

# ADMINISTRATIVE LAW INTENSIVE

25 FEBRUARY 2010, WELLINGTON

## 'Developments in the constitutional protection of property rights'

Justice Pamela Tate <sup>1</sup>

### 1. INTRODUCTION

Rights of property have long received the protection of the common law. While Rousseau conjectured, in his *Discourse on the Origin of Inequality*, 1754, that an idealized state of nature would be one in which the 'fruits of the earth belong to us all, and the earth itself to nobody', he understood that social organization and the cultivation of the earth leads to the enclosure of land and this gives rise to the concept of 'property'. As he famously said:

The first man who, after fencing off a piece of land, took it upon himself to say 'This belongs to me' and found people simple-minded enough to believe him, was the true founder of civil society. (*Discourse on the Origin of Inequality*, 1754).

The common law protection is illustrated by the rule of statutory interpretation that 'clear and unambiguous words be used before there will be imputed to the legislature an intent to expropriate or extinguish valuable rights relating to property without fair compensation': *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 111. That rule is well recognized in New Zealand: *Laing v Waimairi County* [1979] 1 NZLR 321, 324. It is more generally one aspect of the modern principle of legality. One of the framers of the Australian *Constitution*, Sir Samuel Griffith, who contributed to the drafting of the Judiciary Act 1903 (Cth) which established the High Court of Australia and who became its first Chief Justice, said (in a joint judgment with Rich J) that if the Parliament sought to pass a law dispossessing persons of valuable rights of property, its intent must be 'expressed in unequivocal terms incapable of any other meaning': *The Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552, 563.

There is an additional common law rule of statutory construction designed to confer protection upon rights of property, one relating not to the powers of the Parliament but to the scope of the powers of the executive, which provides that:

An executive power to deprive a citizen of his [or her] property by compulsory acquisition should be construed as being confined within the scope of what is granted by the clear meaning or necessary intendment of the

---

<sup>1</sup> Judge of the Court of Appeal of the Supreme Court of Victoria.

words by which it is conferred: *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193, 201.

So too, as the Privy Council held in *Sydney Municipal Council v Campbell* [1925] AC 338, 'a body ... authorized to take land compulsorily for specified purposes, will not be permitted to exercise its powers for different purposes, and if it attempts to do so, the Courts will interfere'. (343) These rules fall short of any form of guarantee for the protection of property rights.

The Australian *Constitution* seeks to provide such a guarantee. It is to be found in s 51(xxxi). As Heydon J of the Australian High Court said, in referring to each of the common law rules I mentioned and the authorities that support them, in the recent case of *ICM v The Commonwealth* (2009) 240 CLR 140, 207 [75]:

[Section] 51(xxxi) [of the *Constitution*] goes beyond rules of construction or judicial review of administrative action. Section 51(xxxi) is incapable of being overridden by statutory words, clear or not. It provides that the [Commonwealth] Parliament has 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'.

In this paper I wish to explore some of the dimensions of the power conferred on the Commonwealth Parliament of Australia by s 51 (xxxi) and what sort of guarantee it actually provides. I do this with an understanding that in New Zealand there has been some debate in the past, including the recent past, about whether a right not to be unjustly deprived of property should be expressly included within the New Zealand Bill of Rights Act ('NZBORA') or in some other form of legislation, perhaps an Act addressing regulatory responsibilities: *Report of the Regulatory Responsibility Taskforce* (September 2009), proposed Regulatory Responsibility Bill, cl 7(1)(c).

It is not my role to express any opinion on whether or not such reform would be of benefit to New Zealand. My aim is simply to examine for you the operation of the constitutional guarantee in Australia and how it has been applied in recent years by the High Court of Australia. In particular I will address the question of what has, and what has not, been treated as 'property'; what is involved in the requirement that there must have been an 'acquisition'; and the scope of the notion of 'just terms'. I will also examine those circumstances in which the guarantee does not apply – the exceptions to its application. This will involve consideration of cases in which an existing regulatory scheme is adjusted.

A noteworthy feature of the guarantee, and one that has had a significant impact historically, is that, while it constrains the Commonwealth, it does not constrain the States (*Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 410 [14]). This has led to the question of the lawfulness of an inter-governmental agreement between the Commonwealth of Australia and a State whereby the State acquires a person's property without providing just terms but the Commonwealth thereby achieves a public purpose benefit. This question arose sharply in the recent case of *ICM v The Commonwealth* (2009) 240 CLR 140. The issue at the forefront of the case was whether the conversion of irrigators' bore licences to aquifer access licences, with a consequent dramatic reduction in the volume of water to be accessed, was an acquisition of property without just terms and a contravention of the guarantee. The

conversion was effected by a State, New South Wales, but it was party to an inter-governmental agreement with the Commonwealth aimed at creating a sustainable environment and the preservation of water as a natural resource.

Before looking at the various dimensions of the guarantee, or at *ICM* and the type of intergovernmental agreement it involved, I wish to consider first the nature of the Australian Federation and the general way in which the Commonwealth *Constitution* operates. The manner in which s 51(xxxi) provides a guarantee of property rights is inexplicable without some general background about the relationship between the Commonwealth of Australia and the individual States.

Given that New Zealand is my birthplace, I have always found it to be of more than passing interest to read the terms of covering clause 6 of the Australian *Constitution* which provide that:

*The States* shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States, and each of the parts of the Commonwealth shall be called ‘a State’.

It is notorious that when asked, in 1890, whether New Zealand would become part of the Commonwealth of Australia – and thus a State – Sir John Hall rejected the idea. Sir John, then ‘Premier’ of New Zealand (as the office of ‘Prime Minister’ was then called), and perhaps better known for his courage in moving the Bill that gave women in New Zealand the right to vote as the first country in the world to do so, responded by saying (as reported in the *Official Record of the Proceedings and Debates of the Australasian Federal Conference*, Melbourne, 12 February 1890):

Nature has made 1,200 impediments to the inclusion of New Zealand in any such Federation in the 1,200 miles of stormy ocean which lie between us and our brethren in Australia. (175)

Despite the stormy Tasman sea, now colloquially referred to as ‘the ditch’, nevertheless, the reference to ‘New Zealand’ in covering clause 6 was not removed by the time of Federation. The hope for New Zealand’s inclusion must have remained alive.

## 2. AUSTRALIA AS A FEDERATION

The various colonies mentioned in covering clause 6, with the notable exception of New Zealand, formed a federation of States in 1901, known as the Commonwealth of Australia. The document which gave life to this federation is the *Constitution* which was passed by the Imperial Parliament in the United Kingdom in 1900 and has remained relatively unchanged ever since. It was the *Constitution* which established the Commonwealth of Australia and the polity of the Commonwealth of Australia owes its existence to it. So too the status of the former colonies as States is attributable to the effect of the *Constitution*.

While the significance of the foundational document that established the Commonwealth of Australia is uncontested, it is almost impossible to overestimate the importance of the express words in the text of the *Constitution*, and its structure, to the disposition of Australian constitutional litigation. This is so even in a case raising questions about implied rights or freedoms, the most important of which remains the implied freedom of political communication recognized confidently in the defamation case brought by the New Zealand former Prime Minister, David Lange against the Australian Broadcasting Commission (*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520). The reasoning in that case self-consciously sought to demonstrate that the implied right to freedom of political communication was derived from those sections of the *Constitution* that incorporated the doctrine of representative government (ss 1, 7, 13, 24, 28 and 30). The type of government recognized in the *Constitution* would be impossible, it was concluded, if people were precluded from communicating with each other on matters relating to the government of the Commonwealth.

The importance of the text of the *Constitution* as providing a limit to an implied freedom can be seen also from the recognition hinted at most recently in a case in which the High Court invalidated legislation passed by the State of South Australia designed at disrupting the activities of a bikie organisation similar to the Hells Angels (*State of South Australia v Totani* [2010] HCA 39). It was clear that some members of the Court might recognize an implied freedom of association, but, indirectly by deference to the text of the Constitution, the freedom of association would not be free-standing but would be limited to what is necessary to give expression to the freedom of political communication (*State of South Australia v Totani* [2010] HCA 39, [31] (French CJ)).

The model for the Australian *Constitution* was that of the *United States Constitution*. This was so not only in the desire for a foundational document but also in the way in which the Australian *Constitution* entrenched the separation of powers by placing the legislative, judicial and executive branches of government into discrete chapters. Sir Owen Dixon pointed out the similarities between the Australian *Constitution* and the United States *Constitution* to the American Foreign Law Association in 1942. He said (as reported in -The separation of powers in the Australian Constitution|| (2008) 10(2) Constitutional Law and Policy Review 35):

[the *Australian Constitution*] was divided into chapters, the first of which was entitled The Parliament, the second The Executive Government and the third The Judicature ... The section at the head of Chapter I begins by declaring that the legislative power of the Commonwealth shall be vested in a federal parliament. That which heads Chapter II says that the executive power of the Commonwealth is vested in the sovereign and is exercisable by the Governor-General as the sovereign's representative. Chapter III begins with a section which vests the judicial power of the Commonwealth in a federal supreme court called the High Court of Australia and in such other federal courts as the parliament creates and in such other courts as it invests with federal jurisdiction. No one can fail to perceive that these provisions were inspired by the first sections of Articles 1, 2 and 3 of the Constitution of the United States. (36)

However, the Australian *Constitution* is unlike the *United States Constitution* (and the written Constitutions of many other nations) inasmuch as it is less concerned with civil rights and liberties as it is with the distribution of legislative power between the Commonwealth and State Parliaments and the associated executive power of the respective governments. Thus, by contrast with the *United States Constitution*, the Australian *Constitution* contains no Bill of Rights. Sir Owen Dixon explained this omission, in *Two Constitutions Compared* in Woinarski (ed) *Jesting Pilate* (Law Book Company, Melbourne, 1965), on the basis that,

[t]he framers of the Australian Constitution were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central government the full content of legislative power. The history of their country had not taught them the need of provisions directed to the control of the legislature itself. (102)

The Australian *Constitution* thus contains very few express rights. One rare example is the right to a trial by jury in the case of indictable offences against laws of the Commonwealth (*Constitution*, s 80). As I've mentioned, the High Court has established some further rights by implication. This makes the express guarantee of the protection of property rights under s 51(xxxi) all the more unusual and important.

The differences between Australia's constitutional arrangements and those of New Zealand are stark, not only in the significance to Australia of the written *Constitution* but also in the absence in Australia of any national equivalent to the NZBORA. In the State of Victoria we have a Charter of Human Rights and Responsibilities which contains a free-standing property right (s 20). However, this does not provide a just terms guarantee but is rather cast as a simple protection against deprivation of one's property other than in accordance with law. It has not yet received any detailed judicial attention.

### 3. THE DISTRIBUTION OF POWERS

I mentioned before that a feature to note about the guarantee under s 51(xxxi) is that it does not bind the States but only the Commonwealth of Australia. Another feature that is immediately apparent from its terms is that it is cast as a conferral of legislative power. It is not expressed as a direct prohibition upon the compulsory acquisition of property in the absence of just terms – rather, it is cast as a conferral of power – a power conferred on the Commonwealth Parliament to make laws with respect to the acquisition of property. What s 51 (xxxix) does is to require that such laws must also be laws that provide for just terms.

It is axiomatic under the Australian *Constitution* that the Commonwealth Parliament may not legislate on a particular topic unless the legislation can be supported by what is described in Australian constitutional law as a 'head of power', expressly provided for under the *Constitution*. The particular 'topic' or character of the legislation must be sufficiently connected to a subject matter, or purpose, in relation to which the Commonwealth Parliament is empowered to legislate. For the Commonwealth Parliament is a Parliament with only limited and enumerated powers: *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129. These permitted 'topics' are listed almost exhaustively in s 51 of the

Constitution. For example, s 51 empowers the Commonwealth Parliament to make laws imposing taxation but not so as to discriminate between the States (s 51(ii)). It is also empowered to make laws with respect to lighthouses (s 51(vii)), weights and measures (s 51(xv)), marriage (s 51(xxi)), conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State (s 51(xxxv)), foreign and trading or financial corporations (s 51 (xx)), and immigration (s 51(xxvii)). While s 51 contains the majority of Commonwealth legislative powers, some other powers can be found in s 52 which confers, *inter alia*, the exclusive legislative power to make laws with respect to Commonwealth places. In addition, s 122 confers legislative power on the Commonwealth over the territories of Australia. The question of whether the territories power is also constrained by the constitutional guarantee has recently been resolved in the recent case of *Wurridjal v The Commonwealth of Australia* (2009) 237 CLR 309.

The States, on the other hand, have retained all the legislative powers they enjoyed under their former status as colonies. Those powers are not enumerated under the *Constitution* but are general and ‘plenary’ in scope: *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 9. These general powers include the power of the State to acquire property and, as I’ve mentioned, there is no constitutional limitation requiring a State to provide compensation for the compulsory acquisition of property. Any limitation on the power of acquisition derives from statute, as it were, voluntarily imposed. Many States have imposed a requirement that the Crown provide compensation for the compulsory acquisition of land, one such example being s 30 of the Land Acquisition and Compensation Act 1986 (Vic).<sup>2</sup> As the requirement is not constitutional, it could be suspended or impliedly repealed by a subsequent Act and, in any event, its breach would not lead to invalidity, as occurs with contravening Commonwealth laws.

Much constitutional litigation is directed at whether the Commonwealth Parliament has the power to make the impugned law. Let me give you a couple of examples.

A well-known example is the *Commonwealth v Tasmania. The Tasmanian Dam Case* (1983) 158 CLR 1. That case involved the Hydro-Electric Commission of Tasmania and its proposed construction of a dam near the confluence of the Franklin and Gordon Rivers in Tasmania. The Commonwealth moved to stop the dam and the Commonwealth Governor-General proclaimed the area in which the dam was to be built as ‘identified property’ for the purposes of a Commonwealth Act which effectively froze any construction of the dam.

The Commonwealth Parliament does not have a specific power vested in it under the *Constitution* to legislate for national parks or the conservation of wildlife. One might ask, therefore, how was the Commonwealth able to interfere in the construction of a dam in Tasmania’s wilderness? The case has become famous for the reliance placed by the Commonwealth Parliament on its power to make laws with respect to external affairs (s 51(xxix)) to support the federal statute. The external affairs power enables the Commonwealth Parliament, *inter alia*, to make laws that implement treaties which have been entered into by the executive. Australia was a party to the *Convention for the Protection of the World Cultural and Natural Heritage* and the Western Tasmania Wilderness National Parks (which encompassed the site of the dam) featured on the World Heritage List that was maintained under the Convention. The High Court held by a 4:3 majority that the Commonwealth’s legislation protecting the dam and prohibiting interference with it was constitutionally valid. This was so because it was reasonably appropriate and adapted to giving effect to the Convention as the Act carried out, or provided for the carrying out, of the

---

<sup>2</sup> See, in New Zealand, the Public Works Act 1981 (NZ).

obligations of the Commonwealth executive under the Convention: *The Commonwealth v Tasmania. The Tasmanian Dam Case* (1983) 158 CLR 1, 136, 178-9, 235-9 and 267-8.

Another well-known example is the case of *Polyukhovich v The Commonwealth* (1991) 172 CLR 501. In 1988, the Commonwealth Parliament legislated to make war crimes committed in World War II punishable in the courts of Australia. Mr Polyukhovich was charged on information for acts which he had allegedly committed in the Ukraine, including the murder of certain named individuals and for 'being knowingly concerned in or a party to' the murder of 850 Jews by the Nazi occupying army. He challenged the law under which he was being tried on the basis that the Commonwealth Parliament did not have the power to enact such a law. There is no Commonwealth head of power to make laws creating criminal offences generally. The High Court held, again only by majority, that, as the legislation was directed to actions and events which had taken place outside Australia, such events and actions were 'external affairs' and thus the law could be properly characterised as a law with respect to 'external affairs'. The Act was therefore valid: *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, 530, 603, 641, 692, 696 and 712.

In those cases in which the High Court has struck down or invalidated a statute for want of power, that statute is no longer of any force or effect. Often only one or two sections of an Act are challenged and if the challenge is successful, they are struck down. The High Court's capacity for judicial review of legislation, enabling it to declare laws invalid, places it in a very powerful position within Australia's constitutional arrangements.

#### 4. SECTION 51(xxxi) AS A CONSTITUTIONAL GUARANTEE

Section 51(xxxi) sits alongside the various other enumerated heads of power in s 51 enabling the Commonwealth Parliament to make laws.

The placitum was included within s 51 because concern had been expressed at the Convention Debates of the 1890s, in which delegates of the colonies debated a draft of the *Constitution*, that there was a need for the Commonwealth Parliament to have an express power to make laws for the acquisition of property. Doubts were raised as to whether the 'incidental power' (s 51(xxxix)) would enable the Commonwealth to appropriate land for public purposes: (Simon Evans -Property and the Drafting of the Australian Constitution|| (2001) 29 Federal Law Review 121, 128; Rosalind Dixon -Overriding Guarantee of Just Terms or Supplementary Source of Power?: Rethinking s 51(xxxi) of the Constitution|| (2005) 27 Sydney Law Review 639, 655). To the delegates, as recorded in the *Official Report of the National Australasian Convention Debates*, Melbourne, 4 March 1898, it was 'quite clear that there must be a power of compulsorily taking property for the purposes of the Commonwealth.' (1874)

Sir Edmund Barton, who would later be Australia's first Prime Minister and a founding Justice of the High Court, introduced the relevant clause by saying:

There is no express provision in the Constitution for the acquisition by the Commonwealth of any property the acquisition of which might become necessary. It has been suggested to me that subsection (37) of clause 52 [the then incidental power] might give a sufficient power of legislation for that purpose, but there is doubt on the subject. (151)

Sir Isaac Isaacs, from the colony of Victoria, who would later also be a Justice of the High Court, and its third Chief Justice, complained that if the Commonwealth government needed to acquire the land of a State for, say, the purposes of a federal court-house, the insertion of the new clause was not necessary as it was already covered by the incidental power. (152) This might be so because acquiring land for such a purpose would be incidental to the creation of a federal judicature as contemplated by s 71 of the *Constitution*. However, Dr John Quick, also from the colony of Victoria, replied:

It is very doubtful whether, a general provision of that kind would give this express power. Then there is no machinery in that clause [the incidental power] for determining the mode in which the Commonwealth is to acquire ... land ... The Commonwealth would be crippled in its future operations if express power were not given in the manner suggested. (152)

Thus, the original aim behind the introduction of s 51(xxxi) was not to protect the property rights of the States or individuals, but to ensure there was a compulsory power of acquisition for the Commonwealth. The need for any form of protection to individual property-holders was not at all uppermost in the minds of the delegates. In fact, one of the delegates, Sir George Turner, objected to the insertion of the words 'on just terms' on the basis that '[w]e assume that the Federal Parliament will act strictly on the lines of justice.' (153) This further indicates that it was assumed that property rights, as with other rights, were best protected by a democratic and accountable legislature, rather than by way of constitutional entrenchment.

However, notwithstanding the emphasis of the delegates on the need for the *Constitution* to provide for an express compulsory power of acquisition to avoid doubt about whether the Commonwealth otherwise had this power, the High Court has long held that s 51(xxxi) serves a double purpose: *Bank of New South Wales v Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1, 349-350 (Dixon J). Like many other enumerated heads of power, it vests the federal legislature with a power to make laws with respect to a particular subject matter, in this case the acquisition of property. As Sir Owen Dixon said:

At the same time, as a condition upon the exercise of the power, it provides the individual or the State affected with a protection against governmental interferences with his [or her] proprietary rights without just recompense. (349)

Most significantly of all, the qualification that any acquisition proceed on 'just terms' has been interpreted to mean that a law made under any other of the various heads of power under s 51, if it is also a law for the acquisition of property, will be subject to the same qualification. That is, the 'just terms' guarantee for the acquisition of property by the Commonwealth applies to, and constrains, the exercise of all its other legislative powers under s 51 (with some exceptions). The guarantee thus has a force and operation beyond its inclusion within a single head of power.

Sir Gerard Brennan made this point forcefully with his observation about the dual effect of s 51(xxxi), in *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155:

First, it confers power to acquire property from any State or person for any purpose for which the Parliament has power to make laws and it conditions the exercise of that power on the provision of just terms. Second, by an implication required to make the condition of just terms effective, *it abstracts the power to support a law for the compulsory acquisition of property from any other legislative power....* (177, emphasis added)

This might be referred to as ‘the abstraction rule’. The reason that s 51(xxxi) abstracts the power of acquisition from any other legislative power is because s 51, in vesting the Commonwealth Parliament with the range of powers to make laws with respect to certain matters, contains the general qualification: ‘subject to this Constitution’. Thus, each of the heads of power therein is constrained by any relevant explicit or implied limitation qualifying another head of power. The High Court, in considering the protection provided for in s51(xxxi), has abstracted the legislative limitation of ‘just terms’ so that it has a general operation qualifying the other heads of power.

In *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361, Dixon CJ (with whom Fullagar, Kitto and Taylor JJ agreed) made this principle of construction explicit:

It is hardly necessary to say that when you have, as you do in par. (xxxix), 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. (371-2)

In this way, the requirement that the acquisition of property be on just terms has much of the status of a freestanding constitutional guarantee which restrains generally the activities of the Commonwealth: (See: Rosalind Dixon –Overriding Guarantee of Just Terms or Supplementary Source of Power?: Rethinking s 51(xxxi) of the Constitution|| (2005) 27 Sydney Law Review 639, 642).

## 5. WHAT IS ‘PROPERTY’?

To understand how the constitutional guarantee operates, one must first ask the question, ‘what is property?’ – that is, what constitutes ‘property’ for the purpose of the guarantee?

On this issue, the High Court has been pragmatic. By and large, it has not adopted a narrow or restricted understanding of what relevantly constitutes ‘property’. This is in part because the notion of ‘property’ here occurs within the context of a conferral of legislative power. This typically invites a broad construction. The context is far removed from that of an Act, for example, providing for the sale of land or chattels. In the *Bank of New South Wales v*

*Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1, Sir Owen Dixon confirmed that the notion of ‘property’ in s 51 (xxxix):

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 ... [I]t 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. (349).

However, that broad understanding took some time to be achieved. A good example of the type of conflict of opinion over what relevantly constituted ‘property’ is to be found in *Minister of State for the Army v Dalziel* (1944) 68 CLR 261.

The facts of *Dalziel* were as follows. Mr Dalziel was the tenant of a vacant lot on which he had operated a car park for the previous thirteen years. He made approximately £15 net profit per week through the carpark business. On 12 May 1942, the Quartermaster-General for the Commonwealth took possession of the land temporarily under the National Security (General) Regulations for the use of the United States army. Mr Dalziel later lodged a claim for compensation for the amount of £23 per week of occupation (£8 per week in rent and £15 per week in lost profits) and £10 for the cost of moving his belongings off the land. However, the Central Hirings Committee determined the amount of compensation payable to Mr Dalziel to be limited to the lesser £34 13s 4d per month. This covered strictly the £8 per week rent that Mr Dalziel was obliged to pay as tenant and nothing more—it did not cover his loss of profits or the cost of him evacuating the premises. Mr Dalziel refused to accept this figure and the matter went to the Compensation Board which made a larger monetary order in favour of Mr Dalziel, including £91 for ‘goodwill’ and £2 for removal of fixtures. However, the total figure still did not take into account the lost profits. Loss of profits were specifically excluded under the relevant Regulations which prohibited the assessment tribunals from taking into account either loss of occupation or profits when making their orders. Regulation 60H relevantly provided that:

(iii) in assessing compensation, loss of occupation or profits shall not be taken into account; and

(iv) in any case in which, owing to exceptional circumstances, the payment of compensation on the basis set out above would not provide just terms to the owner of the land, the compensation may include such additional amount as is just.

Because loss of occupation or profits was specifically contemplated by reg 60H(iii), it was held that such a situation could not amount to ‘exceptional circumstances’ for the purposes of reg 60H(iv) and, thus could not be used to invoke an order on just terms. (309) Both parties appealed to the New South Wales Supreme Court which found in favour of Dalziel. The Minister appealed to the High Court. A majority of the High Court held the relevant parts of the Regulations to be invalid by reason of s 51(xxxix) of the *Constitution* and thereby severed them. The decision of the Compensation Board was quashed.

The central source of division within the Court concerned whether what was acquired by the Commonwealth – admittedly for a permissible purpose – amounted to ‘property’. On one side of the division was Latham CJ who, in dissent, said:

The only question which arises in the present case is whether the rights ... are proprietary rights, so that it can be said that the Commonwealth has acquired property.

The rights of the Commonwealth are to take and remain in possession of the land and to use it for purposes of defence. In such use, but only for the purposes of such use, the Commonwealth has the rights of an owner in fee simple. The Commonwealth can, at will, give up possession at any time. The rights of the Commonwealth, by reason of the terms of the *National Security Act*, s. 19, cannot last for longer than the war and six months afterwards. In my opinion the Commonwealth is unable to alienate these rights so as to entitle any other person to enjoy them. The right is limited to a right to the Commonwealth to use the land for defence purposes, and such a right cannot be transferred to any other person. The mode of such use may be as determined by the Commonwealth, but any use must be by or on behalf of the Commonwealth. The right may be said to be personal to the Commonwealth. (278)

Ultimately, Latham CJ took the view that the rights at issue were inalienably personal. He said:

The only question is, as I have already said, whether these rights are proprietary rights. That which can be owned in respect of land is ... an estate. The Minister has not an estate in fee simple or any lesser freehold estate, nor in my opinion, has he a chattel interest. The Bank of New South Wales is still the owner of the land and Dalziel is still the tenant under a weekly tenancy. No other tenancy has been created and there has been no assignment of Dalziel's tenancy. The Commonwealth is, in my opinion, in the position of a licensee with rights as stated in the Regulations. The Regulations permit the Commonwealth to do upon the land things which would otherwise be unlawful ... A licence ... properly passeth no interest, nor alters or transfers property in any thing, but makes an action lawful, which without it had been unlawful ... In *Commissioner of Stamp Duties (NSW) v Yeend* ... it was held that an agreement under which a person had the sole right to use premises for the purpose of providing refreshments did not vest any ‘property’ in that person within the meaning of a definition of property which included any estate or interest in any property real or personal. ... In the present case the rights of the Commonwealth to use land for purposes of defence are ..., in my opinion, of [that] same character ... they are inalienable personal rights and the Commonwealth is not a grantee of property but a licensee. Such personal rights are not proprietary rights. (278-9)

On the other side of the division was Rich J who had a greater eye to the dual role played by s 51(xxxi) and to the significance of its inclusion within the context of the *Constitution*. He said:

The placitum which is in question [placitum xxxi] is concerned with the legislative power of the Commonwealth parliament. One of the characteristic features of a fully sovereign power is its legal right to deal as it thinks fit with anything and everything within its territory. This includes what is described in the United States as eminent domain ... the right to take to itself any property within its territory, or any interest therein, on such terms and for such purposes as it thinks proper, eminent domain being thus the proprietary aspect of sovereignty. The Commonwealth of Australia is not, however, a fully sovereign power. Its legislature possesses only such powers as have been expressly conferred upon it, or as are implied in powers which have been expressly conferred. The subject of eminent domain is dealt with by ... s 51(xxxi) .... *What we are concerned with is not a private document containing 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. The meaning of property in such a connection must be determined upon general principles of jurisprudence, not by the artificial refinements of any particular legal system or by reference to Sheppard's Touchstone.* (284-5, emphasis added).

He went on to suggest that, given that context, 'property' was to be conceived of in unrestricted terms:

The language used is perfectly general. It says the acquisition of property. It is not restricted to acquisition by particular methods or particular types of interests, or to particular types of property. It extends to any acquisition of any interest in any property. ... In the case now before us, the Minister has, *in adversum*, assumed possession of land of which Dalziel was weekly tenant. ... I am quite unable to understand how this can be said not to be an acquisition of property from Dalziel within the meaning of the placitum. 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 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 [its] restrictive provisions ... by taking care to seize something short of the whole bundle owned by the person whom it was expropriating. ... Not only is a right to possession a right of property, but where the object of proprietary rights is a tangible thing it is the most characteristic and essential of those rights. ... It would ... be wholly inconsistent with the language of the placitum to hold that, whilst preventing the legislature from authorizing the acquisition of a citizen's full title except upon just terms, it leaves it open to the legislature to seize possession and enjoy the full fruits of possession, indefinitely, on any terms it chooses, or upon no

terms at all. [Here] the Minister has seized and taken away from Dalziel everything that made his weekly tenancy worth having, and has left him with the empty husk of tenancy. (285-6)

The other members of the Court took a similar view to that of Rich J on the property question, with Starke J saying, in a passage now often-cited, that ‘property’, for the purposes of s 51(xxxi), includes ‘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.’(290)

The breadth of the notion of property has been evident from the findings by the High Court that the following interests all constitute ‘property’ for the purposes of s 51 (xxxi): a vested common law cause of action in tort for damages against the Commonwealth or a Commonwealth authority, (*Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297); the right to extract minerals from leased land (*Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513); and common law native title rights (*Mabo v Queensland [No 2]* (1992) 175 CLR 1, 110-11).

However, in the High Court disputes over such central concepts as what is ‘property’ tend not to be resolved for long. In *ICM* there was a significant division of opinion over whether rights to groundwater conferred under licence were a species of property. The issue was also live in the case about the territories power which I mentioned before and which I will go on to discuss later, *Wurridjal v The Commonwealth of Australia* (2009) 237 CLR 309. This case was a constitutional challenge to the intervention of the Commonwealth in the Northern Territory effected by the Northern Territory National Emergency Response Act 2007 (Cth) (‘the NER Act’). The case raised a number of questions, one of which was whether the interest conferred under statute on an aboriginal Land Trust in the fee simple of a particular land area was a species of property, in circumstances in which the use to which the Trust could put the land was constrained by the Minister.

## 6. WHAT IS ‘ACQUISITION’?

However, even if the interest at issue in a case is demonstrably proprietary in character, the guarantee won’t be triggered unless there is also an ‘acquisition’ of that interest.

I can safely make the negative observation that the term ‘acquisition’ has not been interpreted in a restrictive or narrow way. In *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155, Deane and Gaudron JJ stated that ‘the word –acquisition is not to be pedantically or legalistically restricted to a physical taking of title or possession.’ (184)

However, there must still be an *acquisition*. There must be an ‘identifiable and measurable advantage’ derived by another from, or in consequence of, the actions of the Commonwealth: *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140, 201 [147]. It is not sufficient that Commonwealth legislation adversely affects or extinguishes a right that could be characterised as proprietary in nature: *The Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1, 145). As Deane and Gaudron JJ went on to explain in *Mutual Pools*:

Once it is appreciated that ‘property’ in s 51 (xxxii) extends to all types of ‘innominate and anomalous interests’, it is apparent that the meaning of the phrase ‘acquisition of property’ is not to be confined by reference to traditional conveyancing principles and procedures. Nonetheless, the fact remains that s 51(xxxii) is directed to ‘acquisition’ as distinct from deprivation. The extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property. For there to be an ‘acquisition of property’, there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property. On the other hand, it is possible to envisage circumstances in which an extinguishment, modification or deprivation of the proprietary rights of one person would involve an acquisition of property by another by reason of some identifiable and measurable countervailing benefit or advantage accruing to that other person as a result. (185)

In *Georgiadis v Australian and Overseas Telecommunication* (1994) 179 CLR 297 the extinguishment of a common law cause of action in tort for damages in respect of an injury sustained in the course of employment with the Commonwealth or a Commonwealth authority was held to be an ‘acquisition’ because there was a concomitant release from the Commonwealth’s liability for damages. The release in respect of a pre-existing liability for employment injuries was sufficient to amount to the countervailing necessary benefit. In *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1993) 179 CLR 155 McHugh J said (in dissent) that there will be an acquisition where the Commonwealth ‘obtains a corresponding benefit of commensurate value’ from depriving the plaintiff of property (223). However, the majority of the Court clarified in *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513, that there was no reason why the identifiable benefit or advantage relating to the ownership or use of acquired property should correspond precisely to that which was acquired.

In this respect, s 51(xxxii) is strikingly different from the *United States Constitution* which has a ‘taking clause’ as the subject of the Fifth Amendment: ‘not shall private property be taken for public use, without just compensation’. That clause requires no more than a *destruction* of property rights to trigger an entitlement to just terms compensation. Furthermore, as Mason CJ, Deane and Gaudron JJ said, in *Georgiadis v Australian and Overseas Telecommunication* (1994) 179 CLR 297:

There is another aspect of the distinction between a taking and an acquisition .... ‘Taking’ directs attention to whether there has been a divesting, a question which is answered by looking to the position of the person who claims that he has been deprived of his property. On the other hand, ‘acquisition’ 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. That is particularly so with ‘innominate and anomalous interests’. Thus, the fact that neither Telecom nor any one else now has the cause of action which was previously vested in Mr Georgiadis is not conclusive of the question whether there has been an acquisition of property for the purposes of par. (xxxii). (304-5)

## 7. WHAT ARE 'JUST TERMS'?

The requirement for 'just terms' does not require an indemnity for the market value of the acquired property. Rather, as Dixon J stated in *Grace Bros Pty Ltd v The Commonwealth* (1946) 72 CLR 269, the law must amount 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. (290)

Dixon J went on to state in *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 that '[u]nlike -compensation||, which connotes full money equivalence, -just terms|| are concerned with fairness.' (569) As Kitto J stated, at a later stage in the proceedings in *Nelungaloo Pty Ltd v The Commonwealth* (1952) 85 CLR 545:

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. (600)

It is clear that *ex gratia* payments cannot amount to 'just terms', 'on the ground that -just terms|| must depend on law, not grace and favour': *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140, 235.

Where the property acquired by the Commonwealth is land, the Commonwealth has certain additional statutory obligations with respect to compensation. Section 55 of the Lands Acquisition Act 1989 (Cth), provides for compensation to be paid at more or less market value. The statute that was the subject of challenge in the national emergency case, the *Wurridjal* litigation, the NER Act, suspended the operation of the Lands Acquisition Act in the Northern Territory.

However, because the source of the guarantee under s 51 (xxxix) is the Constitution, the Commonwealth may not dispense with the underlying constitutional requirement to afford 'just terms' although this may not yield market value compensation.

## 8. WHEN IS AN ACQUISITION OF PROPERTY NOT SUBJECT TO s 51(xxxix)?

I have discussed the meaning and scope of the terms 'property' and 'acquisition' for the purposes of s 51(xxxix), and the general scope of what is required by 'just terms'. I have also asserted that the Commonwealth may not dispense with the constitutional guarantee. This is so, but it is not to say that the guarantee has universal application to acquisitions of property by the Commonwealth.

The High Court has held that there are some circumstances in which what might appear to be otherwise an acquisition of property does not attract the constitutional guarantee. The seemingly *ad hoc* nature of these exceptions has led some commentators to call for the High

Court to rethink its approach.<sup>3</sup> However, there has been no indication from the Court that these doctrinal questions will be revisited in the near future.

One commentator identifies four categories of acquisition of property which do not attract the 'just terms' constitutional guarantee: Rosalind Dixon –Overriding Guarantee of Just Terms or Supplementary Source of Power?: Rethinking s 51(xxxi) of the Constitution|| (2005) 27 Sydney Law Review 639. Another identifies 'at least' nine separate approaches adopted by the High Court to explain why the guarantee may not apply: Simon Evans –When Is an Acquisition of Property Not an Acquisition of Property? The Search for a Principled Approach to Section 51(xxxi)|| (2000) 11 Public Law Review 183, 186. I will deal briefly with the most common approaches.

## Contrary to constitutional intention

The application of the guarantee can be excluded where the law that provided for the acquisition of property is supported by another of the Commonwealth's legislative powers that manifests a contrary intention to the guarantee. This is best understood by illustration. For example, the taxation power (s 51(ii)) is not subject to a requirement that any money exacted from taxpayers be on just terms. To be obliged to provide fair and just compensation to each individual who pays tax to ensure the exaction was lawful would defeat the very purpose of the constitutional head of power: *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1993) 179 CLR 155, 197-8. The same is true of the imposition of a penalty: *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270, 284.

Another example arises in the intellectual property field. In the case of *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134, Nintendo sued for infringement of its rights under the Circuit Layouts Act 1989 (Cth). Nintendo contended that Centronics was importing video games with a particular circuit layout to which Nintendo had exclusive rights. The power to enact the Circuit Layouts Act 1989 came from s 51(xviii) which enables the Commonwealth Parliament to make laws with respect to copyrights, patents and trade marks. Centronics argued that the Circuit Layouts Act, under which Nintendo had been granted exclusive rights to exploit commercially the particular circuits, was a law which provided for the acquisition of property other than on just terms. The plurality judgment said:

It is of the essence of that grant of legislative power [s 51(xviii)] that it authorizes the making of laws which create, confer, and provide for the enforcement of, intellectual property rights in original compositions, inventions, designs, trade marks and other products of intellectual effort. It is of the nature of such laws that they confer such rights on authors, inventors and designers, other originators and assignees and that they conversely limit and detract from the proprietary rights which would otherwise be enjoyed by the owners of affected property. Inevitably, such laws may, at their commencement, impact upon existing proprietary rights. To the extent that such laws involve an acquisition of property from those adversely affected by

---

<sup>3</sup> See Tom Allen –The Acquisition of Property on Just Terms|| (2000) 22 Sydney Law Review 351; Rosalind Dixon –Overriding Guarantee of Just Terms or Supplementary Source of Power?: Rethinking s 51(xxxi) of the Constitution|| (2005) 27 Sydney Law Review 639; and Simon Evans –When Is an Acquisition of Property Not an Acquisition of Property? The Search for a Principled Approach to Section 51(xxxi)|| (2000) 11 Public Law Review 183.

the intellectual property rights which they create and confer, the grant of legislative power contained in s 51(xviii) manifests a contrary intention which precludes the operation of s 51(xxxi). (160-1).

It is evident that the abstraction rule, which applies the guarantee in s 51(xxxi) to other heads of Commonwealth legislative power, is subject to a contrary intention apparent in the *Constitution* itself, or any necessary implication drawn from the text and structure of the *Constitution*. When a law can be supported by another head of power that manifests such a contrary intention, the acquisition of property which that law permits is not subject to the constitutional guarantee.

### **Rights inherently susceptible to variation**

Furthermore, where the rights or interests acquired have their origin in statute rather than the common law and are thus inherently susceptible to statutory variation or extinguishment, the constitutional guarantee is unlikely to apply.

This circumstance has arisen in many cases. In *Health Insurance Commission v Peeverill* (1994) 179 CLR 226, the Commonwealth had legislated to reduce retrospectively the benefit which a patient would be reimbursed for specified pathology services. As the benefit was assigned to the medical practitioner who performed the services, the practitioner's entitlement was correspondingly reduced. The High Court held that there was no contravention of the guarantee. While the reasoning supporting that conclusion varied, one strand of the reasoning was that, although the law provided for the acquisition of property other than on just terms, the relevant interests were

statutory entitlements to receive payments from consolidated revenue which were not based on antecedent proprietary rights recognized by the general law. Rights of that kind are rights which, as a general rule, are inherently susceptible of variation ... the mere fact that a particular variation involves a reduction in entitlement does not convert it into an acquisition of property. More importantly, any incidental diminution in an individual's entitlement to payment in such a case does not suffice to invest the law with the distinct character of a law with respect to the acquisition of property for the purposes of s. 51 (xxx) of the Constitution. (237)

Much emphasis was placed on the fact that the rights in that case were statutory rights and not recognised at common law. So too in *Georgiadis v Australian and Overseas Telecommunication* (1994) 179 CLR 297 the recognition that the vested causes of action in tort against the Commonwealth had their origin in the common law and were not creatures of statute significantly contributed to the plaintiff's success.

Sometimes the consideration of inherent variability, or defeasibility, is presented not as an exception to the general doctrine but rather as a means of demonstrating that the interest concerned is not 'property' within the meaning of s 51(xxxi). The issue of statutory rights and their inherent susceptibility to variation vexed the case for the plaintiffs in *ICM* as their entitlements to groundwater had their source in licences granted under statute.

## Genuine adjustment of competing rights

One of the most significant exceptions to the guarantee, and one that may be relevant if New Zealand were to decide to introduce an express right not to be unjustly deprived of property into the NZBORA, is the exception arising in a regulatory context where the taking of the property is part of a genuine adjustment of competing rights. Where legislation effects a genuine adjustment of competing rights, claims or obligations of persons in a particular relationship or area of activity the constitutional guarantee will generally not apply. Thus, in *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134, an additional basis for dismissing Centronic's constitutional argument upheld by Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, was that the Circuit Layouts Act was a law

which is not directed towards the acquisition of property as such but which is concerned with the adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity ... It cannot properly, either in whole or in part, be characterized as a law with respect to the acquisition of property ... Its relevant character is that of a law for the adjustment and regulation of the competing claims, rights and liabilities of the designers or first makers of original circuit layouts and those who take advantage of, or benefit from, their work. Consequently, it is beyond the reach of s. 51(xxxi)'s guarantee of just terms. (161)

In *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480, the Commonwealth amended the Copyright Act 1968 (Cth) with the effect that private individuals could copy music on to blank tapes for private and domestic use. The sellers of blank tapes were obliged to pay a levy that would be redistributed to the copyright owners of the music. While the majority held that, because the law was one with respect to tax, no just terms were needed,<sup>4</sup> they stated that:

In a case where an obligation to make a payment is imposed as genuine taxation, as a penalty for proscribed conduct, as compensation for a wrong done or damages for an injury inflicted, or as a *genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity*, it is unlikely that there will be any question of an -acquisition of property|| within s 51(xxxi) of the Constitution. (510, emphasis added)

This test was rephrased in *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1993) 179 CLR 155 to include reference to the need for the area of activity to be regulated in the public interest. Section s 51(xxxi) was held there not to apply to laws which provide for the creation, modification, extinguishment or transfer of rights and liabilities as an incident of, or a means for enforcing, some general regulation of the conduct, rights and obligations of

---

<sup>4</sup> The relevant part of the Act was struck down as invalid, in any event, because it imposed a tax and contravened s 55 of the *Constitution*.

citizens in relationships or areas *which need to be regulated in the common interest.*' (189-90, emphasis added)

This regulatory exception was also relevant in *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133. An Australian domestic airline went into liquidation, owing the Civil Aviation Authority significant amounts of money for services already rendered (such as air traffic control). The Civil Aviation Act 1988 (Cth) allowed the Authority to impose a statutory lien over the airline's aircraft in order to recoup costs. The aircraft, however, had been leased by the airline and the ultimate owners of the aircraft brought proceedings which challenged the lien on the basis that it was an acquisition of property other than on just terms. The High Court applied the exception that the law was intended to create a genuine adjustment of competing rights. In the majority, Gummow J observed:

It may be said that many laws which affect property rights are in some sense made by the legislature in an attempt to resolve competing claims with respect to that property and its use. As a result, it may not be easy to draw a line between a law to which s 51(xxxi) applies and one which resolves competing claims or specifies criteria for some general regulation of conduct which is –needed|| ... However, the line ... is to be drawn in the present case. The statutory lien provisions are part of the regulatory scheme for civil aviation safety created by the Act. The lien provisions adjust the respective interests of those who own, lease or operate the aircraft and of the provider of services necessary for commercial operations of the aircraft in Australia. (299-300, [500]-[501])

### **Compensation 'incongruous'**

The last exception may be dealt with briefly. This is where compensation appears incongruous. Put another way, it is broadly accepted that the Commonwealth may acquire property on other than just terms in circumstances where *\_no question of just terms could sensibly arise'*: *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, 408.

The laws which fall into this exception are those, for example, which provide for the forfeiture of property tainted by crime. Such laws do not need to provide for the acquisition to be on just terms, even where the ultimate owner of the forfeited goods is an innocent bona fide purchaser for value: *Burton v Honan* (1952) 86 CLR 169; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270. Other examples include the acquisition of property by the Trustee of Bankruptcy, and the forfeiture of prohibited imports.

## 9. DOES s 51(xxxi) APPLY TO THE TERRITORIES? – Wurridjal v The Commonwealth

As foreshadowed above, there has long been a vexed question as to whether the guarantee under s 51(xxxi) applies to the territories as well as the States. Australia has various territories: its two mainland territories are the Northern Territory and the Australian Capital

Territory, the latter encompassing the seat of the federal government. The power the Commonwealth Parliament has to make laws for those territories is not included within the list of the enumerated powers in s 51. It is not derived at all from s 51 – rather, as I’ve mentioned, it is s 122 of the *Constitution* that confers on the Commonwealth Parliament a power to make laws for the government of any territory. Section 122 occurs within Chapter VI of the Constitution (entitled ‘New States’) rather than Part V of Chapter I, where s 51 sits, which is concerned with ‘Powers of the [Commonwealth] Parliament’.

The territories power is granted without reference to any subject matter —it is on its face a complete power, as large a power as can be granted. The power is wide ranging. The Commonwealth Parliament has, for example, legislated effectively to repeal voluntary euthanasia laws passed by the Northern Territory Parliament (Euthanasia Laws Act 1997 (Cth)).

The vexed question has arisen precisely because the power under s 122 appears unlimited and because of the place of s 122 in a part of the Constitution quite remote from s 51. Again, the indicia drawn from the text and structure of the Constitution has been relied upon.

In *Teori Tau v The Commonwealth* (1969) 119 CLR 564 the High Court held that s 122 was not affected by the constitutional guarantee in s 51(xxxi). Barwick CJ (for the Court) delivered the judgment *ex tempore*, holding:

Section 51 is concerned with what may be called federal legislative powers as part of the distribution of legislative power between the Commonwealth and the constituent States. Section 122 is concerned with the legislative power for the government of Commonwealth territories in respect of which there is no such division of legislative power. The grant of legislative power by s 122 is plenary in quality and unlimited and unqualified in point of subject matter. In particular, it is not limited or qualified by s. 51(xxxi) or, for that matter, by any other paragraph of that section. (570)

That decision was recently overruled in *Wurridjal v The Commonwealth* (2009) 237 CLR 309. The resulting point of legal principle is that the guarantee of just terms under s 51(xxxi) now extends to constrain the exercise of power by the Commonwealth over the territories.

As I’ve mentioned, *Wurridjal* related to Commonwealth legislation, primarily the NER Act, which was enacted to support an ‘emergency response’ to deal with the perceived problems in the Northern Territory involving the sexual abuse of Aboriginal children, alcohol and drug abuse, pornography and gambling. In order to facilitate the Commonwealth’s intervention, which included at one stage mobilisation of the military, the NER Act provided for the grant of a 5-year statutory lease over certain parts of the Northern Territory to the Commonwealth government (s 32). It was argued that this grant of a lease was an acquisition of property insofar as it affected two types of interests:

- (1) the fee simple estate in land held by the Arnhem Land Aboriginal Land Trust, pursuant to the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth); and
- (2) the ability of traditional owners, pursuant to s 71 of that Act, to enter, occupy and use the land in accordance with Aboriginal tradition.

Native title was not in issue.

The majority in *Wurridjal*, in extending the guarantee of just terms under s 51(xxxi) to the territories power of s 122 (French CJ, Gummow, Kirby and Hayne JJ), gave expression to the notion of the unified nature of the Constitution, itself an expression of national unity. Section 122 was to be seen as –but one of several heads of legislative power given to the national legislature of Australia|| (386, [184]) and thus on a par with those individual heads of power conferred under s 51 which are subject to the just terms guarantee. This revealed that the rule of abstraction applies outside of the enumerated list of powers under s 51. For Gummow and Hayne JJ it was clear that there was to be no more of the –disjunction|| *Teori Tau* drew between the territories power and –the remainder of the structure of government established and maintained by the *Constitution*||. (387, [188]).

But even if the guarantee applied in principle, there remained an argument about whether it applied in the circumstances of the case. There were live questions about whether either of the two types of interest was relevantly ‘property’; whether there was, in any event, an ‘acquisition’; and whether one or more of the exceptions applied.

The Commonwealth argued that the Land Trust’s ‘fee simple’ was created by statute and was thus inherently defeasible. It was submitted that the interests were therefore not proprietary in character within the meaning of s 51 (xxxi). So too the interests under s 71.

With respect to the nature of the Land Trust’s fee simple, the uses to which the land could be put by the Land Trust were circumscribed by the involvement of the Minister and the relevant Land Council. To this extent the interest enjoyed by the Land Trust was not a fee simple in its purest form. However, the majority held that it was not the case that the fee simple grant enjoyed by the Land Trust was so unstable or defeasible by the prospect of subsequent legislation so as to deny the operation of s 51(xxxi). On this issue the majority consisted of French CJ, Gummow and Hayne JJ, Kirby J, and Keifel J, with Crennan J not disagreeing and Heydon J finding the issue unnecessary to decide.

The same majority also agreed that the taking of a lease over the fee simple land constituted an acquisition of property within the meaning of s 51(xxxi). (Heydon J again found the issue unnecessary to decide.) On this Crennan J dissented. She said:

The present problems [in the Northern Territory, which are not contested ..., have arisen under a scheme of control of the land which was set up without envisaging or predicting their possibility. The features and structure of that scheme of control, unamended by the challenged provisions, are not easily or necessarily adapted to tackling the present problems quickly. Thirty-five years ago, in his *Second Report*, of April 1974, Aboriginal Lands Commissioner Woodward recommended that grants of land under the Land Rights Act be an estate in fee simple but he foresaw that the recognition of Aboriginal rights to land needed to be ‘sufficiently flexible to allow for changing ideas and changing needs amongst Aboriginal people over a period of years’. ...

The Land Trust’s fee simple has always been subject to the legislative scheme of control of the land under the Land Rights Act. That legislative scheme of control, like the fee simple itself, is directed to supporting successive generations of traditional Aboriginal owners. It is inherent in the Land Rights Act that that there can be a limited legislative adjustment of the control of the land if a need for such an adjustment arises and if that limited adjustment is directed to achieving the purposes of the Land Rights Act,

namely supporting the traditional Aboriginal owners. The challenged provisions fall within that description. (454-5, [442-3]).

Accordingly, Crennan J held that the scheme fell within the exception of a genuine adjustment to competing rights.

A differently constituted majority (including Crennan J but with Kirby J holding that the issue was not apt to be resolved by a demurrer, and Heydon J finding that the issue was not live) held that there was no acquisition of the s 71 rights to use the land in accordance with tradition, as such rights continued to exist unaffected by the NER Act. This was so because the NER Act that provided the 5-year statutory lease to the Commonwealth preserved existing ‘interests in land’, which phrase expressly included a licence. This was considered to indicate that the phrase ‘interests in land’ was to be construed broadly so as to include the statutory entitlements to use the land in accordance with tradition. As the s 71 rights were preserved, there was no acquisition.

The NER Act ultimately survived the constitutional challenge in *Wurridjal* because a majority composed of French CJ, Gummow and Hayne JJ, Heydon J and Keifel J, (with Kirby J dissenting and Crennan J finding the issue unnecessary to decide) went on to hold that the acquisition of the property comprised by the Land Trust’s fee simple was made on just terms, as the NER Act provided for the Commonwealth to pay a ‘reasonable amount of compensation’, to be determined by a court in the absence of agreement. The expression ‘reasonable compensation’ was held to be ‘apt to include provision for interest to reflect delay occasioned by recourse to adjudication in the absence of agreement’. (389-90 [197]) It was remarked that ‘[t]he submissions to the contrary by the plaintiffs raise a false alarm’. (390, [197]) The entitlement to reasonable compensation was thus sufficient to amount to just terms.

## 10. WHAT HAPPENS WHERE THERE IS AN INTER-GOVERNMENTAL AGREEMENT?

There is a legal maxim in Australia that provides that, in relation to constitutional guarantees and prohibitions, ‘you cannot do indirectly what you are forbidden to do directly’: *Wragg v New South Wales* (1953) 88 CLR 353, 388. In the area of s 51(xxxi), the attention of the courts is drawn to substance over form: Rosalind Dixon –Overriding Guarantee of Just Terms or Supplementary Source of Power?: Rethinking s 51(xxxi) of the Constitution|| (2005) 27 Sydney Law Review 639, 642. It would thus seem unlikely that the Commonwealth could avoid the constitutional guarantee merely by enlisting the States to acquire property pursuant to an inter-governmental agreement. This might be thought to involve a misplaced reliance on the States’ immunity from the guarantee.

Just such a misplaced reliance was found in the post-World War II case of *P J Magennis v The Commonwealth* (1949) 80 CLR 382. The Commonwealth made an agreement with the government of New South Wales for New South Wales to acquire land for the resettlement of returned servicemen. The Commonwealth Parliament passed the War Service Land Settlement Agreements Act 1945 (Cth) which provided for the approval of the agreement and the agreement was annexed to the Act in a schedule. The New South Wales Parliament amended legislation which already existed for land acquisitions, the Closer Settlement

(Amendment) Act 1907 (NSW), authorising the State government to acquire the land for the purpose of resettling returned servicemen. The amendments provided that the price to be paid where an acquisition is made 'for the purposes of the scheme contained in the Agreement approved and ratified by the War Service Land Settlement Agreement Act 1945' should not exceed the value as at 10 February 1942, together with improvements made to the land since that date. This could not constitute 'just terms' as the value of the land in some cases had greatly increased since 1942.

The High Court held that the Commonwealth legislation was invalid as it was a law with respect to the acquisition of property other than on just terms. This was so notwithstanding the fact that the Commonwealth was not the entity which acquired the land nor was the land formally acquired on behalf of the Commonwealth. The Court also held that the inter-governmental agreement was ineffective. The Court further held that the State legislation was inoperative, despite the State not being constrained by the guarantee under s 51 (xxxii), because it purported to give power to resume lands for the purposes of the inter-governmental agreement with the Commonwealth, and there was *at law* no 'agreement' such as was referred to in the Closer Settlement (Amendment) Act 1907 (NSW) (405-6, 425; *Pye v Renshaw* (1951) 84 CLR 58, 79).

Following that decision, the resettlement scheme was restructured. New South Wales amended the Closer Settlement (Amendment) Act 1907 (NSW) to remove all reference to any 'agreement' with the Commonwealth and all reference to any direct or indirect participation of the Commonwealth in the soldier settlement scheme. Financial assistance from the Commonwealth was paid directly to the State and not referable to the earlier inter-governmental agreement. When this arrangement was challenged in *Pye v Renshaw* (1951)84 CLR 58, the High Court unanimously upheld the scheme's validity. To the Court it was now

perfectly clear that all relevant legislation of the Parliament of New South Wales is intended to take effect unconditioned by any Commonwealth legislation and irrespective of the existence of any agreement between the Commonwealth and the State of New South Wales. (80)

This arrangement was upheld despite the same value as before (that is, the 1942 valuation) being paid for the land purchased compulsorily by New South Wales.

The ostensible inconsistency between *Magennis* and *Pye v Renshaw* lay dormant until the 2009 case of *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140.

### **The case of ICM**

The proceeding in *ICM* was brought by a major agricultural company that owned land in a part of New South Wales relevantly known as the Lower Lachlan Groundwater System. ICM was the licensee of bore licences which had been granted under statute (the Water Act 1912 (NSW)) and were converted under State legislation, the Water Management Act 2000 (NSW), to aquifer access licences, such conversion resulting in a massive volumetric reduction of entitlement to groundwater – a reduction for ICM of about 70%.

Groundwater had been the subject of an earlier inter-governmental agreement. In June 2004, New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory

and the Northern Territory entered into an intergovernmental agreement with the Commonwealth on a 'National Water Initiative' (NWI) which included an agreement that each party would 'implement firm pathways and open processes for returning previously allocated and/or overdrawn surface and groundwater systems to *environmentally-sustainable levels of extraction.*' (original emphasis) This was followed in September 2004 by the Commonwealth's establishment of an 'Australian Water Fund' to provide funding assistance for projects with objectives consistent with those of the NWI. In December 2004 the Commonwealth established the National Water Commission pursuant to the National Water Commission Act 2004 (Cth) and the Australian Water Fund Account. Financial assistance was approved by the Commonwealth from the Australia Water Fund Account to be given to New South Wales as the 'Groundwater Entitlement and Financial Assistance Package' in June 2005 and a Funding Agreement was entered into between the Commonwealth and New South Wales in November 2005.

Under the Funding Agreement, New South Wales was required to convert all water licences in the Lower Lachlan Groundwater System to licences under the Water Management Act 2000; to develop a method for reducing water entitlements to the Groundwater System that took into account a licence holder's historical extraction of water from the relevant system; and once that method had been agreed by the Prime Minister and Premier of New South Wales, to achieve a reduction of 56 percent in water entitlements in respect of the Lower Lachlan Groundwater System by 1 July 2016.

ICM brought a challenge against the Commonwealth and New South Wales based on s 51(xxxi). The Attorney-General for Victoria intervened, for whom I appeared as Solicitor-General.

There was provision within the arrangements for the making of *ex gratia* –structural adjustment payments|| to affected licence holders but each payment was not to exceed two-thirds of the final value of a licence holder's water entitlement reduction at the end of the ten year period over which the reduction was to occur. As mentioned above, it was clear that provision for such *ex gratia* payments could not amount to 'just terms'. This was conceded by the Commonwealth in argument.

The Commonwealth argued primarily that the just terms guarantee did not apply in the circumstances of the case because the funding it made to New South Wales was supported by its power under s 96 of the *Constitution* to make financial grants to the States and this was not qualified by the just terms guarantee. The argument was somewhat reminiscent of the submissions the Commonwealth had made in the earlier *Wurridjal* case in relation to the territories power under s 122.

I argued that the scheme in this case was distinguishable from the soldier resettlement scheme invalidated in *Magennis* as, *inter alia*, the New South Wales legislation had been enacted independently of the Funding Agreement. As a matter of history, the policy of the New South Government had well recognized the need to reduce the entitlements of private irrigators, in favour of the public interest in preserving groundwater to ensure a sustainable environment, well before the inter-governmental agreement was entered into and before the funding assistance from the Commonwealth had been granted. Legislative and executive action had been taken by the State in pursuit of that policy quite separately from any Commonwealth action. With that background and history, I argued that the State scheme of converting the old bore licences into aquifer access licences was 'decoupled'<sup>5</sup> from the

---

<sup>5</sup> Cheryl Saunders –Intergovernmental agreements and the executive power|| (2005) 16 Public Law Review 294, 301.

Commonwealth Funding Agreement and the requirements under the inter-governmental agreement for reductions in water entitlements.

There was a significant difference between, on the one hand, a State scheme that was decoupled from the Commonwealth, although with similar if not identical policy objectives and the recipient of Commonwealth funding and, on the other hand, a State scheme that was in effect an expression of the will of the Commonwealth. The significance of that difference also served to demonstrate that the earlier soldier resettlement case of *Magennis* was consistent with the case of *Pye v Renshaw*. In *Magennis* the State had simply carried out a Commonwealth scheme (with the Commonwealth Minister in effect determining eligibility of candidates and approving when advances were to be made by the State to the settlers) whereas the scheme considered in *Pye v Renshaw* had been sufficiently modified to make it genuinely the State's own scheme. (There was an additional soldier resettlement scheme in Victoria which came under challenge, *Tunnock v Victoria* (1951) 84 CLR 42, and the High Court there observed that the Victorian Act had never been intended 'to be mere machinery for carrying out the [inter-governmental] agreement' with the Commonwealth. (56))

The High Court accepted the significance of decoupling in inter-governmental arrangements but did not agree that the circumstances of the case in *ICM* were more like *Pye v Renshaw* than *Magennis*. (169-170 [39]-[45], 206 [174])

There was thus a risk that the relevant Commonwealth legislation would be invalidated if the power to grant financial assistance, under s 96 of the Constitution, was indeed qualified by the just terms guarantee. The case did not turn on the point but, in obiter comments, a majority of the Court held that:

The legislative power of the Commonwealth conferred by s 96 [the power to grant financial assistance to States] ... does not extend to the grant of financial assistance to a State on terms and conditions requiring the State to acquire property on other than just terms. (170 , [46])

It follows that the rule of abstraction thus applies to the grants power under s 96. In finding this to be so, the High Court confirmed, albeit in obiter comments, what it had concluded in *Wurridjal*, namely, the just terms guarantee applies to constrain the legislative powers of the Commonwealth beyond those in the enumerated list under s 51. The Commonwealth thus cannot *require*, or impose *as a condition of funding to a State* that the State compulsorily acquire property and do so without providing just terms. Nor may it be sufficient to avoid the strictures of the guarantee that such a requirement arise, not as a formal condition of funding assistance, but as an informal presupposition: *Spencer v The Commonwealth* (2010) 241 CLR 118.

Ultimately, however, the Court held that the conversion of the bore licences was not an acquisition of property within the meaning of s 51(xxxi). French CJ, Gummow and Crennan J summarized the plaintiffs' arguments as follows:

The plaintiffs placed heavy reliance upon what they said were the rights, recognized at common law in England and applicable to Australian conditions, of an overlying landowner to take and use groundwater. ... These rights were said to amount to an interest in land with an existence apart from statute. The statutory intervention by the 1912 Act was but a particular form

of regulation in the perceived public interest and, in any event, the bore licences held by the plaintiffs themselves created rights which were ‘property’ within the meaning of s 51(xxxi). (170, [48])

Their Honours considered the history within Australia, from pre-Federation times to the present, of the ownership of water rights and the recognized need for conservation of water resources in a country with an arid environment, concluding that on the date the licences were converted, ‘the plaintiffs had no common law rights with respect to the extraction from the land of groundwater for the purposes of their businesses, and ... whatever proprietary characteristics the bore licences of the plaintiffs may have had, there was no acquisition of property within the meaning of s 51 (xxxi)’. (177, [69]). They held that the statutory vesting of the right to the use and flow and control of all sub-surface water for the benefit of the Crown by NSW statute in 1966 divested the plaintiffs of any common law rights the plaintiffs may have had. This was in recognition of water as a natural common resource.

They considered that it was unnecessary to decide whether ‘the bore licences were of such an insubstantial character as to be no more than interests defeasible by operation of the legislation which called them into existence’ (179, [80]) because there was, in any event, no acquisition. As they said:

the groundwater ... was not the subject of private rights enjoyed by [the plaintiffs]. Rather, ... it was a natural resource, and the State always had the power to limit the volume of water to be taken from that resource. The State exercised that power from time to time by legislation imposing a prohibition upon access to and use of that natural resource, which might be lifted or qualified by compliance with a licensing system. The changes of which the plaintiffs complain implemented the policy of the State respecting the use of a limited natural resource, but that did not constitute an ‘acquisition’ by the State in the sense of s 51 (xxxi). Nor can it be shown that there has been an acquisition in the necessary sense by other licensees or prospective licensees. They have at best the prospect of increasing or obtaining allocations under the new system .... (180, [84])

The reasoning of Hayne, Kiefel and Bell JJ focused upon the absence of any acquisition. As they stated:

It may readily be accepted that the bore licences that were cancelled were a species of property. That the entitlements attaching to the licences could be traded or used as security amply demonstrates that to be so. It must also be accepted, as the fundamental premise for consideration of whether there has been an acquisition of property, that, until the cancellation of their bore licences, the plaintiffs had ‘entitlements’ to a certain volume of water and that after cancellation their ‘entitlements’ were less. Those ‘entitlements’ were themselves fragile. They could be reduced at any time, and in the past had been. But there can be no *acquisition* of property unless some identifiable and measurable advantage is derived by another from, or in consequence of, the replacement of the plaintiffs’ licences or reduction of entitlements. That

is, another must acquire ‘an interest in property, however slight or insubstantial it may be’. (201-2, [147])

They concluded that:

Since at least 1966 no landowner in New South Wales has had any right to take groundwater except pursuant to licence. The rights the plaintiffs had under their bore licences (in particular, their right to extract certain volumes of water) did not in any sense ‘return’ to the State upon cancellation of the licences. The State gained no larger or different right itself to extract or permit others to extract water from that system. It gained no larger or different right at all. (202, [150])

The effect of *ICM* has thus been both to affirm the all-pervasive effect of the constitutional guarantee embodied in s 51(xxxi) in principle and to demonstrate the limits of its application in practice in the context of a natural resource. It has provided greater illumination about the exactitude applicable to the component parts of the guarantee. More generally, it has renewed the importance of constitutional limitations on intergovernmental cooperation.

## 11. THE NEW ZEALAND PERSPECTIVE

Lastly, I briefly want to touch upon the question of property rights and compulsory acquisition in the New Zealand context.

It is interesting to note the contributions made by the New Zealand delegates to the Convention debates in Australia in the 1890’s.

New Zealand sent two delegates, Captain William Russell and Sir John Hall, to the 1890 Convention in Melbourne, and three delegates, Captain Russell (again), Sir George Grey, and Sir Harry Albert Atkinson, to the 1891 Convention in Sydney. New Zealand was not represented at the three later Conventions in Adelaide (1897), Sydney (1897) and Melbourne (1898).

The ‘acquisition on just terms’ clause was not introduced until the 1898 Melbourne Convention and, therefore, New Zealand delegates were not in a position to comment upon its passage into the draft Bill. However, New Zealand delegates did obliquely make reference to property rights and compulsory acquisition in earlier contributions to the Convention Debates.

The brief comments made on these subjects by the New Zealand delegates showed that they were concerned with the acquisition of property by a new federal body and believed that the unjust compulsory acquisition of property might be repugnant, either morally or politically.

At the 1891 Convention, Sir George Grey, speaking on the anti-democratic and corrupting nature of plural voting for property owners, as reported in the *Official Report of the National Australasian Convention Debates*, Sydney, 9 April 1891, said:

I will not now delay this Convention by entering upon the subject at greater length; but I could prove that acts of the greatest cruelty have arisen from the causes of which I speak [plural voting]; that great tracts of land ... have been under their influence given away in a manner in which they ought not to have been; and that in consequence of regulations to which I object, people of the native races have been expelled from their territory without the least compensation of any kind whatever, purposely that the land might be given to certain persons. (927)

Grey is here possibly speaking of his observations in Western Australia, where he spent some time exploring and studying local Aboriginal languages before becoming Governor of South Australia and later New Zealand.

At the same Convention, Captain William Russell also touched upon property rights in the context of native title and the fragile peace the New Zealand colonists had struck with the Māori population. He stated:

the questions of native title are matters of very grave moment ... any interruption in our relations with [the Māori] people might be of the most serious importance to the colony ... we shall require to see that we have a safeguard in all such respects as these before we submit ourselves to federal authority. (66)

As I mentioned at the outset, I am aware that, in the absence of any express right in the NZBORA not to be unjustly deprived of private property, there have been proposals for legislative change. I understand that there have been two attempts in the past to amend NZBORA in order to guarantee explicitly property rights, once in 1998 and again in 2007, but these were defeated,<sup>6</sup> although the issue continues to arise on the agenda again. I understand that the defeat of the previous Member's Bills was in part because of a concern that the courts might adopt an overly broad reading of what constitutes property, thereby creating a right to compensation for a wide range of regulatory 'takings'.

I hope that the discussion of the Australian cases has shown that a right not to be unjustly deprived of property need not necessarily bring with it a real risk that the adjustments of interests involved in regulatory schemes will be compensable. The origin of the interests subject to regulation will be paramount in determining whether the interests are proprietary in character – whether they ultimately have their source in the common law (as with the vested causes of action in *Georgiadis*), or are substantial enough to be variable only within constraints (as was the free simple owned by the Arnhem Land Aboriginal Land Trust in *Warrigal*) or whether they are inherently defeasible by operation of the legislation which called them into existence (as were the entitlements of medical practitioners to reimbursements in *Health Insurance Commission v Peverill* and which, perhaps, were the entitlements to groundwater conferred under the bore licences in *ICM*).

---

<sup>6</sup> The New Zealand Bill of Rights (Property Rights) Amendment Bill (defeated at the second reading stage in February 1998: see 566 NZPD 6809 (25 February 2009)) and the New Zealand Bill of Rights (Private Property Rights) Amendment Bill (defeated at the second reading stage in November 2007: see 643 NZPD 13352 (21 November 2007)).

The cases also demonstrate, I hope, that what is critically important are the terms in which any right is cast. On a very tentative note it might be said that a right not to be 'deprived' of property sounds more reminiscent of the 'taking' clause in the *United States Constitution* than the 'acquisition' clause in the Australian *Constitution*. The cases illustrate that a requirement that there be an acquisition (and not simply a takings or an extinguishment) has allowed for the Courts to recognize (as in *ICM*) that a change in the regulatory environment has not provide any 'return' to the Crown or conferred upon it any identifiable measurable advantage. A change in regulation may often fail to constitute an 'acquisition' because it has brought no corresponding benefit of value to the Crown.

The cases also illustrate that even where an interest in property has clearly been acquired, and acquired in the absence of just terms, it remains the case that a regulatory scheme can properly be immune from the guarantee when what is involved is no more than a genuine adjustment of competing rights (as in the *Nintendo* case).

The limited operation of the guarantee is also evident from its being inapplicable in circumstances where its application would be incongruous, for example, as I mentioned, the contexts of taxation, criminal forfeiture and bankruptcy.

Whether there are any direct or indirect lessons to be drawn from the Australian constitutional experience is an open question. The constitutional context in New Zealand is very different from that in Australia. Because of the place of s 51(xxxi) within a written Constitution in which the High Court has the power to judicially review legislation, the consequences of finding a contravention of the guarantee are severe. The same consequences would not apply in New Zealand.

What is perhaps clear at the level of legal principle, is that if a guarantee of just terms was to be enacted in New Zealand to constrain the compulsory acquisition of property by the Crown, it would bring with it a host of complex and fascinating questions about the nature of property and how 'just terms' should be understood. I hope I have given some sense of the way in which these questions can arise and how, within an Australian constitutional context, they continue to be grappled with.