Compulsory Acquisition of Property

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SUMMARY

This paper looks at the limits placed on Commonwealth legislative power by s 51(xxxi) of the Constitution, which provides the Commonwealth with power to 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".

The paper provides an overview of the jurisprudence on s 51(xxxi), which has developed significantly in recent years, not the least as a result of actions being instituted by resource companies. The paper outlines:

- *the role of s 51(xxxi) as a source of power and, in particular, how and to what extent it constrains the operation of other Commonwealth legislative powers;*
- *the limits of the concepts of "acquisition" and "property", which comprise essential elements of the constitutional guarantee, and some analytical difficulties that arise in this area; and*
- *the ambit of the just terms requirement.*

The second part of the paper discusses some current issues of particular interest to lawyers who work in and for the resources industry, including the matters that arose in Commonwealth v Western Australia (another case pending before the High Court which raises s 51(xxxi) issues in a mining context) and the question whether native title may be protected by s 51(xxxi).

INTRODUCTION

The Australian Constitution is not resplendent in guarantees of rights and freedoms that are exercisable by, or designed to protect, individuals (be they natural persons or companies). The primary focus of the Constitution was and is: first, to establish a federal polity, comprised by a parliament, an executive and a judiciary; and secondly, to determine as between the new federal government and

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the State governments which powers were to be exercised at which level of government. Most of the rights and freedoms that do appear in the Constitution arose more from our Founding Fathers' desire to limit the potential exercise of federal powers against the States than from a desire to limit the exercise of such powers against individuals. Nonetheless, these limits may be used by individuals to protect themselves from unauthorised governmental action. This paper looks particularly at the limits on the power to make laws for the compulsory acquisition of property.

An attribute of sovereignty is the ability to acquire compulsorily the property of those in relation to whom the sovereignty may be exercised.[1] The right is that of "eminent domain".

It was recognised, in the Convention Debates,[2] that it was desirable for the new Constitution to contain provisions dealing specifically with the topic. The provision adopted was that which became s 51(xxxi) of the Constitution, namely:

> "51. The Parliament shall, subject to this Constitution, have power to make laws for the peace order and good government of the Commonwealth with respect to:
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> ...
>
> (xxxi) 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."

This provision gives the Commonwealth a limited power of eminent domain to enable the Commonwealth to add to the property conferred upon it directly by the Constitution[3] where it needs to do so for a relevant public purpose. It is limited in the sense that: (i) the acquisition must be for a Commonwealth purpose (an issue with which we shall not deal at length); and (ii) the acquisition must be on just terms. One reason for the existence of these limits is that those attending the Convention Debates who were particularly concerned about maintaining the rights of States wanted to ensure that States would not have their lands taken by the Commonwealth without compensation. (It is important to keep in mind that at this time land sales were a critically important source of finances for the colonial governments.)

The guarantee of just terms provided by s 51(xxxi) goes further, of course, and also protects property privately held. However, one may question whether this was a core object of the provision at a time when the colonies were believed to have a relatively unrestricted power of eminent domain. That is, the colonies could acquire private property without paying compensation if the necessary legislation was passed.

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1 *United States v Jones* 109 US 513.

2 Conveniently summarised in Quick and Garran, *Annotated Constitution of the Australian Commonwealth*, 1901, p 640.

3 Section 85, Constitution.

Although its reason for existence may have been the protection of State coffers, s 51(xxxi) has proved to be a real source of protection for private property holders over the century, and recently of use to at least one holder of a mining tenement.

This paper first provides a fairly detailed overview of the jurisprudence on s. 51(xxxi). In the course of this overview, issues that may be of particular interest to this audience have been emphasised. This section comprises the lion's share of the paper. In a second section, the paper considers some current acquisition-related issues as well as highlighting other constitutional provisions that may be of interest to the mining industry.

AN OVERVIEW OF S 51(xxxi)

Section 51 (xxxi) – a source of power

Section 51(xxxi) of the Constitution is the Commonwealth's sole[4] source of legislative authority to acquire property from the States or individuals. It appears that, as there were doubts at the time of the drafting of the Constitution about whether the incidental power (s 51(xxxix)) would support the acquisition of property for the purposes enumerated in the other placita of s 51, it was decided that it would be better to provide a constrained power of eminent domain rather than simply provide that acquisitions by the Commonwealth must be on just terms.[5]

The just terms requirement applies not only to Commonwealth laws that effect acquisitions of property but also to Commonwealth laws with respect to acquisitions of property (that is, Commonwealth laws that form part of a Commonwealth-State scheme under which the actual acquisition is effected by a State law).[6] Section 51(xxxi) does not, however, directly constrain State legislatures.[7] Whilst the provision of compensation is not a condition of *validity* of State laws, there is yet a strong presumption that State enactments will not be construed as providing for taking away the property of the subject without compensation.[8] Because it is a presumption it may be rebutted by a sufficiently clear exercise of legislative power.[9]

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4 But see a series of exceptions to this general proposition outlined below.

5 R L Hamilton, "Some aspects of the acquisition power of the Commonwealth" (1973) 5 FL Rev 265 at 267; see also *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 290-291 per Dixon; Australasian Federal Convention, *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 20th January to 17th March 1898 (Sydney: Legal Books, 1986) (reprint of Melbourne: Govt Pr, 1898), Vol 4, 151-154, Vol 5, 1874.

6 *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382.

7 *Pye v Renshaw* (1951) 84 CLR 58 at 83.

8 See eg *Attorney-General v Horner* (1884) 14 QBD 245 at 257; *Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd* [1919] AC 744 at 752; *Colonial Sugar Refining Co v Melbourne Harbour Trust Commissioners* [1927] AC 343.

9 *Commissioner of Public Works (Cape Colony) v Logan* [1903] AC 355;

To the extent that there is any such power, s 51(xxxi) does not restrict the Commonwealth executive's power to acquire property.[10]

The position of s 51(xxxi) as both a source of legislative power and a limitation on the exercise of such power has led to a construction of the provision that has seen the power to acquire that might otherwise have been an incident of other heads of power (but as such not expressly constrained in the manner referred to in s 51(xxxi)) "abstracted" such that s 51(xxxi) is the sole source of power to legislate for the acquisition of property. In this way, subject to the exceptions that we outline below, the Commonwealth is obliged to provide just terms in relation to all acquisitions of property. The High Court has described this method of construing s 51(xxxi) in the following terms:[11]

> "It is well settled that s 51(xxxi)'s indirect operation to reduce the content of other grants of legislative power is through the medium of a rule of construction, namely, that 'it is in accordance with the soundest principles of interpretation to treat' the conferral of 'an express power, subject to a safeguard, restriction or qualification, to legislate on a particular subject or to a particular effect' as inconsistent with 'any construction of other powers conferred in the context which would mean that they included the same subject or produced the same effect and so authorised the same kind of legislation but without the safeguard, restriction or qualification'. That operation of s 51(xxxi) to confine the content of other grants of legislative power, being indirect through a rule of construction, is subject to a contrary intention either expressed or made manifest in those other grants."

This contrary intention is most likely to be found, that is the acquisition is most likely to be held to be supported by a head of power other than s 51(xxxi), where the provision of just terms would defy the object of the acquisition.[12] In *Re DPP; Ex parte Lawler* (1994) 179 CLR 270, Deane and Gaudron JJ (Mason CJ concurring), referring to the expression "acquisition of property on just terms", stated at 285:

> "That phrase must be read in its entirety and, when so read, it indicates that s. 51(xxxi) applies only to acquisitions of a kind that permit just terms. It is not concerned with laws in connection with which 'just terms' is an inconsistent or incongruous notion. Thus, it is not concerned with a law

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Commonwealth v Hazeldell Ltd (1918) 25 CLR 552; *Colonial Sugar Refining Co v Attorney-General of Queensland* [1916] St R Qd 278; *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75.

10 *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v Commonwealth* (1943) 67 CLR 314, at 318 per Latham CJ, at 325 per Starke J; see *also Case of the King's Prerogative in Saltpetre* (1606) 12 Co 12; *A-G (UK) v De Keyser's Royal Hotel Ltd* [1920] AC 508; *France Fenwick & Co Ltd v The King* [1927] 1 KB 458.

11 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

12 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155; *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ

> imposing a fine or penalty, including by way of forfeiture, or a law effecting or authorising seizure of the property of enemy aliens, or the condemnation of prize. Laws of that kind do not involve acquisitions that permit of just terms and, thus, they are not laws with respect to 'acquisition of property', as that expression is used in s 51(xxxi)."

It becomes a question of the characterisation of the law providing for the acquisition.[13] In *Mutual Pools & Staff Pty Ltd v Commonwealth*, Mason CJ at 171 provided the following insight into the characterisation process:[14]

> "[T]he court has decided that acquisitions of various kinds, even though they might perhaps fall prima facie within the general power [s 51(xxxi)], are to be regarded as authorised by the exercise of specific powers otherwise than on the basis of just terms. Of these instances, it may be said that they are all 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."

The following list provides a guide to the kinds of laws that have been upheld even though no just terms have been provided in respect of the "acquisition" that has been effected. That is, they have been found to be supported by other heads of power:

(a) the imposition of a tax[15] and the imposition of a liability to pay provisional tax, which are both supported by the taxation power, s 51(ii);[16]

(b) the forfeiture of goods illegally imported into Australia[17] and the imposition of a pecuniary penalty upon persons who have committed offences or unlawfully imported goods;[18]

(c) the restraint of the free exercise of property rights in

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13 An example of a case where the question of the characterisation of an acquisition was said to be finely balanced is *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 308 per Mason CJ, Deane and Gaudron JJ.

14 For tests of characterisation of legislation that are expressed a little differently, see also in *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155: Brennan J at 176-177 and 180-181, Deane and Gaudron JJ at 190 and McHugh J at 219-220.

15 *MacCormick v Commissioner of Taxation (Cth)* (1984) 158 CLR 622; *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 508-510 per Mason CJ, Brennan, Deane and Gaudron JJ.

16 *Commissioner of Taxation (Cth) v Clyne* (1958) 100 CLR 246; see also *Commissioner of Taxation (Cth) v Barnes* (1975) 133 CLR 483.

17 *Burton v Honan* (1952) 86 CLR 169. In relation to forfeiture of an unlicensed fishing boat owned by a person other than the person who committed the offence of using the boat within designated waters, see *Cheatley v The Queen* (1972) 127 CLR 291; *Re DPP; Ex parte Lawler* (1994) 179 CLR 270.

18 *R v Smithers; Ex parte McMillan* (1982) 152 CLR 477. See also *DPP v Pirone* (1997) 143 ALR 369 for a case where a person validly lost superannuation entitlements following his commission of an offence.

order to eradicate noxious practices (to the extent that such restraint amounts to an "acquisition of property"), because such laws are "of the same nature as provisions for penalty or forfeiture";[19]

(d) the sequestration of the property of a bankrupt, under the bankruptcy power, s 51(xxvii);[20]

(e) the condemnation of prize, under the defence power, s 51(vi);[21]

(f) the taking of property pursuant to a court order, the effect of which is to avoid the defeat of other court orders, for example under s 85 of the *Family Law Act* 1975 (Cth);[22]

(g) the imposition of an obligation, for example, to make a payment, that involves "a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship";[23] and

(h) the extinguishment (in whole or part) of statutory entitlements to receive payments from consolidated revenue, where the payments were not based on an antecedent proprietary right recognised by the general law and, therefore, were inherently susceptible of variation.[24]

The explanation provided above in relation to why these exercises of legislative power do not require just terms, namely that the Constitution reveals a contrary intention to the general principle that all acquisitions of property should occur under s 51(xxxi), may readily explain the laws that fall into categories (a)-(f). However, it is not clear that the remaining two categories can be explained on that basis. They perhaps need to be seen as free-standing exceptions to the general rule.

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19 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 408 per Gibbs J; see also *R v Smithers; Ex parte McMillan* (1982) 152 CLR 477. For a view that Parliament cannot make laws to forfeit the property of persons undertaking allegedly noxious activities, see *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 229-230 per Williams J. Two examples of the principal proposition are: (i) restrictions on the grounds upon which a land owner can refuse to grant or renew a lease, effected in order to eradicate the "noxious practice of exclusive dealing": *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 416 per Stephen J; and (ii) empowering a court to order divestiture of shares when they were acquired in order to lessen substantially competition in a market: *Trade Practices Commission v Gillette Co (No 1)* (1993) 118 ALR 271; *WSGAL v Trade Practices Commission* (1994) 51 FCR 115.

20 *Re Dohnert Muller Schmidt & Co* (1961) 105 CLR 361.

21 *Re Dohnert Muller Schmidt & Co* (1961) 105 CLR 361.

22 *In the Marriage of Gould* (1993) 17 Fam LR 156.

23 *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 510 per Mason CJ, Brennan, Deane and Gaudron JJ; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 171 per Mason CJ, at 177 per Brennan J, at 190 per Deane and Gaudron JJ; *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 161 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ. This also applies to people who were in a particular relationship at a relevant time: *Gerrard v Mayne Nickless Ltd* (1996) 135 ALR 494 at 514-515 per Wilcox CJ, Ryan and Marshall JJ.

24 *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 237 per Mason CJ, Deane and Gaudron JJ, at 255-256 per Toohey J, at 260 per McHugh J.

As Gibbs J said in *Tooth*:[25] "I am not sure that a completely satisfactory explanation has yet been given of the principles by which it is to be determined which laws do, and which laws do not, fall within s 51 (xxxi)."

Before turning to the "guarantee" aspect of s 51(xxxi), it is appropriate to make some comment on a developing area of acquisitions jurisprudence, namely whether there is a separate power to acquire property (other than on just terms) under s 122 of the Constitution (the so-called "Territories power").

It has long been thought that the Territories power was independent of s 51 and, in particular, not subject to the just terms requirement imposed by s 51(xxxi). It was considered that the expression "for any purpose in respect of which the Parliament has power to make laws" in s 51(xxxi) did not encompass laws made under s 122. This view was premised in large part upon a unanimous decision of the High Court in *Teori Tau v Commonwealth* (1969) 119 CLR 564.

This decision arose for reconsideration in *Newcrest Mining v Commonwealth* (1997) 71 ALJR 1346. Although the majority did not overrule *Teori Tau*, the authority of the case was dealt a significant blow. Only time will tell if the blow will prove to be fatal.

Three members of the majority in *Newcrest* (all of whom are still on the court) accepted that it should be overruled.[26] The three dissenting members of the court thought it should not be.[27]

The fourth member of the majority, Toohey J, preferred to rely solely upon the majority's alternative basis for the conclusion that the relevant legislation had to provide just terms, namely that as the legislation was supported in part by the external affairs power it was subject to the just terms requirement imposed by s 51(xxxi) irrespective of any support gained from the Territories power. This basis depends upon a new approach to dual characterisation of laws according to which, if a law is characterised as falling within a head of power under which acquisitions can be effected only on just terms, then just terms are required even if the law also falls within a head of power under which such terms are not required. Taking this approach, Toohey J considered that he did not need to overrule *Teori Tau*.

However, *Teori Tau* is on an uncertain footing even on this alternative basis. The case involved the territory of New Guinea, which was administered by Australia under a mandate from the League of Nations (and subsequently the United Nations). That is, as in *Newcrest*, *Teori Tau* did not involve only the Territories power; the external affairs power was also invoked. Hence, applying *Newcrest*, a just terms requirement would have applied to the legislation in question in *Teori Tau*.

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[25] *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 408 per Gibbs J.

[26] Gaudron, Gummow and Kirby JJ.

[27] Brennan CJ, Dawson and McHugh JJ.

Section 51(xxxi) - a guarantee

Although s 51(xxxi) effects a grant of legislative power, it also provides a constitutional guarantee of just terms that should not be construed narrowly.[28] Nor should it be given a construction that would permit acquisitions on unjust terms by an "indirect means"[29] or a "circuitous device".[30] However, the guarantee provides protection in relation to property rights and not in relation to a person's general commercial or economic position.[31]

As s 51(xxxi) empowers acquisitions on just terms only, a breach of that constraint will result in the invalidity of the legislation empowering such an acquisition rather than the conferral of a right to compensation upon persons deprived of their property.

"Property"

The expression "property", at least as used in s 51(xxxi), is to be construed broadly.[32] In *Bank of New South Wales v Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1, Dixon J stated at 349 that:

> "s 51(xxxi) is not to be confined pedantically to the taking of title by the Commonwealth to some specific estate or interest in land recognised at law or in equity and to some specific form of property in a chattel or chose in action similarly recognised, but that it extends to innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property."

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[28] *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 201-202 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; *Minister for Army v Dalziel* (1944) 68 CLR 261 at 276 per Latham CJ, at 284-285 per Rich J; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 403 per Barwick CJ, at 407 per Gibbs J; *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 508 per Mason CJ, Brennan, Deane and Gaudron JJ. See also *Newcrest Mining v Commonwealth* (1997) 71 ALJR 1346 at 1372-3 per Gaudron J (with whom Toohey, Gummow and Kirby JJ agreed in this regard). But note that in *Commonwealth v WMC Resources Ltd* [1998] HCA 8, McHugh J at paras 126-130 warned that the application of the word "guarantee" may mislead.

[29] *Federal Council of the British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201 at 270 per Dixon J.

[30] *Bank of New South Wales v Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1 at 349 per Dixon J; *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 510 per Mason CJ, Brennan, Deane and Gaudron JJ. See also *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155; *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297.

[31] *Federal Council of the British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201 at 270 per Dixon J.

[32] *Minister for Army v Dalziel* (1944) 68 CLR 261 at 276 per Latham CJ, at 285 per Rich J, at 295 per McTiernan J, at 305 per Williams J; *Bank of New South Wales v Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1 at 349 per Dixon J; *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1 at 282-283 per Deane J; *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 508-510 per Mason CJ, Brennan, Deane and Gaudron JJ See also *Attorney General v Jobe* [1984] 1 AC 689 at 700-701; *Societe United Dicks v Government of Mauritius* [1985] 1 AC 585 at 599-600; *Commonwealth v NSW* (1923) 33 CLR 1.

This formulation has been repeatedly approved in the High Court.

In *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, the only three judges dealing with the acquisitions issue approved the definition of "property" stated by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1247-1248:[33]

> "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability."

The element of assignability is probably not essential, but only indicative.[34] In addition, the right or interest must be in existence, it cannot be merely an abstract possibility of a future right.[35]

The breadth of the expression is perhaps best shown by considering which "things" have received judicial support as falling within the ambit of "property":[36]

(a) "any tangible or intangible thing" including "the possession of land";[37]

(b) "land belonging to any State with all the minerals or metals that may be contained in such land";[38]

(c) common law native title (this is still the subject of doubt and it will be discussed in the second part of this paper);[39]

(d) vested common law causes of action,[40] even when they are time barred if there is a mechanism for extending the limitation period or otherwise removing the bar;[41]

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33 This definition has also been approved *in R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342 per Mason J.

34 *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342-343 per Mason J; *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 311-312 per Brennan J; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 165-166 per Brennan J (McHugh J concurring in this regard).

35 *Victoria v Commonwealth* (1996) 187 CLR 416 at 559 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

36 Note the some of the items in the list are supported in obiter dicta only.

37 *Minister for Army v Dalziel* (1944) 68 CLR 261 at 295 per McTiernan J.

38 *Commonwealth v New South Wales* (1923) 33 CLR 1 at 20-21 per Knox CJ and Starke J.

39 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 110-112 per Deane and Gaudron JJ. They were the only judges who dealt with the question. For a contrary view, see *Newcrest Mining v Commonwealth* (1997) 71 ALJR 1346 at 1368 per Toohey J, Gummow J at 1398 and Kirby J at 1420, who would tend to disagree with this position, but see McHugh J at 1377. In truth, this category is very much still in the air and we deal with this later in the paper.

40 *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303-304 per Mason CJ, Deane and Gaudron JJ. See also Brennan J at 310-312, and *Victoria v Commonwealth* (1996) 187 CLR 416 at 559 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

41 *Commonwealth v Mewett* (1997) 71 ALJR 1102.

(e) statutory debts;[42]
(f) money and the right to receive a payment of money;[43]
(g) copyright;[44]
(h) a broadcaster's licence;[45]
(i) a licence to fish and statutory units of fishing capacity;[46]
(j) a statutory permit for petroleum exploration;[47]
(k) a mineral lease;[48]
(l) the assets of a business;[49]
(m) photocopies;[50] and
(n) confidential information.[51]

Before providing a much smaller list of things that have been held not to be property, it should be observed that the various elements of s 51(xxxi) are not clearly compartmentalised. For example, if a question were to arise about whether a particular statutory right may be revoked or changed without providing just terms, it is possible for the same result to be achieved by a variety of different paths. One approach would be to say that the statutory right is property but that the right may be acquired, revoked or altered other than under s 51(xxxi) and hence just terms is not required. A second approach might be to determine that the statutory right is not property because it lacks some degree of permanence (or some other requisite element of property). A third approach may be to say that the right is property but that the right is merely

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42 *Peverill v Health Insurance Commission* (1991) 32 FCR 133 at 140-141 per Burchett J.

43 *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 508-509 per Mason CJ, Brennan, Deane and Gaudron JJ. See also *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, in which McHugh J reversed his opposition, and *Bienke v Minister for Primary Industries and Energy* (1996) 135 ALR 128 at 147-148 (FC).

44 *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 527-528 per Dawson and Toohey JJ (McHugh J concurring). See also the decision of Gummow J in *Newcrest Mining v Commonwealth* (1997) 71 ALJR 1346.

45 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 166 per Brennan J (McHugh J concurring in this regard), at 198-199 per Dawson J.

46 *Fitti v Minister for Primary Industries & Energy* (1993) 40 FCR 286. This case was overturned, but not on this point: *Minister for Primary Industry & Energy v Davey* (1993) 47 FCR 108 (FC). See also *Bienke v Minister for Primary Industries and Energy* (1996) 135 ALR 128 (FC), where a fishing licence's status as property was assumed.

47 *Commonwealth v Western Mining Corporation Ltd* (1996) 136 ALR 353 at 358-359 per Black CJ, at 384 per Beaumont J, and at 397 per Cooper J (albeit dissenting on other grounds) (note on appeal to the High Court the Commonwealth conceded that this kind of permit amounted to property).

48 *Newcrest Mining v Commonwealth* (1997) 71 ALJR 1346.

49 *Bank Nationalisation Case* (1948) 76 CLR 1 at 214 per Latham CJ, at 267 per Rich and Williams JJ.

50 *Fieldhouse v Commissioner of Taxation (Cth)* (1989) 25 FCR 187. But see *FH Faulding & Co Ltd v Commissioner of Taxation (Cth)* (1994) 54 FCR 75, in which the scope of application of s 51(xxxi) to photocopies is significantly reduced.

51 *Smith Kline & French Laboratories (Aust) Ltd v Secretary to the Department of Community Services & Health* (1990) 22 FCR 73 at 120-122 per Gummow J.

extinguished and not acquired (the meaning of "acquisition" is discussed below), and therefore does not attract the just terms guarantee.

The point to recognise is that there is more than a little flexibility in analytical approaches. This means that, although a list of the kind provided may be of use, it should be approached with some degree of caution. A "thing" determined to be property may yet not be protected by s 51(xxxi), or receive only limited protection.

There is also authority for excluding the following from the definition of "property":

(a) the liabilities of a company;[52]
(b) an organisation's right to have members;[53] and
(c) some statutory rights conferred when there was no similar right at common law.[54]

"Acquisition"

Pursuant to s 51(xxxi), the Commonwealth may make laws not only effecting, or empowering the executive to effect, compulsory acquisitions but also laws empowering acquisitions by agreement. Where there is agreement, the acquisition will be on just terms.[55]

Section 51(xxxi) is not limited to acquisitions *by* the Commonwealth. It concerns all acquisitions effected under Commonwealth law whether the acquirer is the Commonwealth or a third party.[56]

The classic formulation has it that an acquisition of property occurs only when the acquirer receives a proprietary interest.[57] In *R*

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[52] *Bank Nationalisation Case* (1948) 76 CLR 1 at 214 per Latham CJ, at 267 per Rich and Williams JJ.

[53] *R v Ludeke; Ex parte Australian Building Construction Employees' & Builders Labourers' Federation* (1985) 159 CLR 636 at 653, the court.

[54] *Allpike v Commonwealth* (1948) 77 CLR 62 at 69 per Latham CJ (although only one of three judges decided on this ground); see *also Minister for Primary Industry & Energy v Davey* (1993) 47 FCR 108 (FC). An alternative construction of these cases is that statutory rights are property but that they are inherently susceptible of change and therefore not likely to be characterised as the subject of an acquisition of property within the meaning of s 51(xxxi).

[55] *Poulton v Commonwealth* (1953) 89 CLR 540 at 603, the court; see also *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495; *Federal Council of the British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201 at 270-271 per Dixon J.

[56] *Jenkins v Commonwealth* (1947) 74 CLR 400; *McClintock v Commonwealth* (1947) 75 CLR 1 at 23 per Starke J, at 36 per Williams J (Rich J concurring); *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 403 per Barwick CJ, at 407 per Gibbs J, at 426 per Mason J, at 451 per Aickin J; *Tasmanian Dams Case* (1983) 158 CLR 1 at 145 per Mason J, at 247 per Brennan J, at 282 per Deane J; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 165 per Brennan J (McHugh J concurring on this point), at 197-198 per Dawson J; *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480; and, implicitly in its dicta, *Victoria v Commonwealth* (1996) 187 CLR 416 at 559 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

[57] *R v Taylor; Ex parte Federated Ironworkers Association of Australia* (1949) 79 CLR 333 at 339, the court; *Tasmanian Dams Case* (1983) 158 CLR 1 at 145 per Mason J, at 181 per Murphy J, at 247-248 per Brennan J; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 165-166 per Brennan J (McHugh J concurring on this point) at 197-198 per Dawson J; *Australian Tape*

v Taylor; Ex parte Federated Ironworkers Association of Australia (1949) 79 CLR 333, the High Court considered the validity of legislation that empowered a federal court to make orders requiring unions to pay moneys into court, the object of which was to stop the unions from using the money to prolong strike action. The court stated at 399:

> "[This] case in no way resembles *Minister of State for the Army v Dalziel* relied upon in argument because the Commonwealth did not acquire any proprietary interest in the moneys paid into court."

While this approach requires that the acquirer receive a proprietary interest, it is not necessary that the interest received be the same as the interest lost.[58] As Mason CJ, Deane and Gaudron JJ stated, in *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 304-305:

> "'[A]cquisition' directs attention to whether something is or will be received. If there is a receipt, there is no reason why it should correspond precisely with what was taken."

The Australian formulation may be contrast with that which applies under the 5th Amendment to the US Constitution, the so-called "takings clause". While the US jurisprudence focuses on whether property has been *taken*, the Australian jurisprudence (at least in its classic formulation) looks to whether property has been *acquired*. As a result, the US jurisprudence can provide little guidance in these matters.

What flows from this approach is the rule that a "mere" extinguishment of rights (to property) is not an acquisition.[59] This begs the question when is an extinguishment of rights a "mere" extinguishment.

In the *Tasmanian Dams Case*, four judges stated this general rule.[60] Three of them (Mason, Brennan and Murphy JJ) found that the laws involved in that case, which had the effect of prohibiting the

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Manufacturers Association Ltd v Commonwealth (1993) 176 CLR 480 at 499-500 per Mason CJ, Brennan, Deane and Gaudron JJ, at 528 per Dawson and Toohey JJ (McHugh J concurring).

58 *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 304-305 per Mason CJ, Deane and Gaudron JJ, at 310-311 per Brennan J. See also *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 173 per Mason CJ, at 177 per Brennan J, at 184-185 per Deane and Gaudron JJ, at 223 per McHugh J; and *Newcrest Mining v Commonwealth* (1997) 71 ALJR 1346 at 1410 per Gummow J (with whom Toohey, Gaudron and Kirby JJ effectively agreed).

59 *Federal Council of the British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201 at 270-271 per Dixon J; *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; *R v Ludeke; Ex parte Australian Building Construction Employees' & Builders Labourers' Federation* (1985) 159 CLR 636 at 653, the court; *Smith Kline & French Laboratories (Aust) Ltd v Secretary to the Department of Community Services & Health* (1991) 28 FCR 291 at 305-306, Federal Court (FC); and *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 499-500 per Mason CJ, Brennan, Deane and Gaudron JJ, at 528 per Dawson and Toohey JJ (McHugh J concurring).

60 *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.

exercise of rights of use and development of the land in dispute, amounted to a mere extinguishment. Deane J, however, found that parts of the challenged laws went beyond "mere" extinguishment. He stated at 283-284:

> "Difficult questions can arise when one passes from the area of mere prohibition or regulation into the area where one can identify some benefit flowing to the Commonwealth or elsewhere as a result of the prohibition or regulation... Where... the effect of prohibition or regulation is to confer upon the Commonwealth or another an identifiable and measurable advantage or is akin to applying the property, either totally or partially, for a purpose of the Commonwealth, it is possible that an acquisition for the purposes of s 51(xxxi) is involved. The benefit of land can, in certain circumstances, be enjoyed without any active right in relation to the land being acquired or exercised... Thus, if the Parliament were to make a law prohibiting any presence upon land within a radius of 1 kilometre of any point on the boundary of a particular defence establishment and thereby obtain the benefit of a buffer zone, there would, in my view, be an effective confiscation or acquisition of the benefit of use of the land in its unoccupied state notwithstanding that neither the owner nor the Commonwealth possessed any right to go upon or actively to use the land affected."

Although Deane J was the only judge who expressed this view, the decision of the court was consistent with Deane J's view because three other judges determined that the same portions of legislation (amongst others) were invalid on other grounds.

In that case, the owner of the land (in effect, the Tasmanian government) was prohibited from using or developing the land, thereby advancing the Commonwealth government's environmental objectives. This, for Deane J, was a sufficient benefit to make the extinguishment of rights not "mere" extinguishment.

Although elements of the approach taken by Deane J have been adopted in later cases,[61] his Honour's decision in *Tasmanian Dams* still stands as a high water mark for this principle.

Newcrest was, in many respects, a similar case. Once again, Commonwealth environmental laws were being relied upon to prevent development in a national park. However, the court did not describe the benefit as did Deane J (in terms of some general community benefit gained from prohibiting development of a park) but rather identified benefits accruing to the two parties with interests in the land (other than Newcrest itself). The Commonwealth as the owner of the minerals gained because "the minerals [were] freed from the rights of Newcrest to mine them". And, the Director of National Parks and Wildlife, as the owner of the land, gained because the "land [was] freed from the rights of Newcrest to occupy and conduct mining operations thereon".[62]

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[61] *Newcrest Mining v Commonwealth* (1997) 71 ALJR 1346 at 1410 per Gummow J (with whom Toohey, Gaudron and Kirby JJ effectively agreed).

[62] Ibid at 1410 per Gummow J.

While this "benefit" is more readily visible than Deane J's "benefit" in *Tasmanian Dams*, Gummow J's formulation in *Newcrest* leads to a curious result. In a practical sense, the benefits acquired by the Commonwealth and the Director in *Newcrest* were the same as those acquired by Tasmania in *Tasmanian Dams*. Both owners were "freed" from the rights of developers. The difference between the two cases is that, in the *Tasmanian Dams Case*, the owner did not see the freedom from development as a "benefit" (and indeed actively opposed its imposition), while in *Newcrest*, the parties with interests in the land did see this freedom as a "benefit".

It would be a curious (and obviously wrong) result if the validity of laws revolved around the perceptions and preferences of a property owner.

We do not suggest any particular path for resolving the position. The point of this discussion is, simply, to indicate that the law on when the extinguishment of rights will be "mere" extinguishment and when there will be a benefit such that the law effected an acquisition of property is not yet fully settled.

Before moving on, it is appropriate to note a few additional matters. First, the normal prerequisite to the application of s 51(xxxi) – that the acquirer receives a proprietary interest – is now generally met where the acquirer receives "a direct benefit or financial gain"[63] or an "identifiable benefit or advantage relating to the ownership or use of property".[64]

Secondly, in assessing whether a law effects a mere extinguishment, the court will, in accordance with its current jurisprudence, look at substance rather than form and will not permit the guarantee of just terms to be avoided by upholding a law that does indirectly what it could not do directly.[65]

This raises another difficulty. It has been held that the use of a person's property under force of a Commonwealth law by the Commonwealth or another does not amount to an acquisition of property under s 51(xxxi).[66] There seems to be some incongruity

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[63] *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305-306 [68 ALJR 272; 119 ALR 629] per Mason CJ, Deane and Gaudron JJ, at 310-311 per Brennan J.

[64] *Newcrest Mining v Commonwealth* (1997) 71 ALJR 1346 at 1410 per Gummow J (with whom Toohey, Gaudron and Kirby JJ effectively agreed). For a case that looks at the directness of the benefit required, see *also Commonwealth v WMC Resources Ltd* [1998] HCA 8, per Brennan CJ at paras 17, 23-24 and Gaudron J at paras 82-84, cf Toohey J at paras 57-59 and Kirby J at para 246 (see also Gummow J at para 193).

[65] *Wragg v New South Wales* (1953) 88 CLR 353 at 387-388 per Dixon J; and with respect to s 51(xxxi), see *Bank Nationalisation Case* (1948) 76 CLR 1 at 349-350; *Re Dohnert Muller Schmidt & Co* (1961) 105 CLR 361 at 371 per Dixon CJ (Fullagar, Kitto, Taylor and Windeyer JJ concurring).

[66] *Australasian United Steam Navigation Co Ltd v Shipping Control Board* (1945) 71 CLR 508; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 166-167 per Brennan J (McHugh J concurring on this point), at 198-199 per Dawson J; *Smith Kline & French Laboratories (Aust) Ltd v Secretary to the Department of Community Services & Health* (1991) 28 FCR 291 at 306, FC.

between, on the one hand, the principle that the Commonwealth *can,* without paying compensation, take over a person's property rights and use the property for its purposes to its benefit, and, on the other hand, the principle that the Commonwealth *cannot,* without paying compensation, prohibit property owners from exercising their rights when such a prohibition results in the Commonwealth (or another) achieving one of its purposes to its benefit. This, perhaps, over simplifies the second limb, but it raises the question whether the difference between these principles reveals a matter of substance or a matter of form.

This whole area of jurisprudence has some distance to go before the disparate decisions are rationalised.

Thirdly, the impact of the jurisprudence in this area is that any Commonwealth law that extinguishes a common law right should be carefully scrutinised to see if some person (including the Commonwealth itself) has received a reciprocal benefit. As rights held by one person usually have corresponding obligations in other persons, the extinguishment of rights will usually "free" one or more persons from an obligation, which could amount to a "benefit" sufficient to require the law to be characterised as a law effecting an acquisition of property. The exception is that laws that simply "adjust" competing rights as between individuals may not be characterised as laws effecting acquisitions, as we have already mentioned.

This applies to the area of mining operations as much as anywhere else. If a Commonwealth law extinguishes a common law right held by a mining concern, there may be grounds to challenge the law if it does not provide for just terms compensation.

More commonly, mining enterprises will be holders of statutory rights rather than common law rights. The position is more complex. One needs to analyse the nature of the statutory right in issue and, in particular, assess whether the right is inherently susceptible of change (in which case Parliament will be able to modify or extinguish the rights without compensation[67]) or whether it is intended to have a high level of stability or indefeasibility.[68] In the latter case, extinguishment may be characterised as an acquisition of property.

It may be that a particular statutory right, such as a mining lease, has a substantial level of stability involved in it (as provided for by the legislation under which it was created) but also has some limited defeasibility. If the law that extinguishes the right goes beyond the limits of the defeasibility, the law may yet amount to an acquisition of property.[69]

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[67] *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305-306 per Mason CJ, Deane and Gaudron JJ. See also *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 and *Bienke v Minister for Primary Industries and Energy* (1996) 135 ALR 128 at 143, (FC).

[68] *Commonwealth v WMC Resources Ltd* [1998] HCA 8, see Toohey J at para 53, Gummow J at paras 195-196, and Kirby at para 237, cf McHugh J at para 144ff.

[69] *Newcrest Mining,* op cit n 64 at 1410 per Gummow J.

"For any purpose"

Section 51(xxxi) empowers acquisitions of property "for any purpose in respect of which the Parliament has power to make laws". As Dixon CJ put it in *A-G (Cth) v Schmidt* (1961) 105 CLR 361 at 372:

> "The expression 'for any purpose' is doubtless indefinite. But it refers to the use or application of the property in or towards carrying out or furthering a purpose comprised in some other legislative power."

In that sense, the expression amounts to a limitation on the scope of the power to acquire.[70]

Just terms

Broadly speaking, "just terms" has been said to involve "full and adequate compensation for the compulsory taking"[71] or "a full measure of compensation".[72]

Concerning the measure of compensation that was appropriate under s 51(xxxi), Dixon J stated in *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 290:

> "Under that paragraph [s 51(xxxi)] the validity of any general law cannot, I think, be tested by inquiring whether it will be certain to operate in every individual case to place the owner in a situation in which in all respects he will be as well off as if the acquisition had not taken place. The inquiry rather must be whether the law amounts to a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property, fair and just as between him and the government of the country."

In broad accord with this approach is Latham CJ's view that the measure of just terms "involves consideration of the interests of the community as well as of the person whose property is acquired".[73]

Again, in much the same vein, in *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545, Fullagar J at 600 said:

> "The standard of justice postulated by the expression 'just terms' is one of fair dealing between the Australian nation and an Australian State or individual in relation to the acquisition of property for a purpose within the national legislative competence."

What, in practice, comprises this full compensation will depend upon the circumstances of each case. At a minimum, compensation would appear not to be just if it fell below the common law standard in the area of compulsory acquisitions, namely that the

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70 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 169 per Mason CJ.

71 *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v Commonwealth* (1943) 67 CLR 314 at 323 per Latham CJ and at 324 per Rich J.

72 Ibid at 333 per Williams J.

73 *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 280 per Latham CJ.

owner of property should be given for the property the price that a knowledgeable purchaser would have to offer a vendor willing to sell, assessed on the basis of the property's most advantageous use.[74]

However, there may be instances when full compensation for the property acquired is more than the price of the property. For example, in *Commonwealth v Huon Transport Pty Ltd* (1945) 70 CLR 293, Rich J at 306 said:

> "When a person is deprived of property, no terms can be regarded as just which do not provide for payment to him of the value of the property as at date of expropriation, together with the amount of any damage sustained by him by reason of the expropriation, over and above the loss of the value of the property taken."

Similarly, Latham CJ in *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v Commonwealth* (1943) 67 CLR 314 said at 322-323:[75]

> "The reference to 'price'... is a price in the ordinary sense, that is, merely the money value of goods, no account being taken of any special loss suffered by an owner as the result of a compulsory taking of his goods.
>
> Where goods are acquired from a person who deals in those goods, the price of the goods taken would, as a general rule, be fair compensation to him. The price of goods depends upon the characteristics of the goods and the state of the market for them, if any. The just compensation to be paid to a person for compulsory taking of goods depends upon these circumstances, but also possibly upon particular circumstances which may vary in different cases... In the case of goods (such as a machine) which a person uses in his business, such a price might fall below fair compensation if the machine could not be replaced without long delay. In such a case the payment to the dispossessed owner only of the price at which such a machine could, after some lengthy period, be bought, would not give him compensation on just terms."

And along the same lines, see also the judgments of Rich and Williams JJ in *Minister for Army v Dalziel* (1944) 68 CLR 261.

None of this discussion is, however, to suggest that there is a precise formula that the Parliament must adopt in order to ensure that just terms compensation is paid. It must be remembered that s 51(xxxi) is a legislative power and, as such, the Parliament has a measure of discretion in determining the nature of just terms.[76]

There is authority (from 1946) that a law will not be held to be invalid under s 51(xxxi) unless the law is "so unreasonable as to

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[74] *Spencer v Commonwealth* (1907) 5 CLR 418 at 440-441 per Isaacs J. Even if the property is not currently being used in that way: *Minister for Army v Parbury Henty & Co Pty Ltd* (1945) 70 CLR 459 at 495 per Latham CJ.

[75] Rich J at 323-324 and Williams J at 334 were of a similar view; cf Starke J at 328.

[76] *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269.

terms that it cannot find justification in the minds of reasonable men".[77] Notwithstanding this authority and while Parliament would certainly have a margin of appreciation in these matters, there is a question whether this *Wednesbury* unreasonableness standard would be the margin imposed by the High Court today.[78]

Another aspect of just terms that is not clear is whether just terms compensation involves an entitlement to interest from the date of acquisition. There is judicial support both for[79] and against[80] the proposition. Perhaps there is stronger authority for the proposition that where a compensation process entails long delays between the time of acquisition and the time of the payment of compensation, then just terms would require the payment of interest.[81]

This issue is probably now more of theoretical than practical interest because most courts (insofar as they are the decision-maker in just terms disputes) have a general power to award interest in relation to judgments.

Before leaving this part of the paper, the question of fair procedures as a requisite element of just terms should also be commented upon.

Although it has never been authoritatively resolved, there is a body of judicial support for the proposition that fair procedures are an essential element of just terms.[82] Given the general developments in administrative law and procedural fairness that have taken place in the course of this century, there is every reason to expect that the court is likely to require just terms compensation systems to provide procedural fairness.

This begs the question of what will procedural fairness entail?

Although it is not unfair to have the quantum of compensation

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77 *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 280 per Latham CJ, at 285 per Starke J, at 294 per Dixon J, at 295 per McTiernan J. See *also Poulton v Commonwealth* (1953) 89 CLR 540 at 574 per Fullagar J.

78 In *Tasmanian Dams*, Deane J, the only judge who needed to consider the issue of what constituted just terms enunciated an objective test at 289-290, but quoted as authority for his approach some of the older authority premised on the unreasonableness test. This leaves the matter quite unresolved.

79 *Commonwealth v Huon Transport Pty Ltd* (1945) 70 CLR 293 at 311 per Rich J, at 338 per Williams J; *Marine Board of Launceston v Minister of State for the Navy* (1945) 70 CLR 518, Rich, Dixon, McTiernan and Williams JJ (although the case turned upon the interpretation of the statute and equitable principles, rather than the requirements of just terms); *Bank Nationalisation Case* (1948) 76 CLR 1 at 277 per Rich and Williams JJ (at least in respect of income-producing property).

80 *Commonwealth v Huon Transport Pty Ltd* (1945) 70 CLR 293 at 324-326 per Dixon J; *Marine Board of Launceston v Minister of State for the Navy* (1945) 70 CLR 518, at 520-527 per Latham CJ, at 529 per Starke J; *Bank Nationalisation Case* (1948) 76 CLR 1 at 228 per Latham CJ (McTiernan J concurring on this point), at 343 per Dixon J.

81 *Tasmanian Dams Case* (1983) 158 CLR 1 at 291 per Deane J; *Bank Nationalisation Case* (1948) 76 CLR 1 at 316-317 per Starke J.

82 *Australian Apple & Pear Marketing Board v Tonking* (1942) 66 CLR 77 at 109 per Rich J; *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v Commonwealth* (1943) 67 CLR 314 at 333 per Williams J; *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1 at 290 per Deane J.

determined outside the judicial process (at least initially),[83] it will not generally[84] be just to provide that a body may arbitrarily determine compensation.[85] The *Bank Nationalisation Case* provides an example of a process for an arbitrary assessment of compensation. In that case, an Act both empowered a Commonwealth agency to appoint a manager to control the property of a private bank, and conferred upon the manager a general power to negotiate the sale of that property to the agency. The Commonwealth agency and its agent could thereby have arbitrarily determined the level of compensation paid.

It has been held to be unfair for a compensation procedure to require a property owner either to accept the terms offered by the Commonwealth or to wait years before being allowed a determinative assessment of compensation.[86]

RECENT TRENDS, CURRENT ISSUES AND OTHER MATTERS

The recent trend that would probably be of most interest to an AMPLA conference concerns the direction of the High Court in relation to the protection (or otherwise) of resources tenements. Of course, the two most recent decisions in the acquisitions area have involved resources tenements: a mining lease in *Newcrest* and an exploration licence in *WMC Resources*.

We understand that Dr Griffith's paper will provide a detailed analysis of those cases. To avoid repetition, we shall not focus upon them. Instead, we will speak generally about three matters which may be of interest to this Conference, namely:

(a) the issues raised before the High Court recently in another s 51(xxxi) case - again a mining case - *Commonwealth v Western Australia*;
(b) some acquisitions issues relating to native title;
(c) some other constitutional provisions that may affect mining concerns.

Commonwealth v Western Australia

The case was argued before the High Court at the end of May. It

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[83] *Australian Apple & Pear Marketing Board v Tonking* (1942) 66 CLR 77 at 106-107 per Rich J; *Tasmanian Dams Case*(1983) 158 CLR 1 at 291 per Deane J. A body empowered to determine compensation is not required to have a costs power in order to have fair procedures: see *Bank Nationalisation Case* (1948) 76 CLR 1 at 229 per Latham CJ (McTiernan J concurring), at 317 per Starke J, at 343 per Dixon J.

[84] However, for an example of a case where it was fair for a body to be able to exercise a relatively arbitrary discretion, see *Poulton v Commonwealth* (1953) 89 CLR 540 at 606.

[85] *Australian Apple & Pear Marketing Board v Tonking* (1942) 66 CLR 77 at 106-107 per Rich J.

[86] *Tasmanian Dams case* (1983) 158 CLR 1 at 291 per Deane J.

concerns an area in Western Australia that had been declared to be a Defence Practice Area (the DPA) under the *Defence Force Regulations* (Cth). The DPA is located within a region known as the Lancelin Training Area. It is a bombing range used fairly extensively by the various branches of the Australian defence forces. The DPA, broadly speaking, contains three kinds of land tenure. Some of it is held by the Commonwealth in fee simple, although the minerals are reserved to the State of Western Australia. Some of it is held by the Commonwealth under special leases issued by the Western Australian government. And, the final portion is Western Australian Crown land.

The Western Australian government purported to grant several exploration licences in relation to the DPA. Apparently, there are thought to be valuable minerals sands located there.

The Commonwealth objected to the grant of the licences raising a number of arguments why the licences were invalid.

Its primary argument was that the *Mining Act* 1978 (WA) (under which the licences were granted) is invalid insofar as it purports to apply to land within the DPA, the freehold of which is owned by the Commonwealth, because it deals with a matter within the exclusive power of the Commonwealth under s 52(i) of the Constitution. The *Commonwealth Places (Application of Laws) Act* 1970 (Cth) was said to have no application for a range of reasons that we need not refer to. Section 52(i) provides, in effect, that once the Commonwealth has acquired a fee simple in land, its powers over that land become exclusive of the States.[87]

May we mention an historical matter. The question whether States could authorise mining under land held by the Commonwealth was a matter of heated debate in the Parliament in 1906 when the Lands Acquisition Bill was being considered.[88] The government of the day was represented by the Minister of Home Affairs, Mr Groom. He made it clear that the government's view was that once the Commonwealth had acquired property (meaning land) a State could not authorise a person to undertake mining operations on that land.[89]

We quote briefly from the Honourable Minister's response to questions from the House, at 3204:

> "When the Federation was established, it took over a large number of properties from the States, including rifle ranges in mining districts. Those properties passed to the Commonwealth absolutely, and are subject to its exclusive jurisdiction. In Victoria especially, our attention has been drawn to a difficulty which has arisen in this connection, and the Commonwealth has been asked to consider claims relating

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[87] *Worthing v Rowell & Muston Pty Ltd* (1970) 123 CLR 89; R v Phillips (1970) 125 CLR 93; *Allders International Pty Ltd v. Commissioner of State Revenue* (1996) 186 CLR 630.

[88] House of Representatives, *Hansard*, 22 August 1906, pp 3200ff.

[89] Ibid, p 3204.

> to mining operations upon properties which are used for defence purposes. Under the existing Act we have no power to issue mining leases, and yet the State could not take any action regarding the properties to which I allude, because they have passed to the control of the Commonwealth. Under [the proposed] provision the Governor-General has power to authorise the grant of a lease or licence to any person to mine for metals or minerals on any land which is the property of the Commonwealth."

Clause 62 of the Bill, to which Mr Groom was referring, became s 62 of the 1906 *Lands Acquisition Act* and then s 51 of the *Lands Acquisition Act* 1955 (Cth) and is retained, albeit indirectly, in the current Act.

It is curious that this issue, which appeared to be of the utmost concern in 1906, has taken more than 90 years to find its way to the courts.

The Commonwealth also launched a separate argument that the *Mining Act* 1978 was invalid because it was inconsistent with various provisions in the *Lands Acquisition Act* 1989 (Cth) in so far as it applied to land acquired by the Commonwealth (under either freehold or leasehold grants).

We shall not comment on the strength of these arguments but it is clear that, even on their own terms, they do not affect the capacity of the State to issue exploration licences in respect of land that has not been acquired by the Commonwealth. However, some parts of the DPA, although subject to the declaration under *Defence Force Regulations* and therefore subject to significant restrictions as to activities that may take place in the area, have not been acquired by the Commonwealth. These parts remain WA Crown land. In this respect (and in relation to the other portions of the DPA as well), the Commonwealth argued that the *Mining Act* 1978 is inconsistent with *Defence Force Regulations* ss 49 to 53 insofar as the Act purports to confer rights (including those conferred by the grant of a mining tenement) of access to, in and over land gazetted as a defence practice area, and is, to the extent of the inconsistency, invalid.

Not surprisingly, Western Australia has argued that, if the *Defence Force Regulations* have the effect that the Commonwealth contends for, they have effected an acquisition of property, namely of the State's property in the land and minerals of its affected Crown land. Western Australia has also put similar arguments in relation to the *Lands Acquisition Act* 1989, claiming that if it has the effect for which the Commonwealth contends, then it also effects an acquisition of the State's rights to the minerals beneath the land acquired by the Commonwealth.

The lesson, no doubt, is that if one wants to explore for minerals in a Defence Department bombing range and wants to avoid litigation, it would be best to seek Commonwealth agreement in advance. Of course, if one wants to explore for minerals (or

otherwise go upon) an active bombing range, there are some other, fairly elementary, precautions that should be taken.

Acquisitions of property and native title

We mentioned in the section above on the meaning of "property" that native title had been considered by Deane and Gaudron JJ in *Mabo* to fall within the protection offered by s 51(xxxi): [90]

> "Our conclusion that rights under common law native title are true legal rights which are recognized and protected by the law would, we think, have the consequence that any legislative extinguishment of those rights would constitute an expropriation of property, to the benefit of the underlying estate, for the purposes of s 51(xxxi)."

In obiter dicta, various members of the Court in *Newcrest* posited views on whether Commonwealth laws made under the Territories power which had the effect of extinguishing (or even simply impairing) native title rights would amount to an acquisition of property. Prior to *Newcrest*, the provision of just terms in the territories was not an issue because *Teori Tau* had been understood to have resolved the question whether exercises of the Territories power were subject to a just terms requirement. That is, under *Teori Tau*, Commonwealth laws applying to the territories were valid even if they effected acquisitions of property other than on just terms.[91]

One of the side effects of *Newcrest* and its undermining (although not overruling) of *Teori Tau* is that the validity of the grant of all kinds of interests in land in the Territories (including grants of mineral leases over native title land) has been brought into question.[92]

McHugh J (in the minority) considered that one reason why *Teori Tau* should not be overruled is that:[93]

> "it is at least arguable that to overturn that decision would result in grants of freehold and leasehold in the Territory being invalid. This is because freehold grants and perhaps many leasehold grants of land in the Territory have extinguished

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90 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 111 per Deane and Gaudron JJ.

91 But note, of course, that the question whether native title is protected by s 51(xxxi) is not limited to the Territories. Commonwealth laws not supported by s 122 of the Constitution may have effected acquisitions of native title rights throughout Australia (or purported to have done so). The problem, however, is more acute in the Territories because laws there could be made without having to provide for just terms so scrupulous attention to that matter may not always have been made. In addition, the Commonwealth's powers in relation to land use and land management generally is much more extensive in the Territories than elsewhere because in the States these issues are predominantly dealt with by the State authorities. For example, while the Commonwealth was responsible for issuing grants of freehold, leasehold and mining tenements in the Northern Territory between 1911 and 1978, it has not undertaken parallel activities in the States. It is these kind of activities that are most likely to extinguish or detrimentally affect native title rights.

92 Subject to the effect of the validation laws, which are discussed below.

93 *Newcrest Mining v Commonwealth* (1997) 71 ALJR 1346 at 1377.

native title rights and conferred a commensurate and identifiable and measurable benefit on the grantees resulting in an acquisition of the property of the native title owners. Because the grants depend on statute and have been made in a territory as opposed to a State, those grants could not be constitutionally validated without the payment of compensation or a referendum if *Teori Tau* is overturned. If the decision in *Teori Tau* was plainly wrong, then justice for the dispossessed holders of native title might justify the court overruling that decision despite the economic and probable social cost that such a step might bring on the people of the Territory and consequentially on the people of Australia. But I cannot see how at this late stage of the interpretation of s 122, it can be said that *Teori Tau* is plainly wrong."

At least three of the members of the majority did not share McHugh J's view. Toohey J, without explaining his rationale, said:[94]

"I am not persuaded by the argument of the Commonwealth that the application of s 51(xxxi) to reduce the content of the legislative power conferred by s 122 would potentially invalidate every grant of freehold or leasehold title granted by the Commonwealth in the Northern Territory since 1911, to the extent to which any such grant may be inconsistent with the continued existence of native title as recognised at common law."

Gummow J (with whom Kirby J agreed on this point[95]) provided the following perhaps elusive explanation of the connection between s 51(xxxi) and native title:

"The Commonwealth and the Director contended that the application of s 51(xxxi) to reduce the content of the legislative power conferred by s 122 'would potentially invalidate every grant of freehold or leasehold title granted by the Commonwealth in the [Territory] since 1911 to the extent to which any such grant may be inconsistent with the continued existence of native title as recognised at common law'. Such apprehensions are not well founded. The characteristics of native title as recognised at common law include an inherent susceptibility to extinguishment or defeasance by the grant of freehold or of some lesser estate which is inconsistent with native title rights; this is so whether the grant be supported by the prerogative or by legislation. Secondly, legislation such as that considered in *Mabo v Queensland* and *Western Australia v Commonwealth (Native Title Act Case),* which is otherwise within power but is directed to the extinguishment of what otherwise would continue as surviving native title (or which creates a "circuitous device" to acquire indirectly the substance of that title), may attract the operation of s 51(xxxi). However, no legislation of that character, with an operation in the

[94] Ibid at 1368.
[95] Ibid at 1420.

Territory, was pointed to in the submissions in this case."

It would seem that his Honour considers that native title rights have a character (at least in respect of grants of freehold) similar to that of most statutory rights, namely they are inherently susceptible to extinguishment or defeasance. In this respect, native title rights, although enforceable in the same way as common law rights, are innately less robust than other rights enforceable by the common law.

It remains to be seen whether a majority of the court will be prepared to determine that native title rights receive less protection than other common law rights.

It is also not clear how this approach fits with the second limb of Gummow J's analysis according to which statutes "directed to the extinguishment of what otherwise would continue as surviving native title" may attract the operation of s 51(xxxi). It will be interesting to see how the nature of protection offered to native title rights by s 51(xxxi) changes not according to the nature of the right but according to the method of acquisition: acquisition effected by the grant of a fee simple estate pursuant to an enactment does not require just terms but acquisition pursuant to a statute designed to acquire those rights does require just terms.

This brings us back to a comment made much earlier in this paper. There is a considerable degree of flexibility in the way that the principles extant under s 51(xxxi) are applied.

Before leaving this topic, it is appropriate to say a word or two about the effect of invalidity by reason of s 51(xxxi) on grants that have been made on native title land. To remain silent might imply that the grants would simply be invalid. As a result of the *Native Title Act* 1993 (Cth) and, in particular, sections 14-20 thereof, acts that were invalid because of the effect they purported to have on native title have been validated. This would include grants of freehold in the Northern Territory if such grants were found to infringe s 51(xxxi) of the Constitution.[96]

Native title holders who lose rights as a result of this kind of validation are entitled to compensation.[97] The *Native Title Act* also confers rights to compensation in instances where s 51(xxxi) does not require compensation to be required.[98]

Note that the validation provisions of the *Native Title Act* have been upheld.[99]

Other Commonwealth powers affecting the exercise of resources industry rights

Moving away from s 51(xxxi) and its concern with the *acquisition* of rights, we note that there are other Commonwealth legislative powers the exercise of which can have an equally dramatic effect on the *exercise* of resources industry rights.

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[96] Note also the role played by the *Validation of Titles and Actions Act* 1994 (NT).
[97] Note in particular ss 17, 18, 20, 51 and 53 of the *Native Title Act* 1993.
[98] Note in particular s 51 of the *Native Title Act* 1993.
[99] *Western Australia v Commonwealth* (1995) 183 CLR 373 at 454-455.

A leading example is *Murphyores Incorporated Pty Ltd v Commonwealth*[100] where mineral sands to be derived from Fraser Island leases were effectively made prohibited exports. That meant that the mining leases in question were economically useless, the significant market for rutile, zircon etc being overseas. The Commonwealth action was pursuant to the "trade and commerce" power.[101]

The *Tasmanian Dams Case*[102] also shows how the external affairs power[103] could be similarly used. But there are also many other powers which can be used to prevent the exploitation of particular resources. Examples are:

(a) the taxation power,[104] which can provide for significant financial disincentives;
(b) the defence power,[105] which could be used to prevent the extraction or sale of some substances, or mining in or under defence related sites; and
(c) the corporations power,[106] which could be utilised to determine when foreign corporations could extract Australian resources.

As discussed earlier, the Commonwealth has also the *exclusive* legislative power in relation to Commonwealth places.[107] One implication of this is discussed above in relation to the decision pending in the High Court and the mining of Commonwealth places.

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[100] *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1.
[101] The power to make laws with respect to "Trade and commerce with other countries, and among the States": s 51(i) of the Constitution.
[102] *Tasmanian Dams Case* (1983) 158 CLR 1.
[103] The power to make laws with respect to "External affairs": s 51(xxix).
[104] The power to make laws with respect to "Taxation; but so as not to discriminate between States or parts of States": s 51(ii).
[105] The power to make laws with respect to: "The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth": s 51(vi).
[106] The power to make laws with respect to "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth": s 51(xx).
[107] Section 52(i). See *Allders International Pty Ltd v Commissioner of State Revenue (Victoria)* (1996) 186 CLR 63.