

## **Constitutional Law Conference :**

### **Looking Ahead :**

## **The Issues of 2002 and Beyond :**

### **Acquisition of Property :**

### **Past Cases, Future Directions**

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Section 51(xxxi) of the *Constitution* provides:

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

(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;”

“Fairness is the vibe.”

(These comments are restricted to “acquisitions” to which s.51(xxxi) of the *Constitution* might apply).

### **Past cases**

I am indebted to the excellent paper published in 1998 in the *Australian Mining and Petroleum Law Association Year Book* by David Jackson QC and Stephen Lloyd : *Compulsory Acquisition of Property*. As noted in Quick and Garran, *Annotated Constitution of the Australian Commonwealth 1901* (page 640) the framers of the *Constitution* thought it was desirable for new *Constitution* to contain provisions dealing specifically with compulsory acquisition of property. As Mr Jackson’s and Mr Lloyd’s paper notes the provision agreed to by the framers was a limited power and one reason for those limits was the concern to maintain rights of the States to ensure that the States would not have their lands taken by the Commonwealth without compensation.

The power provided by s.51(xxxi) is:

1. A power to acquire “property”;
2. A power to do so for a Commonwealth purpose; and
3. A power dependent upon there being “just terms”.

It will be seen that s.51 is both a source of legislative power and a limitation on that power’s exercise. Because of the limitation that an acquisition be on “just terms”, s.51(xxxi) is said to be a “constitutional guarantee” (see McHugh J in *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 48 fns 148 and 149 and *Smith v ANL* (2000) 75 ALJR 95; 176 ALR 449; [2000] HCA 58 per Callinan J at [157]. Justice McHugh

stated however that much of the difficulty in applying s.51(xxxi) to a federally created right arises because of this description (*WMC* at 48)).

The operation of s.51(xxxi) to affect the exercise of other heads of legislative power is achieved by applying the rule of construction that where there is a conferral of an express power, subject to a safeguard, restriction or qualification, it is inconsistent with that conferral to interpret other powers in a way which would mean they included the same subject or produced the same effect and so authorised the same kind of legislation without the safeguard restriction or qualification (*Nintendo Co Ltd v Centronics Systems Pty Limited* (1994) 181 CLR 134 at 160 (per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ)).

Much of the debate in past cases has focussed on whether there is a contrary intention to that rule of construction in other heads of legislative power.

Mr Jackson and Mr Lloyd give a list of eight examples of the kinds of laws that have been upheld even though no just terms have been provided. These are:

- (i) The imposition of a tax (*MacCormick v Commissioner of Taxation* (Cth) (1984) 158 CLR 622; *Australian Tape Manufacturers Association v Commonwealth* (1993) 176 CLR 480 at 580-510 per Mason CJ, Brennan, Deane and Gaudron JJ) and the imposition of a liability to pay provisional tax (supported by the taxation power in s.51(ii)) (*Commonwealth v Clyne* (1958) 100 CLR 246);
- (ii) The forfeiture of goods illegally imported into Australia (*Burton v Honan* (1952) 86 CLR 169) and the imposition of a pecuniary penalty on persons who have committed offences or unlawfully imported goods (*R v Smithers*; *Ex parte McMillan* (1982) 152 CLR 477);
- (iii) The restraint of a free exercise of property rights in order to eradicate noxious practices, because such laws are “of the same nature as provisions for penalty or forfeiture” (*Trade Practices Commission v Tooth & Co Limited* (1979) 142 CLR 397 at 408);
- (iv) The sequestration of the property of a bankrupt under the bankruptcy power s.51(xxvii) (*Re: Dohnert Muller Schmidt & Co Ltd* (1961) 105 CLR 361);
- (v) The condemnation of prize under the defence power s.51(vi) (*Re: Dohnert Muller Schmidt & Co Ltd* (1961) 105 CLR 361);
- (vi) The taking of property pursuant to a Court order the effect of which is to avoid the defeat of other Court orders (*In the Marriage of Gould* (1993) 17 Fam LR 156);
- (vii) The imposition of an obligation, for example, to make a payment that involves a genuine adjustment of competing rights, claims or obligations of persons in a particular relationship (*Australian*

*Tape Manufacturers Association v Commonwealth* (1993) 176 CLR 480 at 510);

- (viii) The extinguishment (in whole or part) of statutory entitlements to receive payments from consolidated revenue, where the payments were not based on an antecedent proprietary right recognised by the general law and, therefore, were inherently susceptible of variation (*Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 237, 255-256 and 260).

McHugh J in *Commonwealth v WMC Resources* (1998) 194 CLR at 50-51 noted that laws of the Commonwealth may affect a person's property rights notwithstanding s.51(xxxi). His Honour gave two examples:

- (i) where the Commonwealth law merely varies or extinguishes a property interest, without any corresponding gain or benefit;
- (ii) where the law can fairly be characterised as a law with respect to another s.51 head of power (examples of this are taxes and forfeitures).

I will not attempt to summarise all the past decisions dealing with s.51(xxxi) but in this context I will focus on those which might be thought to raise the last category identified by Mr Jackson and Mr Lloyd where laws may be held not to be subject to s.51(xxxi). In trying to discern future directions these decisions might point to an area with which the Court will be concerned in the near future. In addition, the issues of what constitutes "an acquisition", and what may be "just terms" are also likely to be raised in the context of the provisions of the *Corporations Act* authorising compulsory acquisition of shares of minority shareholders by majority shareholders. The issue of whether a law of the Commonwealth (or Territory) authorising the grant of a freehold or lesser interest in land constitutes an acquisition of property is likely to be raised in the native title context.

Decisions dealing with the status of federally conferred rights also raise the Court's interpretation of the term "property" and confirm that "property" is given a liberal interpretation, confirming perhaps the status of s.51(xxxi) as a constitutional guarantee of just terms (see *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 201-202; *Mutual Pools and Staff v Commissioner of Taxation* (1992) 172 CLR 155 at 185).

In *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 the Court held that a chose in action constituted "property" for the purposes of s.51(xxxi). Mason CJ, Deane and Gaudron JJ in their joint judgment cited *Minister for Army v Dalziel* (1944) 68 CLR 261 at 290 where the Court said that property for the purposes of s.51(xxxi) extended to "every species of valuable and interest including ... chose in action". Given the broad scope of property for the purposes of s.51(xxxi) it may be that the "right" to have a determination made would constitute property in the relevant sense. However there still may not be an acquisition of such property where the statutory right is not recognised by the general law.

*Georgiadis* involved a challenge to s.44 of the *Commonwealth Employees Rehabilitation and Compensation Act 1988* which, in effect, provided that actions did not lie for damages against the Commonwealth for injuries sustained by Commonwealth

employees in the course of their employment. The joint judgment of Mason CJ, Deane and Gaudron JJ noted that “a right to bring an action for damages for negligence is a valuable right” (at 304) and was clearly property. Their Honours further found there was an acquisition of that property for the purposes of s.51(xxxi). Notwithstanding that their Honours acknowledged that some statutory rights might be inherently susceptible to change by further legislative action without engaging s.51(xxxi), their Honours found that this particular right did not exist purely as a creature of statute. The joint judgment characterised the right in question as “a vested cause of action that arose under the general law ... even if the right to proceed against the Commonwealth is properly identified as a statutory right”. Brennan J held that the Commonwealth liability in tort was not a creature of statute. His Honour noted, without deciding, that even if it were true that the Commonwealth immunity in tort was removed by Commonwealth law, so long as that immunity was removed, the cause of action was created by the common law (at 312). Accordingly, their Honours seemed to have given considerable weight to their characterisation of the cause of action as one arising under the general law notwithstanding that, as a matter of procedure, action could only be taken against the Commonwealth as a result of statute (because at common law, action in tort could not lie against the Crown). The judgments of Dawson and Toohey JJ do not I think advance this aspect of the argument. McHugh J was in dissent. At pages 325-326 of his judgment his Honour acknowledged that a chose in action was property for the purposes of s.51(xxxi) and that such chose had been extinguished. However, his Honour concluded there had been no acquisition for the purposes of s.51(xxxi) because the:

“right of the plaintiff to bring his action was dependent on the Federal Law and was always liable to be revoked by Federal Law. A right which can be extinguished by a Federal Law enacted under a power other than s.51(xxxi) is not a law which falls within the terms of that paragraph of the *Constitution*”.

His Honour noted that, at common law, the Crown was not liable to be sued in an action for tort and that the Commonwealth’s liability to be sued probably arose from s.64 and perhaps s.56 of the *Judiciary Act 1903* (Cth) (at 326). His Honour referred with approval to the view of Dixon J in *Werrin v The Commonwealth* (1938) 59 CLR 150 at 167 where His Honour said “that the right of the subject to recover from the Crown in right of the Commonwealth, whether in contract or in tort, is a creature of the law which the Federal Parliament controls”. McHugh J concluded that if s.78 of the *Constitution* contained the power to enact ss.56 and 64 of the *Judiciary Act*, such provision would also authorise laws repealing or modifying laws conferring rights to proceed against the Commonwealth. McHugh J took a similar approach in *Health Insurance Commission v Peverill* (1993-1994) 179 CLR 226. In that case Mason CJ, Deane and Gaudron JJ once again noted that statutory rights “not based on antecedent proprietary rights recognised by the general law” were “inherently susceptible of variation” (at 237).

The majority’s approach in *Georgiadis* has been followed in *Commonwealth v Mewett* (1997) 191 CLR 471 and *Smith v ANL* 75 ALJR 95, [2000] HCA 58.

In *Commonwealth v WMC Resources Limited* (1998) 194 CLR 1 a question arose as to whether, inter alia, statutes amending the rights of the respondent under an exploration permit issued under the *Petroleum (Submerged Lands) Act 1967* (Cth) effected an acquisition of property contrary to s.51(xxxi) of the *Constitution*. Ultimately Justices Gaudron, McHugh and Gummow all took the view that the modification of rights

created by statute were inherently subject to modification by the Parliament and that such modification or extinguishment would not amount to an acquisition for the purposes of s.51(xxxi) of the *Constitution*. However their reasoning differed.

Gaudron J (at para.78) noted “when s.51(xxxi) is invoked, it may be helpful to ask whether the law in question does no more than modify or extinguish a statutory right which has no basis in the general law and which is inherently susceptible to modification or extinguishment”. However, her Honour went on to note that where a law modifies or extinguishes a statutory right which, albeit it had no basis in a general law, results in a person gaining a consequential advantage or benefit in relation to property or where it extinguishes such right and invests a similar right with respect to the same subject matter in another person, such may amount to an acquisition because what occurs is more than the mere modification or extinguishment of a right inherently susceptible to modification (at para.79). Notwithstanding that proviso, her Honour concluded that there was no acquisition in that case. Whilst the gaining of a benefit has always been a factor in determining whether there has been an acquisition, that factor does not so far seem to have previously qualified the notion that a right existing only pursuant to statute can be amended or extinguished without engaging s.51(xxxi).

McHugh J held to his previous reasoning in earlier cases and, so far as is relevant, made the following observations (at 51):

“In my view, s.51(xxxi) has an effect on a head of federal power which has created a property interest that is quite different from the effect that s.51(xxxi) has on a head of federal power that, in the absence of s.51(xxxi), would authorise the acquisition of property held under the general law. Cases where the acquisition of property is an inevitable consequence of the exercise of another s.51 power or is a reasonably proportionate consequence of breach of a law passed under a s.51 power are in a special class of their own. Putting them aside, the presence of s.51(xxxi) in the Constitution precludes resort to any other head of s.51 power to acquire property held under the general law or held under a federal law that substituted a statutory right of property for property previously held under a State enactment or the general law. But if a head of s.51 power otherwise authorises the Parliament to confer a statutory right that constitutes property, in circumstances where no specific property right previously existed under a State enactment or the general law, why should s.51(xxxi) be read as withdrawing from that head of power the authority to vary or extinguish the statutory right created under it? It is one thing to say that “it is in accordance with the soundest principles of interpretation” to construe a general power in s.51 as not authorising an acquisition of property without just terms when s.51(xxxi) gives an express power to acquire property only on just terms. It is another matter altogether to conclude that the presence of s.51(xxxi) prevents another s.51 power from varying or revoking a right that it has created, merely because that right can be characterised as property and the Commonwealth or some other person obtains a benefit from the variation or revocation.

The power to make laws with respect to a subject described in s.51 carries with it the power to amend or repeal a law made on that subject.

A property interest that is created by federal legislation, where no property interest previously existed, is necessarily of an inherently determinable character and is always liable to modification or extinguishment by a subsequent federal enactment. Section 51(xxxi) therefore does not ordinarily withdraw from the Parliament the authority to use another s.51 power to revoke or amend legislation that has been passed under that power, even when the legislation has created a property right. The fact that the Commonwealth or some other person might be viewed as benefiting from that alteration or revocation is irrelevant.”

Gummow J (at 75) pointed out that some statutory rights may be abrogated without any acquisition – the legislation made clear that the right was inherently susceptible to variation.

In *Smith v ANL Ltd* at [53] Gaudron and Gummow JJ noted that in *WMC Resources* “various views were expressed as to whether the submission that the enjoyment of any right created solely by a law of the Commonwealth always is contingent on subsequent legislative abrogation or extinguishment, is too wide”. Callinan J rejected the proposition that a right to compensation should turn upon the way in which rights have originally arisen or have been created, whether by statute or otherwise (at [189]).

### **Future Directions**

#### ▪ **Federally conferred rights**

Five proceedings involving the “roping in” provisions of the *Industrial Relations Act 1988* (Cth) were granted special leave on 27 June 2001 and were heard on 7 February 2002. (*Attorney-General for the State of Queensland v the Australian Industrial Relations Commission & Ors* (B53 & B54/2001); *Minister for Employment, Workplace Relations and Small Business v the Australian Industrial Relations Commission & Ors* (B56, B57 & B58/2001) (some of which are known as the *Chicken Catchers’ Case*). Appeals B54/2001, B57/2001 and B58/2001 arose out of applications to the AIRC by the second respondent, the Transport Workers’ Union of Australia (the “TWU”), for ‘roping-in’ awards which would have had the effect of binding, as respondents to a federal award, several employers carrying on business in Queensland. Applications pursuant to s.111(1)(g) of the then *Industrial Relations Act 1988* (Cth) were made by the Queensland Chamber of Commerce and Industry (“the QCCI”), the Australian Workers’ Union of Employees (Queensland) and the State of Queensland (which had been granted leave to intervene).

Senior Deputy President Harrison conducted hearings in relation to the TWU’s claims in September and October of 1996 and, in September 1997, handed down a decision indicating that a roping-in award would be made in respect of certain employers identified in the decision. On appeal to the Full Bench of the AIRC, it was held that because of the application of s.8 of the *Acts Interpretation Act*, the TWU was entitled to have its applications for roping-in awards determined without regard to s.111AAA of the *Workplace Relations Act 1996* (Cth) (that provision, which commenced after the original applications, requires that the AIRC must cease dealing with a matter if satisfied, in brief, that there is a State award).

Appeals B53/2001 and B56/2001 arose from an industrial dispute created by the service in 1989, by the Federated Furnishing Trades Society (“the FFTS”), of a log of claims on

employers throughout Australia, including employers in Queensland. The FFTS subsequently amalgamated with the Construction, Forestry, Mining and Energy Union (“the CFMEU”). In 1996 the CFMEU sought to have the dispute brought on before the AIRC in order to bind Queensland employers to a federal award that had been made by the AIRC. Applications were then made by the Furnishing Industry Association of Australia, the QCCI and the State of Queensland under s.111(g) of the *Industrial Relations Act 1988* (Cth). The matter proceeded in the AIRC before Senior Deputy President Watson. In the course of the proceedings, s.111AAA of the *Workplace Relations Act 1996* (Cth) came into force. The Senior Deputy President found that the CFMEU was entitled to have the applications under s.111(1)(g) determined without regard to s.111AAA.

There was no appeal against that ruling but in April 1998 the QCCI applied to have the pending application under s.111AAA determined. That application was referred to a Full Bench of the AIRC. The Full Bench dismissed the applications under s.111AAA.

McHugh J during the special leave hearing noted that, depending on the nature of the right which accrues to an applicant for an industrial award in the circumstances raised in that case, the question whether such a right is affected by s.51(xxxi) may arise. Although none of the parties argued the application of s.51(xxxi) in the proceedings in the course of the special leave hearing on 27 June 2001 Justice McHugh noted in discussion with senior counsel for the unions that the case “raises questions as to whether or not the Federal legislature can interfere with those rights without compensation. I mean it seems to me it is a very important point and, as Justice Kirby said it is amazing that it has not come up for consideration before now.”

It might be thought that on the majority view of the High Court to date the type of rights under the *Workplace Relations Act* exist only as a result of the Commonwealth statute, there being no right at general law to have industrial disputes determined by the Industrial Relations Commission. If that is right, s.51(xxxv) will support modification of rights to have an industrial dispute determined without engaging s.51(xxxi) of the *Constitution*.

At the hearing of the matter before the Full Bench (McHugh J was not present, but the parties agreed to his Honour participating in the decision on a reading of the transcript) the argument about “deprivation of property” was not pursued (p 37 of transcript). Clarification of the question noted by Gaudron and Gummow JJ in *Smith v ANL* and explanation of the scope of the “exception” to the application of s.51(xxxi) where the relevant law abrogates or extinguishes a right created solely by a law of the Commonwealth must await other proceedings.

#### ▪ **The “Green mail” cases**

Chapter 6A of the *Corporations Act 2001* deals with compulsory acquisitions and buy-outs. In brief, under the provisions of the *Corporations Act* (which had equivalents in the *Corporations Laws* of the various jurisdictions) a majority shareholder, for instance the bidder under a takeover bid, may compulsorily acquire minority interests. Section 1350 of the *Corporations Act* provides for the payment of compensation of a reasonable amount if property would be acquired other than on just terms as required by s.51(xxxi).

In a series of proceedings, these provisions have been challenged (for instance *Pauls Limited v Elkington* in the Supreme Court of Queensland, *Winpar Holdings Limited v*

*Kelly-Springfield Australia Pty Limited*, Supreme Court of New South Wales). Challenges based on s.51(xxxi) have been made to those provisions as they appear in the *Corporations Act*. Previously, challenges were made to those provisions as they appeared in the *Corporations Laws* of the jurisdictions on other grounds (including the application of the principle that States are unable to compulsorily acquire private property: see *Pauls Limited v Elkington* [2001] QCA 414 at para.15 and *Durham Holdings Pty Limited v New South Wales* (75 ALJR 501)). In the course of dismissing the challenge to the *Corporations Law* (Queensland) Williams JA in the Queensland Court of Appeal noted the equivalent to s.1350 in the *Corporations Law* (Queensland) (s.1362BA) saying that the provision had the effect that if the law stated the acquisition must be on “just terms” because of the provision of the *Constitution*, that is how the compensation payable must be assessed. In other words, according to his Honour, the legislation is not rendered invalid by the operation of s.51(xxxi), but rather if the provision of the *Constitution* applies appropriate compensation must be paid.

Another such case was reported in the *Australian Financial Review* of 23 November 2001 (apparently involving Western Australian Diamond Trust and Rio Tinto). The report noted that the Commonwealth Solicitor-General had intervened in the proceedings and had submitted to Warren J in the Supreme Court of Victoria that the argument against validity was pointless. The Commonwealth Solicitor-General was reported as saying the following:

“It is of interest that it is the courtroom which was used for the filming of The Castle, because some of my learned friends’ arguments ... in relation to special value to the seller are really arguments which have their base only in that case and nowhere else.”

▪ **Application of s.51(xxxi) in relation to offshore mining**

Rights to exploit natural resources, such as fishing rights and mining rights, have been a fertile ground for consideration of the application of s.51(xxxi) (see, for instance, *WMC Resources; Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 181; *Bienke v Minister for Primary Industry and Energy* (1996) 63 FCR 567; and *Fiti v Minister for Primary Industries* (1993) 40 FCR 286). A case currently before the Courts raising similar, and other, issues is *Petrotimor Companhia de Petroleos S.A.R.L. v Commonwealth of Australia*. The background to the claims made by Petrotimor appear in the interlocutory decision given by Beaumont J in the Federal Court ([2002] FCA 18). The government of Timor had entered into a Concession Agreement with Petrotimor which entitled Petrotimor exclusively to prospect for, investigate, develop and exploit deposits of natural hydrocarbons on part of the Continental Shelf between the then Portuguese Province of East Timor and Australia. Petrotimor spent money and resources in exploring, investigating and prospecting activities under that Concession Agreement. In the course of those activities Petrotimor obtained certain confidential information. The performance of the obligations under the Concession Agreement was prevented or obstructed as a result of the civil unrest in Portuguese Timor from August 1975 and by the subsequent invasion by Indonesia in December 1975. By a law made in 1976, the government of Indonesia purported to integrate East Timor into the Republic of Indonesia. It appears that by agreement between Portugal and Petrotimor made in 1976 performance of the Concession Agreement was suspended for *force majeure* and remained suspended until at least November 1999.



Petrotimor's officers were forced to vacate its premises in Portuguese Timor in August 1975 and the documents with the confidential information were by necessity left behind. The Commonwealth and the Joint Authority established under the Timor Gap Treaty between Australia and Indonesia came into possession of the confidential information. The Commonwealth and Indonesia entered into the Treaty which established a zone of co-operation. The terms of the Treaty required the Joint Authority to enter into production contracts for the concession area to the exclusion of Petrotimor and without payment of compensation to Petrotimor. Such contracts were issued by the Joint Authority to Phillips Petroleum. The claim includes that Phillips has benefited unjustly from the use of a confidential information made by it, or by the Commonwealth and the Joint Authority, with Phillips' knowledge. If the action proceeds (it is noted from the decision of Beaumont J that written submissions were to be filed as to the issue of justiciability) they may raise a number of issues relating to the application of s.51(xxxi) of the *Constitution*. These issues might include whether the rights concerned, and from which Phillips is said to have benefited, are "property" within s.51(xxxi) (compare *Smith Kline & French Laboratories (Aust) Ltd v Secretary to the Department of Community Services & Health* (1991) 28 FCR 291 at 306), and the application of s.51(xxxi) to rights granted and obligations imposed by way of international agreement or treaty. No doubt there may be other issues arising in those proceedings relevant to s.51(xxxi).

▪ **Native title**

Stephen Lloyd in his entry in the Oxford Companion to the High Court of Australia, at p.6, says that an issue of some moment that the Court will be called upon to address in the near future is whether native title rights fall within the ambit of "property". Mr Lloyd notes that in *Newcrest Mining v The Commonwealth* (1997) 190 CLR 513 McHugh J (at 576) appears to agree with the views of Deane and Gaudron JJ in *Mabo No. 2* that freehold grants and perhaps many leasehold grants of land in the Northern Territory extinguish native title rights and conferred a commensurate and identifiable and measurable benefit on the grantees resulting in an acquisition of a property of the native title owners. If s.51(xxxi) applied, such grants, to the extent to which they were authorised under a law of the Commonwealth and did not provide for just terms, would be invalid. It appears that Toohey J in *Newcrest* would not agree (despite Toohey J apparently sharing Deane and Gaudron JJ's views in *Mabo*) (at 560) and nor would Gummow and Kirby JJ (at 613 and 651 respectively). Gaudron J does not appear to have expressly dealt with the matter, although her Honour agreed generally with the reasons of Gummow J.

It appears that Gummow J (with whom Toohey and Gaudron JJ seem to have relevantly agreed) had two reasons for describing the apprehensions of the Commonwealth as to the potential invalidity of every grant of freehold or leasehold granted by the Commonwealth in the Territory since 1911 to the extent to which such grants were inconsistent with the continued existence of native title as recognised at common law as "not well founded":

1. The characteristics of native title included an inherent susceptibility to extinguishment or defeasance by *the grant* of freehold or of some lesser estate which is inconsistent with native title rights; this is so whether the grant be supported by prerogative or legislation.

2. Legislation such as the *Queensland Coast Islands Declaratory Act 1985* (Qld) and the *Land (Titles and Traditional Usage) Act 1993* (WA) which were directed to extinguishment of what otherwise would continue as surviving native title might attract the operation of s.51(xxxi) (presumably if enacted by the Commonwealth).

It appears that within his Honour's first point is the proposition that a law of the Commonwealth authorising the grant of freehold or some lesser estate is not one with respect to the acquisition of property but is with respect to something else and therefore s.51(xxxi) is not attracted and the proposition that native title rights suffer from a "congenital infirmity" which means that their extinguishment will never be an acquisition of property for s.51(xxxi).

His Honour's second point (which I assume is intended to refer to such laws if they were enacted by the Commonwealth) is that those laws are laws with respect to acquisition of property and hence s.51(xxxi) applies, even if the extinguishment is achieved by a "circuitous device".

It is not clear how Justice Gaudron's general agreement with Gummow J in *Newcrest* is consistent with her Honour's finding (with Deane J) in *Mabo (No 2)* at 111 that Commonwealth legislation authorising extinguishment by inconsistent grant constitutes an expropriation of property for the purposes of s.51(xxxi). On the other hand, the view that s.51(xxxi) applies to s.122 laws thereby producing invalidity when native title is affected does not sit comfortably with the joint judgment of six justices (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) in *Western Australia v The Commonwealth (The Native Title Act case)* (1995) 183 CLR 373 at 454 where their Honours said that "the chief, and perhaps the only, way in which the existence of native title might have produced invalidity in a past act attributable to a State or Territory is by attracting the overriding operation of the *Racial Discrimination Act*...".

As to the characterisation of native title as a 'species' of property, I do not think there is much doubt that such would be so treated and, indeed, the "past act" provisions of the *Native Title Act 1993* (Cth) assume that such is the case (see also Toohey J in *Mabo (No 2)* at 195). The "past act" provisions of the *Native Title Act* and the application of s.51(xxxi) to them are explicable on the basis that such provisions (which specifically validate grants and provide for extinguishment or "suppression" of native title) are likely to be characterised as laws with respect to the acquisition of property in any event. Without the compensation provisions in the *Native Title Act*, presumably the *Native Title Act* would have been invalid to the extent that it did not provide just terms compensation for the extinguishment of native title. It is not entirely clear what the views of Justice Callinan may be with respect to this question but from his Honour's judgment in *Smith v ANL* (at [157]) it appears his Honour would apply s.51(xxxi) in a broad range of circumstances, although it is not clear that protection of native title from inconsistent grant would be included.