven justices were of the contrary view in Newcrest, with a fourth justice almost indistinguishably of the same opinion.

INTRODUCTION

Mining and petroleum exploration have figured in the two most recent decisions of the High Court of Australia concerning the constitutional protection against expropriations of property. *Newcrest Mining (WA) Ltd v Commonwealth*[1] concerned the effective extinguishment of mining tenements in the area of Coronation Hill, in

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1 (1997) 71 ALJR 1346.

the Northern Territory, by virtue of the proclamation of Stage 3 of Kakadu National Park and the consequent prohibition of mining in the area. *Commonwealth v WMC Resources Ltd*[2] concerned the extinguishment of offshore petroleum exploration licences resulting from the enactment of legislation implementing the Timor Gap Treaty between Australia and Indonesia.

We discuss these two decisions in the context of current High Court jurisprudence on s 51(xxxi) of the Constitution. The contours of that jurisprudence are not level. Although our discussion is at a general level, the recent cases serve to emphasise its relevance to resource industries. As the ultimate constraints on acquisition of property by other levels of government in Australia are political and economic (in the case of the States) or found in Commonwealth legislation (in the case, for the moment at least, of self-governing Territories),[3] we confine our attention in this paper to acquisitions effected by or under laws of the Commonwealth.

Section 51(xxxi) of the Constitution is located with the Commonwealth Parliament's main heads of legislative power and provides that the Parliament may make laws "with respect to": "The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws."

Although it is framed as a head of power, s 51(xxxi) has long been recognised more as a limitation on power, ensuring that acquisitions take place on "just terms". It has that operation by means of a rule of construction: when a power to do something is conferred subject to a limitation, other powers are not construed as allowing that thing to be done without the limitation.[4] In its operation as a guarantee, s 51(xxxi) does not itself confer any right to compensation. Rather, it invalidates a Commonwealth law which acquires property contrary to its requirement of just terms.

Section 51(xxxi) is only engaged when an "acquisition of property" takes place. It is therefore necessary to consider the concepts of "property" and "acquisition". In this context, special questions are raised by rights which derive their existence from Commonwealth statutes (as do most rights offshore). The next issue requiring consideration is whether a particular acquisition comes within s 51(xxxi) or not, an issue which depends on presently uncertain interactions between s 51(xxxi) and other heads of power (especially s 22). This paper also makes a brief overview of the concept of "just terms".

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2 (1998) 72 ALJR 280.

3 *Australian Capital Territory (Self-Government) Act* 1988 (Cth), s 23(1)(a); *Norfolk Island Act* 1979 (Cth), s 19(2)(a); *Northern Territory (Self-Government) Act* 1978 (Cth), s 50(2). Commonwealth legislation will also constrain acquisitions by the States if the rights in question are derived from or protected by such legislation, since in such a case any State legislation would be inoperative by reason of s 109 of the Constitution.

4 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371-372 per Dixon J.

PROPERTY

The protection afforded by s 51(xxxi) is not limited to "property" as traditionally understood or defined in legal texts. In keeping with the status of s 51(xxxi) as a constitutional guarantee,[5] the concept of property is construed very broadly. "Property" in this context has been described as extending to "anomalous and innominate interests"[6] and to "every species of valuable right and interest",[7] in dicta which are often cited in recent decisions. [8] Thus, copyright,[9] a contractual right amounting to a chose in action,[10] a statutory right to the payment of Medicare benefits,[11] a vested cause of action in tort[12] and mining leases[13] have in recent times been held to constitute "property" for the purposes of s 51(xxxi). An exploration permit under the *Petroleum (Submerged Lands) Act* 1967 (PSL Act)[14] and fishing rights allocated under Commonwealth fisheries legislation[15] have been treated as amounting to "property" following express or implied concessions to that effect, and broadcasting licences have been assumed to be "property".[16] There is also some support, albeit obiter, for regarding common law native title as "property".[17]

The concept of property has limits. The definition adopted by Mason J in *R v Toohey; Ex parte Meneling Station Pty Ltd*,[18] in a context

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5 *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 201-202 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; *Mutual Pools and Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 184 per Deane and Gaudron JJ; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303 per Mason CJ, Deane and Gaudron JJ.

6 *Bank of New South Wales v Commonwealth* (*Bank Nationalisation Case*) (1948) 76 CLR 1 at 349 per Dixon J.

7 *Minister for the Army v Dalziel* (1944) 68 CLR 261 at 290 per Starke J.

8 For example *Australian Tape Manufacturers Association Ltd v Commonwealth* (*Blank Tapes* case) (1993) 176 CLR 485 at 509 per Mason, Brennan, Deane and Gaudron JJ, at 528 per Dawson and Toohey JJ; *Mutual Pools* (1994) 179 CLR 155 at 172 per Mason CJ, at 184 per Deane and Gaudron JJ; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 71 ALJR 1346 at 1375 per McHugh J; *Minister for Primary Industries and Energy v Davey* (1993) 47 FCR 151 at 159 per Black CJ and Gummow J.

9 *Blank Tapes* case (1993) 176 CLR 485 at 527-528 per Dawson and Toohey JJ.

10 *Mutual Pools* (1994) 179 CLR 155 at 173 per Mason CJ, at 176 per Brennan J, at 194 per Dawson and Toohey JJ, at 222 per McHugh J.

11 *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 235 per Mason CJ, Deane and Gaudron JJ, at 249 per Dawson J, at 256 per Toohey J, at 263, 265 per McHugh J.

12 *Georgiadis* (1994) 179 CLR 297 at 303-304 per Mason CJ, Deane and Gaudron JJ, at 311-312 per Brennan J, at 318-320 per Toohey J; also *Victoria v Commonwealth* (*Industrial Relations Act* case) (1996) 187 CLR 416 at 559 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

13 *Newcrest* (1997) 71 ALJR 1346 at 1375 per McHugh J, at 1404 per Gummow J (Toohey and Gaudron JJ agreeing), at 1412 per Kirby J.

14 *WMC* (1998) 72 ALJR 280.

15 *Minister for Primary Industries and Energy v Davey* (1993) 47 FCR 151; *Bienke v Minister for Primary Industries and Energy* (1996) 63 FCR 567.

16 *Australian Capital Television v Commonwealth* (*ACTV*) (1992) 177 CLR 106 at 198 per Dawson J.

17 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 110-112 per Deane and Gaudron JJ.

18 (1982) 158 CLR 327 at 342, quoting *National Provincial Bank v Ainsworth* [1965]

different to s 51(xxxi), has sometimes been cited as a general statement of principle.[19] That definition requires that an interest be "definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability". However, not much of value is excluded. Hence, despite the general rule that such rights are not assignable, a cause of action in tort was held to be property by the majority in *Georgiadis*. Only Brennan J considered the issue at any length, pointing out that the test adopted in *Meneling Station* did not make assignability an essential characteristic of a right of property.[20] Causes of action in tort are regarded as non-assignable for reasons of public policy rather than because they are not "capable in their nature" of assignment. The more recent decision in *Commonwealth v Mewett*[21] extended this analysis even to causes of action which were statute barred and therefore subject to a complete defence unless a discretionary extension of time was obtained. In *Peverill*, Brennan J held that the right to receive Medicare benefits was not property: it was neither assignable, enforceable as a debt (being instead, enforced by public law remedies to secure performance of the statutory duty to pay whatever amount the Act defined as due), susceptible to any form of repetitive or continuing enjoyment or capable of being exchanged for or converted into any kind of property.[22] However, other members of the court clearly regarded the right as proprietary (although they did not need to decide the issue as they rejected the argument that the impugned law effected an acquisition of property on other grounds).

Although it seems unlikely to have been within the framers' contemplation, even money is now regarded as property. Thus, although genuine taxation falls outside s 51(xxxi), the creation of a debt may constitute the acquisition of property,[23] despite the well-recognised distinction between property and value.[24] The majority view that the imposition of a debt should in some circumstances be regarded as an "acquisition of property" is based on a concern that s 51(xxxi) could otherwise be circumvented by imposing a crippling debt on a person instead of directly acquiring his or her property. However, as Dawson and Toohey JJ point out, the imposition of such a debt would probably be supportable only as an exercise of the taxation power, and if directed at an individual would be arbitrary and therefore beyond power.[25]

AC 1175 at 1247-1248 per Lord Wilberforce.

19 *Blank Tapes* case (1993) 176 CLR 485 at 528 per Dawson and Toohey JJ; *ACTV* (1992) 177 CLR 106 at 165 per Brennan J (McHugh J agreeing).

20 *Georgiadis* (1994) 179 CLR 297 at 311-312 per Brennan J.

21 (1997) 71 ALJR 1102.

22 (1994) 179 CLR 226 at 242-245.

23 *Blank Tapes* (1993) 176 CLR 485 at 509-511 per Mason CJ, Brennan, Deane and Gaudron JJ; *Mutual Pools* (1994) 179 CLR 155 at 220-221 per McHugh J.

24 *Blank Tapes* (1993) 176 CLR 485 at 527 per Dawson and Toohey JJ (McHugh J agreeing); *Mutual Pools* (1994) 179 CLR 155 at 201-202 per Dawson and Toohey JJ.

25 *Mutual Pools* (1994) 179 CLR 155 at 202.

ACQUISITION

Acquisition and deprivation

In contrast to the United States Constitution's Fifth Amendment, s 51(xxxi) refers to "acquisition" rather than "taking". As recently as the *Blank Tapes* case, s 51(xxxi) was regarded as operating, according to its terms, only when somebody acquired *property* by reason of the legislation in question.[26] Thus a law which merely extinguished a proprietary right or had a detrimental effect on its enjoyment or value did not engage s 51(xxxi).[27] "Property" was broadly construed as discussed above but the "acquisition of property" nevertheless involved somebody obtaining property as well as somebody losing it. In *Blank Tapes* itself, the rights of holders of copyright in sound recordings were diminished by a provision to the effect that some copying of recordings would not constitute a breach of copyright; however, nobody thereby acquired anything of a proprietary nature.

The distinction between "acquisition" and mere deprivation is still acknowledged. However, in conformity with the modern emphasis on form rather than substance, the High Court has, in *Mutual Pools* and cases following it, extended the concept of "acquisition of property" to include situations where the extinguishment of one person's property interest confers an "identifiable and measurable countervailing benefit or advantage" on another person.[28] Dawson and Toohey JJ resisted this development, holding to the traditional view[29] but they have more recently accepted at least the authority (if not also the correctness) of the broader concept of "acquisition".[30]

"Countervailing benefit or advantage" and the termination of rights of access to resources

The clearest case of a "benefit or advantage" resulting in the application of s 51(xxxi) is where the Commonwealth extinguishes a chose in action (particularly one against itself) so that the person against whom the right was enforceable gains a release from the corresponding obligation. In that situation, the benefit derived is the direct "correlative" of the right extinguished.[31] That was the position in

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26 (1993) 176 CLR 480 at 499-500 per Mason CJ, Brennan, Deane and Gaudron JJ, 527-528 per Dawson and Toohey JJ (McHugh J agreeing).

27 *Commonwealth v Tasmania* (*Tasmanian Dams Case*) (1983) 158 CLR 1 at 145-146 per Mason J, at 181 per Murphy J, at 247-248 per Brennan J, at 283 per Deane J; *Waterhouse v Minister for the Arts and Territories* (1993) 43 FCR 175.

28 *Mutual Pools* (1994) 179 CLR 155 at 185 per Deane and Gaudron JJ. To similar effect see at 173 per Mason CJ, at 176 per Brennan J, at 222-223 per McHugh J.

29 *Mutual Pools* (1994) 179 CLR 155 at 204; *Peverill* (1994) 179 CLR 226 at 251, 256; *Georgiadis* (1994) 179 CLR 297 at 315, 321.

30 *Commonwealth v Mewett* (1997) 71 ALJR 1102 at 1111, 1116.

31 Compare *Georgiadis* (1994) 179 CLR 297 at 311 per Brennan J.

Mutual Pools, *Peverill* and *Georgiadis*, although it was noted in the last of these cases that what is received need not correspond precisely with what was taken.[32]

In *Newcrest* none of the interests under the mining tenements were formally acquired. However, the practical extinguishment of the tenements meant that the Director of National Parks and Wildlife acquired the land in Kakadu Stage 3 free of the burden of the mining tenements, and that the Commonwealth was left with undisturbed ownership of the minerals in and under that land. These enhancements to the rights of the Director and the Commonwealth were readily identified as an "acquisition of property".[33] Had the extinguishment been effected expressly this conclusion would clearly have followed even on the literal interpretation given to the phrase prior to *Mutual Pools*, since it was possible to point to proprietary rights in land that had been expanded as a direct consequence. The concept of a "countervailing benefit or advantage" was probably necessary, however, because the extinguishment itself was a matter of substance rather than form (mining operations were prohibited, rather than the tenements being extinguished in terms). Thus the release of the Director's and the Commonwealth's interests from the burden of the tenements occurred in practice rather than as a matter of formal legal interests

The special circumstances in *WMC* made the question whether an "acquisition" had occurred a difficult one. The respondent had obtained exploration permits under the PSL Act in respect of a number of blocks in the area which became Area A of the Zone of Co-operation under the Timor Gap Treaty. Following the making of the Treaty (by which Australia and Indonesia agreed to a joint management regime for the Zone of Co-operation to take account of the fact that both nations maintained claims to sovereign rights in respect thereof), the PSL Act was amended so as to excise Area A from the "adjacent areas" in respect of which it operated. The result of the amendments was to deprive the respondent of the rights of an exploration permit holder under Australian law in respect of those blocks. At first instance the respondent succeeded with an argument that the extinguishment of the permits had removed a burden on the sovereign rights of the Commonwealth in respect of the relevant areas of sea bed (so as, for example, to allow new rights to be granted in respect of that area) and that although such rights are not proprietary, this constituted a benefit or advantage which could convert the extinguishment into an "acquisition".[34] In the Full Court of the Federal Court, Black CJ took a similar view, noting also that the

32 (1994) 179 CLR 297 at 305 per Mason CJ, Deane and Gaudron JJ.
33 (1997) 71 ALJR 1346 at 1351 per Brennan CJ, at 1410 per Gummow J (Toohey and Gaudron JJ agreeing), at 1413 per Kirby J (McHugh J contra at 1375).
34 (1994) 60 FCR 305 at 341-342 per Ryan J.

extinguishment freed the Commonwealth of obligations to grant petroleum licences on the fulfilment of certain conditions.[35]

In the High Court, Brennan CJ examined the source of rights in offshore areas, holding that the Commonwealth's power to grant such interests was not based on any prior property rights vested in the Crown[36] (in contrast to areas of land where the Crown's "radical title" is the logical postulate of the doctrine of tenure).[37] The grant of rights such as an exploration permit therefore created no reciprocal liability in the Commonwealth, with the result that the extinguishment of a permit does not enhance the Commonwealth's rights in any way that amounts to an "acquisition of property".[38] Gaudron J also held that there was no estate or interest capable of being enhanced by the extinguishment of the permit,[39] although her conclusion that there was no "acquisition" appeared to rest primarily on the statutory nature of the permit (which is considered below), as did the reasoning of McHugh and Gummow JJ. Toohey J held that an "acquisition" had occurred on the basis that the sovereign right to explore resources "was revested in the Commonwealth".[40] Kirby J also saw the rights under the permit as an "encumbrance" on the sovereign rights, the removal of which enhanced the Commonwealth's rights. However, the "benefit or advantage" which he identified as flowing to the Commonwealth was not so much the expansion of its legal rights in the sea bed but the enhancement of its ability to achieve its foreign policy objectives (by concluding and implementing the Treaty) and to secure the taxation benefits for which the Treaty provided.[41]

The decision in *WMC* confirms a position of some uncertainty as to what kind of "benefit or advantage" is necessary to raise an extinguishment of proprietary rights to the status of "acquisition".

Kirby J appears to be alone in holding that the enhanced ability of the Commonwealth to achieve its policy objectives is relevant.[42] Earlier, in the *Tasmanian Dams* case, Deane J had cited the Commonwealth's fulfilment of its treaty obligations as a benefit accruing to it from the sterilisation of an area of land which elevated that sterilisation into an "acquisition". However, his Honour's conclusion appeared to rest on the consideration that the restrictions

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[35] (1996) 67 FCR 153 at 167. Beaumont J reached the same conclusion (at 188) without identifying the precise benefit acquired. Cooper J disagreed (at 208-209).

[36] (1998) 72 ALJR 280 at 287-288.

[37] Mabo (No 2) (1992) 175 CLR 1 at 48 per Brennan J.

[38] (1998) 72 ALJR 280 at 288.

[39] Ibid at 298.

[40] Ibid at 294.

[41] Ibid at 333.

[42] Although Gummow J at 319 suggests (obiter) that the Commonwealth was "advantaged" by its treaty obligations becoming more likely of fulfilment, Gaudron J expressly rejected the argument that enhanced capacity to implement treaty obligations was a relevant benefit: at 298.

on use of the land were analogous to a restrictive covenant (which is a valuable proprietary right) and were so complete as to amount to the Commonwealth "dedicating the property of others to its purposes".[43] The other members of the court who considered the issue held that there was no "acquisition".[44]

The approach of Brennan CJ, although expressed only in relation to statutory rights, suggests that his Honour might restrict the principle to situations where the extinguishment of a right results in a release from a corresponding obligation.[45] Toohey J, while agreeing with Kirby J in the result, also expressed the principle in quite narrow terms, remarking that "acquisition involves obtaining 'some identifiable benefit or advantage relating to the use of property' ".[46] Gummow J also suggested a narrow approach, citing the *Blank Tapes* case without criticism and suggesting that for s 51(xxxi) to apply, it would be necessary to identify an acquisition of "something proprietary in nature".[47]

The correct approach would seem to be to regard a consequential "benefit or advantage" as amounting to "acquisition" only when the benefit constitutes an enhancement of identified legal rights in some way that mirrors the relevant deprivation. In such circumstances, what occurs is in substance an acquisition of property rather than a mere adverse effect on property rights. If more diffuse or disconnected benefits were taken into account, the doctrine would go beyond preferring substance over form and the constitutional language would be effectively abandoned. If the achievement of general Commonwealth objectives constituted a relevant "benefit or advantage", there would be no reason in principle why every Commonwealth law which reduced the scope of a person's rights did not thereby effect an "acquisition" (since every Commonwealth law is ex hypothesi directed at the achievement of Commonwealth objectives).

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43 (1983) 158 CLR 1 at 286-287.

44 Ibid at 145-146 per Mason J, at 181-182 per Murphy J, at 247-248 per Brennan J.

45 (1998) 72 ALJR 280 at 286.

46 Ibid at 294. The quotation is from *Mutual Pools* (1994) 179 CLR 155 at 185 per Deane and Gaudron JJ. Their Honours continued: "On the other hand, it is possible to envisage circumstances in which an extinguishment, modification or deprivation of the property rights of one person would involve an acquisition of property by another by reason of some identifiable and measurable countervailing benefit or advantage accruing to that other person as a result." With respect, the result is a lack of clarity as to whether or not their Honours had in mind only benefits "relating to the ownership or use of property".

47 (1998) 72 ALJR 280 at 318. The holding in *Blank Tapes* referred to above probably remains correct, on the basis that the "benefit" conferred by the diminution of copyright holders' rights was merely a new freedom conferred on members of the community generally rather than a release from any existing corresponding liability (contrast the position if the legislation had extinguished copyright holders' rights to compensation in respect of prior breaches).

WITHDRAWAL OF STATUTORY RIGHTS

Special issues arise where the right whose extinguishment or modification is said to constitute "acquisition of property" is a right which owes its existence to a Commonwealth statute. Such a right may be inherently susceptible to modification or extinguishment by a later statute. Where that modification or extinguishment occurs, it is in no way inconsistent with the terms of the right and logically there is no "acquisition of property". The provision which effects the modification or extinguishment is "not a dealing with the property; it is the exercise of powers inherent at the time of its creation and integral to the property itself".[48]

Inherent defeasibility - the narrow basis

This is clear enough where the provisions under which the right is conferred make it clear that the right is subject to later modification. An example arose in *Minister for Primary Industries and Energy v Davey*, where an amendment to a Plan of Management under the *Fisheries Act* 1952 extinguished a proportion of the "units" available for allocation to boats which were used in the relevant fishery. The allocation of sufficient units to a boat was necessary for the lawful use of that boat. The units were creatures of the Plan and their allocation was expressed to be subject to the Plan as amended from time to time. The Full Court of the Federal Court held that the extinguishment of units did not constitute an acquisition of property, as the units were inherently defeasible and the amendment of the Plan was a contingency to which the units were always subject.[49]

Similar reasoning is available wherever Commonwealth legislation creating a right provides that the right has effect subject to the legislation as it exists from time to time. If a right is conferred in those terms, changes to the legislation are not inconsistent with the terms of the right and do not effect an "acquisition" of it.[50] Ordinarily, also, a bare reference to "this Act" should be construed as a reference to the Act as it stands from time to time,[51] so that a right conferred "subject to this Act" will generally be inherently defeasible by amendments to the relevant Act.

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48 *Davey* (1993) 47 FCR 151 at 165 per Black CJ and Gummow J.

49 Ibid at 163-165 per Black CJ and Gummow J.

50 The defeasibility of a statutory right may be spelled out with great particularity: eg *Fisheries Management Act* 1991 (Cth), s 22(3)-(5).

51 *Ocean Road Motel Pty Ltd v Pacific Acceptance Corporation Ltd* (1963) 109 CLR 276 at 280 per Taylor J; *WMC* (1998) 72 ALJR 280 at 320 per Gummow J. Note also s 15 of the *Acts Interpretation Act* 1901 (Cth), referred to by Gummow J, which on one view has the effect that a reference to "this Act" includes all amending Acts.

Inherent defeasibility – the broad basis

A more controversial proposition is that *any* right which owes its existence wholly to Commonwealth legislation is, ipso facto, subject to modification by later legislation. That proposition has considerable logical force. As the Commonwealth Parliament is incapable of binding its successors, it may be suggested that every legislative scheme erected by the Parliament is necessarily liable to be amended. It should follow that every right created by the Parliament has built into it a susceptibility to modification or extinguishment by later legislation of the Parliament.

Such an approach was embraced by McHugh J in *Georgiadis*. His Honour took the view that, in the light of the Crown's immunity from suit, the plaintiff's cause of action against the Commonwealth would not exist if it were not for provisions of the *Judiciary Act* 1903 (Cth). The *Judiciary Act* was liable to amendment at any time and, therefore, when s 44 of the *Safety Rehabilitation and Compensation Act* 1988 (Cth) (SRC Act) extinguished a cause of action that depended on the *Judiciary Act* provisions, it did not effect any "acquisition of property".[52] In *Georgiadis* Mason CJ, Deane and Gaudron JJ regarded the plaintiff's cause of action as founded in the common law (although it was accepted that because of Crown immunity, statutory provisions were needed to confer a right to proceed)[53] and therefore reached a different result. However, they did remark:

> "The position may be different in a case involving the extinguishment or modification of a right that has no existence apart from statute. That is because, prima facie at least and in the absence of a recognised legal relationship giving rise to some like right, a right which has no existence apart from statute is one that, of its nature, is susceptible of modification or extinguishment. There is no acquisition of property in the modification or extinguishment of a right which has no basis in the general law and which, of its nature, is susceptible to that course."[54]

The same point formed the basis McHugh J's reasoning in *Peverill*. Patients who had obtained services from the respondent became entitled to benefits at rates specified in the relevant Schedule operating under the *Health Insurance Act* 1973. They had assigned their rights to the respondent as consideration for those services. However, there was no contractual relationship between the respondent and the Commonwealth; Peverill's entitlement was no different to those of the patients, namely a statutory right to a gratuitous payment in the nature of a welfare benefit. To McHugh J it was abundantly clear that

52 (1994) 179 CLR 297 at 325-326.
53 Ibid at 306. See also at 312 per Brennan J.
54 Ibid at 305-306.

no acquisition of property inhered in the amendment or repeal of such an entitlement, whether retrospective or prospective.[55] In relation to statutory rights more generally, his Honour said:

> "In my opinion, in the absence of a contract, a right or entitlement to a payment created by federal law may be altered or abolished at any time without infringing the provisions of s 51(xxxi) even though the beneficiary of the entitlement may have acted in reliance on the payment being made. Until the right or entitlement has been transformed into some other form of property recognised and enforceable under the general law, the head of federal power that created the right or entitlement may be exercised so as to alter or revoke that right or entitlement without infringing the guarantee embodied in s 51(xxxi)."[56]

Mason CJ, Deane and Gaudron JJ appeared to take the same view, remarking that the rights in issue were "statutory entitlements to receive payments from consolidated revenue which were not based on antecedent proprietary rights recognised by the general law" and that rights of that kind "as a general rule, are inherently susceptible of variation".[57] However, their Honours also relied on the argument that any acquisition of property was incidental to the adjustment of competing claims under a comprehensive statutory scheme and did not give the law the character of a law with respect to the acquisition of property (a point which is returned to below).

The effect of s 51(xxxi) on the modification of statutory rights received further attention in *WMC*. There, it will be recalled, what was extinguished was an exploration permit under the PSL Act. The permit was not an estate in land forming a burden on any radical title of the Crown. Rather, it was in effect an exclusive exemption from a general prohibition on conducting exploration activities (to which were attached various duties, and rights to the grant of a petroleum licence if certain conditions were fulfilled).

McHugh J maintained his view that rights which owe their existence to Commonwealth law may be modified or extinguished by later Commonwealth laws without engaging s 51(xxxi). He viewed the basic question as whether s 51(xxxi) was properly to be seen as having abstracted the power to modify or extinguish a property right from the head of power which otherwise would have supported that modification or extinguishment. Where a head of Commonwealth legislative power provided the legal basis for the creation of a right, he argued that the same head of power provides the authority to modify or extinguish the right, as an incident of the general capacity under each head of power to amend laws enacted under that power. Section 51(xxxi) thus does not come into play.[58] His Honour therefore held

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[55] (1994) 179 CLR 226 at 260-263.
[56] Ibid at 266.
[57] Ibid at 237. See also at 256 per Toohey J.
[58] (1998) 72 ALJR 280 at 306-307, 309.

that the extinguishment of the exploration permit did not come within s 51(xxxi) even if it did confer an identifiable benefit on the Commonwealth. In *WMC* McHugh J seems to have added another strand to his argument that statutory rights are inherently defeasible. It is now not simply a case of there being, conceptually, no "acquisition". Even if there is an acquisition in some sense, his Honour argues that it is not caught by the general rule of construction which gives s 51(xxxi) its operation as a guarantee.

Other members of the court who considered the issue refused to embrace McHugh J's view. Gummow J proceeded upon analysis of the exploration permit and the terms of the Act under which it was granted to conclude that the permit was inherently subject to variation by amendments to the Act.[59] He regarded the proposition that any right created solely by Commonwealth law was inherently defeasible as "too broad".[60] In support of this view he cited intellectual property rights created under copyright legislation, which are clearly proprietary in character. He cited passages in the *Blank Tapes* case, one of which stands for the proposition that copyright "constitutes property within the scope of s 51(xxxi) of the Constitution".[61] Yet there is no decision holding that the modification of intellectual property rights disturbs those rights in a way that can amount to an "acquisition" within the meaning of s 51(xxxi). The fact that copyright is "property" does not conclude the matter. Indeed, while it is "of the essence" of s 51(xviii) that it involves the making of laws which create and confer intellectual property rights,[62] there seems to be no reason in principle why that power should not also extend to the modification and diminution or even extinguishment of those rights. It may also be significant that copyright in original works is expressed by s 32 of the *Copyright Act* 1968 to subsist "subject to this Act".[63]

Gaudron J cited with approval the passage from the judgment of Mason CJ, Deane J and herself in *Georgiadis* which is set out above. However, her explanation for the conclusion there expressed was that a law modifying purely statutory rights ordinarily does not confer any proprietary interest or benefit on another person and, even if it does, it will ordinarily not be properly characterised as a law with respect to the acquisition of property.[64] Her Honour did not adopt the conceptual framework of McHugh J which views a purely statutory right as inherently defeasible principally because all legislation is necessarily susceptible to amendment or repeal. She held that there could be an "acquisition of property" if a law modified a statutory

59 Ibid at 318-320.
60 Ibid at 317.
61 (1993) 176 CLR 485 at 527 per Dawson and Toohey JJ (cited (1998) 72 ALJR 280 at 318, n 229). With respect, the other passage cited (1993) 176 CLR 485 at 499-500 at best assumes that copyright is property.
62 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160.
63 See also s 8.
64 (1998) 72 ALJR 280 at 297.

right in some way that conferred a corresponding benefit, or if it operated to transfer a statutory right or to extinguish a right and vest an equivalent right in somebody else.[65] Following analysis of the exploration permit, her Honour concluded that the impugned law had "simply modified a statutory right which had no basis in the general law and which was inherently subject to that course and, thus, did not effect an acquisition of property".[66] However, the preceding analysis focused on the lack of any relevant interest or benefit accruing to the Commonwealth rather than establishing the defeasibility of the exploration permit. The precise basis of her Honour's conclusion is therefore somewhat unclear.

The other member of the majority, Brennan CJ, based his decision on the lack of a countervailing benefit rather than the nature of the interest and rejected the broad proposition regarding statutory rights favoured by McHugh J. He held that a Commonwealth law which extinguished a statutory property right of A and thereby released B from a corresponding obligation, or compulsorily transferred a statutory licence held by A to B, would effect an acquisition of property.[67]

Toohey and Kirby JJ, dissenting, clearly rejected any argument that there was no acquisition of property because of the defeasible nature of the permit. Toohey J, like Gummow J, cited the example of intellectual property rights in rejecting the "broad" argument of inherent defeasibility but did not grapple with the argument at the level of principle. He also rejected the "narrow" argument of defeasibility, based on the terms of the Act, apparently regarding it as sufficient that the permit had proprietary characteristics. The express provisions making the permit "subject to this Act" were dismissed as doing little more than stating the obvious[68] – although that argument might be thought to support the broad argument of indefeasibility rather than rebut the narrow argument. Kirby J dismissed the arguments of defeasibility in similarly brief terms. [69]

The court's treatment of statutory rights

Kirby J noted in *WMC* that the mining tenements considered in *Newcrest* were creatures of statute, and suggested that that case therefore stood against any general proposition as to the inherent defeasibility of statutory rights.[70] In *Newcrest* the question whether there had been an "acquisition of property" was of interest only to the four members of the majority (since the minority regarded s 51(xxxi) as inapplicable), although McHugh J expressed the view that the extinguishment of the mining tenements had not resulted in any

[65] Ibid.
[66] Ibid at 299.
[67] Ibid at 286.
[68] Ibid at 293.
[69] Ibid at 335.
[70] Ibid.

corresponding benefit to the Commonwealth.[71] Gummow J (with whom Toohey and Gaudron JJ agreed) remarked that this was "not a case in the category considered in *Health Insurance Commission v Peverill* where what was in issue were rights derived purely from statute and of their very nature inherently susceptible to the variation or extinguishment which had come to pass".[72] It is not certain whether the important point was that the rights were not "derived purely from statute" or that, even if they were, they were not of an inherently defeasible nature. Kirby J held that there had been an acquisition of property[73] but did not expressly consider the defeasibility issue.

The mining tenements in *Newcrest* could arguably be distinguished from the exploration permit in *WMC* on the basis that, whereas the latter was inconceivable apart from the statutory regime (since the Crown had no rights in the sea bed which would have allowed the grant of such an interest apart from statute), the former was a right in land referable to the Crown's radical title and carved out of the plenum dominium which the Crown would otherwise have been entitled to assert. The *Newcrest* mining tenements were thus rights of a nature recognisable by the common law and rights which, although their grant was regulated by statute, could in principle have been granted, transferred and enforced under the general law. However, for a majority of the court it seems unnecessary to draw any such distinction as the majority does not recognise any general principle that purely statutory rights stand apart from rights which have an origin in the general law. Rather, absent a "narrow" basis of defeasibility, the statutory basis of a right may be an indicator that its extinguishment does not engage s 51(xxxi) either for lack of a corresponding benefit or for reasons of characterisation. Distinctions appear to be drawn between:

- statutory rights which are rendered subject to modification by the terms of the statute under which they are granted;
- rights which, while not so expressed, are taken to be subject to modification because they are gratuitous in nature (that is welfare benefits); and
- other statutory rights, the extinguishment of which amounts to "acquisition of property" under the same conditions as non-statutory rights.

These distinctions may be pragmatically justifiable in that they match likely expectations about the status of various statutory rights. Many investors in businesses which base their operations on valuable (and often tradeable) statutory licences or permits granted by the Commonwealth would no doubt be surprised to find that those assets could be resumed by the Commonwealth without payment of compensation. However, these distinctions are not readily located in

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71 (1997) 71 ALJR 1346 at 1375.
72 Ibid at 1410.
73 Ibid at 1413.

constitutional principle. If a statutory right of access to valuable resources is (depending on the terms of its grant) protected by s 51(xxxi), there seems to be no reason, other than received notions of the precedence of some interests over others, why an accrued right to payment of a Medicare benefit should not also be so protected.

The distinctions proposed above also require some qualification in that rights may possibly be inherently subject to modification as a result of implications from the nature of the statutory scheme under which they were granted rather than its express terms. Thus, in *WMC*, Gummow J mentioned the schemes for the regulation of fishing considered in *Davey* and *Bienke* as examples of "flexible statutory schemes", rights under which are inherently subject to change.[74] Possibly the second category of rights mentioned above is merely an example of statutory rights which by virtue of their particular character are taken to be subject to modification, and rights granted under a necessarily changeable regulatory regime are another example. However, that development would open up the possibility of the constitutional status of statutory rights depending on impressionistic characterisations of the statutory schemes under which they were granted.

As a postscript to this section, it should be mentioned that the majority reasoning in *Georgiadis* was applied in *Mewett*,[75] another case concerning s 44 of the SRC Act. *Mewett* and the two cases that were heard with it raised questions as to whether s 44 operated as a complete defence to claims which had become barred under applicable limitation statutes, either before or after the commencement of the SRC Act. Those questions involved complicated issues concerning the application of State limitation statutes to claims against the Commonwealth by the *Judiciary Act*, and the legal character of claims which were statute barred but might be revived by the grant of extensions of time. The court concluded unanimously that such claims remained vested property rights and that the majority's reasoning in *Georgiadis* was directly applicable to them. The Commonwealth challenged the correctness of that reasoning, arguing that McHugh J had correctly characterised causes of action against the Commonwealth as statutory in nature; but the attempt to re-open *Georgiadis* was rejected by the whole court. (Gummow and Kirby JJ (with Brennan CJ and Gaudron J apparently agreeing) went further and held that, by virtue of Ch III of the Constitution, the Crown's common law immunity from suit had never applied in relation to the Commonwealth.)[76]

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[74] (1998) 72 ALJR 280 at 319 (although it will be recalled that the actual decisions in those cases rested on the absence of a corresponding benefit and the express terms of the relevant Plan of Management).

[75] (1997) 71 ALJR 1102.

[76] Ibid at 1135-1139 per Gummow and Kirby JJ; also at 1104 per Brennan CJ, at 1127 per Gaudron J (Dawson J contra at 1109). This is a highly significant conclusion, but one which is outside the scope of this paper

CHARACTERISATION – s 51(xxxi) AND OTHER s 51 POWERS

It has long been recognised that there are some kinds of laws which effect acquisitions of property but nevertheless are not caught by s 51(xxxi). Examples are taxes (if money is regarded as property) including provisional tax, forfeiture of prohibited imports, the condemnation of seized enemy property and the sequestration of bankrupts' property.[77] These are all classes of laws which seem highly unlikely to be beyond power and in respect of which a "just terms" requirement would obviously be incongruous.

The first real attempt to articulate a rationale for these "exceptions" to s 51(xxxi) occurred in *Mutual Pools*. The plaintiff had successfully challenged the validity of sales tax levied by the Commonwealth on swimming pools constructed by it.[78] Prior to that litigation, the Commissioner of Taxation had agreed with the plaintiff to refund the amounts in question should the plaintiff succeed. However, new legislation was enacted which extinguished a taxpayer's right to a refund of the invalid tax except where it was established that the tax had not been "passed on" to the customer or where an amount equivalent to tax passed on had since been refunded to the customer. The plaintiff argued that this legislation contravened the just terms requirement in s 51(xxxi). Five members of the court (Dawson and Toohey JJ dissenting) accepted that the impugned legislation had effected an "acquisition of property" by extinguishing the plaintiff's right to a refund. However, all five also held that the legislation did not come within s 51(xxxi) and was a valid exercise of the taxation power (s 51(ii)).

Deane and Gaudron JJ, in what is perhaps the most comprehensive judgment, took as their starting point the fact that s 51(xxxi) is framed as a grant of power subject to a "confining component". That component operates as a guarantee, limiting other heads of power, indirectly by virtue of a rule of construction.[79] Several points flowed from this. First, the application of the "just terms" requirement was subject to any contrary intention which might be expressed in, or arise by necessary implication from, another head of power. The power to tax is the prime example, since taxation necessarily involves the raising of revenue without any quid pro quo.[80] Secondly, since in its primary operation as a grant of power s 51(xxxi) only extends to acquisitions "on just terms", its guarantee has application only to acquisitions of a

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77 See *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 408 per Gibbs J and cases there cited; *MacCormick v Commissioner of Taxation* (1984) 158 CLR 622. On penalties see also *R v Smithers; Ex parte McMillan* (1982) 152 CLR 477 and *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270.

78 *Mutual Pools and Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450.

79 See text at n 4 above.

80 (1994) 179 CLR 155 at 186-187.

kind which admit of just terms. It therefore has no application to, for example, laws imposing penalties or forfeitures.[81] Thirdly, the abstraction of law-making power from the other heads of Commonwealth power which s 51(xxxi) effects is no greater than the law-making power which s 51(xxxi) itself confers: a law will only be within the reach of the "just terms" requirement if it is within the grant of power in s 51(xxxi). The question whether a law is within that grant of power is to be answered, as for any other head of power in s 51, by a process of characterisation. If the law cannot properly be characterised as a law "with respect to" the acquisition of property for some purpose in respect of which Parliament may make laws, that law cannot be supported by the grant of power in s 51(xxxi) and, accordingly, cannot be within its requirement of "just terms".[82] (Of course, if the law cannot be brought within any other head of power, it will be invalid.)

These different bases upon which laws may fall outside s 51(xxxi) will, as Deane and Gaudron JJ noted, overlap, so that more than one of them might explain any particular example. Their Honours identified, as one category of laws likely to fall outside s 51(xxxi), laws which

> "provide for the creation, modification, extinguishment or transfer of rights and liabilities as an incident of, or a means of enforcing, some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest".

A law in that category is likely to fall outside s 51(xxxi) because

> "even though an 'acquisition of property' may be an incident or a consequence of the operation of such a law, it is unlikely that it will constitute an element or aspect which is capable of imparting to it the character of a law with respect to the subject matter of s 51(xxxi)".[83]

Similar reasoning appears in the judgments of other members of the court. Mason CJ described the various cases in which acquisitions were held not to come within s 51(xxxi) as:

> "cases in which the transfer or vesting of title to property or the creation of a chose in action was subservient and incidental to or consequential upon the principal purpose and effect sought to be achieved by the law so that the provision respecting property had no recognisable independent character. Indeed, the taxation cases apart, they were all cases in which the relevant statute provided a means of resolving or adjusting competing claims, obligations or property rights of individuals as an incident of the regulation of their relationship .... In a context in which the law resolves or adjusts competing claims, obligations or property rights, it is not possible to regard the law as a law for the acquisition of property

[81] Ibid at 187.
[82] Ibid at 188-189.
[83] Ibid at 189-190.

within the meaning of s 51(xxxi)."[84]

Brennan J said:

> "In each of the cases in which laws for the acquisition of property without the provision of just terms have been held valid, such an acquisition has been a necessary or characteristic feature of the means selected to achieve an objective within power, the means selected being appropriate and adapted to that end. Therefore a law which selects and enacts means of achieving a legitimate objective is not necessarily invalid because the means involve an acquisition of property without just terms. What is critical to validity is whether the means selected, involving an acquisition of property without just terms, are appropriate and adapted to the achievement of the objective. The absence of just terms is relevant to that question, but not conclusive."[85]

McHugh J considered that

> "[w]hen the taking of property is an inevitable consequence of the exercise of a power conferred by s 51 or is a reasonably proportional consequence of a breach of a law passed under one of those powers, no acquisition of property within the meaning of s 51(xxxi) takes place".[86]

Later remarks made it clear that his Honour was referring to an "inevitable consequence" of a particular exercise of a s 51 power and not limiting the proposition to powers whose exercise necessarily involves acquisitions of property.[87] However, he held the particular legislation valid on the narrower ground that it was a law with respect to taxation and "[w]hat is validly within s 51(ii) is outside s 51(xxxi), for the two powers are mutually exclusive".[88]

The language of "adjusting competing claims" had first been used in the *Blank Tapes* case[89] and recurs in some later decisions. It is, with respect, not particularly helpful since every legislative provision affecting property is in some sense an attempt by Parliament to resolve competing claims in respect of that property. The line between a law which resolves competing claims, or is involved in some general regulation of conduct, and one which acquires property for the purposes of s 51(xxxi), may be difficult to draw and to describe the process in these terms is apt to leave observers wondering what is the true basis of the decision.

The language of characterisation is also used. While still somewhat imprecise, it is more helpful. It directs attention to whether a law can be said to be directed at the acquisition of property for a purpose within Commonwealth law-making power, or whether acquisitions which it effects are incidental to the pursuit of some other object. That

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[84] Ibid at 171.
[85] Ibid at 179-180.
[86] Ibid at 219.
[87] Ibid at 222.
[88] Ibid at 224.
[89] (1993) 176 CLR 485 at 510 per Mason CJ, Brennan, Deane and Gaudron JJ.

statement conceals complexity, in that an acquisition under s 51(xxxi) will necessarily be effected for a purpose. However, it will generally be possible to sketch a dividing line between a law which effects acquisitions of property as a side-effect of the method chosen by Parliament to achieve its object, or as a sanction for the breach of a rule of conduct, and a law which selects acquisition as the means of achieving its objective.[90]

The language of characterisation also accords with the constitutional placement and function of s 51(xxxi), which is primarily a grant of power and only indirectly a guarantee of just terms. Section 51(xxxi) operates as a guarantee of just terms only because laws that are made under s 51(xxxi) are taken not to be supported by other s 51 powers which are not subject to "just terms" requirements. The just terms requirement is thus imposed only on laws that can be said to be made under s 51(xxxi), and in identifying those laws the principles of characterisation which are applicable to Commonwealth powers generally are clearly relevant.

However the exceptions to s 51(xxxi)'s guarantee are conceptualised, there will be difficult cases. In *Georgiadis,* Mason CJ, Deane and Gaudron JJ recognised that there would inevitably be "borderline" cases and that that case was one of them. They indicated that, had the extinguishment of injured workers' common law claims occurred in the context of a compensation scheme applying to employees and employers generally, they would probably not have characterised the provision as a law with respect to the subject matter of s 51(xxxi). What tipped the balance in favour of giving s 44 that characterisation was that it applied only to causes of action vested in Commonwealth employees.[91]

SECTION 51(xxxi) AND THE TERRITORIES POWER

The main issue in *Newcrest* was whether s 51(xxxi) stands in the same relationship with s 122 of the Constitution as with the other heads of power in s 51. The issue had come before the court in 1969, in

[90] Compare *Lawler* (1994) 179 CLR 270 at 289 per Dawson J, arguing that the imposition of a penalty is not a "purpose in respect of which the Parliament has power to make laws". Section 51(xxxi) requires the acquisition itself, and not the provisions to which the acquisition is incidental, to be for such a purpose. In *Nintendo* (1994) 181 CLR 134 at 165-167 his Honour argues that in this context the use or application to which the acquired property is to be put is crucial.

[91] (1994) 179 CLR 297 at 308. Since s 51(xxxi) is not confined to laws by which the Commonwealth itself acquires property (see eg *Blank Tapes* case (1993) 176 CLR 485 at 510-511), it is not obvious why the fact that the scheme was limited to rights against the Commonwealth should be so significant. In *Smith v Australian National Line Ltd*, in which judgment is pending, the Full Court of the Supreme Court of Western Australia is considering the validity of a provision which has an effect similar to s 44 but which applies generally to seafarers and their employers rather than specifically to Commonwealth employment.

Teori Tau v Commonwealth,[92] in which the court decided, without calling on counsel for the Commonwealth, that the Mining Ordinance of Papua New Guinea which vested minerals in the Crown was not invalid by reason of any acquisition of property other than on just terms. The basis for the decision was that the Ordinance was made under s 122, a grant of power which "is plenary in quality and unlimited and unqualified in point of subject matter" and which, in particular, "is not limited or qualified by s 51(xxxi)". This conclusion followed from the consideration that, while s 51 allocates power as part of a federal distribution of legislative power, s 122 concerned the government of the Territories for which there is no such distribution.[93]

Newcrest

In *Newcrest*, the issue was whether proclamations under the *National Parks and Wildlife Conservation Act* 1975 (the National Parks Act) extending the area of Kakadu National Park, which (as discussed above) were taken to effect an acquisition of mining tenements held by the appellant, were invalid by reason of s 51(xxxi). Brennan CJ, Dawson and McHugh JJ held that the provisions which allowed the proclamations to be made and which prohibited mining in the area of the Park were supported by s 122 and that *Teori Tau* should be followed. They considered it inappropriate to re-open the decision in *Teori Tau*, which was unanimous and followed a clear line of authority on s 122, and they also agreed with the core element of its reasoning that s 122 stood apart from the s 51 heads of power as a plenary power to govern the Territories. [94] Gaudron, Gummow and Kirby JJ would have overruled *Teori Tau*. Toohey J would not have overruled *Teori Tau* as authority for the proposition that s 122 is not qualified by s 51(xxxi), but took the view (adopted as an alternative basis for decision by Gaudron, Gummow and Kirby JJ)[95] that a law which is supported by a head of power in s 51 should, even where it operates only in a Territory, be regarded as made under s 51 rather than s 122 and therefore is subject to the requirements of s 51(xxxi).[96] This line of reasoning is therefore the ratio of the case. It was common ground that the relevant provisions of the National Parks Act were laws with respect to external affairs within s 51(xxix) (being directed at implementing treaty obligations), so that by a 4-3 majority they were held to be subject to s 51(xxxi).

The reasoning in *Newcrest* is concerned more with the nature of the Territories power – a subject on which there is a substantial body of learning[97] – than with s 51(xxxi). Given the present state of flux (and

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92 (1969) 119 CLR 564.
93 Ibid at 570.
94 (1997) 71 ALJR 1346 at 1356, 1357 per Brennan CJ, at 1362-1364, 1365 per Dawson J, at 1376-1381 per McHugh J.
95 Ibid at 1371-1372, 1399, 1426.
96 Ibid at 1368.
97 See Horan, "Section 122 of the Constitution: a 'disparate and non-federal' power?"

constraints of space) it is possible here only to offer some brief comments on the various approaches.

Arguments against the exclusion of s 122 laws from s 51(xxxi)

Textual arguments may be mounted both for and against *Teori Tau*. On the one hand, the paragraphs of s 51 are expressed to be "subject to this Constitution", while s 122 is not;[98] the "just terms" limitation in s 51(xxxi) applies to acquisitions under that paragraph, while s 122 is unlimited as to subject matter and therefore empowers acquisitions in its own right;[99] and the two provisions are quite separate both conceptually and as a matter of textual arrangement.[100] On the other hand, laws made "for the government of" a Territory can be said to be made for a "purpose in respect of which the Parliament has power to make laws",[101] and the principle of construction by which s 51(xxxi) abstracts power from the other paragraphs of s 51 can be made to work in respect of s 122.[102] Those who would have overruled *Teori Tau* were led to that conclusion mainly by the perceived consequences of regarding s 122 as free of the constraints of s 51(xxxi).

Kirby J appeared to be primarily concerned that residents of the Territories should not be denied the benefit of one of the few express guarantees of fundamental rights in the Constitution. He called in aid an "interpretive principle" that, in a case of ambiguity, the Constitution should be interpreted so as not to conflict with the international law of fundamental human rights.[103] His Honour regarded it as compelling that emphasising the non-federal character of s 122 might on one view preclude s 116 from applying to laws made under the Territories power,[104] and thought it

> "unlikely that a fundamental law made by the people of Australia ... would have contemplated the establishment of the Territories as akin to federal fiefdoms, beyond the protection of the relatively few guarantees of rights thought so fundamental to the rest of the people of Australia that they had to be expressly stated in the constitutional text".[105]

This last proposition seems, with respect, by no means self-evident.

Gummow J was also concerned with individual rights. He thought that the Constitution should not be interpreted in such a way that residents of the Northern Territory, which was part of the State of South Australia between 1901 and the surrender of the Territory to

(1997) 25 FL Rev 97.

98 (1997) 71 ALJR 1346 at 1381 per McHugh J.

99 Ibid at 1367 per Dawson J.

100 Ibid at 1353-1354 per Brennan J.

101 Ibid at 1389, 1390-1391 per Gummow J, at 1420-1421 per Kirby J.

102 Ibid at 1422 per Kirby J.

103 Ibid at 1423-1426. This approach was firmly rejected in *Kartinyeri v Commonwealth* (1998) 72 ALJR 722, 745-746 per Gummow and Hayne JJ.

104 (1997) 71 ALJR 1346 at 1422-1423.

105 Ibid at 1421-1422.

the Commonwealth in 1911, lost the protection of s 51(xxxi) by virtue of the surrender.[106] However, his main concern (one also mentioned by Kirby J) appeared to be that s 122 supports laws having an operation outside the Territories and therefore, if not qualified by s 51(xxxi), might allow the uncompensated acquisition of property in a State.[107]

Commonwealth power in the Territories

To state the issue in terms of Territory residents being denied the protection of s 51(xxxi) is somewhat misleading. On any view, a law made under a head of power in s 51 and operating Australia-wide would, if it infringed s 51(xxxi), be invalid everywhere.[108] Furthermore, even where a Commonwealth Act is prima facie within s 122 there will often be a question whether it should properly be regarded as having been made under s 51, and thus subject to s 51(xxxi), or under s 122. By placing the government of a Territory under the exclusive authority of the Commonwealth, s 122 effectively places the Commonwealth in a relationship to a Territory closely comparable to that of a State government with areas under its control. States are, of course, not subject to any limitation on power comparable to s 51(xxxi). There is therefore support in the structure of the Constitution for the view that the Commonwealth Parliament is restricted by s 51(xxxi) when it acts as the national (that is federal) Parliament but not when it acts as the governing authority of a Territory.[109]

That view is reflected in the alternative analysis which Gaudron, Gummow and Kirby JJ adopted and which, having been adopted by Toohey J, forms the ratio of *Newcrest*. That analysis gives primacy to the federal powers of Parliament under s 51, essentially holding that a law which falls within a head of power in that section is to be regarded as a s 51 law even if it also comes within the terms of s 122. It therefore reduces the scope of s 122, and thus the field in which the Parliament may legislate free of s 51(xxxi), to matters outside the scope of any s 51 power. Thus Territory residents receive *greater* protection than residents of the States, because in the absence of an inconsistent Commonwealth law there is nothing to prevent a State Parliament enacting a law on a subject-matter within s 51 that acquires property without compensation. However, this is perhaps preferable to the alternative approach, which is to regard a law having the requisite nexus with a Territory as supported by s 122 regardless of whether it might also come within a head of power in s 51. On that approach,

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[106] Ibid at 1391.

[107] Ibid.

[108] Unless the law manifests an intention that it should operate as a law for the government of a Territory even if it is invalid in its general operation: (1997) 71 ALJR 1346 at 1367 per Dawson J.

[109] Compare (1997) 71 ALJR 1346 at 381-1382 per McHugh J. The analogy with the States is not exact, since a State law effecting an acquisition of property may, unlike a Commonwealth law enacted under s 122, be invalid by reason of s 109 if there is an inconsistent Commonwealth law.

which was preferred by Brennan CJ, the Commonwealth could legislate to acquire land in a Territory for defence purposes or to build a lighthouse without paying compensation, even though an acquisition of land in a State for the same purpose would be subject to s 51(xxxi).

The concern that s 122 might provide a basis for the acquisition of property in a State (for example the compulsory acquisition of a site for a Territory tourist bureau in a State capital) seems capable of being dealt with by construction of s 122 itself and therefore need not be a factor in deciding whether s 51(xxxi) applies. As Brennan CJ points out, traditional principles of international law deny to any state the power to determine the ownership of property within the territory of another state. The same principle applies by analogy to the States of Australia and also provides a strong basis for denying that a law made "for the government of" a Territory may effect an acquisition of property in a State.[110] It is arguable that in legislating for a Territory under s 122 the Commonwealth acts as the governing authority of the Territory, and in that capacity it has no greater power to acquire property in a State than does the government of another State.[111]

JUST TERMS

Just terms and the quantum of compensation

Although there are several older authorities on the assessment of "just terms"[112], the issue has not yet received the attention it deserves in the recent and ongoing re-appraisal of s 51(xxxi). The starting point has always been that "just terms" involves compensating the deprived owner of the property fully[113] for what has been taken (including any special value the property may have had to the owner, or losses consequent upon its taking).[114] However, there were occasional suggestions in the older cases that "just terms" was a less precise concept than "compensation" and involved general notions of fairness

[110] (1997) 71 ALJR 1346 at 1358; McHugh J agreeing at 1382-1383.

[111] Compare (1997) 71 ALJR 1346 at 1366 per Dawson J.

[112] *Spencer v Commonwealth* (1907) 5 CLR 418; *Minister of State for the Army v Parbury Henty & Co Pty Ltd* (1945) 70 CLR 459; *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269; *Nelungaloo Pty Ltd v Commonwealth* (1948) 74 CLR 495; *Poulton v Commonwealth* (1953) 89 CLR 540.

[113] The relevant value is the value to the owner: *Parbury Henty* (1945) 70 CLR 459 at 495 per Latham CJ. This means that the price will generally be the price for which a person willing (but not anxious) to sell would part with the property, and will be based on the most advantageous use of the property: ibid; *Spencer* (1907) 5 CLR 418 at 440-441 per Isaacs J. However, it also means that the possible uses of the property to be taken into account are the uses to which the owner could have put it, not other uses to which it might be put by the Commonwealth: *Parbury Henty* at 495.

[114] *Johnston Fear and Kingham & the Offset Printing Co Pty Ltd v Commonwealth* (1943) 67 CLR 314 at 322-323 per Latham CJ, at 323-324 per Rich J, at 334 per Williams J.

as between the deprived owner and the community.[115] On that basis, there might be situations in which the circumstances in which property had been acquired, the use to which it had been put or the needs of the community could mean that compensation at less than full value, or even zero, would constitute "just terms".[116]

Brennan J took a firmly different view in *Georgiadis.* He described the purpose of s 51(xxxi) as "to ensure that the owners of property compulsorily acquired by government presumably in the interests of the community at large are not required to sacrifice their property for less than its worth". He therefore held that the terms of an acquisition cannot be "just" unless it is shown that "what is gained is full compensation for what is lost".[117] A similar view of s 51(xxxi) is echoed by McHugh J in *Mutual Pools*, describing the effect of s 51(xxxi) as being that "[i]f the Parliament wishes to acquire property belonging to a State or individual, the cost of the acquisition has to be borne by the taxpayers of the Commonwealth and not by the owner of the property",[118] although his Honour was not there explicitly addressing the concept of "just terms".

This approach is perhaps more logically satisfying than an appeal to general concepts of fairness. A looser concept of "just terms" might have been appealing in the absence of an articulated conceptual basis for laws which effect acquisitions but nevertheless do not come within s 51(xxxi). However, now that concepts of characterisation or laws "adjusting competing claims" can be brought to bear in order to take acquisitions outside s 51(xxxi) altogether, it is less likely that the requirement of "just terms" will be found to apply in circumstances where the court considers that anything less than full compensation is appropriate. The view enunciated by Brennan J therefore seems likely to become the accepted one.

Just terms and justiciability

Many Commonwealth statutes now contain "historic shipwrecks" clauses – provisions requiring compensation to be paid in the event that the operation of the law would otherwise effect an "acquisition of property" within s 51(xxxi).[119] Such a provision was present in *WMC*, so that the issue before the court was whether that provision was applicable rather than whether the legislation was valid. Such clauses generally require the amount of compensation, failing agreement between the parties, to be assessed by a court of competent jurisdiction. A provision along those lines is sufficient to provide "just

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[115] *Grace Bros* (1946) 72 CLR 269 at 280 per Latham CJ, at 290 per Dixon J.

[116] *Peverill v Health Insurance Commission* (1991) 32 FCR 133 at 144 per Burchett J.

[117] (1994) 179 CLR 297 at 310-311. See also *Bank Nationalisation Case* (1948) 76 CLR 1 at 300 per Starke J.

[118] (1994) 179 CLR 155 at 219.

[119] For example *Historic Shipwrecks Act* 1976, s 21; *Native Title Act* 1993, ss 18, 53; *Moomba-Sydney Pipeline System Sale Act* 1994, ss 31, 137; *Offshore Minerals Act* 1994, ss 49, 136, 196; *Airports Act* 1996, s 188 (see also s 63).

terms" for any acquisition and thus ensure the validity of the legislation.[120]

There is an interesting question whether s 51(xxxi) requires the amount of compensation to be assessed by a Ch III court. Certainly a regime which places the assessment of compensation wholly within administrative discretion, so as to make the determination of the amount essentially unreviewable by the courts, does not satisfy the constitutional requirement.[121] However, it does not necessarily follow that the assessment must be made, or reviewable on all grounds, by a court. Section 51(xxxi) requires that the terms be "just", but leaves it to Parliament to prescribe the terms. It is submitted that, if the statute provides a regime for administrative assessment which embodies "just" criteria for determination, and a person deprived of property may have recourse to the courts to ensure that the regime is complied with, that ought to be regarded as amounting to "just terms".[122]

CONCLUSION

Undoubtedly there is a drift in opinion of the High Court generally to ensure that it is for the community as a whole to carry the burden of legislative acquisition or diminution of individual property and rights equivalent to property. This re-working of the acquisitions power elevates a provision which was intended merely to cover the acquisition by, and for, the Commonwealth of physical property[123] into a general constitutional protection. It is attractive to the court in that it is one of the few specific provisions in the Constitution that sustain a textual foothold for the contention that individual rights are specifically protected.

In common with other matters concerning the Territories,[124] the High Court is moving also to accord to the people of the Territories the constitutionally protected freedoms which are enjoyed by other Australians. This is of some significance for the exploitation of minerals in the Northern Territory, as *Newcrest* demonstrates.

Nevertheless, there is a barrier to the elevation of just terms for acquisitions of property into a universal right in Australia, given that none of the State constitutions require any terms, just or unjust, for

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[120] *Davey* (1993) 47 FCR 151 at 165-168 per Black CJ and Gummow J.

[121] *Dalziel* (1944) 68 CLR 261 at 286-287 per Rich J; *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77.

[122] *Tasmanian Dams Case* (1983) 158 CLR 1 at 289-290, 291 per Deane J and cases there cited. A ministerial power to fix compensation will not ordinarily be construed as capable of arbitrary exercise: *Andrews v Howell* (1941) 65 CLR 255 at 283-284 per Dixon J.

[123] See Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901), pp 640-641.

[124] For example *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 (on s 90); *Kruger v Commonwealth* (1997) 71 ALJR 991 at 1021-1026, 1028-1029 per Toohey J, at 1038, 1041-1047 per Gaudron J, at 1069-1077 per Gummow J (on Ch III, s 116 and implied freedoms based on representative government).

acquisitions of property by the States. Except in the exceptional case where it can be said that the Commonwealth itself is seeking to evade s 51(xxxi) by enlisting States to make acquisitions in its stead,[125] the issue of acquisitions by the States is substantially free of constitutional limitation.

Furthermore, the attempt by at least some justices to ensure that s 51(xxxi) operates as a real constitutional guarantee for all Australians is offset by a concern that it should not impair the Commonwealth Parliament's capacity to fulfil the purposes for which its powers are conferred by imposing a "just terms" requirement whenever a Commonwealth law affects vested rights.[126] That concern is evident in the various attempts to identify laws which effect acquisitions but are beyond the reach of s 51(xxxi), although those attempts are yet to produce a clear and simple test.

As is seen in the *WMC* case, the court is also not yet speaking lucidly on issues of legislative abrogation or diminution of rights created by statute. The court has drawn back from what would have been the untenable position of holding generally that a right of value granted pursuant to Commonwealth statute is a right of property which attracts a constitutional requirement of just terms whenever its value is depreciated by subsequent government action. Such a position would provoke a legislative response of limiting the grant of governmental authorities and rights, which otherwise would have a value, to rights revocable at will. Clearly some statutory rights must be capable of modification to allow governmental regulation. But the process of characterisation of statutory rights remains for case by case exposition by shifting majorities of the High Court.

If *Newcrest* and *WMC* are a guide, we remain unsure as to what is the complete nature of the inquiry. The tasks of categorisation of "property" rights, and characterisation of laws which effect "acquisitions" of those rights, remain uncertain. And as to "just terms", there is almost no authority which takes account of recent expositions of the nature of the guarantee. Uncertainty will not be eradicated, at least for some time.

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[125] In *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382 a Commonwealth Act providing for agreements with the States, under which land would be acquired by the States for soldier settlement, was held to be a law "with respect to" those acquisitions and thus subject to s 51(xxxi): see at 402, 422-424. That difficulty was avoided by the later scheme considered in *Pye v Renshaw* (1951) 84 CLR 58 at 72, 73, 77-78, which involved only executive action at the Commonwealth level.

[126] For example *Mutual Pools* (1994) 179 CLR 155 at 180 per Brennan J.