# SOME ASPECTS OF THE ACQUISITION POWER OF THE COMMONWEALTH

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*Mr Hamilton's examination of the Australian Government's power under s.* 51(xxxi.) *of the Constitution begins with an analysis of judicial interpretation of the concepts of "property" and "acquisition". After drawing comparisons with the law relating to compulsory acquisition in the United States and Britain, he proceeds to suggest certain extensions of the definitions arrived at and to propose a test for "acquisition",* viz, *whether the taking is for the "use and service of the Crown". He concludes with a warning that some development of the law is required to combat any possible tendency toward "back door" acquisition by regulation.*

The Commonwealth's power of "eminent domain" or the

> rightful authority, which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit[1]

is contained in section 51 of the Constitution which provides that the Parliament shall have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

> (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.

In ordinary times s. 51(xxxi.) provides the sole constitutional justification for the Commonwealth in the exercise of its acquisition power.[2] The power of acquisition does not fall within the incidental area surrounding other powers of the Commonwealth Parliament; the suggestion that it did was expressly rejected by the High Court of Australia in *Johnston Fear and Kingham* v. *The Commonwealth.*[3] In that case Latham C.J. said "I am of opinion that the only power of the Commonwealth Parliament to legislate with respect to the acquisition of property . . . is that conferred by s. 51(xxxi.)".[4] Starke J. in the same case said:

> . . . the express power to make laws for the acquisition of property . . . makes it plain that the general powers of the Parliament, e.g.,

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[1] *Cooley's Constitutional Limitations* (8th ed. 1927) ii, 1110.
[2] Note, however, the provisions of s. 85(ii) relating to property of State departments transferred to the Commonwealth.
[3] (1943) 67 C.L.R. 314.
[4] *Id.*, 318.

> the defence power, to legislate with respect to the subjects confided to it must not be interpreted as authorizing legislation for the acquisition of property.[5]

This reasoning has never since been doubted and has been reaffirmed in a number of cases.[6]

It may be, however, that in a period of grave national crisis, particularly a defence emergency, the Commonwealth could exercise a prerogative power of acquisition without compensation. The theory of the prerogative power is based upon the decision in the *Saltpetre Case*,[7] which decision was extensively discussed, and not disapproved, in the case of *Attorney-General* v. *De Keyser's Royal Hotel Ltd.*[8] Latham C.J. and Starke J. adverted to the existence of a prerogative power in *Johnston Fear and Kingham* v. *The Commonwealth*[9] and indicated that in an appropriate case they would be prepared to listen to argument. Both Wynes in *Legislative, Executive and Judicial Powers in Australia*[10] and R. W. Baker in *Essays on the Australian Constitution*[11] consider that a prerogative power exists although its exercise may well be quite limited. The object of this article is to consider the express power in s. 51(xxxi.) and so discussion of a prerogative power will not be pursued.

Considering the wide implications of the Commonwealth's acquisition power, it is a little surprising that no express power of acquisition was contained in the draft Commonwealth of Australia Bill considered by the constitutional conventions. Doubts as to the adequacy of the Commonwealth's power to take over public works situated within one State were first voiced by Mr Wise at the Adelaide Convention of 1897.[12] At the Melbourne Convention of 1898 Mr Barton proposed the insertion of a new sub-section giving the Commonwealth power of acquisition.[13] It seems that it was previously considered that the incidental power (now s. 51(xxxix.)) would give a sufficient power of acquisition to the Commonwealth. Barton was supported by Dr Quick who thought that the incidental power was not enough,[14] and that "The Commonwealth would be crippled in its future operations if express power were not given in the manner suggested."[15] Sir George Turner doubted the

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[5] *Id.*, 325.
[6] *E.g. W. H. Blakeley and Co. Pty Ltd* v. *The Commonwealth* (1953) 87 C.L.R. 501, 521 (by the Full Court).
[7] (1606) 12 Co. Rep. 12 (77 E.R. 1294).
[8] [1920] A.C. 508.
[9] (1943) 67 C.L.R. 314, 318 and 325.
[10] (4th ed. 1970) 324.
[11] R. W. Baker, "The Compulsory Acquisition Powers of the Commonwealth", in Else-Mitchell (ed.) *Essays on the Australian Constitution* (2nd ed. 1961) 193, 194-196.
[12] Conv. Deb., Adel., 1199.
[13] Conv. Deb., Melb., i, 151.
[14] *Ibid.*
[15] *Id.*, 152.

advisability of inserting the new sub-section because he thought it might involve State treasuries in "enormous expenditure" and that there were not sufficient safeguards on the arbitrary exercise of the power.[16] Barton sought to reassure him on the latter point by indicating the requirement of just terms but Turner remained unconvinced and sought time to consider the effect of the amendment.[17] Barton agreed to this and when s. 51(xxxi.) as it now appears was reconsidered, its insertion was agreed to, with Mr O'Connor stating categorically that the clause provided a power of compulsory acquisition for the Commonwealth.[18]

In view of the remarks made by the whole court in *Blakeley's* case, *viz:*

> The power to acquire property compulsorily would probably have been regarded as forming an incident of almost every other power which is expressly granted by s. 51 in the absence of par. (xxxi.), and the grant of a specific power would have been in itself unnecessary. At all events that is the view which no doubt would now commend itself to constitutional lawyers[19]

it would seem that the members of the Convention were motivated by an abundance of caution.

*The Theory of Acquisition*

The placing of pl. (xxxi.) in section 51 gains its importance from the fact that the Commonwealth Parliament has been granted an affirmative power of acquisition (subject to the qualifications contained in the words of the paragraph) which is to be contrasted with the mere restriction on power contained in the 5th Amendment to the Constitution of the United States which concludes with the words "nor shall private property be taken for public use, without just compensation". In the United States each of the powers granted to the Federal Government contains within it an incidental power of acquisition.[20] The exercise of that incidental acquisitive power is then subject to the check or bar contained in the 5th Amendment. (It should also be noted that the 14th Amendment applies the provisions of the 5th Amendment to State and local legislative bodies.) It would have been possible to have included a similar check in the Australian Constitution, but the framers chose to grant a limited specific power, probably to overcome the doubts about the adequacy of the incidental power.[21] The difference between the United States and Australian positions might be illustrated by comparing an

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[16] *Ibid.*
[17] *Id.*, 153.
[18] Conv. Deb., Melb., ii, 1874.
[19] (1953) 87 C.L.R. 501, 521.
[20] Art. 1, para. 8, ch. 18.
[21] *Blakeley's* case (1953) 87 C.L.R. 501, 521 and Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 641.

acquisition in both countries. In Australia the legislative power given is with respect to a compound conception, *i.e.* "acquisition-on-just-terms"; and if just terms are not provided by the authorizing legislation any acquisition is a nullity. The Act of Parliament itself must make specific provision for the compensation of affected property owners, and that specific provision will be tested by the Court against the requirement of "just terms". In the United States, provided that "due process" has been observed, the validity of an acquisition is not affected by the lack of provision for "just compensation". The property acquired passes into the ownership of the acquiring authority and the former owner seeks his remedy from the Court which, if it thinks the compensation offered is inadequate, will increase it to a sum which it considers meets the constitutional requirement. Given the differences between the U.S. and Australian provisions, there are lessons which may be learnt from the American experience provided that the *caveat* of Dixon J. in *Grace Brothers Pty Ltd* v. *The Commonwealth* is borne firmly in mind. His Honour there said:

> . . . much assistance may be derived from American judicial decisions and juridical writings dealing with analogous difficulties, but they must be used with care and, in my opinion, cannot be applied directly to s. 51 (xxxi.).[22]

Much of the Australian case law on the acquisition power arose as a result of the actions of the Federal Labor Government during and immediately after the Second World War. Not only were schemes for the control and marketing of essential commodities and war supplies such as apples and pears, pineapples, wheat and wool the subject of challenge under s. 51 (xxxi.) but so also was the more conventional use of the acquisition power in obtaining land and buildings for use by the military. Basic planks of the Labor platform were attacked on the basis that acquisitions otherwise than on just terms were being effected — some more successfully than others. During this period the limits of the acquisition power began to be tested and expanded, but no rigid outer boundaries were set. One object of this article is to explore how much the limits might expand and still be consistent with the words of pl. (xxxi.) of section 51.

The meanings of the words "property" and "acquisition" will be examined by reference to the cases and although it is sometimes difficult to differentiate sharply between the two expressions, major examination will be directed towards the word "acquisition". It may be that in these days of burgeoning "government-by-regulation", and with subordinate legislation being more likely to be closely scrutinized, the expressions have taken on a wider meaning. If they have not, it will be argued that

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[22] (1946) 72 C.L.R. 269, 290.

a much more liberal interpretation should be given to them in an attempt to redress the balance between the governors and the governed. A test is suggested at a later stage against which legislation could be measured in order to ascertain whether or not an acquisition has been effected.

*The Meaning of "Property"*

The plain intention of the framers of the Constitution was to give the Commonwealth power to acquire property such as land and buildings to enable it to carry on the functions of government. Acquisition of a fee simple interest, in the main, presents no problem in interpretation. Acquisition of lesser interests and acquisitions by means other than voluntary sale or resumption may often give rise to complex questions.

(i) *General*

The meaning of the word "property" was most extensively considered by the High Court of Australia in the case of *Minister of State for the Army* v. *Dalziel.*[23] In that case Dalziel operated a parking station on vacant land in the City of Sydney leased to him by the Bank of New South Wales on a weekly tenancy. Acting under regulation 54 of the National Security (General) Regulations which related to the taking of possession of land by the Commonwealth, the Minister gave notice that the land was required for defence purposes and then took possession of the land. The Commonwealth sought to argue[24] that there had been no acquisition since no legal or equitable estate or interest in the property, but merely the temporary possession or occupation of it, had passed. This argument was rejected by a majority of the High Court,[25] which held that the taking of exclusive possession by the Commonwealth, even for a temporary period, constituted an acquisition of property within the meaning of s. 51(xxxi.) of the Constitution.

All the judges in *Dalziel's* case were inclined to a broad view of the meaning of the word "property". Starke J. said,

> . . . property . . . is *nomen generalissimum* and extends to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action. And to acquire any such right is rightly described as an "acquisition of property". On the other hand a mere personal licence such as is not assignable would not be rightly described as property.[26]

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[23] (1943-1944) 68 C.L.R. 261.
[24] *Id.*, 265.
[25] Rich, Starke, Williams and McTiernan JJ., Latham C.J. dissenting.

According to McTiernan J.

> The word "property" in s. 51(xxxi.) is a general term. It means any tangible or intangible thing which the law protects under the name of property.[27]

Even Latham C.J., who dissented on the effect of the taking of possession, said:

> I can see no reason why, so far as land is concerned, "property" in s. 51(xxxi.) of the Constitution should not be interpreted so as to include land itself and also proprietary rights in respect of land. The provision in the Constitution is plainly intended for the protection of the subject, and should be liberally interpreted.[28]

Rich J. indignantly pointed out the dangers involved in too strict an interpretation of the word "property":

> What we are concerned with is not a private document creating rights *inter partes,* but a Constitution containing a provision of a fundamental character designed to protect citizens from being deprived of their property by the Sovereign State except upon just terms . . . . Property, in relation to land, is a bundle of rights exercisable with respect to the land. The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle. But there is nothing in the placitum to suggest that the legislature was intended to be at liberty to free itself from the restrictive provisions of the placitum by taking care to seize something short of the whole bundle owned by the person whom it was expropriating.[29]

He went on to say:

> . . . if the argument which has been addressed to us on behalf of the Minister were allowed to prevail . . . (it) would be in effect to strike placitum (xxxi.) out of the Constitution.[30]

One conclusion which can be drawn from the preceding quotations is that since pl. (xxxi.) is designed for the protection of the individual citizen (although this is not its sole purpose, since the interests of the Government and the public generally are also to be taken into account — see *Grace Brothers Pty Ltd* v. *The Commonwealth*[31]) its terms are to be given a liberal meaning. The word "property" should be "interpreted according to general principles of jurisprudence which treat it, not in a physical sense, but as a legal concept comprising a bundle of rights".[32] Dixon J. put it neatly in the *Bank Nationalization Case*:

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[26] (1943-1944) 68 C.L.R. 261, 290.
[27] *Id.*, 295.
[28] *Id.*, 276.
[29] *Id.*, 284-285.
[30] *Id.*, 287.
[31] (1946) 72 C.L.R. 269, 280.
[32] R. W. Baker, "The Compulsory Acquisition Powers of the Commonwealth", *supra* n. 11, 204.

> I take *Minister of State for the Army* v. *Dalziel* to mean 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 recognized at law or in equity and to some specific form of property in a chattel or chose in action similarly recognized, 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.[33]

It should also be noted that the constitutional protection afforded to the citizen cannot be avoided by the Commonwealth by describing that which is acquired as not being property. An argument based on this received short shrift in *Dalziel's* case but it is possible to envisage its re-emergence when considering one of the "innominate and anomalous" interests to which Dixon J. made reference. R. W. Baker in *Essays on the Australian Constitution*[34] considers that "property" may include an easement destroyed by building a fort on acquired land, or a breach of covenant in respect of land acquired for a post office. Similarly the destruction of a right to get wood from land submerged as a result of the Commonwealth's building a dam to supply water to one of its territories could conceivably be characterized as an acquisition of "property". If, however, Commonwealth legislation prevented a man from building a multi-storey office block on his land which was zoned by the local government body specifically for that purpose, on the authorities as they stand at present it is doubtful whether the right taken away would be regarded as property. This leads on to the question of whether the uses which can be made of property can themselves be said to be property which is acquirable.

In *Dalziel's* case[35] it was argued that the test of what estate a person has in land is to consider what he can do with it, and that the action taken by the Commonwealth had put an end to the use that Dalziel could have made of the land even though it had not put an end to the tenancy.[36] The Court held that this was an acquisition of property for which just terms had to be provided. Latham C.J. (dissenting) said that "the right to possession is the most valuable attribute of ownership",[37] but went on to say that in this case the tenancy was not destroyed by the fact that Dalziel had no right to possession, and that the taking of possession did not mean that there had been an acquisition. Rich J. expressed the view that "the Minister has seized and taken away from Dalziel everything that made his weekly tenancy worth having, and has left

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[33] *Bank of New South Wales* v. *The Commonwealth* (1948) 76 C.L.R. 1, 349.
[34] *Supra* n. 11, 204.
[35] (1943-1944) 68 C.L.R. 261.
[36] *Id.*, 267.
[37] *Id.*, 277.

him with the empty husk of tenancy".[38] The other members of the Bench agreed with Rich J., Starke J. saying "The right conferred upon the Commonwealth may be classified, I think, . . . a right of property, the subject of acquisition".[39]

It is clear in the light of *Dalziel's* case that a Commonwealth law which seeks to take away the right of an owner to possession of his property is a law with respect to the acquisition of property and that just terms must be provided. Whether or not other incidents of the ownership of property are themselves property is much less obvious. Would, for instance, a Commonwealth law preventing an owner of property from sub-leasing it or granting a licence, or constructing a certain type of building on the property—which *vis-à-vis* Commonwealth legislation (excluding that relating to the Territories) are the undoubted rights of the owner of property—be said to amount to an acquisition of property? Certainly if the Commonwealth sought to appropriate those rights to itself, it would be difficult to resist an argument that an acquisition of property was involved. For instance, if Federal legislation were to provide that every person should lease his unoccupied premises to such public servants as the Commonwealth directed, ahead of all others, the Commonwealth would be taking away a valuable attribute of ownership, and virtually taking that right for itself. If this were done merely as a regulation of the rights of property, which amounted to a deprivation and not an acquisition of property or a "taking as one's own", the argument could be more difficult to sustain and would depend on the precise provisions of the legislation.

In *Belfast Corporation* v. *O.D. Cars Ltd*[40] the House of Lords held that those rights which in the aggregate constitute ownership of property would not individually be called property. This, of course, is a question of degree as the taking away of a particularly valuable right, such as possession, may render the other rights practically useless. It will be argued later that these individual rights of ownership should themselves fall within the definition of "property" so that the "just terms" guarantee cannot be avoided.

An interesting sidelight which arises out of the *Bank Nationalization Case*[41] is whether the liabilities of an owner of property can be regarded as property. It was argued by counsel for the bank that the acquisition of a "business" cannot be based on s. 51(xxxi.) because the word "property" is not wide enough to encompass such an exercise of power. Alternatively, it was argued that the Commonwealth could not take over the liabilities of the private banks as provided for by s. 24 of the Banking

[38] *Id.*, 286.
[39] *Id.*, 290.
[40] [1960] 1 All E.R. 65.
[41] *Bank of New South Wales* v. *The Commonwealth* (1948) 76 C.L.R. 1.

Act 1947, because to do so would be outside all power.[42] The latter argument was upheld by the whole court with the exception of McTiernan J. Latham C.J. said:

> The acquisition of property is a subject which is completely different from that of the transfer of liabilities . . . the Commonwealth has no power, because it acquires a man's factory or machinery, to provide that he shall be released from his trade or other debts. A power to acquire property from one person does not include a power to abolish the rights of creditors of that person. If the rights which the creditors of such a person has are themselves property, those rights could be acquired (upon just terms) . . .[43]

The Chief Justice held that if the Commonwealth attempted to reduce the amount of compensation payable to a person whose property has been acquired by taking into account the liabilities of the owner of that property it could not be said to be an acquisition on just terms, for "The amount of the debts owed by the owner of the property has nothing to do with the value of his property".[44] Starke J. saw no objection to the taking over of a business as a going concern but went on to say "the power is not, in itself, wide enough to include the taking over of liabilities",[45] in the sense that Commonwealth legislation could not provide that the private banks should be discharged from their liabilities.[46]

(ii) *Conclusions as to the meaning of "property"*

The courts have held that "property" is a word of very wide import. *Dalziel's* case decided that although a person may still technically be the owner of property, if the Commonwealth takes for itself valuable attributes of that ownership then this will be an acquisition of property within s. 51 (xxxi.). Problems arise, however, when considering some of the less obvious features of ownership in relation to the constitutional provision, particularly if the exercise of those features is regulated rather than taken over by the Commonwealth. This leads to the crucial question of where "regulation" ends and "acquisition" begins. The cases so far have set no boundaries for the meaning of the word "property" and each situation must be looked at individually as it arises. The courts have not limited themselves in their definition but it is still a matter of speculation in some of the more "borderline" circumstances, which remain for judicial resolution.

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[42] *Id.*, 110.
[43] *Id.*, 214.
[44] *Id.*, 215.
[45] *Id.*, 299.
[46] *Id.*, 269-271.

*The Meaning of "Acquisition"*

*Dalziel's* case[47] once again provides a convenient starting point for an examination of the meaning of "acquisition". The facts of the case have already been stated and discussion in the case dealt as much with the meaning of "property" as with the meaning of "acquisition". The case decided that the taking of temporary but indefinite possession of property constituted an acquisition of property within the meaning of s. 51(xxxi.). Starke J. gave the term a wide interpretation when he said:

> It is said in the *Imperial Dictionary* that to gain a mere temporary possession of property is not expressed by the word acquire, but by such words as gain, obtain, procure, as to obtain (not acquire) a book on loan. But the construction of the Constitution cannot be based on such refinements.[48]

Chief Justice Latham was the only member of the Court to dissent and he did so on the grounds that the Commonwealth could only use the land for defence purposes and could not transfer its rights to another person; and since Dalziel's tenancy still subsisted the Commonwealth was in the position of a licensee, with rights as stated in the regulations.[49]

(i) *The element of force*

Where Commonwealth legislation has forced an owner of property to deal with that property in a certain manner the courts have generally been quite willing to hold that an acquisition was involved. Under challenge in *McClintock* v. *The Commonwealth*[50] were orders made under regulation 59 of the National Security (General) Regulations and regulation 9 of the National Security (Food Control) Regulations dealing with the disposal of the Queensland pineapple crop during World War II. The effect of these orders was to compel the grower to deliver such proportion of his crop as might be directed to a controlling committee which would arrange its distribution to the various canneries. The grower was to be paid for the crop in the manner and at the rate prescribed. It was argued for the Commonwealth that no acquisition was involved but merely control and direction of the pineapples, and that the word "acquisition" contemplated the vesting of some right in the nature of property in the Commonwealth itself. Furthermore, if an acquisition was involved, it was by a body independent of the Commonwealth and therefore not subject to the constitutional requirement of just terms.[51] The High Court, by majority (Rich, Starke and Williams JJ.), held that the provisions of s. 51(xxxi.) were not limited to acquisitions by the

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[47] (1943-1944) 68 C.L.R. 261.
[48] *Id.*, 290.
[49] *Id.*, 278.
[50] (1947) 75 C.L.R. 1.
[51] *Id.*, 12-14.

Commonwealth but extended to acquisitions for any purpose in respect of which the Commonwealth Parliament has power to make laws. The question of whether an acquisition had been effected was fully considered in the judgment of Starke J. He dealt first with order no. 1 which required the grower to pick and deliver his pineapples as directed. His Honour said of the order "In operation it compels the grower to deliver his pineapples to canners at a fixed price. Such a transaction is a forced sale and results in the acquisition of property . . .".[52] Order no. 2 next fell for consideration. The order provided that "a grower should not distribute, sell, supply, deliver, remove, use, consume or otherwise dispose of pineapples".[53] It also provided that the Controller of Defence Foodstuffs could compel the grower to dispose of the pineapples in such a manner as the Controller directed. Starke J. held that this was an acquisition for the same reasons as for order no. 1.[54]

Order no. 3, as Starke J. termed it, provided for even greater control and direction of the growers' pineapple crop, in that it provided that a grower should continue to comply with order no. 2 and further that he should not without approval "move, transport, distribute, sell, dispose of, use or consume . . . any prescribed food in his possession or custody or under his control whether on his own account or on behalf of any other person". Growers were directed to load a proportion of their crop for delivery to the canneries (although the place of acceptance of the fruit was stated to be the canning factory). Yet His Honour did not regard it as an acquisition because

> the Commonwealth did not in fact acquire any of the appellant's pineapples under this order and the directions given pursuant to it, nor did it operate as an acquisition by the Commonwealth of any of his pineapples. And it is doubtful, I think, whether the order and directions under it operated as a forced sale to the factories. It was rather a diversion order.[55]

With respect, it is difficult to see how McClintock was in any better position under order no. 3 than he was under order no. 2 and it would seem that the effect was the same. From the point of view of Starke J., the distinction would appear to turn on whether a forced sale was the consequence or not. His concluding words seem to confirm this:

> There was no obligation on the canners to accept the goods and no price was prescribed. If the canners accepted the pineapples they would come under an obligation to pay a reasonable price therefor.[56]

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[52] *Id.*, 24.
[53] *Id.*, 27.
[54] *Id.*, 28.
[55] *Id.*, 29.
[56] *Id.*, 29-30.

Williams J. in the same case considered that an acquisition had taken place. He said:

> . . . an order compelling particular persons to deliver specific food to the Commonwealth or some other body or person would, in my opinion, be legislation providing for the compulsory acquisition of that food . . . within the meaning of s. 51, pl. (xxxi.) of the Constitution.[57]

However, he thought that the acquisition did not commence until the pineapples were actually on their way to the canneries:

> The effect of the orders if valid would have been to transfer the property to the Commonwealth when they were delivered by the growers to the loaders of the [Committee of Direction]. The growers then lost the possession and all control of the disposition of their pineapples . . . .[58]

In *Jenkins* v. *The Commonwealth*[59] the provisions of the National Security (Minerals) Regulations were under attack. The Regulations provided that the Controller should have power "on behalf of the Commonwealth, to operate, control and direct the production and supply of minerals" (reg. 6(1.)). The Regulations were later amended to give the Controller power of compulsory acquisition over minerals and alternative power to direct their supply and delivery. The plaintiffs were mica miners in the Harts Range in the Northern Territory who were ordered to deliver all their mica to the Commonwealth for use in defence production. Williams J. held that such an order would be an acquisition of the mica by the Commonwealth. Similarly a direction to supply mica to a person other than the Commonwealth would also be an acquisition.[60] He does not mention the "control" provisions in relation to the acquisition power but it seems doubtful whether he would have considered these alone to be an acquisition of property.

In another case involving Commonwealth legislation with a compulsive element, while not deciding the point (because it was not raised in argument) two of the Justices of the High Court felt that an acquisition of property might have been involved. The case is *The Real Estate Institute of New South Wales* v. *Blair*,[61] in which the provisions of the National Security (War Service Moratorium) Regulations were under scrutiny. The Regulations provided that an ex-serviceman or his dependants could apply for a court order authorizing the delivery of possession to him of "a dwelling-house which is unoccupied or about to

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[57] *Id.*, 36.
[58] *Ibid.*
[59] (1947) 74 C.L.R. 400.
[60] *Id.*, 404-406.
[61] (1946) 73 C.L.R. 213.

become unoccupied" (reg. 30A). Blair had applied for an order requesting the delivery of possession to him of an unoccupied dwelling-house situated in Queanbeyan. Criticism of the regulations was directed, among other things, at the lack of provision for:

(a) a definite term of tenancy;

(b) covenants for repair and for use of the premises and against sub-letting;

(c) the right of the owner to enter and view; and

(d) a requirement that the applicant should live on the premises.

The regulations were upheld as a valid exercise of the defence power (s. 51(vi.)) but Latham C.J. went on to say:

> There is another aspect of these regulations to which, however, no reference was made in argument. They are provisions under which successful applicants become tenants of property, and therefore acquire an interest in property. Even if it were held that reg. 30AD did not result in the creation of tenancies strictly so called, it could nevertheless be argued that there would be a right of exclusive possession in the protected person and therefore an acquisition of property by him: See *Minister of State for the Army* v. *Dalziel*.[62]

The Chief Justice reserved his opinion on whether just terms had been provided.

Williams J. also made mention of the acquisition question but came to no conclusion on whether there was an acquisition involved here. He did say, however, that

> there is no general authority under the Constitution for the Parliament in the exercise of its legislative powers to interfere with the proprietary rights of individuals under the law of the States and compel one citizen to make his property available for the benefit of another.[63]

He went on to make the statement that:

> We are now in a period when the defence power is contracting. In my opinion the operation of the defence power in peace-time could not be wide enough to authorize legislation otherwise than under s. 51(xxxi.), to make dwelling houses owned by individuals available as dwelling houses for discharged members of the forces. But the present regulations can, I think, be justified as an exercise of the defence power during hostilities and the immediate aftermath.[64]

His Honour appears to have overlooked the decision in *Johnston Fear and Kingham* v. *The Commonwealth*[65] which decided that there was

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[62] *Id.*, 223.
[63] *Id.*, 236.
[64] *Ibid.*
[65] (1943) 67 C.L.R. 314.

no incidental area in other powers to authorize the acquisition of property and that this had to be done under the power given by pl. (xxxi.) of section 51. So whether during a period of hostilities or of peace, any acquisition must be carried out in pursuance of section 51(xxxi.). Bearing this in mind it would seem that Williams J. thought that the regulations here authorized an acquisition of property as did Chief Justice Latham.

It was argued in *British Medical Association* v. *The Commonwealth*[66] that the provisions of the Pharmaceutical Benefits Act 1947-1949 were invalid by reason of the power to regulate the retail prices of drugs and medicines and that the legislation operated to authorize a forced sale (or acquisition) to a customer on other than just terms.[67] The High Court was unimpressed by this argument but Dixon J. was the only member to deal with it at any length. He stated that a "dialectical argument" could be made out to support the contention that the customer is acquiring the property (medicines) from chemists on other than just terms, but he considered such an argument to be "synthetic" and "unreal". He went on to say:

> There is here no compulsory acquisition by the customer of the drugs he obtains from the chemist when he presents a medical prescription. The chemist is legally free to supply them or not as he pleases. I do not think that the risk he may run of his approval being revoked if he refuses, or the business consequences of the revocation, can make the acquisition compulsory. Its legal character is a voluntary sale. The protection which s. 51(xxxi.) gives to the owner of property is wide. It cannot be broken down or avoided by indirect means. But it is protection to property and not to the general commercial and economic position occupied by traders .... If the prices are too low he may suffer in his trade, but that is not within the protection of s. 51(xxxi.).[68]

The implications for the Commonwealth's power over prices of a contrary decision would have been broad. The Commonwealth's power with respect to foreign, trading and financial corporations, recently considered in the *Concrete Pipes* case[69] could have been severely restricted if the Commonwealth were required to give just terms to persons affected by price regulation.

There seems no doubt that a forced sale, whether to the Commonwealth or to some other person authorized by Commonwealth legislation, is an acquisition of property within section 51(xxxi.) (see *McClintock's* case and *Jenkins'* case). There is not as much authority for a similar

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[66] (1949) 79 C.L.R. 201.
[67] *Id.*, 211.
[68] *Id.*, 270-271.
[69] *Strickland* v. *Rocla Concrete Pipes Ltd* [1972] A.L.R. 3.

proposition with regard to a forced lease of property but it would almost certainly be regarded as an acquisition entitling the property owner to just terms (see *Real Estate Institute of New South Wales* v. *Blair*). On the authority of the *British Medical Association* case price fixing does not constitute an acquisition, nor does the revocation of a licence to trade, probably because the Commonwealth in such cases is gaining nothing tangible for itself. A "diversion order", while held not to be an acquisition in *McClintock's* case, seems almost indistinguishable from a forced sale, since the owner of the property has no choice but to deliver it to the persons specified in the order. Mere control of property by the Commonwealth without there being a positive duty to use that property for the benefit of the Commonwealth in its broad sense would not seem to involve an acquisition.

(ii) *Other examples of acquisition*

In the *Bank Nationalization Case*[70] an interesting question relating to acquisition was raised. Many of the provisions of the Banking Act 1947 did not attempt to disguise the fact that they were directed to the acquisition of the shares and business of the private banks. However the provisions of Part IV, Division 3, the "Management Provisions", seem to be based on the notion that no acquisition was involved. The offending sections provided that:

(a) on a date specified in a notice the directors of the bank should cease to hold office (although provision was made here for compensation to the individual directors): s. 17;
(b) the Governor of the Commonwealth Bank might, with the Treasurer's approval, appoint directors to take the place of those who had ceased to hold office: s. 18;
(c) the directors appointed under s. 18 were to have full power to manage, direct and control the affairs of the bank of which they were directors, to declare dividends and to dispose of the business of the bank to the Commonwealth bank or otherwise. Disposal of business required the consent of the Treasurer but the directors could exercise their other powers in their sole and unfettered discretion: s. 19; and
(d) any provisions requiring a minimum number of members in a private bank were rendered ineffective: s. 21.[71]

Latham C.J., Dixon and McTiernan JJ. all held that these provisions amounted to an acquisition of property which did not at once grant just terms. Latham C.J. said:

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[70] *Bank of New South Wales* v. *The Commonwealth* (1948) 76 C.L.R. 1.
[71] *Id.*, 4 (footnotes).

> . . . nominee directors would have at best a divided duty. . . . they would be in an impossible position. . . . The provisions with respect to management of the bank provide, by reason of s. 19, a means of acquiring property. That being so, they must provide for just terms of acquisition. It cannot, in my opinion, be said to be just that an authority with powers of compulsory purchase should appoint managers of the property to be acquired with power to sell the property to the authority for a price fixed by those managers and the authority.[72]

Dixon J. regarded the provisions as

> a circuitous device to acquire indirectly the substance of a proprietary interest without at once providing the just terms guaranteed by s. 51(xxxi.) . . .[73]

and thought that:

> The company and its shareholders are in a real sense, although not formally, stripped of the possession and control of the entire undertaking.[74]

Rich, Williams and Starke JJ. also held the "Management Provisions" invalid, although they preferred to rely on the ground that the provisions were not authorized by the banking power (s. 51(xiii.)). But all said that even if this were not the case s. 51(xxxi.) would not support them because of the absence of just terms.

One conclusion that could be drawn from this case is that full scale control of property by the Commonwealth even though no formal acquisition had taken place can, in some circumstances, be characterized as an acquisition of property. To take this view to a logical conclusion it could be said that the appointment of a receiver of a bankrupt estate is an acquisition of property and therefore subject to the just terms requirement. This is plainly incorrect since the appointment of a receiver is a normal incident of the bankruptcy power, as are the forfeiture provisions in the Customs Act normal incidents of the customs power and not acquisitions—see *Burton* v. *Honan*.[75] It must also be borne in mind that the "Management Provisions" were part of a legislative plan to acquire the business of the private banks and this may have coloured the reasons for the judgment of Latham C.J. and those who concurred with him. This is far from saying, however, that the views of the Chief Justice and Dixon J. are without value. They add authority to the proposition that control of property may in some instances be an acquisition of that property and together with the decision in *Dalziel's*

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[72] *Id.*, 217-218.
[73] *Id.*, 349.
[74] *Ibid.*
[75] (1952) 86 C.L.R. 169.

case[76] provide perhaps the widest interpretation of the meaning of acquisition.

The *Bank Nationalization Case* could perhaps be contrasted with the decision in *Australasian United Steam Navigation Co. Ltd* v. *The Shipping Control Board,*[77] a case which provided a golden opportunity to extend the meaning of acquisition in s. 51(xxxi.). However, no member of the Court was prepared to regard the facts as leading to the conclusion that an acquisition was involved. The facts were that the steamship *Macumba* was requisitioned by the Commonwealth Government under the National Security (Shipping Control) Regulations which provided that the owner of a ship was to be bound by the terms and conditions of the standard time charter-party set out in the schedule. The ship was lost at sea, and the plaintiff sought to establish that the ship had been acquired and that it was therefore entitled to be compensated on just terms which, it was claimed, were not provided under the charter-party. Some of the relevant provisions of the charter-party were:

(a) that the owners agreed to let and the charterer to hire the ship (clause 1);
(b) that the owners were to deliver the ship with master and a full complement of officers and crew (clause 2);
(c) that the owners were to pay for all provisions and ordinary wages (clause 4);
(d) that a hiring rate per day was to be paid as prescribed (clause 7);
(e) that the whole capacity of the ship was to be at the charterer's disposal (clause 10);
(f) (and perhaps most important) that the master was to be solely under the orders of the charterer as regards the employment of the ship but was at the same time responsible to the owners for the management, handling and navigation of the ship (clause 13).

The plaintiffs argued that an acquisition of property (even if only of some limited right) had occurred, since the Commonwealth had taken almost complete control of the ship.[78]

The argument was rejected on the grounds that since the owner retained control of the management and navigation of the ship the Commonwealth acquired neither property nor possession. Latham C.J. held that the requisitioning of a ship may not involve its acquisition,

[76] (1943-1944) 68 C.L.R. 261.
[77] (1945) 71 C.L.R. 508.
[78] *Id.*, 515.

depending on the terms of the requisition. He referred to *Dalziel's* case[79] and stated that the question at issue was whether possession had passed to the charterer. If not, no property would pass either. The general test is "whose servants the master and crew were",[80] and if the owner has the power of appointment and dismissal of the master and crew, possession of the ship remains with him. The expressions in the charter-party relating to "letting", "hiring", "demise" and "re-delivery" were, in the opinion of Latham C.J., obsolete hangovers of a past age.[81] He considered that it was made clear beyond doubt "that the possession of the ship should not be delivered to the charterer" by clause 13. He was supported in this conclusion by all the other members of the Court who held that neither possession of, nor property in, the ship passed to the Commonwealth.

Rich J. however, recognized that the charter gave the Commonwealth "a power of direction as to the voyages to be made and, within limits, the cargoes to be carried".[82] This aspect of the power of control and direction vested in the Commonwealth was not fully explored in the case. It may be that an argument could have been mounted on the basis that effective control of the ship had passed to the Commonwealth and that the owners were mere "conduit pipes" for the directions given by the Commonwealth. In view of the unequivocal nature of the judgments it is doubtful that such an argument could have succeeded. The case might be partially explained by its peculiar circumstances, since it dealt with a maritime situation and the decision was based on the law of charter. There was English authority that a charter of this type did not operate as a demise.[83] If similar facts had occurred in a non-maritime context an interesting problem might have arisen. If, for example, Mr Dalziel had been allowed to retain possession of his parking station but had been directed to use it solely for the parking of military vehicles the effect of such a direction might well have constituted an acquisition of property.

(iii) *Recent developments*

The most recent discussion of the meaning of "acquisition" was in *Re Döhnert Müller Schmidt and Company*.[84] In this case the Australian property of two German nationals had been confiscated during the war under the Trading with the Enemy legislation. It was argued that the confiscation was an exercise of the acquisition power for a Common-

[79] (1943-1944) 68 C.L.R. 261.
[80] *Fenton* v. *City of Dublin Steam Packet Co.* (1838) 112 E.R. 1054, 1057.
[81] *A.U.S.N.* v. *The Shipping Control Board* (1945) 71 C.L.R. 508, 522-523.
[82] *Id.*, 525-526.
[83] *Elliott Steam Tug Co. Ltd* v. *The Admiralty* [1921] 1 A.C. 137, 141.
[84] (1961) 105 C.L.R. 361 *sub. nom. Attorney-General of the Commonwealth* v. *Schmidt.*

wealth purpose, *e.g.* defence or external affairs, and therefore just terms had to be provided. It was further argued that since this was not an exercise of the prerogative power of acquisition it must be an exercise of the power under s. 51(xxxi.).[85] The arguments were rejected by the High Court, but the Chief Justice discussed the acquisition power at some length.

He held that the confiscation was analogous to a forfeiture or confiscation under Customs legislation, or a fine, neither of which involves acquisition. But he went on to say:

> It is hardly necessary to say that when you have, as you do in par. (xxxi.), an express power, subject to a safeguard, restriction or qualification, to legislate on a particular subject or to a particular effect, it is in accordance with the soundest principles of interpretation to treat that 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 authorized the same kind of legislation but without the safeguard, restriction or qualification. But two observations must be made. First, it is necessary to take care against an application of this doctrine to the various powers contained in s. 51 in a too sweeping and undiscriminating way. For it cannot have much to do with some of the subject matters of power upon the very terms in which they are conferred. The other observation is that the principle does not apply except with respect to the ground actually covered by par. (xxxi.) of s. 51.[86]

Therefore the vesting of bankrupt property in an official receiver is not an acquisition, but obtaining land for a bankruptcy office would be covered by s. 51(xxxi.).

> But that does not mean that property can never pass to or become vested in the Commonwealth or its officers except under a law made in pursuance of s. 51(xxxi.). . . . It covers laws with respect to the acquisition of real or personal property for the intended use of any department or officer of the Executive Government of the Commonwealth in the course of administering laws made by the Parliament in the exercise of its legislative power.
> How much further it goes may not perhaps be settled but it does not affect acquisition by way of forfeiture or penalty or for the purpose of provisional tax *(Commissioner of Taxation* v. *Clyne (1958) 100 C.L.R. 246)*, by the condemnation of prize or indeed anything which lies outside the very general conception expressed by the phrase "use and service of the Crown".[87]

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[85] *Id.*, 363-364.
[86] *Id.*, 371-372.
[87] *Per* Dixon C.J., *id.*, 372-373.

The Chief Justice has given considerable attention to the words of pl. (xxxi.) and his words serve as a warning not to seek to expand the limits of the acquisition power beyond its intended ambit. It echoes his dismissal of the acquisition argument in the *British Medical Association's* case[88] as "synthetic" and "unreal".

The phrase "use and service of the Crown" is tantalizingly vague, but when it is read together with some of the preceding words it would seem that his Honour took a fairly narrow view of the scope of the acquisition power, and one which may not allow for many of the wider implications of the decisions in *McClintock's* case and the *Bank Nationalization Case*.

(iv) *Conclusions as to the meaning of "acquisition"*

The authorities would seem to establish that an acquisition of property by the Commonwealth requires the Commonwealth, or its agency, or some person or body authorized by Commonwealth legislation, to gain possession and control of the property. The Commonwealth must have some interest in the acquisition, in that in a very broad sense some benefit flows to it. In *Schmidt's* case Dixon C.J. said:

> The scope of s. 51(xxxi.) is limited. Prima facie it is pointed at the acquisition of property by the Commonwealth for use by it in the execution of the functions, administrative and the like, arising under its laws.[89]

The idea of the Commonwealth "using" the property in the execution of its functions is important. Acquisition must, for example, be distinguished from mere deprivation, which does not require compensation to be given. If the Commonwealth were to revoke the licence of a television station, for instance, thereby preventing it from broadcasting, such action could not be regarded as an acquisition. Fines, customs forfeitures and confiscation of enemy property also fall outside the classification of acquisition, since these are regarded as incidental to the exercise of other Commonwealth powers, and no "use" is made of the property. Similar considerations apply to the appointment of a receiver under the bankruptcy power.

The reasons stated in the *Bank Nationalization Case*[90] by Latham C.J., Dixon and McTiernan JJ. for their decisions on the "Management Provisions" indicate a movement away from the idea of possession being required to effect an acquisition, but it could perhaps be said that the Commonwealth was taking notional possession of the banks by installing its own directors. An extension of this argument applied to the facts of

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[88] (1949) 79 C.L.R. 201.
[89] (1961) 105 C.L.R. 361, 372.
[90] (1948) 76 C.L.R. 1.

*McClintock's* case[91] could show that the Commonwealth or its agency was in notional possession of the grower's pineapples as soon as the grower received notice from the Controller of Foodstuffs, as the grower could not, without the Controller's approval, do anything else but pick the crop. The Court did not consider this aspect, preferring to date the acquisition from the time the crop was dispatched to the Committee of Direction.

*Acquisition—an Overseas Comparison*

Much care needs to be exercised when seeking to apply principles of constitutional law applicable in other jurisdictions to the Australian situation—not only is the wording of the provisions different but the whole course of interpretation has often followed divergent lines. Overseas experience, however, should not be dismissed out of hand because of the uniquely national content of the Constitution, as foreign courts often bring to bear a different point of view which may, on reflection, be acceptable (even if only in some modified form) to the interpreters of the Australian Constitution. For example, the word "acquisition" in section 51(xxxi.) does not have a rigid meaning and as new circumstances arise which may involve the acquisition of property by the Commonwealth, older views of the scope of the paragraph may no longer suffice. Some of those circumstances have been postulated earlier, and in some cases it may be valuable to look for some guidance to decisions by United States courts. As mentioned previously, the Federal Government of the United States has no affirmative acquisition power; it is an incident of the other powers vested in the Government. Its exercise is restricted by the provisions of the 5th Amendment to the Constitution which states "nor shall private property be taken for public use, without just compensation". This restriction is also applicable to State and local bodies by virtue of the 14th Amendment. It should be noted that the words of the 5th Amendment refer to "taking" rather than "acquisition". A controversial question in the American courts is the problem of distinguishing between a "regulation" and a "taking". "Regulation" in the American context usually refers to an exercise of what is known as the "police power" or the inherent right to legislate to protect the health, safety, morals and welfare of the community. If such a power is invoked no compensation is payable. Such a power (except with respect to the Territories) does not reside in the Australian Commonwealth Parliament which is bound by the Constitution to the enumerated and limited powers.[92]

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[91] (1947) 75 C.L.R. 1.

[92] The existence of an unexpressed "general welfare" power was argued and rejected in the *Pharmaceutical Benefits Case (Attorney-General for Victoria (ex. rel. Dale)* v. *The Commonwealth)* (1946) 71 C.L.R. 237.

The American courts appear to have evolved two different tests which they apply in the majority of cases involving legislation which is challenged as infringing the constitutional guarantee. The first is to see whether the government has taken possession of the property in question (the "invasion" theory; see *United States* v. *Central Eureka Mining Co.*[93]); and the second is to balance the interests of the property owner against those of the public (*e.g. Miller* v. *Schoene*[94]). One major consideration in this approach is the extent of the diminution of the property's value to its owners. Neither theory has been applied with any consistency by the Supreme Court to the "taking *v.* regulation" cases and its doctrine has been described as a "crazy-quilt pattern".[95] Neither test is satisfactory, the "invasion" theory being excessively legalistic and inappropriate for modern conditions while the diminution of value test is historically unsound and has not been consistently followed.[96] A further subsidiary test is the "noxious use" theory which classifies an interest as a "nuisance" and as such not property. This theory assumes that since the owner is in some way responsible for creating the problem he should receive no compensation when it is alleviated (*e.g. Goldblatt* v. *Town of Hempstead*[97]). The United States courts have, however, been willing to hold that a broader range of controls over property amount to a compensable "taking". Illustrative of this attitude is the case of *U.S.* v. *Causby*[98] where the owner of a chicken farm beside an airport had the misfortune to be directly below the glidepath of approaching aircraft. The resulting noise so frightened the chickens that Causby's business was ruined. It was held that the "taking" was as effective as if the U.S. Government had entered the land and taken exclusive possession, for

> The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field.[99]

The United States courts have certainly shown greater willingness to scrutinize *prima facie* regulatory legislation to see whether in fact a "taking" has been effected. Mr Justice Holmes probably summed up the true position in the case of *Pennsylvania Coal Co.* v. *Mahon*[1] when he said:

> The general rule, at least, is that while property may be regulated

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[93] (1958) 357 U.S. 155; 2 L. Ed. 2d 1228.
[94] (1928) 276 U.S. 272; 72 L. Ed. 568.
[95] Dunham, "*Griggs* v. *Allegheny County* in Perspective: Thirty Years of Supreme Court Expropriation Law" 1962 Supreme Court Review 63.
[96] See J. L. Sax "Taking and the Police Power" (1964) 74 Yale L.J. 36.
[97] (1962) 369 U.S. 590; 8 L. Ed. 2d 130.
[98] (1946) 328 U.S. 256; 90 L. Ed. 1206.
[99] *Id.*, 262; 90 L. Ed. 1206, 1211.
[1] (1922) 260 U.S. 393; 67 L. Ed. 322.

> to a certain extent, if regulation goes too far it will be recognized as a taking. . . . this is a question of degree.[2]

Normally decisions of English courts on questions of acquisition are not relevant to similar questions arising under the Australian Constitution. The reason is that the United Kingdom is a unitary system which has no written constitution and so there is no guarantee that compensation must be given in cases of acquisition (although there is a strong presumption that compensation will be given which requires clear words in a statute to rebut it). Occasionally English cases are cited by the High Court in its examination of problems concerning "just terms" but it has been held that that expression does not import the common law rules relating to compensation into s. 51(xxxi.).[3]

One recent British case is, however, of some interest. It was *Belfast Corporation* v. *O.D. Cars Ltd*[4] and concerned the interpretation of s. 5(1) of the Government of Ireland Act, 1920 which provided, *inter alia,* that the Parliament of Northern Ireland shall not "take any property without compensation". The respondents sought planning permission to erect industrial and commercial buildings on land that it owned. Permission was refused by the Corporation because the proposed development did not meet minimum height requirements and because part of the development would have been in land zoned as residential. The company then sought compensation. Much reliance was placed by counsel for the company on decisions from the United States, Australia and Canada.

Viscount Simonds said:

> I hope that I do not over-simplify the problem, if I ask whether anyone using the English language in its ordinary signification would say of a local authority which imposed some restriction on the user of property by its owner that that authority had "taken" that owner's "property". He would not make any fine distinction between "take", "take over" or "take away". He would agree that "property" is a word of very wide import, including intangible and tangible property. But he would surely deny that any one of those rights, which in the aggregate constitute ownership of property, could itself and by itself aptly be called "property" and, to come to the instant case, he would deny that the right to use property in a particular way was itself property and that the restriction or denial of that right by a local authority was a "taking" . . . . But, having said so much and fully recognizing the distinction that may exist between measures that are regulatory and measures that are confiscatory, and that a measure which is ex facie regulatory may in substance be con-

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[2] *Id.*, 415-416; 67 L. Ed. 322, 326.
[3] *Grace Brothers Pty Ltd* v. *The Commonwealth* (1946) 72 C.L.R. 269.
[4] [1960] 1 All E.R. 65 (House of Lords).

> fiscatory, I must add that . . . the question is one of degree and the dividing line is difficult to draw . . . .[5]

This decision has been examined in a case note,[6] which criticized the use by Viscount Simonds of the "man-on-the-Clapham-omnibus" (*i.e.* "ordinary signification") test in construing a constitutional Act and suggested that those individual rights of the owner of property to deal with that property which in aggregate constitute his estate could themselves be called property.[7] It was there contended that their Lordships took too narrow a view of the meaning of property, since such items as "site goodwill" and "adherent goodwill" have been judicially recognized as proprietary interests and that these are most likely to be affected by planning restrictions.[8]

*Implications for Australia*

The decision in *Belfast Corporation* v. *O.D. Cars Ltd* is interesting in that it is probably indicative of the attitude which our own High Court would take if presented with a similar problem. The value of the American decisions is that they may be precursors of the judicial trend which could emerge in years to come. There are, however, qualifications to this statement which should be presented.

In *The Commonwealth* v. *Huon Transport Pty Ltd* Dixon J. said "Section 51(xxxi.) has not the effect of transferring into our Constitution the Fifth Amendment, nor all the glosses placed upon it"[9]; and McTiernan J. in *Dalziel's* case[10] said of s. 51(xxxi.):

> . . . whereas this placitum is a power, the Fifth Amendment is a restraint on power. These differences between the Australian Constitution and the United States Constitution would suggest a need for caution in the application of the American decisions regarding the power of eminent domain and the safeguards upon its exercise.

Further factors to be considered when seeking to apply the American cases are that the Commonwealth Parliament has no "police power" as it is understood in America, and also that until recently the United States Government was immune to suits in tort. This is important because where a property owner in Australia would seek relief in nuisance or negligence in, say, the fact situation in *Causby's* case,[11]

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[5] *Id.*, 69-70.
[6] F. H. Newark, (1960) 23 Mod. L.R. 302.
[7] A contrary view was expressed in (1960) 76 L.Q.R. 200 and satisfaction with the decision was recorded by the author. The author was, presumably, R. E. Megarry of property law fame who considers it "indisputable" that rights of user of property are not in themselves property. This opinion adds to the authority of the *O.D. Cars Ltd* case.
[8] (1960) 23 Mod. L.R. 302, 306.
[9] (1945) 70 C.L.R. 293, 326.
[10] (1943-1944) 68 C.L.R. 261, 295.
[11] (1946) 328 U.S. 256; 90 L. Ed. 1206.

this right was denied to the American property owner who needed to find a different way of gaining compensation for his loss. Section 51(xxxi.) is not intended to provide protection against nuisance or damage.[12]

This is not, however, to deny that the U.S. cases may have some persuasive authority in the Australian courts; they may even be of practical importance in a case where the question is whether an acquisition has been effected—for instance, where some piece of legislation wears the cloak of regulation but in fact severely restricts an owner's right to use his property. A future High Court could well adopt the Holmesian view "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking".[13]

In an era of "big government" with society becoming increasingly subject to regulation and control and where quite valuable rights of user of property are being restricted and infringed, traditional concepts of the meaning of "acquisition" may not be sufficient to protect the property rights of individuals against encroachment by the state. While heeding the warning issued by Dixon C.J. in *Schmidt's* case[14] that the meaning of the words of s. 51(xxxi.) should not be strained in an attempt to apply it to ground not actually covered by the placitum, it seems that some Commonwealth legislation, in defiance of the decision in *Johnston Fear and Kingham* v. *The Commonwealth*[15] effects at least partial acquisition of property as an incidental matter to the main object of the legislation. While on the present state of the authorities such provisions may not be regarded by the courts as acquisition of property within the meaning of s. 51 (xxxi.), it seems unjust that property owners should be deprived of valuable rights without compensation.

*Limitations on User under Commonwealth Legislation*

A particularly blatant example of the exercise by the Commonwealth of power to limit the user of property is found in section 19 of the Customs Act 1901-1968 which provides that:

> Every wharf-owner and airport owner shall provide to the satisfaction of the Collector suitable office accommodation on his wharf or at his airport for the exclusive use of the officer employed at the wharf or airport also such shed accommodation for the protection of goods as the Minister may in writing declare to be requisite. Penalty: One hundred dollars.

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[12] R. W. Baker, *Essays, supra* n.11, 204.
[13] *Pennsylvania Coal Co.* v. *Mahon* (1922) 260 U.S. 393, 415; 67 L. Ed. 322, 326.
[14] (1961) 105 C.L.R. 361, 372.
[15] (1943) 67 C.L.R. 314.

No mention is made of compensation to be paid to the wharf-owner. Similarly regulation 439 of the Air Force Regulations provides that the Governor-General may declare any area to be an air fighting, gunnery or bombing practice area and that a person shall not come or remain within any area so declared while practice is in progress on pain of a fine. Even more draconian is regulation 439A of the Air Force Regulations which empowers the Governor-General to proclaim any area to be an Air Force Operational or Practice Area and that a person shall not be within any such area at any time. No compensation is offered to a land owner whose property is declared to be a practice area and who is excluded from occupation of the land.

Even under current tests such legislation would probably be struck down as infringing the "just terms" requirement. More doubtful, but equally likely to affect the value of property, are the limitations imposed by the Air Navigation (Buildings Control) Regulations[16] authorized by s. 26(2)(g) of the Air Navigation Act 1920-1971, which prohibit the construction of buildings of greater than a prescribed maximum height within areas surrounding airports. Breaches of the Regulations are punishable by fine or imprisonment. This could be a classic case of a valuable factory site being reduced to grazing land or a residential section to a wheat field.[17] It is not difficult to envisage a situation where, because of town planning restrictions or zoning, further limiting the owner's use of his land, a substantial decrease in the value of land could result from these Regulations. Indeed this was recognized by the Senate Standing Committee on Regulations and Ordinances in its Twenty-First Report.[18] The Committee noted that compensation was not provided to an owner who is prevented from building or from altering his building, and recommended that the Regulations be re-framed to include a right to compensation. This was done by Statutory Rule No. 66 of 1967.[19] In its Thirty-Eighth Report the Committee noted that Statutory Rule No. 20 of 1970 continued to embody these rights of compensation but was of the opinion "that such rights are not matters of administrative detail but matters of substantive legislation more appropriate to Parliamentary enactment".[20] Such regulations would probably not, under the current tests, be held to amount to an acquisition of property; yet valuable proprietary rights have been affected. There is a need for a new test by which Commonwealth liability to affected property owners can be measured. It is not

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[16] Statutory Rules 1966, No. 6.
[17] *U.S.* v. *Causby* (1946) 328 U.S. 256, 262; 90 L. Ed. 1206, 1211.
[18] Twenty-First Report from the Standing Committee on Regulations and Ordinances [1964-65-66] Parliamentary Papers, x, 675 (reproduced in [1969] Parliamentary Paper No. 188, 191).
[19] Twenty-Eighth Report, para. 43, [1969] Parliamentary Paper No. 188, 234.
[20] Thirty-Eighth Report, para. 10, [1971] Parliamentary Paper No. 100, 2.

enough to require "invasion" of the property by the Commonwealth's taking possession before compensation can be given.

*An American View*

J. L. Sax in his article entitled "Takings and the Police Power"[21] distinguishes two roles which the government fulfils, first as a participant in the economic process (its "enterprise" capacity) and secondly as mediator between the conflicting interests of citizens. He suggests that this distinction should provide a basis for deciding whether a "taking" has occurred. If the government in its enterprise capacity enhances its economic position by regulation then this should be recognized as a taking and therefore compensable. When it acts as a mediator resolving conflict between citizens by, for example, enforcing health or safety standards this should be recognized as a legitimate exercise of the police power and not compensable. Using this method it would not be necessary that the economic value of some government enterprise has been increased. For a right to compensation to arise, however, there must be some direct economic benefit to the government which could be regarded as an asset by private business.[22]

*Suggested Test for Australia*

Sax's theory, while attractive, is of doubtful applicability to the Australian situation. Bearing in mind the history of interpretation of s. 51(xxxi.)—with the virtual requirement that the Government should take possession of the property—and the differences in the theory of acquisition between Australia and the United States, it is difficult to envisage an Australian court accepting it.

A necessary first step in formulating a test for s. 51(xxxi.) of the Australian Constitution is for Australian courts firmly to grasp the principle that the various separate rights of user of property are in themselves property. The Court in *Dalziel's* case[23] recognized that by taking away some rights of user, in particular the right to possession, the Commonwealth could make property practically worthless. But it did not explicitly say that the taking (or control of the exercise) of some other rights could, in effect, be an acquisition. What needs to be recognized is that property is a bundle of rights, and each right in that bundle is itself property the subject of acquisition. Whenever the Commonwealth seeks to control the exercise of one of the rights in the bundle a question of acquisition is on the threshold.

To decide whether or not the control of the right amounts to an acquisition, the words of Dixon C.J. in *Schmidt's* case,[24] when he refers

[21] (1964) 74 Yale L.J. 36.
[22] *Id.*, 69 n. 154.
[23] (1943-1944) 68 C.L.R. 261.
[24] (1961) 105 C.L.R. 361.

to "use and service of the Crown", could provide the basis of a new test. His Honour admits that this is a very general conception and there is no precise definition of the phrase. If a liberal interpretation were given to "use and service of the Crown" in deciding these "marginal" acquisition cases, the court could ask itself whether a piece of Commonwealth legislation affecting some right of property can be said to appropriate that property to the use and service of the Crown, or whether the government is acquiring some valuable right by virtue of the legislation. The acquisition element, however, must always be evident to conform with the words of pl. (xxxi.) of section 51. The adoption of such a test would require the extension of existing tests of acquisition, since it would no longer be necessary to show that the Commonwealth or some person or agency authorized by Commonwealth legislation should take possession of the property or exercise broad control over it. Such a test would not be dissimilar in result to that applied by Latham C.J., Dixon J. and McTiernan J. in the *Bank Nationalization Case*[25] to the "Management Provisions", when they held that the "Management Provisions" allowed the Commonwealth to control the affairs of the private banks in a manner amounting to an acquisition. Under the proposed "use and service of the Crown" test, if the Commonwealth were to benefit in its operations from the control of some right of property, then this would be in effect an acquisition of that right.

Of course, under the proposed new test the position with regard to such matters as fines, customs forfeitures, provisional taxation and enemy property confiscation would be unaffected. In such cases the Government is fulfilling its roles as guardian of law and order and tax gatherer and is not acting in its "enterprise" capacity. And in cases where the Commonwealth makes no economic use of the property it controls, as in the case of the appointment of a receiver in bankruptcy, there would of course be no acquisition.

This approach would complicate the issue of "just terms", since in some cases it would be very difficult to quantify in monetary terms the value of the property right acquired. Perhaps there could be some flat rate payable to the owners of property affected by the legislation. Placitum xxxi. does not take from Parliament all initiative in the fixing of terms of acquisition, and so long as the terms can find justification in the minds of reasonable men they will be upheld.

Another difficulty of this approach is to determine what happens to the right of property when the Commonwealth no longer requires it. Suppose for instance that an airport is closed down, and building height restrictions are no longer necessary. The Commonwealth, having "acquired" the right to build above a certain height from the owner,

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[25] (1948) 76 C.L.R. 1.

presumably is now the owner of that right. Could the property owner then buy back the right from the Commonwealth? One solution may be that the Commonwealth merely "leases" the right of property until such time as it no longer requires it, and the right then reverts to the owner.

While s. 51(xxxi.) of the Constitution has fulfilled its primary objective of protecting individual property against arbitrary confiscation by governments, the time has now come to start meeting the challenge of "back door" acquisition by regulation. For this reason broadening of the concepts of "acquisition" and "property" is necessary, and so is a resolve by governments and the judiciary that justice shall be done to the affected property owner.