HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

STEPHEN PAUL SMITH APPELLANT

AND

ANL LIMITED RESPONDENT

Smith v ANL Limited [2000] HCA 58
16 November 2000
P56/1999

ORDER

1. *Amend the style of the respondent to "ANL Limited".*

2. *Appeal allowed with costs.*

3. *Set aside orders of the Full Court of the Supreme Court of Western Australia made on 18 November 1998 and, in lieu thereof, order that:*

   (a) *the appeal to that Court from the orders of Registrar Powell dated 9 September 1996 be allowed with costs, those orders be set aside and the application to the Registrar be dismissed with costs;*

   (b) *the appeal to that Court from the orders of Ipp J dated 27 August 1996 be allowed with costs and question 2 of the questions of law ordered to be tried by Owen J on 17 June 1996 as preliminary questions of law be answered: "Section 54 of the* Seafarers Rehabilitation and Compensation Act *1992 (Cth) is invalid in its application to the causes of action pleaded by the plaintiff";*

   (c) *costs of the trial of the preliminary questions, including any reserved costs, be the plaintiff's costs in the action.*

On appeal from the Supreme Court of Western Australia

Representation:

P J Hanks QC with N J Mullany for the appellant (instructed by Slater & Gordon)

G H Murphy for the respondent (instructed by Cocks Macnish)

Intervener:

D M J Bennett QC, Solicitor-General of the Commonwealth with G R Kennett intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

CATCHWORDS

Smith v ANL Limited

Constitutional law (Cth) – Acquisition of property on just terms – Seaman injured on ship during course of employment – Legislation barred existing common law rights to bring action and allowed an action to be brought within six-month period – Whether a law with respect to the acquisition of property on just terms.

Workers' compensation – Seafarers' compensation – Provisions in lieu of entitlement to damages at common law – Whether Act validly abolished entitlement – Whether abolition constituted acquisition of property on just terms.

Constitution, s 51(xxxi).
Seafarers Rehabilitation and Compensation Act 1992 (Cth), s 54.
Seafarers Rehabilitation and Compensation (Transitional Provisions and Consequential Amendments) Act 1992 (Cth), s 13.

1 GLEESON CJ. In December 1988 the appellant was injured whilst working as a merchant seaman in the employment of the respondent. He claims that the respondent became liable to him in damages, for breach of contract (in failing to provide a safe system of work), and in negligence. In November 1994, the appellant sued the respondent in Western Australia. In the meantime, the Australian Parliament, as part of a new legislative scheme to compensate injured seafarers, enacted legislation which, if valid, would deprive the appellant of the common law rights asserted in his action. The relevant statutory provisions are s 54 of the *Seafarers Rehabilitation and Compensation Act* 1992 (Cth) ("the Rehabilitation Act"), and s 13 of the *Seafarers Rehabilitation and Compensation (Transitional Provisions and Consequential Amendments) Act* 1992 (Cth) ("the Transitional Provisions Act"). The issue presently before the Court is whether those provisions are invalid because, in their application to the appellant, they are laws with respect to the acquisition of property other than on just terms as required by s 51 (xxxi) of the Constitution.

2 The facts of the case, and the terms of the relevant legislation, are set out in the reasons for judgment of Gaudron and Gummow JJ.

3 In certain respects the case is similar to *Georgiadis v Australian and Overseas Telecommunications Corporation*[1], which was followed and applied in *The Commonwealth v Mewett*[2]. Those cases establish that a right of action for damages for personal injury of the kind which, it is assumed, was vested in the appellant immediately before the enactment of the Rehabilitation Act and the Transitional Provisions Act, is "property" within the meaning of s 51 (xxxi). They also establish that a law which extinguishes such a right of action may bear the character of a law with respect to the acquisition of property. In *Georgiadis*[3] it was said that "'acquisition' in s 51 (xxxi) extends to the extinguishment of a vested cause of action, at least where the extinguishment results in a direct benefit or financial gain … and the cause of action is one that arises under the general law." It was also held, as a matter of characterisation, that a law, which effected such an extinguishment in the wider context of legislation altering entitlements to compensation for certain work-related injuries, was a law of the kind to which s 51 (xxxi) refers.

4 The respondent argued that the present case is materially different from *Georgiadis*. The combined effect of s 54 of the Rehabilitation Act and s 13 of the Transitional Provisions Act was not to bring about an immediate

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1 (1994) 179 CLR 297.

2 (1997) 191 CLR 471.

3 (1994) 179 CLR 297 at 305 per Mason CJ, Deane and Gaudron JJ.

extinguishment of the appellant's right of action. Rather, it was to impose upon the appellant a qualified removal of his right to bring such an action (s 54), the qualification being that the appellant had the right to bring such an action within a further six months after the commencement of the legislation (s 13). In practical terms, in place of the limitation period that would otherwise have operated, the appellant had a period of six months in which to commence his proceedings for common law damages, and if he did not bring them within that time, he lost his right to bring the action. The Rehabilitation Act provides a statutory scheme of compensation for injured seafarers.

5 In respect of a cause of action which had accrued before 24 June 1993, the legislation provided that a claim could be brought within six months after that date, but not thereafter. This, it was said, was no more than a modification of the limitation period that would otherwise apply, and was procedural rather than substantive in effect[4]. The legislation, it was contended, did not take away the appellant's right of action; at most it diminished its value by requiring that it be exercised, if it were to be exercised at all, within six months. Correspondingly, the only benefit conferred upon the respondent was an assurance that, if it were to be sued at all, that had to occur within six months.

6 It is true that, in *Georgiadis*[5], significance was attached to the fact that the law there in question did not merely modify the limitation period applicable to causes of action sustained by Commonwealth employees before the new scheme of compensation came into effect, but immediately extinguished such causes of action. What must be addressed in the present case is the operation of s 51 (xxxi) in relation to legislation having the effect already described.

7 The legislation did not operate immediately to divest the appellant of his right of action against the respondent. However, it had the effect that, after the expiration of a further six months, he did not have a right to bring an action against the respondent for damages for a work-related injury. Section 54 removed the right of action. Section 13 provided that, despite s 54, the respondent had a right to bring such an action within a further six months. The combined legal effect of the two provisions, which were intended to be read together, was that the appellant's pre-existing common law right was modified; and a corresponding benefit was conferred on the respondent. Once it is accepted, as the authorities establish, that a chose in action is a species of property to which s 51 (xxxi) applies, and that the constitutional guarantee is not to be narrowly confined, then modification of a right to bring an action, in circumstances where a corresponding advantage accrues to the party against

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4 cf *Maxwell v Murphy* (1957) 96 CLR 261.

5 (1994) 179 CLR 297 at 307.

whom action may be brought, would ordinarily involve an acquisition of property. If it were the case that only an extinguishment of a chose in action would amount to acquisition, then the constitutional guarantee would be easily circumvented. The distinction between procedural and substantive consequences of limitation provisions may be significant in other areas, but it does not control the application of s 51 (xxxi). If it did, a guarantee protecting rights of private property could be rendered worthless by the adoption of a drafting technique that would produce, for the citizen affected, a result having no practical difference from the result of extinguishment. Furthermore, to provide by legislation that a person who has an accrued right of action, which could previously have been exercised within a longer period, may only bring the action within a substantially shorter period, is to affect the right in a manner which will ordinarily cause disadvantage to one party and a corresponding advantage to another.

8 The extent of the disadvantage may be a material matter in deciding whether just terms have been provided. The circumstance that the appellant could have avoided the adverse consequences of the legislation by taking action within six months does not, in my view, mean that there was no acquisition. The appellant did not consent to the modification of his right. It is, however, a matter to be taken into account in considering whether, in the circumstances, there was a failure to provide just terms. So is the fact that the legislative scheme provided certain other benefits in place of the common law rights which it affected. However, it is the position of the appellant, not other injured seafarers considered collectively, or the public generally, that is to be addressed. As Brennan J said of the corresponding legislation in *Georgiadis*[6]:

> "If a worker is entitled at common law to a lump sum award in damages, it is not within the power of the Commonwealth under s 51 (xxxi) to limit the amount which it or a statutory authority may have to pay the worker or to delay the worker's entitlement to payment. In determining the issue of just terms, the Court does not attempt a balancing of the interests of the dispossessed owner against the interests of the community at large. The purpose of the guarantee of just terms is to ensure that the owners of property compulsorily acquired by government presumably in the interests of the community at large are not required to sacrifice their property for less than its worth. Unless it be shown that what is gained is full compensation for what is lost, the terms cannot be found to be just."

9 The guarantee contained in s 51 (xxxi) is there to protect private property. It prevents expropriation of the property of individual citizens, without adequate compensation, even where such expropriation may be intended to serve a wider

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6 (1994) 179 CLR 297 at 310-311.

public interest. A government may be satisfied that it can use the assets of some citizens better than they can; but if it wants to acquire those assets in reliance upon the power given by s 51 (xxxi) it must pay for them, or in some other way provide just terms of acquisition.

10 In the present case it is not shown that what was gained by the appellant was full compensation for what was lost, even allowing that, in considering what was lost, the period of six months to bring action should be taken into account.

11 I agree with the orders proposed by Gaudron and Gummow JJ.

12 GAUDRON AND GUMMOW JJ. This is an appeal from the Full Court of the Supreme Court of Western Australia (Kennedy, Pidgeon and Templeman JJ)[7]. The Full Court upheld the validity of s 54 of the *Seafarers Rehabilitation and Compensation Act* 1992 (Cth) ("the Rehabilitation Act") which had been pleaded in bar to the appellant's action for damages in contract and tort. The impact of s 54 upon the appellant's rights of action in contract and tort was held not to render it a law with respect to the acquisition of property from the appellant on other than just terms, within the meaning of s 51(xxxi) of the Constitution. The issues that arise respecting s 51(xxxi) are to be understood only with an appreciation of the source and nature of the proprietary rights asserted by the appellant, and the course of events and legislation over some years. To these matters we now turn.

13 The appellant ("Mr Smith") was born in 1955 and was a merchant seaman. Mr Smith was injured in December 1988. He was then employed under a contract with the respondent ("ANL") and was serving on the "Australian Prospector". This vessel was owned and operated by ANL. It was an implied term of the contract of employment with ANL that it would provide Mr Smith with a safe working place and safe conditions of work and that ANL would not require him to undertake work which carried an unreasonable risk of injury. ANL also owed Mr Smith a duty to take reasonable care to avoid a foreseeable risk of him suffering injury.

14 Mr Smith was injured on 7 December 1988 when he was required and directed by servants or agents of ANL urgently to rig and shackle a heavy pilot ladder. The "Australian Prospector" then was approaching the port of Sakai in Japan. On the next day, or thereabouts, whilst the vessel was at Sakai, Mr Smith was injured when he was required and directed to pull across the deck an electrical generator weighing 300 kg. It is to be assumed for present purposes that there were breaches by ANL of its contractual obligations to Mr Smith and of its duty of care. Mr Smith required a spinal fusion, will be unable to work again as a merchant seaman and has been permanently incapacitated since December 1988.

15 At the time Mr Smith was injured, ANL was a body corporate established and constituted by s 7 of the *Australian Shipping Commission Act* 1956 (Cth) ("the Principal Act") under the name of the "Australian Shipping Commission"[8].

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7 (1998) 20 WAR 219; 159 ALR 431.

8 The statute was enacted as the *Australian Coastal Shipping Commission Act* 1956 (Cth), but the term "Coastal" was omitted by s 1(3) of the *Australian Shipping Commission Act* 1974 (Cth).

The Commissioners of the body corporate were appointed by the Governor-General (s 8) and in significant respects the discharge of its functions and the exercise of its powers were subject to the direction or control of the Minister[9]. The capital of ANL was repayable to the Commonwealth (s 28) and the Treasurer, on behalf of the Commonwealth, was empowered by s 30 to lend ANL moneys out of parliamentary appropriations for that purpose. Provision was made in s 36 for ANL not to be subject to State taxation. Clearly if Mr Smith had sued ANL forthwith, this would have been an action to which the Commonwealth was a party within the meaning of s 75(iii) of the Constitution[10].

16 Further, Mr Smith's causes of action against ANL in contract and tort were created by the common law of Australia and s 75(iii) denied any operation to doctrines of Crown or Executive immunity which otherwise might be pleaded to those actions[11]. Mr Smith's common law rights were qualified in one relevant respect by federal law which was in force at the time he sustained his injuries. The *Seamen's Compensation Act* 1911 (Cth) ("the 1911 Act") instituted a system of compensation irrespective of fault on the part of the employer. The 1911 Act contained in s 10A provisions which protected the employer from being twice vexed and, in particular, s 10A(3) required the deduction of compensation payments from any later award of damages against the employer[12]. Such provisions cut down common law rights but were held valid in *Joyce v Australasian United Steam Navigation Co Ltd*[13] as "incidental or ancillary" to and as "forming a necessary part of the scheme", which was supported by s 51(i) and s 98 of the Constitution[14]. No question of invalidity under s 51(xxxi) arose in that case. It will be necessary to return to the 1911 Act later in these reasons.

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9 eg s 16(2)(aa), (h); s 16(2B)-(2D); s 16(3); s 17; s 19; s 30.

10 *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334; *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 232; *Crimmins v Stevedoring Industry Finance Committee* (1999) 74 ALJR 1 at 29 [152]-[153]; 167 ALR 1 at 38-39.

11 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 491, 531, 550-551; *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 69 [180]; *Austral Pacific v Airservices Australia* (2000) 74 ALJR 1184 at 1197 [59]; 173 ALR 619 at 635.

12 See *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 15-16; *Telstra v Worthing* (1999) 197 CLR 61 at 80-81 [40]-[43].

13 (1939) 62 CLR 160.

14 (1939) 62 CLR 160 at 168.

17 There was no law of the Commonwealth which enacted a limitation regime of general operation to civil actions pursued in federal jurisdiction. That meant that, unless and until the operation of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") was enlivened, the common law applied and there was no limitation period which operated in respect of Mr Smith's causes of action[15]. The submission which was pressed by ANL in the Supreme Court of Western Australia, that a limitation provision of the statute law of that State[16] of its own force barred Mr Smith's causes of action thus was misconceived[17]. Further, s 79 of the Judiciary Act operates to "pick up" State or Territory laws (dealing with such matters as limitation periods) only when a court is exercising federal jurisdiction[18].

18 Unless displaced by a law of the Commonwealth, the applicable Australian common law included the rules of private international law respecting contract and tort[19]. In the event, although Mr Smith sustained his injuries when the "Australian Prospector" was approaching and in a Japanese port, no party has pleaded or sought to rely on those rules.

19 Did anything turn upon the circumstance that Mr Smith sustained his injuries by reason of the acts of other servants or agents of ANL? In particular, what was the operation of the doctrine of common employment? Did it directly impeach any cause of action which otherwise would have accrued or would it merely provide a defence to an action once instituted? The latter proposition is correct. The immunity of the employer in cases of common employment was regarded as a term imported by law into the contract of employment, so that it

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15 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 301, 312.

16 In particular, s 47A of the *Limitation Act* 1935 (WA) ("the State Act") which, in some circumstances, imposed a one year limitation period.

17 *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 79, 84, 87, 93; *Northern Territory v GPAO* (1999) 196 CLR 553 at 575 [33]; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 352 [35].

18 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 530, 555; *Austral Pacific v Airservices Australia* (2000) 74 ALJR 1184 at 1188 [11]-[13], 1194 [46]-[47]; 173 ALR 619 at 623-624, 631.

19 See *John Pfeiffer Pty Ltd v Rogerson* (2000) 74 ALJR 1109 at 1120 [55]-[56]; 172 ALR 625 at 640-641.

might be set up by way of defence[20]. In any event, s 59A of the *Navigation Act* 1912 (Cth) had abolished the doctrine of common employment for seamen to which that statute applied[21]. ANL was bound by s 59A[22].

20 The claims by Mr Smith in contract and tort were choses in action which, like any chose in action recognised at law or in equity, were classified as "property" for the operation of s 51(xxxi) of the Constitution[23]. This position was confirmed by *Georgiadis v Australian and Overseas Telecommunications Corporation*[24]. Such choses in action might immediately be turned to account by, for example, assigning for value the damages which might later be recovered at an action subsequently instituted and pursued to judgment[25]. The relief from what otherwise would be the measure of liability in respect of an accrued cause of action will be an acquisition of property for the purposes of s 51(xxxi)[26].

21 Counsel for ANL referred to the statement by Rich J in *Loxton v Moir*[27] that the "primary sense" of the phrase "chose in action" is that of "a right enforceable by an action". That statement is to be applied with some caution in a context involving the application of s 51(xxxi) of the Constitution. Thus, a law might leach the economic value of a plaintiff's chose in action whilst conferring a financial benefit upon the defendant by mitigating the duration, nature or quantum of the defendant's exposure to the plaintiff. Yet that law may still leave the plaintiff "legally free" to exercise that right by instituting and pursuing, "as

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20 *Huddart Parker Ltd v Cotter* (1942) 66 CLR 624 at 639, 656-657. See Glass, McHugh and Douglas, *The Liability of Employers in Damages for Personal Injury*, 2nd ed (1979) at 228-229.

21 *Union Steamship Co of New Zealand Ltd v Ferguson* (1969) 119 CLR 191 at 199. Section 59A was inserted by s 40 of the *Navigation Act* 1958 (Cth) ("the 1958 Act").

22 This was the effect of s 2A, inserted by s 5 of the 1958 Act.

23 See *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349.

24 (1994) 179 CLR 297 at 306, 311-312, 314, 319-320.

25 *Glegg v Bromley* [1912] 3 KB 474; *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 24-25, 32.

26 *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 16 [15], 29-30 [56], 37 [81]-[83], 49 [128].

27 (1914) 18 CLR 360 at 379.

[the plaintiff] pleases", an action against the defendant[28], so that the criterion stated by Rich J in *Loxton v Moir* would be satisfied. However, it would not necessarily follow that, because there remained a right enforceable by action, the law was not proscribed by s 51(xxxi).

22 Questions of substance and of degree, rather than merely of form, are involved[29]. The legislation which was invalid in its application to the plaintiff in *Georgiadis* denied his right to recover damages for non-economic loss and deprived him of his entitlement to full recovery of economic loss[30], but did not extinguish the whole of the rights comprising his common law cause of action. The law which was successfully challenged in *Newcrest Mining (WA) Ltd v The Commonwealth*[31] did not in terms extinguish Newcrest's mining tenements and the Kakadu National Park extended only 1,000 metres beneath the surface. Nevertheless there was an effective sterilisation of the rights constituting the property in question, the mining tenements. On the surface and to the depth of 1,000 metres, s 10(1A) of the *National Parks and Wildlife Conservation Amendment Act* 1987 (Cth) forbade the carrying out of operations for the recovery of minerals. As a legal and practical matter, the vesting in the Commonwealth of the minerals to that depth and the vesting of the surface and the balance of the relevant segments of the subterranean land in the Director of National Parks and Wildlife denied to Newcrest the exercise of its rights under the mining tenements. The result was that, in respect of those mining tenements, there were acquisitions of property from Newcrest other than on the constitutional requirement of just terms. As Brennan CJ later put it, the property of the Commonwealth was enhanced because it was no longer liable to suffer the extraction of the minerals from its land in exercise of the rights conferred by Newcrest's mining tenements[32].

23 On the other hand, the degree of impairment of the bundle of rights constituting the property in question may be insufficient to attract the operation of s 51(xxxi). For example, the prohibition imposed under the legislation upheld

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28 The quotation is from the judgment of Dixon J in *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 270.

29 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349-350; *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201-202; *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 49 [128]-[129].

30 See the discussion of the plaintiff's case by Toohey J (1994) 179 CLR 297 at 318.

31 (1997) 190 CLR 513 at 560, 561, 635, 638.

32 *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 17 [17].

in *Waterhouse v Minister for the Arts and Territories*[33] upon the export of the applicant's painting left him free to retain, enjoy, display or otherwise make use of the painting. He was free to sell, mortgage or otherwise turn the painting to his advantage, subject to the requirement of an export permit if the owner or any other person desired to take it out of Australia. The legislation considered in *British Medical Association v The Commonwealth*[34], and held invalid on other grounds, today perhaps would be thought to be nearer the line of invalidity. In *British Medical Association*, Dixon J was of the opinion that there was no involuntary taking of property from chemists without just compensation. The chemists were legally free to supply pharmaceuticals or not, as they pleased, in a situation where, if a sale were made at other than a price fixed by the Commonwealth, there would be little or no other trade for them in that commodity.

24 The considerations involved in these decisions apply in the present case, which indeed turns upon them. In the period after Mr Smith sustained his injuries early in December 1988, his position was affected by Commonwealth laws enacted in two stages. The first was later in 1988 and the second in 1992. We turn to consider the earlier of these laws.

25 The *ANL (Conversion into Public Company) Act* 1988 (Cth) ("the ANL Act") received the Royal Assent on 14 December 1988 and was fully in force by 1 July 1989. The ANL Act substantially amended the Principal Act. The name of the corporation became "ANL Limited" in place of "Australian Shipping Commission" and ANL became a company registered under the *Companies Act* 1981 (Cth) as a public company limited by shares[35].

26 The changes in the constitution of ANL did not affect its liabilities or any legal proceedings to be instituted against it and those proceedings might be commenced against ANL as newly constituted. This is the effect of s 25B(2) of the *Acts Interpretation Act* 1901 (Cth). The ANL Act nevertheless changed the nature of the entity against which Mr Smith's choses in action lay. However, it is not suggested that this result was at odds with s 51(xxxi) of the Constitution, for example, as "but a circuitous device to acquire indirectly the substance of a proprietary interest without at once providing the just terms guaranteed by s 51(xxxi) of the Constitution when that is done". These words were used by

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33 (1993) 43 FCR 175.

34 (1949) 79 CLR 201.

35 New ss 42-49 inserted by s 9 of the ANL Act, operative from 1 July 1989.

Dixon J in *Bank of NSW v The Commonwealth*[36] with respect to the changes invalidly sought to be made by the *Banking Act* 1947 (Cth) to the internal structures of the private banks.

27 The changes made by the ANL Act did not deny any scope for the operation of s 51(xxxi) of the Constitution upon legislation which might provide for the acquisition of property by ANL. The acquisition referred to in that provision is not limited to acquisition by the Commonwealth or an agency of the Commonwealth[37].

28 The question does arise whether, after the commencement of the ANL Act, ANL no longer answered the description in s 75(iii) of the Constitution as the Commonwealth or a party being sued on behalf of the Commonwealth[38]. It is unnecessary to answer that question. A proceeding which attracts federal jurisdiction with respect to one of the nine descriptions of "matter" contained in ss 75 and 76 of the Constitution may contain within it, or involve at its threshold, a matter answering the description of one or more of those heads of federal jurisdiction[39]. If ANL no longer fell within the terms of s 75(iii) of the Constitution this would be a consequence of the amendment of the Principal Act by the ANL Act. However, the continuing liability to Mr Smith would depend for its existence upon the ANL Act and the institution of proceedings by Mr Smith after the commencement of the ANL Act would involve a matter arising under a law of the Commonwealth within the meaning of s 76(ii) of the Constitution[40].

29 The next federal legislative intervention was in 1992, with the enactment of the Rehabilitation Act and the *Seafarers Rehabilitation and Compensation (Transitional Provisions and Consequential Amendments) Act* 1992 ("the Transitional Provisions Act"). It is this legislation which ANL pleaded in bar to Mr Smith's actions in contract and tort and which gives rise to the issue respecting s 51(xxxi). The decision in *Felton v Mulligan*[41] means that this

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36 (1948) 76 CLR 1 at 349.

37 *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 510-511, 526.

38 cf *Telstra v Worthing* (1999) 197 CLR 61 at 71 [9].

39 *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 361 [14].

40 *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581.

41 (1971) 124 CLR 367.

reliance upon federal law for an immunity to the plaintiff's claims itself attracted the exercise of federal jurisdiction in that action. This is a significant consideration. It means that, even if federal jurisdiction otherwise is not attracted, for example because the employer is not the Commonwealth nor a party being sued on its behalf within the meaning of s 75(iii) of the Constitution, reliance by the employer upon the 1992 legislation in answer to the common law claims of the employee will infuse the proceeding with federal jurisdiction.

30 The relevant provisions of both the Rehabilitation Act and the Transitional Provisions Act came into operation on 24 June 1993[42]. The Rehabilitation Act applied to the employment of employees on a "prescribed ship" engaged in trade or commerce between Australia and places outside Australia (s 19(1)(a)). It is accepted that the "Australian Prospector" was a "prescribed ship" within the meaning of the definition in s 3. Accordingly, in its application to Mr Smith, the Rehabilitation Act was a law supported by s 51(i) and s 98 of the Constitution[43].

31 Section 16 of the Transitional Provisions Act repealed the 1911 Act. This statute had applied to Mr Smith because, within the meaning of sub-par (a)(i) of s 4(1), he had been employed on the "Australian Prospector" which was engaged in trade and commerce with other countries. At the time he sustained his injuries in 1988 and at the time of its repeal, the 1911 Act had denied the right of seamen to obtain from the employer a remedy both at common law and under the statutory scheme. In particular, s 10A(3) had provided:

> "A seaman who recovers damages from an employer in respect of an injury shall not be entitled to compensation or any payment under this Act in respect of the same injury and any sum received by him under this Act in respect of that injury prior to the award of the damages shall be deducted from the amount of the damages recoverable from the employer."

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42 Section 2 of the Rehabilitation Act provided that the relevant provisions thereof (including Pt 2) were to commence on a day or days to be fixed by Proclamation; in the absence of a Proclamation, the commencement was to be "on the first day after the end of" the period "of 6 months beginning on the day on which this Act receives the Royal Assent", as to which see the definitions of "Month" and "Calendar month" in s 22(1)(b) and (g) of the *Acts Interpretation Act* 1901 (Cth). The Royal Assent was given on 24 December 1992. There appears to have been no Proclamation. Section 2 of the Transitional Provisions Act provided that its relevant provisions were to commence on the day Pt 2 of the Rehabilitation Act commenced.

43 *Joyce v Australasian United Steam Navigation Co Ltd* (1939) 62 CLR 160.

32 The repeal of s 10A removed a restriction which otherwise would have applied to the concurrent pursuit by Mr Smith of his common law and federal statutory rights. However, the Rehabilitation Act and another provision of the Transitional Provisions Act restricted the pursuit of Mr Smith's common law rights in such a fashion as for him to complain that the requirements of s 51(xxxi) of the Constitution were attracted to that legislation and its terms were not satisfied. The crucial provisions are s 54 of the Rehabilitation Act and s 13 of the Transitional Provisions Act.

33 Section 54 reads:

> "(1) Subject to section 55, a person does not have a right to bring an action or other proceedings against his or her employer, or an employee of the employer in respect of:
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> (a) an injury sustained by an employee in the course of his or her employment, being an injury in respect of which the employer would, apart from this subsection, be liable (whether vicariously or otherwise) for damages; or
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> (b) the loss of, or damage to, property used by an employee resulting from such an injury.
>
> (2) Subsection (1) applies whether that injury, loss or damage occurred before or after the commencement of this section.
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> (3) Subsection (1) does not apply in relation to an action or proceeding instituted before the commencement of this section."

34 Section 54 did not apply in relation to an action or proceeding instituted before 24 June 1993 (s 54(3)), but Mr Smith instituted his proceedings some months thereafter, on 9 November 1994. Section 54(1) provided that, subject to s 55 (to which it will be necessary to return), "a person does not have a right to bring an action or other proceedings" against the employer in respect of an injury sustained by the employee in the course of employment, being an injury in respect of which the employer would, apart from s 54(1), be liable for damages. That sub-section was stated by s 54(2) to apply "whether that injury … occurred before or after the commencement of this section". Thus, on its face, s 54 denied, from 24 June 1993, the right of Mr Smith to bring an action against ANL in respect of the injuries sustained by him in December 1988. The section was directed to any court in which such an action was brought and would prevail to the extent any State law was inconsistent with it.

35 Section 54(1) may be compared with s 44 of the *Commonwealth Employees' Rehabilitation and Compensation Act* 1988 (Cth) ("the *Georgiadis* statute") which was considered in *Georgiadis*. That section was treated as

effecting extinguishment of significant elements of the common law rights of the plaintiff[44]. The common law choses in action at stake in *Georgiadis* had not become statute barred before s 44 commenced. However, in *The Commonwealth v Mewett*[45] Gummow and Kirby JJ concluded that even a chose in action which had become barred by a limitation statute in traditional form would retain sufficient substance to answer the description of "property" in s 51(xxxi) were a federal law thereafter to purport to extinguish it. In the present case, the question of the operation of s 51(xxxi) arises within a different frame. Here, the choses in action had not become barred and the federal law did not extinguish them; rather, it imposed a bar.

36 Section 44 of the *Georgiadis* statute provided that the action or other proceeding in question "does not lie", rather than (as does s 54) expressing the prohibition as a denial of the plaintiff of the right to bring an action. However, like s 45 of the *Georgiadis* statute, s 55 of the Rehabilitation Act empowered the employee in certain circumstances to elect against the receipt of compensation under the statutory scheme and in favour of an action to recover damages for non-economic loss up to a "capped" sum; to such an action, s 54(1) would not apply. Section 54 of the Rehabilitation Act also was qualified by s 13 of the Transitional Provisions Act. This did not have a counterpart in the *Georgiadis* statute. Section 13 states:

> "Despite section 54 of the [Rehabilitation] Act, an employee has the right to bring, within 6 months after the commencing day, an action or other proceeding against his or her employer, or an employee of the employer, in respect of:
>
> (a) an injury sustained before the commencing day by the employee in the course of his or her employment, being an injury in respect of which the employer would, apart from this subsection, be liable (whether vicariously or otherwise) for damages; or
>
> (b) the loss of, or damage to, property used by an employee resulting from such an injury."

The expression "this subsection" in par (a) gives rise to difficulty. There is no sub-section in s 13. It may have been that, in an earlier draft, what became s 13

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44 (1994) 179 CLR 297 at 306, 310, 314, 318, 322. See also *The Commonwealth v Mewett* (1997) 191 CLR 471 at 503-505, 553; *Telstra v Worthing* (1999) 197 CLR 61 at 80 [38].

45 (1997) 191 CLR 471 at 534-535.

was designed to be part of s 54 itself. However that may be, the principle applied in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*[46] applies here to avoid a nonsense and make it permissible to depart from the literal meaning of the text by reading the phrase "this subsection" as if it were "section 54 of the [Rehabilitation] Act".

37 Read in this way, the effect of s 13, as regards Mr Smith, was that he had the right to bring before 24 December 1993 his action against ANL. In the event, Mr Smith did not do so within that time. He instituted the proceeding in the District Court on 9 November 1994. That was just one month short of six years from the date on which he had been injured. The proceeding was transferred to the Supreme Court on 12 April 1996. The first defendant was ANL which was misidentified as "Australian National Line Limited". This error has continued throughout the litigation and into this Court; the identity of the respondent in this Court should be amended to "ANL Limited". The Commonwealth was joined as second defendant, apparently to support an allegation by Mr Smith that s 54 of the Rehabilitation Act was invalid.

38 This provided another basis (in s 76(i) of the Constitution) for the exercise by the courts of Western Australia of federal jurisdiction invested by s 39 of the Judiciary Act[47]. Further, the institution of this proceeding attracted the operation of s 79 of that statute. This then "picked up" the statute law of Western Australia respecting such matters as limitation periods, to the extent that it was not "otherwise provided" by federal law such as s 54 of the Rehabilitation Act[48]. In this Court, ANL does not contend that, on the hypothesis that s 54 did not validly operate upon Mr Smith's causes of action, nevertheless the action was barred by any State law then liable to be "picked up" by s 79.

39 As we have indicated earlier in these reasons, ANL pleaded s 54 of the Rehabilitation Act. An order was made in the Supreme Court for the separate determination of the validity of s 54 as a preliminary issue and on the basis that Mr Smith would be able to establish the facts he pleaded. The facts stated in

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46 (1981) 147 CLR 297.

47 No reliance was placed upon the investment of federal jurisdiction under s 9 of the *Admiralty Act* 1988 (Cth). Mr Smith's claims against ANL may have been general maritime claims within the meaning of s 4(3)(d) of that statute. Section 37 thereof sets out its own limitation period regime for such claims, which may have been incompatible with the later enacted provisions of s 54 of the Rehabilitation Act.

48 See *Northern Territory v GPAO* (1999) 196 CLR 553 at 587-589 [78]-[83], 605-606 [134], 650 [255].

these reasons are recounted on the same footing. Ipp J answered in the negative the question whether s 54 was invalid. The question and answer had been framed by the parties in terms of s 54 as a whole and with no reference (as in the case of the order in *Georgiadis*[49]) to the particular proceeding and the application of the provision to the plaintiff. That was not good practice[50].

40 Thereafter, a registrar made orders by consent dismissing the action and entering judgment for ANL and the Commonwealth. An appeal against ANL and the Commonwealth was taken by Mr Smith to the Full Court. The appeal against the Commonwealth was discontinued. The effect of the orders of the Full Court was to uphold the ruling by Ipp J respecting s 54.

41 In this Court, Mr Smith seeks orders which would have the effect of replacing the answer given by Ipp J with one that s 54 is invalid in its application to his action against ANL, and reinstating that action so that the pleading by ANL in reliance upon s 54 be struck out and the action proceed to trial.

42 We would allow the appeal and make orders with respect to Mr Smith's action which give effect to the conclusion that s 54 is invalid in so far as it applies to choses in action in respect of injury, loss or damage which occurred before 24 June 1993, and which are choses in action subsisting at common law at that date. This is because we accept the submissions by Mr Smith that in this respect s 54 is beyond the power of the Parliament.

43 Save for those powers which clearly contemplate the acquisition of property other than on just terms, the particular powers in s 51 and s 98 of the Constitution (and that in s 51(xxxix)) have abstracted from them all content which otherwise would enable the compulsory acquisition of property and subject the power of acquisition to an obligation to provide just terms[51]. Moreover, in *Newcrest*[52], three members of this Court concluded that the authority of the Parliament under s 122 to make laws for the government of any territory identifies a purpose within the meaning of s 51(xxxi). Section 54 of the Rehabilitation Act is a law with respect to the acquisition of property but does not provide just terms. We turn to explain why we reach that conclusion.

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49 (1994) 179 CLR 297 at 330.

50 See *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 353-360 [40]-[59].

51 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 567-568, 593.

52 (1997) 190 CLR 513 at 561, 600, 652.

Nothing which follows casts any doubt upon the valid operation of s 54 upon rights to bring an action in respect of injury, loss or damage which occurred after 24 June 1993.

44 ANL's preferred submission is that s 54 left intact Mr Smith's rights enforceable by action, but with the new limitation imposed by s 13 as to the time for the institution of proceedings. We have indicated earlier in these reasons that, even were that construction to be placed upon those provisions, it would not necessarily follow that s 51(xxxi) did not operate in such circumstances.

45 The better construction of the legislation is that s 54 denied employees their otherwise existing rights to bring actions against their employers. Mr Smith submits that, in its application to such rights in respect of pre-24 June 1993 injury, loss or damage, s 54(2) operated once, that is to say upon its commencement on that date. Section 13 of the Transitional Provisions Act then replaced the common law rights, which had been unlimited in time, something denied by s 54, with a right to bring an action within six months of 24 June 1993. We accept those submissions. The consequence of the preferred construction of the legislation is that, in the circumstances under consideration, s 54 operated to bring about an acquisition of property and s 13 did not provide the just terms which would have saved the legislation. Nor did the election provisions of s 55 provide just terms. If the employee elects under s 55, compensation under the statute will not be payable. Then, in an action to which s 54(1) will not provide a bar, only a "capped" sum will be recoverable as damages for non-economic loss.

46 The issue here does not turn upon the distinction which ANL seeks to draw between *Georgiadis* and the present case by emphasising that the law in *Georgiadis* extinguished part of the common law rights in question, whereas s 54 merely barred the remedy. The right to bring the action without the defendant being in a position to plead a time bar is a significant and integral element of the cause of action itself. To impose the bar found in s 54 is to do more than impair the enjoyment of the property constituted by the chose in action. It does not attract reasoning of the kind in *Waterhouse*. Rather, the substance of the chose in action is impeached and a correlative and significant benefit is conferred upon the defendant.

47 The reasoning of Dixon J in *British Medical Association*, upon which ANL relied, does not assist its case. The legislative scheme considered in that legislation provided for payment by the Commonwealth at prescribed rates to pharmacists who supplied prescription drugs to customers; pharmacists were not obliged to participate in the scheme or, if participants, to respond to any particular request for supply. The acquisition with which this case is concerned was effected directly by force of the legislation and does not occur by reason of any subsequent voluntary steps taken by Mr Smith.

48 The question thus becomes whether just terms were provided, bearing in mind that s 51(xxxi) involves a compound concept of "acquisition of property on just terms"[53]. It is trite that the decisions of this Court allow to the Parliament a measure of latitude in such matters. ANL relied upon *Grace Brothers Pty Ltd v The Commonwealth*[54] in which the validity of certain provisions of the *Lands Acquisition Act* 1906 (Cth) was upheld. In *Grace Brothers*, Dixon J said of s 51(xxxi)[55]:

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

49 It is true that, as a practical matter, in the absence of s 54 of the Rehabilitation Act, the institution of proceedings on an employee's common law claims would attract the operation of limitation provisions under State or Territory legislation either directly or, if federal jurisdiction had been engaged, by dint of s 79 of the Judiciary Act. The terms of that legislation are not uniform and are apt to attract amendment from time to time. Nevertheless, as a broad proposition, it may be accepted that a six year period has been the norm in such legislation respecting actions in tort and contract. Whilst, on this hypothesis, time was running against causes of action accrued in favour of employees before 24 June 1993, was it not fair to give those employees six months thereafter in which to bring an action? Section 13 of the Transitional Provisions Act is so expressed, on the construction we prefer, as to confer a fresh, and federal, right of six months' duration, to end 24 December 1993. To those employees for whom at 24 June 1993 almost six years had expired since they were injured, s 13 bestowed an advantage by improving what otherwise would have been their susceptibility to the application of a six year limitation period had they sued, say, in November 1993. Other employees would be prejudiced by the legislative changes.

50 In the nature of things, one would expect employees to be placed at various points along this time scale. Mr Smith was so placed that, in the absence

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53 *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290.

54 (1946) 72 CLR 269.

55 (1946) 72 CLR 269 at 290.

of the supervening 1992 legislation, as a practical matter, he could have waited until December 1994 before suing without fear of a limitation bar[56]. It is to stretch beyond its legal endurance the concept of "just terms" to have regard to what, in general, would have been the position of employees if s 54 had not been enacted and to treat s 13 as a true attempt to provide a fair and just standard of compensating employees or rehabilitating their former position. ANL contends that the acquisitive effect of s 54 was at once negated by s 13, which gave sufficient time to realise the full value of the property in question. We disagree. The period of grace specified in s 13 was too short and its operation from one employee to the next too capricious to meet the constitutional requirement of just terms.

51 ANL also submitted, with the support of the Attorney-General for the Commonwealth as an intervener, that it was significant that the 1992 changes erected a new regulatory scheme for seafarers which adjusted competing rights and claims between employers and employees. Many laws may be so described. Questions arise, as they did in *Airservices Australia v Canadian Airlines International Ltd*[57], whether provisions calculated to enforce or induce compliance with the regulatory scheme by those choosing to participate in it must answer the condition imposed by s 51(xxxi) if they are to be valid. That is not this case.

52 Further, no question, for example, arises as to the prospective operation of the election requirements of the new scheme. Nor could it be said that the Parliament might not enact, to operate prospectively, a limitation law to operate in federal jurisdiction in respect of claims in contract and tort such as those involved in this case.

53 The point of distinction is that Mr Smith complains of the legislative impairment of his common law rights which were subsisting at the commencement of that legislation. The anterior rights which were reduced by subsequent legislation upheld in *Health Insurance Commission v Peverill*[58] were the statutory rights of patients to payment of Medicare Benefits. These rights, pursuant to express statutory provision enabling this to be done, had been assigned to Dr Peverill[59]. Common law rights were not at stake as they are in the

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56 This assumes that the one year limitation period provided in s 47A of the State Act would not have been picked up by s 79 of the Judiciary Act.

57 (1999) 74 ALJR 76; 167 ALR 392.

58 (1994) 179 CLR 226.

59 See the analysis of the legislation by Brennan J (1994) 179 CLR 226 at 238-241.

present litigation. The interests created by legislative regulatory schemes may inherently be susceptible of variation. However, in *The Commonwealth v WMC Resources Ltd*[60], 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 upon subsequent legislative abrogation or extinguishment, is too wide. The matter need not be further pursued here.

54 ANL relied upon what was said to be the improvements for seafarers in the no-fault compensation scheme established by the Rehabilitation Act to that which operated under the 1911 Act. It is unnecessary to determine whether this be so, either generally or in the case of Mr Smith. There was disagreement in the submissions as to the many matters of detail, including questions of fact, which would be involved in that determination. The basic objection here is the same as that to the *Georgiadis* statute, which also introduced a new no-fault scheme. The 1992 legislation provides nothing which can fairly be described as compensation with respect to the choses in action which had accrued before the new scheme commenced and the substance or reality of proprietorship in that which was acquired.

55 The identification of the respondent should be amended to "ANL Limited". The appeal should be allowed with costs. The orders of the Full Court should be varied so that:

(a) the appeal from the orders of Registrar Powell of 9 September 1996 is allowed with costs, the orders of the Registrar are set aside and the application to the Registrar is dismissed with costs;

(b) the appeal from the orders of Ipp J dated 27 August 1996 is allowed with costs and in place of the answer to question 2 of the questions in the preliminary issues it be answered: "Section 54 of the *Seafarer's Rehabilitation and Compensation Act* 1992 (Cth) is invalid in its application to the causes of action pleaded by the plaintiff";

(c) costs of the trial of the preliminary questions, including any reserved costs, be the plaintiff's costs in the action.

Steps should then be taken to strike out pars 10 and 11 of ANL's defence and the action should proceed to trial on the merits.

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60 (1998) 194 CLR 1 at 17 [17]-[18], 29 [55], 36-38 [79]-[86], 51-55 [133]-[141], 68-75 [178]-[203], 92-94 [238]-241]. See also *The Commonwealth v Mewett* (1997) 191 CLR 471 at 504-505.

56 McHUGH J. This appeal should be dismissed for the reasons given by Hayne J.

57 KIRBY J. This appeal concerns s 51(xxxi) of the Constitution. That paragraph requires that federal laws with respect to the acquisition of property from any State or person for a federal purpose must provide "just terms" for the acquisition. In deciding the appeal, this Court must revisit the principles elaborated in numerous earlier decisions concerning s 51(xxxi), especially *Georgiadis v Australian and Overseas Telecommunications Corporation*[61] and *The Commonwealth v Mewett*[62].

The facts

58 In late 1988, Mr Stephen Smith (the appellant) was employed in Western Australia by the Australian Shipping Commission as a merchant seaman on board its ship "Australian Prospector". He claimed that, in the course of such employment, in December 1988, while approaching port in Japan, he suffered injuries resulting in loss and damage. He asserted that such loss and damage were the consequence of negligence on the part of the Australian Shipping Commission for which the public company, ANL Limited (the respondent), since created[63], is liable. He also sued the respondent for breach of the implied terms of his contract of employment that he would be provided by his employer with safe conditions of work and a safe place of work.

59 On 9 November 1994, the appellant issued a writ out of the District Court of Western Australia. This named the respondent and the Commonwealth as defendants. The accompanying statement of claim sought damages from each. The writ was issued a month short of the expiry of the six year limitation period provided under s 38(1)(c) of the *Limitation Act* 1935 (WA) in respect of claims in negligence and for breach of contract. By federal law, that Act is rendered applicable to the exercise of federal jurisdiction by a State court[64].

60 The appellant's proceedings were transferred to the Supreme Court of Western Australia. Relevantly, the respondent raised two defences to the claim.

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61 (1994) 179 CLR 297 ("*Georgiadis*").

62 (1997) 191 CLR 471 ("*Mewett*").

63 *ANL (Conversion into Public Company) Act* 1988 (Cth). That Act was assented to on 14 December 1988 and was proclaimed to come into operation on a later date. It amended the *Australian Shipping Commission Act* 1956 (Cth). See now *ANL Act* 1956 (Cth). By s 25B(2)(b) of the *Acts Interpretation Act* 1901 (Cth), it is provided that, where an Act alters the constitution of a body, then, unless the contrary intention appears, the liabilities of the body are not affected by the alteration. See *Smith v Australian National Line Ltd* (1998) 20 WAR 219 at 243.

64 *Judiciary Act* 1903 (Cth), s 79.

The first concerned a suggested application to the appellant's case of s 47A of the *Limitation Act* which, it was submitted, would have put the appellant out of court without any need to consider a constitutional question. Although that defence was upheld by the primary judge, Ipp J[65], the Full Court of the Supreme Court of Western Australia overruled his decision in that respect[66]. No cross-appeal or notice of contention being filed, the first defence can be disregarded by this Court. Special leave to appeal was confined to that part of the reasoning of the Full Court that concerned the constitutional question.

61 The constitutional question arose out of the second defence. By it, the respondent contended that the appellant was precluded from instituting proceedings against it by reason of the operation of s 54 of the *Seafarers Rehabilitation and Compensation Act* 1992 (Cth)[67] ("the Seafarers Act"), read with s 13 of the *Seafarers Rehabilitation and Compensation (Transitional Provisions and Consequential Amendments) Act* 1992 (Cth)[68] ("the Transitional Provisions Act"). The Supreme Court ordered that identified questions of law be tried as preliminary issues. Relevantly, the preliminary issue which is now before this Court is[69]:

> "Is s 54 of the *Seafarers Act* invalid and inoperative under the provisions of s 51(xxxi) of the Constitution[?]"

62 The primary judge answered that question in the negative. Because that answer (as well as his Honour's answer on the limitation point) effectively decided that the appellant's action was not maintainable, the Supreme Court, in September 1996, by consent, dismissed the appellant's claims against the respondent and the Commonwealth.

63 The appellant was thereupon granted leave to appeal to the Full Court from the judgment of the primary judge. His appeal, so far as it challenged the

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65 *Smith v Australian National Line* unreported, Supreme Court of Western Australia, 27 August 1996 at 5-19.

66 *Smith v Australian National Line Ltd* (1998) 20 WAR 219 at 226 per Kennedy J, 245 per Pidgeon J, 253 per Templeman J.

67 The provisions of s 54 of the Seafarers Act are set out in the reasons of Gaudron and Gummow JJ at [33].

68 The provisions of s 13 of the Transitional Provisions Act are set out in the reasons of Gaudron and Gummow JJ at [36].

69 *Smith v Australian National Line* unreported, Supreme Court of Western Australia, 27 August 1996 at 5.

dismissal of his action against the Commonwealth, was discontinued. This left on foot his appeal against the determination in favour of the respondent of the preliminary issue concerning the validity of s 54 of the Seafarers Act, read with s 13 of the Transitional Provisions Act ("the impugned legislation").

The decision of the Full Court

64 The Full Court divided on this question. The majority, Kennedy and Templeman JJ, dismissed the appeal. Their Honours concluded that, properly characterised, the impugned legislation merely modified the limitation period applicable to the appellant's claim. It did not extinguish the appellant's causes of action. Section 54 was not, therefore, a law with respect to the acquisition of property. Consequently, no question arose as to the validity of the section under s 51(xxxi) of the Constitution[70]. In this respect, their Honours differed from the conclusion of the primary judge, who had held that the impugned legislation did effect an acquisition of property. However, the primary judge went on to hold that s 54 of the Seafarers Act did not bear the distinct character of a law "with respect to" the acquisition of property and, for that reason, did not attract the obligations of s 51(xxxi)[71].

65 The dissenting judge in the Full Court, Pidgeon J, felt unable to distinguish the present case from *Georgiadis*[72]. He concluded that, but for the interposition of the impugned legislation, the appellant enjoyed rights at common law, vested in him, to bring his action against the respondent. The impugned legislation had purported to extinguish those rights. Although the operative effect of such extinguishment was postponed by reason of s 13 of the Transitional Provisions Act, s 54 of the Seafarers Act eventually achieved that end, resulting in a purported deprivation of the appellant's property (in the form of the choses in action which he propounded). The extinguishment of the appellant's rights had been to the equivalent benefit of the respondent which was thereby effectively relieved of liability to the appellant. This amounted to an "acquisition" of the appellant's property. Pidgeon J rejected the argument that s 54 of the Seafarers Act could not be characterised as a law of the kind referred to in s 51(xxxi)[73].

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70 *Smith v Australian National Line Ltd* (1998) 20 WAR 219 at 231 per Kennedy J, 255 per Templeman J.

71 *Smith v Australian National Line* unreported, Supreme Court of Western Australia, 27 August 1996 at 22-24 per Ipp J.

72 *Smith v Australian National Line Ltd* (1998) 20 WAR 219 at 247.

73 *Smith v Australian National Line Ltd* (1998) 20 WAR 219 at 247-250 per Pidgeon J.

66 The Full Court granted the appellant leave to appeal. However, because of the adverse determination of the constitutional point by the majority, the appeal was dismissed. It is from that outcome that, by special leave, the appeal now comes to this Court.

The legislation

67 Before the enactment of the Seafarers Act, compensation for injuries to employees on ships having a relevant Australian connection was regulated by the *Seamen's Compensation Act* 1911 (Cth). In 1988, the federal Parliament enacted the *Commonwealth Employees' Rehabilitation and Compensation Act* 1988 (Cth). This was a compensation statute of broad application to federal employees, which was subsequently renamed the *Safety, Rehabilitation and Compensation Act* 1988 (Cth)[74].

68 Soon after that Act came into operation, a decision was taken to "replace the outdated and inadequate" provisions of the *Seamen's Compensation Act* with "a new scheme of compensation" that would include "modern and comprehensive rehabilitation and compensation arrangements similar to those applicable to Commonwealth employees"[75]. In the result, the Seafarers Act was enacted, substantially based on the provisions of the *Safety, Rehabilitation and Compensation Act*.

69 The scheme of the Seafarers Act involves the application of its provisions to "employees"[76] who are employed in any capacity on a "prescribed ship"[77] engaged in trade or commerce, relevantly "between Australia and places outside Australia"[78]. There was no dispute that each of these preconditions applied to the present facts. Nor was there any dispute as to the constitutional validity of such provisions. Substantially, such validity rests on the trade and commerce power

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74 *Commonwealth Employees' Rehabilitation and Compensation Amendment Act* 1992 (Cth), s 4.

75 See the Second Reading Speech for the Bill: Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 October 1992 at 2145.

76 Defined in s 4(1).

77 Defined in s 3 by reference to Pt II of the *Navigation Act* 1912 (Cth), other than a "Government ship" which is defined in the same section not to include a ship "that belongs to a trading corporation that is an authority of agency of the Commonwealth".

78 s 19(1).

in the Constitution[79] which is further extended, by specific constitutional provision, "to navigation and shipping"[80]. However, to be absolutely sure, the Seafarers Act is also expressed to have application to the "employees" of corporations to which the Constitution applies[81]. Those subject to the Seafarers Act are obliged: (1) to assess and pay compensation for work-related injuries and illnesses in accordance with the terms of the Act[82]; (2) to arrange assessment of the rehabilitation needs and the provision of rehabilitation programs to injured workers[83]; and (3) to maintain policies of insurance sufficient to meet their obligations to pay compensation under the Act[84].

70 According to the Minister's Second Reading Speech in support of the Bill that became the Seafarers Act, common law claims against employers were "counter-productive to the fundamental objective of helping injured employees rebuild their lives and return to employment as quickly as possible"[85]. It is in this context that the provisions of s 54 of the Seafarers Act must be considered.

71 Some provisions of the Seafarers Act commenced on the date the Act received Royal Assent. However, by virtue of s 2(3) of that Act, most of its provisions were not to commence, relevantly, until the day following six months after the Royal Assent. As the Seafarers Act was given such Assent on 24 December 1992, the affected provisions, including those in s 54, commenced operation on 24 June 1993. These provisions were, in turn, further affected by the provisions of s 13 of the Transitional Provisions Act. The "commencing day" referred to in s 13 of the Transitional Provisions Act was defined by s 3(2) of that Act to be the day on which Pt 2 of that Act (which included s 13) commenced. Section 2(1) of that Act defined the commencement day of Pt 2 to be the same as the day on which Pt 2 of the Seafarers Act commenced. Therefore, an employee had an additional six months from the commencing day, which was 24 June

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79 Constitution, s 51(i).

80 Constitution, s 98.

81 s 19(2)-(4) referring to s 51(xx) of the Constitution.

82 See s 63. Determinations are subject to review by the Administrative Appeals Tribunal: see Pt 6, Div 3.

83 Pt 3.

84 s 93.

85 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 October 1992 at 2147.

1993, to bring an action, despite the provisions of s 54 of the Seafarers Act. The foregoing statutory scheme was not in dispute.

The issues

72 In determining whether s 54 of the Seafarers Act, read with s 13 of the Transitional Provisions Act, is constitutionally valid, the following issues arise:

1. Were the appellant's choses in action against the respondent "property" within the meaning of s 51(xxxi) of the Constitution?

2. If so, has such "property" been "acquired" within the meaning of that paragraph?

3. If "property" has been "acquired", is the impugned legislation properly characterised as being "with respect to the acquisition of property" within the paragraph?

4. If so, did the impugned legislation provide for the "acquisition" of "property" otherwise than on "just terms" as compliance with s 51(xxxi) of the Constitution obliges?

The appellant may succeed in overturning the majority decision of the Full Court only if the answer to each of the foregoing questions is in the affirmative.

The relevant approach

73 Because the approach to be taken to resolving the foregoing issues is established by recent authority[86], I will not restate all of the considerations that must be kept in mind, but simply remind myself of the following general propositions.

74 First, the provisions of s 51(xxxi) have repeatedly been described as a constitutional guarantee[87]. That guarantee exists in the form of a limitation on

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86 See eg *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 ("*WMC Resources*").

87 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 276, 284-285; *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201-202; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 168; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285; *WMC Resources* (1998) 194 CLR 1 at 90; cf *R v Home Secretary; Ex parte Brind* [1991] 1 AC 696 at 757.

what would otherwise be the extensive power which the Parliament would enjoy to enact a law postulated to be "for any purpose in respect of which the Parliament has power to make laws". Because of its object and function, the constitutional provision must not be given a pedantic[88], rigid[89], or narrow[90] construction but one broad and ample such as befits the achievement of its objective.

75 Secondly, it is the practical operation of the law said to offend the constitutional requirement that will be considered, not merely its expression or legal form[91].

76 Thirdly, whilst every word in s 51(xxxi) is important and has been elaborated by past decisions, the paragraph as a whole refers to a composite conception[92]. Although the stated issues in these proceedings properly address attention to each of the elements in s 51(xxxi), the ultimate requirement to consider the characterisation of the challenged law against the standard expressed in the paragraph, read as a whole, obliges the decision-maker to perform an act of judgment. Different legislation with different purposes and provisions will produce different outcomes[93]. In such matters, a court, performing the task of characterisation, is inescapably obliged to draw lines distinguishing constitutionally valid from constitutionally invalid provisions[94].

77 Fourthly, the mere fact that the legislation in question is otherwise valid, and that the law is indeed made for a purpose that has recommended itself to the Parliament and is apparently within power, is not sufficient to take such law outside the requirements of s 51(xxxi). On the contrary, the existence of a relevant federal "purpose" is a precondition to the application of the provision.

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88 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349-350.

89 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 275-276.

90 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 660-661 ("*Newcrest Mining*").

91 *WMC Resources* (1998) 194 CLR 1 at 90.

92 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285; cf *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290.

93 As the legislation did in *Airservices Australia v Canadian Airlines International Ltd* (1999) 74 ALJR 76; 167 ALR 392.

94 cf *Residual Assco Group Ltd v Spalvins* (2000) 74 ALJR 1013 at 1031 [85]; 172 ALR 366 at 390.

But for the existence of such a purpose, the legislative provisions would fail at the threshold. Moreover, the purposes for which the Parliament is afforded power to make laws, at least as stated in ss 51 and 52 of the Constitution, are themselves expressed to be "subject to this Constitution". That phrase includes, where the law is properly characterised as one "with respect to ... the acquisition of property", the requirement that such law must provide "just terms"[95].

78 Fifthly, because s 51(xxxi) relates to an acquisition "from any State or person", this makes it plain that the trigger for its operation is the fact of an acquisition. It is not the taking, as such, or the fact that the Commonwealth, or one of its instrumentalities, has secured a benefit from the acquisition[96]. Not infrequently, property rights are acquired under federal law for the precise purpose of extinguishing them, that being the very object of the acquisition[97].

Were the choses in action "property"?

79 In the present context, a broad view has long been taken of "property"[98]. This fact is illustrated by many decisions, not the least of which are *Georgiadis* and *Mewett*. The broad view adopted in *Georgiadis* caused a measure of surprise at the time that decision was announced[99]. As the minority judgments in *Georgiadis*[100] demonstrate, there were substantial arguments supporting a conclusion that the extinguishment of undetermined actual and potential claims at common law, occasioned incidentally to the attainment of large social purposes within the legislative power of the Parliament, was not the kind of "property" to which it was originally contemplated that s 51(xxxi) of the Constitution would be addressed.

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95 *WMC Resources* (1998) 194 CLR 1 at 91.

96 See eg *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397.

97 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 290; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1; cf *Georgiadis* (1994) 179 CLR 297 at 305; *Newcrest Mining* (1997) 190 CLR 513 at 633-634.

98 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 290.

99 It has been said that s 51(xxxi) of the Constitution "has begun a second life": Allen, "The Acquisition of Property on Just Terms", (2000) 22 *Sydney Law Review* 351 at 351.

100 *Georgiadis* (1994) 179 CLR 297 at 315 per Dawson J, 320-321 per Toohey J, 325 per McHugh J. See also *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 145.

80 Yet choses in action are undoubtedly a form of property known to the law. Indisputably, they are regarded as valuable to those in whom they are vested. Extinguishing them, where they have arisen and are vested in an identifiable person and otherwise enforceable, is plainly to deprive that person of something valuable. If, in a general way, this Act benefits some other person under the federal law in question, it is not a large step to designate the outcome as an "acquisition of property" of the person concerned under that law. That is the step which this Court took in *Georgiadis*[101]. It declined to reopen that decision in *Mewett*[102]. *Georgiadis* and *Mewett* therefore represent the starting points for analysis in the present case. No party sought to reargue the correctness of those rulings in this appeal. The respondent, supported by the Commonwealth as an intervener, submitted that the principles established by *Georgiadis* and *Mewett* were distinguishable. The appellant argued that they were not.

81 Initially, in the courts below, and ostensibly on the issues for decision in this Court, the classification of the appellant's rights as rights of "property" was not contested. By analogy with *Georgiadis*[103], the appellant argued here that his right to bring an action (whether in negligence or in contract), vested in him and then extinguished by s 54 of the Seafarers Act, was "property", although the extinguishment was deferred for six months by the operation of s 13 of the Transitional Provisions Act.

82 In this Court, the respondent submitted that the appellant's right of action against it was inherently susceptible to statutory alteration. This was because, when it originally arose, the right of action lay against the respondent's statutory predecessor. It was only continued against the respondent by force of the combined provisions of federal law[104]. Although this argument was mounted to suggest that there had been no "acquisition", it might also have afforded a basis for arguing that, whatever right was extinguished by the impugned legislation, it was not analogous to the rights at common law found to be "property" in *Georgiadis* and *Mewett*. Instead, it was the fragile kind of statutory interest, short of "property", considered in other cases that have come before the Court[105].

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101 *Georgiadis* (1994) 179 CLR 297 at 307-308 per Mason CJ, Deane and Gaudron JJ, 312 per Brennan J.

102 *Mewett* (1997) 191 CLR 471 at 503-505 per Dawson J, 512 per Toohey J, 531 per Gaudron J, 532 per McHugh J.

103 (1994) 179 CLR 297 at 303-304.

104 *ANL Act*, ss 40, 65, read with *Acts Interpretation Act*, s 25B(2).

105 eg *Health Insurance Commission v Peverill* (1994) 179 CLR 226; *WMC Resources* (1998) 194 CLR 1; cf *Minister for Primary Industry and Energy v Davey* (1993) 47

(Footnote continues on next page)

83 I would reject this argument. The appellant's right of action against the respondent, before the respondent was reconstituted by legislation as a public company in 1988, arose under the common law. All that the federal legislation providing for its enforcement against a statutory body of the Commonwealth and later reconstituting that body as the respondent did (read with the applicable provision of the *Acts Interpretation Act* 1901 (Cth)[106]) was to ensure that *that* right, that is, the original common law right, lay and survived against the respondent in its reconstituted form. Specifically, the essential character of that right was not then altered by the operation upon it of the impugned legislation. That legislation did not purport to convert the right into a mere creature of federal legislation. It recognised the existence of the common law right prior to and independent of the provisions. It purported to impose restrictions on the appellant's right to bring an action in respect of an injury for which, apart from the legislation, the employer would have been liable for damages at common law.

84 Although not raised by any party, a question arose during argument as to whether, by the common law, a person in the position of the appellant would have a right of action against his employer at the time and in the place that the injuries to the appellant allegedly occurred. The suggested impediment to such a common law entitlement was the doctrine of common employment. That doctrine was originally expounded as part of the common law in England by the Court of Exchequer in *Priestley v Fowler*[107]. The rule was later assumed to be part of the common law in Australia[108]. If it applied to exempt an employer (such as the respondent's statutory predecessor) from common law liability to an employee (such as the appellant) for the negligence of fellow employees, it might be concluded that the appellant enjoyed no such common law right as would constitute "property". If this were so, he would fail at the threshold either in establishing the existence of a right at common law in the first place, or the transmission of any such "right" from one against the original employer to one against the respondent.

85 There are several answers to these suggestions. First, common employment was not in issue in the courts below. It should not be admitted now for it would raise factual questions as to the basis of the respondent's alleged

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

106 s 25B(2).

107 (1837) 3 M & W 1 [150 ER 1030]. See Glass, McHugh and Douglas, *The Liability of Employers in Damages for Personal Injury*, 2nd ed (1979) at 228-229.

108 cf *Chapman v Victorian Deep Leads Co Ltd* (1902) 28 VLR 677.

liability to the appellant that have never been explored[109]. Secondly, the doctrine of common employment was conventionally treated, in law, as a defence. It has never been pleaded as a defence by the respondent. No application was made to do so in this Court. Thirdly, if such a defence had been pleaded, the appellant would appear to have been entitled to invoke the *Law Reform (Common Employment) Act* 1951 (WA). Section 3(1) of that Act provides that it "shall not be a defence to an employer who is sued in respect of any injury or damage caused by the wrongful act, neglect, or default of a person employed by him, that that person was at the time the injury or damage was caused in common employment with the person suffering that injury or damage". Had the defence of common employment been raised in answer to the appellant's claim, the Supreme Court of Western Australia would probably have been obliged to apply that statutory provision as a surrogate federal law. There are counterpart provisions in other Australian jurisdictions[110].

86 In light of all of these considerations, it is unnecessary to explore further the applicability of the doctrine of common employment to the current appeal[111]. I am not persuaded that this belated suggestion casts doubt on the fact that, before the impugned legislation took its purported effect, the appellant's causes of action against the respondent amounted to "property" as that word in s 51(xxxi) of the Constitution has been interpreted by this Court[112]. The appellant is thus entitled to an affirmative answer on the first issue.

Was there an "acquisition" of "property"?

87 To escape the suggestion that the impugned legislation amounted to an "acquisition", the respondent, and the Commonwealth, advanced, essentially, two arguments. The first might be called a technical one. The second argument was more substantive.

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109 *Coulton v Holcombe* (1986) 162 CLR 1 at 7.

110 *Law Reform (Miscellaneous Provisions) Act* 1955 (ACT), s 21; *Workers Compensation Act* 1987 (NSW), s 151AA; *Law Reform Act* 1995 (Qld), s 3; *Wrongs Act* 1936 (SA), s 30; *Employers' Liability Act* 1943 (Tas), s 5; *Wrongs Act* 1958 (Vic), s 24A.

111 cf *Huddart Parker Ltd v Cotter* (1942) 66 CLR 624; *Union Steamship Co of New Zealand v Ferguson* (1969) 119 CLR 191.

112 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349; *Georgiadis* (1994) 179 CLR 297 at 303-304, 312, 319-320, 325; *Mewett* (1997) 191 CLR 471 at 503, 512, 519, 532, 535, 553; *Newcrest Mining* (1997) 190 CLR 513 at 573, 602.

88 The technical argument was that, unlike the legislation considered in *Georgiadis* and *Mewett*, that under consideration here did not, in its terms, extinguish any underlying causes of action belonging to the appellant. Whereas the legislation under consideration in *Georgiadis* provided that "an action … does not lie"[113] (and for this reason was construed to be a purported attempt to extinguish the underlying cause of action founded on the common law), s 54 of the Seafarers Act merely provided that "a person does not have a right to bring an action or other proceedings". The section was therefore (so it was submitted) purely a procedural provision. It was, in this sense, akin to the traditional language of a statute of limitations. The underlying cause of action was unaffected. It remained untouched by the impugned legislation. All that the latter did was to deprive a person such as the appellant of the right to bring an action or other proceedings based upon the cause of action that otherwise survived.

89 It was conceded by the respondent that shorn of the right to proceed, the cause of action would be greatly reduced in practical value. In practice, it would have no value at all, or virtually none. But, according to the respondent, in the eye of the law it remained the "property" of the appellant. Reducing its value incidentally to the attainment of the valid purposes of the federal legislation in question did not, as such, constitute an "acquisition"[114]. It was the remedy, not the right, that was barred. Thus, should the respondent elect not to raise a defence based on the impugned legislation (or should it have waived its right to rely upon the legislation or were it estopped from asserting those provisions), the procedural bar would not extinguish the underlying legal entitlement[115]. It would remain the "property" of the appellant to enforce in such circumstances. Accordingly, it had not been "acquired" by the respondent or anyone else[116].

90 I do not read the impugned legislation in this way. It is impermissible to construe s 54 of the Seafarers Act apart from the qualifications introduced by s 13 of the Transitional Provisions Act[117]. That which is preserved by the

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113 *Safety Rehabilitation and Compensation Act* 1988 (Cth), s 44; cf *Georgiadis* (1994) 179 CLR 297 at 306; *Mewett* (1997) 191 CLR 471 at 557.

114 *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 499-500, 528; *Waterhouse v Minister for the Arts and Territories* (1993) 43 FCR 175 at 181-183 per Black CJ and Gummow J.

115 *Mewett* (1997) 191 CLR 471 at 534-535.

116 *Mewett* (1997) 191 CLR 471 at 508-509.

117 *Smith v Australian National Line* unreported, Supreme Court of Western Australia, 27 August 1996 at 21 per Ipp J; *Smith v Australian National Line Ltd* (1998) 20 WAR 219 at 247 per Pidgeon J.

impugned legislation, and strictly for the limited time there provided, is an empty shell and eventually the appellant's otherwise viable causes of action are extinguished. The value of the "property" that belonged to the appellant, but for the intervening legislation, lay not in its character as a theoretical legal construct. It lay in the appellant's right to invoke the jurisdiction of a court of law and to prosecute his causes of action against the respondent without the impediment subsequently placed in his path by the provisions of the federal laws under challenge.

91 If, as this Court has held, the requirements of s 51(xxxi) of the Constitution address attention to substance and not merely form, depriving a person such as the appellant of the effective *right* to prosecute his claims at common law may amount to an acquisition of those entitlements from him. Confirmation that this was so in the present context lies in the fact that the effect of the impugned legislation was to accord a real financial benefit to the respondent. After the periods successively provided for in the impugned legislation, the respondent could write off its contingent liability to a person such as the appellant. That person, by the terms of s 54 of the Seafarers Act, thereafter did "not have a right to bring an action". It is true that the fact that the descent of the final statutory disentitlement was, by s 13 of the Transitional Provisions Act, postponed for six months. This delayed the "acquisition". But it did not make it any less an "acquisition" when that time expired and the statutory bar descended. I therefore regard the arguments of the appellant on the technical contention concerning the issue of acquisition to be compelling. Accordingly, I move to the second, more substantive, argument.

92 The respondent urged that the proper characterisation of the impugned legislation was that it amounted to no more than a valid federal modification of an otherwise applicable limitation period that governed the bringing of claims such as those of the appellant against the respondent. Whatever may have been the original position with respect to times for bringing proceedings against ship owners[118], nowadays, the respondent argued, it was both reasonable and normal for a plaintiff in the position of the appellant to conform to a time limitation. Such a limitation in fact applied to the prosecution of the appellant's causes of action[119]. All that the impugned legislation did was to modify the limitation

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118 cf Australian Law Reform Commission, *Civil Admiralty Jurisdiction*, Report No 33, (1986) at 200-204 [249]-[250]; cf *Smith v Australian National Line Ltd* (1998) 20 WAR 219 at 233.

119 *Limitation Act* 1935 (WA), s 38(1)(c). The State Act applied by virtue of s 79 of the *Judiciary Act* 1903 (Cth) which provides that the laws of a State shall, except as otherwise provided, be binding on all courts exercising federal jurisdiction in that State.

periods otherwise applicable by the combination of the governing State and federal laws.

93 In certain circumstances, where an otherwise applicable limitation period was about to expire, s 13 of the Transitional Provisions Act would actually have extended for a maximum of six months the time within which an employee might bring proceedings to enforce a common law claim against the respondent. Where (as in the case of the appellant's claims) the applicable limitation period had more than six months to run, the overall effect was to shorten the available time. According to the respondent, this was merely a procedural adjustment. It was no more an "acquisition of property" for the purposes of s 51(xxxi) of the Constitution than was any other limitation law that barred prosecution of a cause of action after a specified time. In support of this substantive argument, the respondent (and the Commonwealth) portrayed the impugned legislation as nothing more than special federal statutory provisions akin to a limitations law which it was within the power of the Parliament to enact in the case of a claim against a body such as the respondent.

94 There are several answers to these arguments. To characterise the impugned legislation solely as a limitations provision is once again to focus attention on form rather than substance. From the point of view of the person whose "property" (in the form of choses in action) is denuded of practical enforceability, and thus of real content, it matters not that the means chosen were those of imposing an abridged limitations period. The Parliament cannot "by statutory modification or change of rights", in this way, "do by circuitous means what it could not successfully do directly"[120].

95 If the drafting technique adopted in the present case were upheld, as compatible with s 51(xxxi) of the Constitution, it would follow that any property constituted by a vested chose in action against the Commonwealth, its statutory authorities, corporations in which it was interested or anyone else it had reason to protect, could be acquired and extinguished by a purported legislative abolition of the right, substitution of a statutory right of action and imposition of a short time span within which, alone, such statutory action might be enforced. If, when the purposes of s 51(xxxi) of the Constitution are given effect, such legislation

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120 *WMC Resources* (1998) 194 CLR 1 at 96. See also *The Commonwealth and Commonwealth Oil Refineries Ltd v South Australia* (1926) 38 CLR 408 at 423; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349-350*; Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371-372*; Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 662-663; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 173, 223; *Georgiadis* (1994) 179 CLR 297 at 305.

would amount, as I believe is the case here, to an "acquisition of property". It will fail unless "just terms" are provided for those who lose as a consequence.

96 This Court has repeatedly held that exact equivalence between the "modification" of property rights and the "benefits" gained by those deemed to have "acquired" those rights need not be shown. It is sufficient that the beneficiary gains "some identifiable and measurable countervailing benefit or advantage"[121]. By effectively curtailing, in some cases significantly, the time within which a person with a vested common law right might prosecute that right against an employer said to be liable to that person in negligence and in contract, it is obvious that the employer gains an "identifiable and measurable ... benefit or advantage". It rarely, if ever, happens that a person is deliberately out of time for the prosecution of a valuable cause of action. Where a person contemplates prosecuting such a claim in a jurisdiction in which the general limitation on the bringing of such proceedings to enforce the causes of action is six years (as in the case of Western Australia) it is ordinarily perfectly reasonable for the litigant, and those advising the litigant, to assume that the vested right may be prosecuted within such time. Reducing the time diminishes the value of the right. In most cases, it effectively extinguishes the right if it has not been prosecuted within the diminished limitation period.

97 It follows that the second issue must also be decided in the affirmative.

Was it a law "with respect to" acquisition of property?

98 The third issue assumes that the impugned legislation effects an acquisition of property (contrary to the submissions of the respondent and of the Commonwealth) but requires consideration of whether this legislation may itself be characterised as laws "with respect to" such acquisition. The contrary contentions were that, properly characterised, the impugned legislation was part of a legislative scheme for compensation for seafarers. That scheme had selected as an objective within power a readjustment of the bundle of rights belonging to seafarers. Thenceforth, seafarers would enjoy larger entitlements to compensation irrespective of fault and enlarged facilities for their rehabilitation if they were injured. They would do so at the price of surrendering (after legislative notice and a specified interval) the entitlements which formerly existed at common law. According to this argument, such a readjustment of entitlements was compatible with the powers given to the Parliament by the Constitution. The Parliament, so it was submitted, should not be frustrated or impeded in the pursuit of its legislative objectives by the adoption of an unduly expansive notion of the requirements of s 51(xxxi).

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121 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 185.

99 According to the respondent, the way to avoid such an error was to apply a sensible characterisation to the legislation, looked at as a whole. If such legislation could be classified as no more than a law with respect to interstate or foreign trade or commerce (or constitutional corporations) which happened to contain incidental adjustments between competing rights to compensation and common law damages, the fact that a small proportion of persons might lose rights to enforce the latter would not bring the impugned provisions of the legislation fairly into the characterisation of a law "with respect to ... the acquisition of property ... from any ... person". The impugned legislation might indirectly and incidentally have such consequences. But it would not amount to, or control, its constitutional character. Accordingly, the impugned legislation did not attract the requirement to provide "just terms". To impose such a requirement in the present case would, it was submitted, be incongruous[122].

100 I regard this as the strongest argument for the respondent. It presents the greatest difficulty in the way of the appellant in this appeal. Finding a touchstone to distinguish legislation which falls within, and that which falls outside, the requirements of s 51(xxxi) is not easy. No verbal formula provides a universal criterion. Describing the deleterious impact on pre-existing property rights with various adjectives such as "incidental", "peripheral" or "consequential" hardly yields a useful *discrimen* by which to discharge the obligation of constitutional characterisation of the law as s 51(xxxi) requires when its provisions are invoked.

101 An intuitive sense that a law which incidentally involves losses of private rights is unjust, although that law is enacted in the pursuit of valid or even laudable statutory objectives that burden a particular State or particular persons, is also insufficient. Indeed, that would be an irrelevant criterion for the constitutional task in hand[123]. What is reasonable and desirable, just or unjust, must be left to the Parliament, provided the law in question is within power.

102 Nevertheless, as this Court has said many times, so far as the acquisition of property is concerned, the Parliament's power to make laws for that purpose has to be abstracted from the other heads of federal legislative power. Otherwise the limitation expressly provided by s 51(xxxi) could always be circumvented[124].

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122 cf *Airservices Australia v Canadian Airlines International Ltd* (1999) 74 ALJR 76 at 135 [341]-[342] per McHugh J; 167 ALR 392 at 472.

123 *Newcrest Mining* (1997) 190 CLR 513 at 639.

124 *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201-202; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 403, 407; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509; *Georgiadis* (1994) 179 CLR 297 at 303, 320; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 184-185.

Therefore, once a party has established that it has lost a valuable "property" right and that such loss is classified as an "acquisition" of such "property" under the impugned law, that party is well on the way to securing the characterisation of such law, or part of it, as one "with respect to" the acquisition of such property.

103 Invariably, other characterisations may be given to any law and any part of such law. However, if it were possible to say that some apparently (or arguably) worthy purpose on the part of the Parliament could stamp a provision effecting an acquisition of property with the constitutional character of that purpose, thereby excluding the character which would attract the constitutional "guarantee" of "just terms", the effectiveness of that "guarantee" would be severely constricted. In most, if not all, cases of federal legislation, purposes are propounded which are said to be worthy and within power. That fact alone cannot therefore expel the right to "just terms". The legislation may indeed be beneficial. But where property is acquired as a consequence, the benefits for society should not ordinarily have to be paid for by private individuals, corporations or States which lose their property as a result of the legislation. If society, through the Parliament, wants to secure such benefits, economic equity, reflected in the constitutional guarantee, obliges that "just terms" be accorded to those who are required by law to help foot the bill.

104 The Constitution operates in a society in which, relevantly, private property of individuals is generally respected and protected by law. Such property is valuable to those who own it. The imposition of the limitation on the power of the Parliament to enact laws with respect to the acquisition of property was a deliberate one. Generally speaking, it has not been given a narrow construction. I judge the approach of the Court to the meaning of s 51(xxxi) not only to accord with the text of the Constitution but also with universal principles of human rights[125] and, I believe, the expectations of citizens.

105 In the context of s 51(xxxi) of the Constitution, the Parliament may adjust for the future the respective rights to common law damages and statutory compensation to be enjoyed by seafaring employees on prescribed ships regulated by federal law so as to prevent common law rights from vesting. The Parliament may enact a general compensation law for all employees that lies within its legislative powers. And the Parliament may enact a general limitations law to the full extent of federal power, and certainly one with prospective operation.

106 However, in so far as the Parliament enacts a special law with retrospective operation, affecting only seafaring employers and employees, and does so with special restrictive limitation provisions that effectively extinguish

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125 *Newcrest Mining* (1997) 190 CLR 513 at 657-661.

the rights of some and commensurately advantage others, such legislation has to run the gauntlet of s 51(xxxi) of the Constitution. If, effectively, the Parliament takes away from employees in such a case causes of action which were vested in them and if there is an "identifiable and measurable countervailing benefit or advantage" to their employers under the legislation, such a law will be one with respect to "the acquisition of property … from any … person". The Parliament must then provide for the residual instances that deprive such employees of what are otherwise their vested property rights. Those who lose must receive "just terms". Otherwise, the legislation will, to that extent, be invalid.

107 To the complaint that this construction of s 51(xxxi) shackles the legislative freedom of the Parliament, the answer is simply that that is precisely what the paragraph was intended to do, by being defensive of the property rights of individuals and the States when those property rights are relevantly acquired under federal law.

108 Whilst I accept that the argument of characterisation was fairly open in this case, the proper characterisation of the impugned legislation is that it is a law with respect to the acquisition of property from the appellant. The fact that, generally speaking, the Seafarers Act and the Transitional Provisions Act might be classified as also being for other and legitimate purposes within the power of the Parliament does not affect this characterisation of the impugned legislation. In the result, the third issue must also be answered in the affirmative.

Were "just terms" provided?

109 It was common ground before the primary judge that no provision was made in the impugned legislation for "just terms" if it were held that such legislation provided for the acquisition of property from the appellant[126]. Nevertheless, in this Court, the respondent and the Commonwealth submitted that, if all else failed, a proper view of the Seafarers Act was that, under it, "just terms" had been provided for the acquisition. The "just terms" propounded were the provisions for the acquisition of the new right conferred by s 13 of the Transitional Provisions Act.

110 It was submitted that the right conferred by the Transitional Provisions Act was no less valuable than the right extinguished by the Seafarers Act since the measure of the right to damages, thereby afforded, was precisely the same. Although s 54 of the Seafarers Act effects, on this hypothesis, an immediate acquisition of the property propounded, that ostensible result was, according to this argument, negated by the terms of s 13 of the Transitional Provisions Act

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126 *Smith v Australian National Line* unreported, Supreme Court of Western Australia, 27 August 1996 at 22 per Ipp J.

which preserved the property in question for a sufficient time within which a person in the position of the appellant could, if he so chose and acted within the time so limited, realise its full value.

111 This argument also fails. Once it is accepted that the appellant's property has been acquired under the impugned legislation, "just terms" would necessitate the provision to a person such as the appellant, in a case such as the present, of legal means of securing entitlements approximately equivalent to those which the appellant had lost by virtue of the legislation. As the appellant was, but for the impugned legislation, still within the applicable time fixed by the relevant limitation law to prosecute the causes of action constituting his property, and as he, in fact, had commenced his action to enforce those rights within the time otherwise applicable, the property interest which was effectively lost by reason of this legislation had a value equivalent to the value of that property, namely the value of the choses in action which the impugned legislation purportedly rendered incapable of enforcement.

112 It might be said that the provisions of s 13 of the Transitional Provisions Act, postponing the descent of the special limitation period of six months, constituted a kind of "terms" potentially beneficial to a seafaring employee who otherwise stood to lose vested common law rights. However, such "terms" were scarcely "just" in all of the instances to which the impugned legislation would apply. The injustice of such terms can be illustrated by the case of the appellant. No provision was made to compensate a person, like him, with vested common law rights who lost those rights although he wished to enforce them. No provision was even made for extension of the limitation period where a seafarer, although otherwise within the previous limitation period, became out of time without fault on his or her own part[127]. This could easily happen with anyone, but especially an international seafarer. Therefore, the provisions of s 54 of the Seafarers Act, read with s 13 of the Transitional Provisions Act, did not provide "just terms" to the appellant.

113 It follows that the constitutional requirements of s 51(xxxi) were not observed by the impugned legislation. Such legislation amounted to a law with respect to the acquisition of property from a person. That law did not provide that such acquisition was to be on "just terms". In its application to a person in the position of the appellant, the impugned legislation did not conform to the Constitution. The legislation is therefore, to that extent, invalid. The fourth issue must likewise be answered in the affirmative.

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127 cf *Mewett* (1997) 191 CLR 471 at 557-558.

Conclusion and orders

114 The appellant having succeeded on each of the four issues argued, he must succeed in the appeal. I agree in the orders proposed by Gaudron and Gummow JJ.

115 HAYNE J. The circumstances which give rise to this appeal are sufficiently described in the reasons of other members of the Court. The legislation which is in issue is set out there. I do not need to repeat these matters.

116 The central question is whether s 54 of the *Seafarers Rehabilitation and Compensation Act* 1992 (Cth) ("the Rehabilitation Act") when read in conjunction with s 13 of the *Seafarers Rehabilitation and Compensation (Transitional Provisions and Consequential Amendments) Act* 1992 (Cth) ("the Transitional Provisions Act") is a law with respect to the acquisition of property other than on just terms.

117 I agree with what Gaudron and Gummow JJ have said in their reasons about the source and nature of the proprietary rights which the appellant had before the provisions now in question came into operation[128]. In particular, I agree with their Honours' conclusions and reasons concerning the doctrine of common employment and the operation of the *Judiciary Act* 1903 (Cth) in respect of limitation periods for which State legislation provided. It follows, as their Honours point out, that the cause of action which was barred by s 54 was "property" for the purposes of s 51(xxxi) of the Constitution.

118 I, however, reach a different conclusion about the central question. In my opinion, the Rehabilitation Act and the Transitional Provisions Act are not, separately or together, a law with respect to the acquisition of property other than on just terms. My conclusion depends upon the proposition that the Acts do not, at the time of their commencement, or on the effluxion of the six month period provided by s 13 of the Transitional Provisions Act, effect an "acquisition" as that word is to be understood in the "compound conception … acquisition-on-just-terms"[129]. It does not depend upon the proposition that just terms are provided.

119 It is well established that s 51(xxxi) of the Constitution is concerned with matters of substance rather than form and that "acquisition" and "property" are to be construed liberally[130]. It is, therefore, necessary to have regard to the practical

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128 Reasons of Gaudron and Gummow JJ at [15]-[20].

129 *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290 per Dixon J.

130 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 276, 284-285; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349-350 per Dixon J; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 370-372 per Dixon CJ; *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201-202; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at

(Footnote continues on next page)

operation of the law in question as well as its precise legal effect in deciding whether it is a law with respect to the acquisition of property otherwise than on just terms.

120 Section 51(xxxi) empowers Parliament to make laws *with respect to* the acquisition of property and, of course, it follows that the connection between the subject of the head of legislative power and the law can be as broad as the expression "with respect to" encompasses. The protection which the "just terms" requirement in s 51(xxxi) provides, and thus implies in other heads of power, must be understood similarly broadly. That is not to say, however, that it may not be useful to consider whether the law in question does, by its own terms, effect an acquisition of property. If it does, attention will necessarily focus upon whether just terms are provided. If it does not, the question that is presented is broader. It is whether, notwithstanding the absence of a direct effect on property, the law's provisions are nevertheless "with respect to" the relevant subject, namely acquisition of property other than on just terms.

121 Neither the Rehabilitation Act nor the Transitional Provisions Act effected any acquisition of property on the day on which those Acts came into force. The property which the appellant had on that day was still his. The day after the Acts commenced, he could have turned that property, his chose in action, to account in any way he wished, just as he could have done on the day before the Acts commenced. Its value was unchanged. If he had brought an action against his employer the day after commencement of the Acts, that action would have had precisely the same value it would have had if he had started it on the day before commencement.

122 Sections 13 and 54 together had the effect that the appellant's right to bring an action must be exercised within six months of the commencing day. Section 13 of the Transitional Provisions Act continued the right (otherwise barred by s 54) which the appellant had to bring action against his employer in respect of the injury he alleged he had sustained (before the commencing day of the legislation) in the course of his employment. The drafting slip in s 13 should, as Gaudron and Gummow JJ point out, be recognised and the section read as referring to s 54 of the Rehabilitation Act. The commencement of operation of the two Acts meant that time began to run. The appellant would, six months after commencement, no longer be able to realise, or deal with, his chose in action if he had not commenced proceedings to enforce it in the meantime.

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303 per Mason CJ, Deane and Gaudron JJ; *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 49 [128]-[129] per McHugh J.

123 The imposition of this time limit did not diminish the appellant's property rights. No matter how wide a practical reach is given to "acquisition", there was none when the Acts commenced and the time limit was imposed. The property rights subsisted unaffected in their nature, extent and value until, at the end of six months, they were wholly lost. The effect on the appellant's property rights occurred when the right recognised by s 13 of the Transitional Provisions Act came to an end.

124 It will be noted that I have said that s 13 "continued" or "recognised" the right which the appellant had to bring action against his employer. Section 13 might be read as creating new rights. It says that "[d]espite section 54 … an employee *has* the right to bring … an action". The use of the present tense might be said to suggest the creation of new rights. It is important, however, to note that the right with which the section deals is a right to bring an action or other proceeding in respect of an injury "in respect of which the employer would, apart from [s 54], be liable (whether vicariously or otherwise) for damages". That language is as much consistent with the recognition and continuation of existing rights as it is with creation of new rights. That being so, I prefer to construe the section as continuing or recognising those existing rights rather than as creating new rights.

125 In any event, if s 13 were to be read as creating new rights, it would be important to recognise that what was created was the same, in all respects except for the time limit stated in s 13, as the common law rights which the appellant previously had. On this alternative construction of s 13, it might be said that the formerly existing common law rights of the appellant had been "acquired" by operation of the two Acts. If that were so, however, the rights given in their place were of no different value from the common law rights which had been acquired. There would, on this analysis of s 13, be no acquisition other than on just terms. As I say, however, this analysis depends upon a construction of the section which I do not adopt, and I need say no more about it.

126 At the expiration of the six month period prescribed by s 13, the appellant's right of action against his employer was barred. The barring of the appellant's potential claim to damages was to the advantage of ANL. There was a contemporaneous diminution in the property or assets of the appellant and an increase in the worth of the net assets of ANL because of the diminution in its contingent liabilities.

127 That result was not inevitable. It came about not just because of the effluxion of time, but also because the appellant had not commenced an action in the meantime.

128 As was said in *Health Insurance Commission v Peverill*[131], s 51(xxxi) "is directed … to requisition, not to voluntary acquisition[132]". In the present case there was no compulsion on the appellant to give up rights of action against his employer of the kind he had before these Acts came into operation. True it is he has now lost those rights, and that the loss, and the consequent gain to ANL, was a result of the operation of ss 13 and 54. But those sections operated only because the appellant did nothing to pursue his rights within the six month period. While the appellant could not avoid the imposition of the six month period, he could avoid any effect on his property or its value. That is, the loss of the appellant's property, and the consequent enhancement of ANL's, came about because of the course the appellant chose to follow, not because that course was forced upon him.

129 The provisions which are now in issue differ from the provisions considered, and held invalid, in *Georgiadis v Australian and Overseas Telecommunications Corporation*[133]. Section 44 of the *Commonwealth Employees' Rehabilitation and Compensation Act* 1988 (Cth) had compulsorily divested the right of action which Mr Georgiadis would otherwise have had against his employer as soon as that section came into operation[134]. His employer benefited directly as a result. The difference in the provisions is significant. As was said in *Georgiadis*[135] of the section then in question (s 44):

> "[Section] 44 puts an end to a cause of action against the Commonwealth or its agencies *if it was not sued upon before it, s 44, came into effect*. Section 44 operated once and for all as a final measure terminating those causes of action … not as a measure prescribing the time in which proceedings were to be commenced." (emphasis added)

The provisions now in question are of the latter kind, not the former. They did not, at their commencement, terminate any cause of action. Instead, they

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131 (1994) 179 CLR 226 at 235 per Mason CJ, Deane and Gaudron JJ.

132 *John Cooke & Co Pty Ltd v The Commonwealth* (1924) 34 CLR 269 at 282; *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 269-271 per Dixon J; *Poulton v The Commonwealth* (1953) 89 CLR 540 at 573 per Fullagar J; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 416-417 per Stephen J; but cf *R v Registrar of Titles (Vict); Ex parte The Commonwealth* (1915) 20 CLR 379 at 392 per Isaacs J.

133 (1994) 179 CLR 297.

134 *Georgiadis* (1994) 179 CLR 297 at 303 per Mason CJ, Deane and Gaudron JJ.

135 (1994) 179 CLR 297 at 307 per Mason CJ, Deane and Gaudron JJ.

prescribed six months as the time within which proceedings were to be commenced.

130 To provide that an existing cause of action must be brought within six months (if it is to be pursued at all) does not amount to an acquisition of the property constituted by the cause of action. There is not that legal or practical compulsion which is necessary to amount to "acquisition" of the property. It follows that no question of just terms arises. The appeal should be dismissed with costs.

131 CALLINAN J. The question in this case is whether provisions in Commonwealth legislation effectively reducing the period within which an injured worker may sue his employer for damages gave rise to "an acquisition of property" on other than "just terms". The matter comes to this Court by way of an appeal from a judgment of the Full Court of the Supreme Court of Western Australia (Kennedy, Pidgeon and Templeman JJ), of 18 November 1998[136].

Facts

132 The appellant was employed by the respondent ("ANL") to serve as a merchant seaman on the respondent's ship "Australian Prospector".

133 The appellant alleges, that in December 1988, as the ship was entering port in Japan, he was injured in the course of his employment and in breach of the respondent's common law and contractual duty to take reasonable care for his safety.

Proceedings at first instance

134 On 9 November 1994, the appellant commenced proceedings in the District Court of Western Australia claiming damages against the respondent, and against the Commonwealth of Australia, in negligence and for breach of contract. (The proceedings were in due course transferred into the Supreme Court). No common law defence of common employment was pleaded by the defendants[137]; and no issues of private international law were raised by either of them.

135 In the alternative, the appellant claimed, that until 23 December 1993, he had had a vested right to bring an action for damages against the respondent for negligent breach of a duty of care and for a breach of a contract. The appellant alleged that in consequence of the enactment of the *Seafarers Rehabilitation and Compensation Act* 1992 (Cth) ("the *Seafarers Act*"), in particular s 54[138], the

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136 *Smith v Australian National Line Ltd* (1998) 20 WAR 219.

137 Section 59A of the *Navigation Act* 1912 (Cth) would in all likelihood have denied the respondent a defence of common employment in any event.

138 "**Employee not to have right to bring action for damages against employer etc. in certain cases**

54. (1) Subject to section 55, a person does not have a right to bring an action or other proceedings against his or her employer, or an employee of the employer in respect of:

(Footnote continues on next page)

Commonwealth acquired property from him (that is, the right to bring a damages claim) other than on just terms, contrary to s 51(xxxi)[139] of the Constitution. The basis upon which the Commonwealth was sued is not clear. It may have been because of a misconception with respect to the consequences for the Commonwealth of the enactment of legislation beyond constitutional power. Because however no claim against the Commonwealth is now asserted that matter needs no further reference.

136 I do not repeat the early history of the legislation to which the respondent owes its existence which is fully set out in the reasons for judgment of Gaudron and Gummow JJ.

137 Section 54 of the *Seafarers Act* came into force on 24 June 1993. By virtue of the provisions of s 13[140] of the *Seafarers Rehabilitation and*

(a) an injury sustained by an employee in the course of his or her employment, being an injury in respect of which the employer would, apart from this subsection, be liable (whether vicariously or otherwise) for damages; or

(b) …

(2) Subsection (1) applies whether that injury, loss or damage occurred before or after the commencement of this section.

(3) Subsection (1) does not apply in relation to an action or proceeding instituted before the commencement of this section."

139 "**Part V - Powers of the Parliament**

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".

140 "**Employee to have right to bring action for damages against employer etc in certain circumstances**

13. Despite section 54 of the Principal Act, an employee has the right to bring, within 6 months after the commencing day, an action or other proceeding against his or her employer, or an employee of the employer, in respect of:

(Footnote continues on next page)

Compensation (Transitional Provisions and Consequential Amendments) Act 1992 (Cth) ("the *Transitional Provisions Act*") the appellant became entitled to bring proceedings for damages for personal injuries within, but only within, six months of the coming into effect of the transitional proceedings.

138 Accordingly the appellant's right to bring the substituted statutory cause of action for damages could be defeated by a plea by the respondent of the sections on and after 24 December 1993.

139 In the action the respondent pleaded two defences: first, it contended that the appellant's claim was time-barred by reason of s 47A[141] of the *Limitation Act*

(a) an injury sustained before the commencing day by the employee in the course of his or her employment, being an injury in respect of which the employer would, apart from this subsection, be liable (whether vicariously or otherwise) for damages; or

(b) … "

See the reasons of Gaudron and Gummow JJ at [36] for an analysis of the meaning of this section.

141 Section 47A was inserted by the *Limitation Act Amendment Act* 1954 (WA), s 4:

"*Actions Against Public Authorities*

Protection of persons acting in execution of statutory or other public duty

47A (1) Notwithstanding the foregoing provisions of this Act but subject to the provisions of subsections (2) and (3) of this section, no action shall be brought against any person (excluding the Crown) for any act done in pursuance or execution or intended execution of any Act, or of any public duty or authority, or in respect of any neglect or default in the execution of the Act, duty or authority, unless –

(a) the prospective plaintiff gives to the prospective defendant, as soon as practicable after the cause of action accrues, notice in writing giving reasonable information of the circumstances upon which the proposed action will be based and his name and address and that of his solicitor or agent, if any; and

(b) the action is commenced before the expiration of one year from the date on which the cause of action accrued,

and for the purposes of this section, where the act, neglect, or default is a continuing one, no cause of action in respect of the act, neglect, or default accrues

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(1935) WA and, secondly, that the appellant was precluded from instituting proceedings against it by reason of s 54 of the *Seafarers Act*.

Supreme Court of Western Australia

140 An Order was made by Owen J on 17 June 1996 that issues of law be tried as preliminary issues:

> "A. If the [appellant] is able to establish a claim against the [respondent] on the basis of the facts set out herein, is such a claim statute barred under the provisions of Section 47A of the Limitation Act?

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until the act, neglect or default ceases but the notice required by paragraph (a) of this subsection may be given and an action may thereafter be brought while the act, neglect or default continues.

(2) A person may consent in writing to the bringing of an action against him at any time before the expiration of six years from the date on which the cause of action accrued whether or not the notice as required by subsection (1) of this section has been given.

(3) (a) Notwithstanding the foregoing provisions of this section application may be made to the Court which would but for the provisions of this section have jurisdiction to hear the action, for leave to bring an action at any time before the expiration of six years from the date on which the cause of action accrued, whether or not notice as required by subsection (1) of this section has been given to the prospective defendant.

(b) Where the Court considers that the failure to give the required notice or the delay in bringing the action as the case may be, was occasioned by mistake or by any other reasonable cause or that the prospective defendant is not materially prejudiced in his defence or otherwise by the failure or delay, the Court may if it thinks it is just to do so, grant leave to bring the action, subject to such conditions as it thinks it is just to impose.

(c) …

(4) (a) In this section 'person' includes a body corporate, Crown agency or instrumentality of the Crown created by an Act or an official or person nominated under an Act as a defendant on behalf of the Crown.

(b) This section is to be construed so as not to affect the provisions of the Crown Suits Act 1947."

B. Is any claim the [appellant] may have had against the [respondent], if he is able to establish the facts set out herein, extinguished by the operation of Section 54 of the Seafarers Act?

C. If question (A) is answered in the affirmative, then:

1. is Section 54 of the Seafarers Act, invalid and inoperative under the provisions of Section 51(xxxi) of the Constitution; or, alternatively,

2. is the [respondent] liable to pay to the [appellant] the full monetary value of property acquired from the [appellant] being either:

(a) the value of damages that would be awarded if the [appellant] successfully pursued the damages claims to judgment; or alternatively

(b) the value of the damages, save for damages for non-economic loss (in the event that such damages are still recoverable by the [appellant] by virtue of Section 55 of the Seafarers Act) if the [appellant] had successfully pursued the damages claim to judgment."

141 Ipp J who tried the preliminary issues held[142] that the first defendant was an agent or instrumentality of the Commonwealth at the relevant time; that the appellant's claim was caught and barred by s 47A of the *Limitation Act*; the legislation conferred only potential benefits on a person such as the appellant, and no obligations on the first defendant; on balance the provision did not bear the distinct character of a law with respect to the acquisition of property for the purposes of s 51(xxxi) of the Constitution; and, that it followed that the appellant's claim was statute barred.

Full Court of the Supreme Court of Western Australia

142 The appellant was granted leave to appeal to the Full Court. The Attorney-General of the Commonwealth elected to intervene in the appeal to that Court following service of notices upon him pursuant to s 78B of the *Judiciary Act* 1903 (Cth). The questions to be answered had by then been reduced to two: whether on the facts pleaded the appellant's claim was barred by s 47A of the *Limitation Act* and, secondly, whether s 54 of the *Seafarers Act* is invalid and

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142 *Smith v Australian National Line* unreported, Supreme Court of Western Australia, 27 August 1996.

inoperative under the provisions of s 51(xxxi) of the Constitution[143]. That second question, I would observe has to be considered in the statutory context of s 13 of the *Transitional Provisions Act* and the rights that it conferred. It also raised a wider question than the case required be answered, that is, as to the operation of the sections in circumstances different from those in which this appellant found himself, for the provisions could in some circumstances operate beneficially upon some of the rights of some injured seamen to enlarge, rather than reduce, the times available to them within which to bring actions.

143 The appellant contended that the *Navigation Act* 1912 (Cth), s 396[144], and the *Admiralty Act* 1988 (Cth), s 37, which need not be set out, covered the field in relation to the limitation of liability for personal injuries occurring on ships at sea.

144 The Full Court held that the Commonwealth legislation was not inconsistent with the *Limitation Act*, s 47A. The provisions of s 47A which referred to "any act done in pursuance or execution or intended execution of any ... public duty or authority, or in respect of any neglect or default in the execution of the … duty or authority" did not extend to cover the acts or omissions complained of by the appellant. Regardless of whether ANL was "a person" within the meaning of s 47A, when the cause of action arose, the Full Court held, that section afforded it no defence to the appellant's claim. The text of s 47A was such, it was held, that, on its ordinary construction, Commonwealth agencies and

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143 *Smith v Australian National Line Ltd* (1998) 20 WAR 219 at 224.

144 "**Limitation of actions**

396 (1) No action shall be maintainable to enforce any claim or lien against a ship or its owners in respect of any damage or loss to another ship, its cargo or freight, or any property on board the ship, or damage for loss of life or personal injuries suffered by any person on board the ship, caused by the fault of the former ship, whether such ship be wholly or partly in fault, or in respect of any salvage services, unless proceedings therein are commenced within 2 years from the date when the damage or loss or injury was caused or the salvage services were rendered.

(2) …

(3) Any Court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of court, extend any period mentioned in this section to such an extent and on such conditions as it thinks fit.

(4) … "

instrumentalities came within it. Further, it was held that the *Seafarers Act*, s 54, did not effect an acquisition of property contrary to the Constitution, s 51(xxxi).

145 The Full Court by a majority (Kennedy and Templeman JJ; Pidgeon J dissenting) allowed the appeal, both questions being answered in the negative. Pidgeon J was of the opinion that the case was indistinguishable from *Georgiadis v Australian and Overseas Telecommunications Corporation*[145]. The result was that the appellant's action for negligence or breach of contract against the respondent remained dismissed[146]. The first question that the Full Court considered is not the subject of any notice of contention to this Court.

The Appeal to this Court

146 The grounds of appeal to this Court are confined to the constitutional point and are as follows:

> "(a) That Section 54 of the *Seafarers Act* and Section 13 of the *Transitional Provisions Act* which, in combination, have the effect of removing the Appellant's right to bring an action or other proceedings against the Respondent in respect of the personal injuries alleged to have been suffered by the appellant in the course of his employment with the Respondent and caused by the negligence of the Respondent, and so extinguish vested causes of action which arose under the general law, constitute an acquisition of property without just terms contrary to the provisions of Section 51(xxxi) of the Constitution and, for that reason, are thereby invalid and ineffective.
>
> (b) The Full Court erred in characterising the provisions of Section 54 of the *Seafarers Act* read with Section 13 of the *Transitional Provisions Act* as they applied in the circumstances of this case as merely modifying the limitation period which otherwise would have applied to common law actions for damages and which, as such, did not effect an extinguishment of the Appellant's causes of action.
>
> (c) If the provisions of Section 54 of the *Seafarers Act* read with Section 13 of the *Transitional Provisions Act* are invalid or are ineffective to extinguish or bar the Appellant's vested rights of

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145 (1994) 179 CLR 297.

146 *Smith v Australian National Line Ltd* (1998) 20 WAR 219 has been applied in *Yougarla v State of Western Australia* unreported, Supreme Court of Western Australia, 11 November 1999.

> action against the Respondent for damages for negligence as alleged, then the Full Court should have allowed the appeal from the decision of the registrar of the Supreme Court of Western Australia dismissing the Appellant's action in consequence of the answers given to the questions of law by the learned judge at first instance in the decision under appeal to the Full Court."

147 The issues which the arguments raise for determination can be distilled into these.

148 First, what rights did the appellant have immediately prior to the enactment of the *Seafarers Act* and the *Transitional Provisions Act*?

149 Secondly, what rights, if any, did the appellant have immediately after the enactment of those two Acts?

150 Thirdly, what rights, if any, did the appellant have after the expiration of six months from the enactment of the Acts?

151 Fourthly, what is the date for the making of a comparison between the appellant's rights before and after the enactment of the Acts?

152 Fifthly, did such change (if any) as occurred to the appellant's rights, on whichever is the appropriate date for the ascertainment of the appellant's changed rights, involve an acquisition of property on other than just terms?

153 Last, what consequences for the parties flow from the answers to these questions?

154 It is convenient to deal first with the fifth issue upon which most of the argument focussed, and to do so initially on the assumption that the appellant was left, after the introduction of the Commonwealth Acts, in a significantly inferior position to the one he was in before they became law. The answer to that question should also supply answers to some of the other questions I have posed.

155 In determining whether the Commonwealth has made an acquisition of property on other than just terms it is essential to keep in mind these settled principles and matters.

156 It is unthinkable that in a democratic society, particularly in normal and peaceful times that those who elect a government would regard with equanimity the expropriation of their or other private property without proper compensation. What the public enjoys should be at the public, and not a private expense. The

authors of the Constitution must have been of that opinion when they inserted s 51(xxxi) into the Constitution[147].

157 Section 51(xxxi) is a constitutional guarantee. No narrow or pedantic[148] view of what is property should be adopted: it may extend to innominate and anomalous interests[149]. That if the correct position is that there may only be an "acquisition" as a result of Commonwealth action when the Commonwealth or someone else actually acquires some property, right or benefit, there does not need to be correspondence either in appearance, value or characterization between what has been lost and what may have been acquired[150]. Indeed what has been acquired may often be without any analogue in the law of property and

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147 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 20 January to 17 March 1898 at 151-154, 1874.

148 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 85 per Dixon J.

149 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 276 per Latham CJ, 285 per Rich J, 295 per McTiernan J, 305 per Williams J; *Bank of NSW v The Commonwealth* ("the *Bank Nationalisation Case*") (1948) 76 CLR 1 at 349 per Dixon J:

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

See also *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 282-283 per Deane J; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 508-510 per Mason CJ, Brennan, Deane and Gaudron JJ.

150 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 304-305 per Mason CJ, Deane and Gaudron JJ:

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

and 310-311 per Brennan J. See also *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 173 per Mason CJ, 177 per Brennan J, 184-185 per Deane and Gaudron JJ, 223 per McHugh J.

incapable of characterization according to any established principles of property law[151]. The powers of the State to take and affect property are far reaching and the means by which this may be done are almost innumerable[152]. Section 51(xxxi) of the Constitution protects against governmental interference with proprietary rights without just recompense[153]. And in exercising the Commonwealth acquisitions power the Commonwealth may not do by circuitous[154] or indirect means[155] what it is forbidden or unauthorised to do directly. On occasions the identification and valuation of what has been acquired may be difficult matters, but that an acquisition has occurred may not be denied

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151 Attention should be directed to what is lost in a "real sense" and not to what has occurred in a formal way only. See *Bank Nationalisation Case* (1948) 76 CLR 1 at 349 per Dixon J.

152 See, for example, *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 20-21 per Knox CJ and Starke J (State land)*; Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 295 per McTiernan J (the possession of land); *Bank Nationalisation Case* (1948) 76 CLR 1 at 214 per Latham CJ, 267 per Rich and Williams JJ (assets of a business); *Fieldhouse v Commissioner of Taxation* (1989) 25 FCR 187 and *FH Faulding & Co Ltd v Commissioner of Taxation* (1994) 54 FCR 75 (photocopies); *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73 at 120-122 per Gummow J (confidential information); *Peverill v Health Insurance Commission* (1991) 32 FCR 133 at 140-141 per Burchett J (statutory debts); *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 110-112 per Deane and Gaudron JJ (common law native title); *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 166 per Brennan J and 198-199 per Dawson J (broadcaster's licence); *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 527-528 per Dawson and Toohey JJ (McHugh J concurring) (copyright); *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303-304 per Mason CJ, Deane and Gaudron JJ, 310-312 per Brennan J and *Victoria v The Commonwealth* (1996) 187 CLR 416 at 559 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ (vested common law causes of action).

153 *Bank Nationalisation Case* (1948) 76 CLR 1 at 349 per Dixon J.

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

155 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 270 per Dixon J.

by reason of those difficulties. Special situations such as taxation and various duties apart[156] the Commonwealth simply has no power to make laws with respect to the acquisition of property unless just terms are provided. The provision of just terms is a condition upon the exercise of the power[157].

158 Not all of these precepts sit comfortably or can be reconciled satisfactorily with some of the statements made and decisions given in other cases in which the application of s 51(xxxi) has been in issue.

159 In *Georgiadis*, Mason CJ, Deane and Gaudron JJ[158] did not doubt that a right to sue for damages for personal injury was a valuable right and that its extinguishment involved an acquisition of property. Their Honours reached this conclusion notwithstanding that the impugned legislation did not entirely extinguish elements of what the plaintiff might have successfully claimed at common law. *Georgiadis* was applied by this Court in *The Commonwealth v Mewett*[159]:

> "[T]he cause of action in tort [against the Commonwealth] was enjoyed by the appellant and was actionable by virtue of the combined operation of the common law and the Constitution."

160 In *Health Insurance Commission v Peverill*[160] however, although before the enactment the respondent had a good chose in action against the Commonwealth, indeed a more certain one, (by reason of the declaration made in his favour in the Federal Court) than the appellant in *Georgiadis*, the Court was not prepared, for reasons which I will discuss, to regard the extinguishment of Dr Peverill's cause of action and right to receive financial benefits in respect of work already performed as involving an acquisition of property there.

161 The Justices who were in the majority in the *Commonwealth of Australia v WMC Resources Ltd*[161] (Brennan CJ, Gaudron, McHugh and Gummow JJ) reached their decision by different routes.

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156 See Constitution, s 55.

157 *Bank Nationalisation Case* (1948) 76 CLR 1 at 349 per Dixon J.

158 (1994) 179 CLR 297 at 306-308.

159 (1997) 191 CLR 471 at 552 per Gummow and Kirby JJ.

160 (1994) 179 CLR 226.

161 (1998) 194 CLR 1.

162 Brennan CJ found against the holder of the permit to explore for minerals on the seabed of the continental shelf essentially on two grounds[162]: that although the Commonwealth could legislate to grant a permit to explore there, it had no proprietary interest in the shelf; and that by legislating to revoke (by excision of an area) the permit in part it did not thereby acquire property[163].

163 But regard has to be had, in my opinion, to these matters: that the statutory scheme may have created a contract between the Commonwealth and the holder of the permit; that it would be an incident of any such relationship, as it is with all contractual relationships, that the Commonwealth would be bound to do all things reasonably necessary to enable the contract to be performed[164]; that the repudiation of the contract by the Commonwealth would ordinarily have given the permittee the right to sue, this being the reason no doubt why the Commonwealth chose to act by legislating; that the right to explore was of value to the permittee, and, subject to the enactment under which it was granted, assignable; that the permittee would have incurred expense in obtaining, holding or exploiting the permit[165]; that the permit was analogous to, and as valuable as a licence, and was an item of property of more than an innominate or anomalous kind[166], and that it could at the very least be treated and dealt with *as if* it were property; that, but for the manner, by legislation, of repudiation the appellant would have had a good chose in action against the Commonwealth; and, that on revocation the Commonwealth obtained, as direct benefits, the unfettered right to negotiate an international treaty covering that part of the seabed and the waters above it, and relief from suit by the holder of the permit. The relevant differences between *WMC* and *Newcrest Mining (WA) Ltd v The Commonwealth*[167] were that in the latter what was extinguished was the effective benefit[168] of a mining lease entitling the appellant to extract the minerals, as

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162 (1998) 194 CLR 1 at 9.

163 (1998) 194 CLR 1 at 19.

164 See *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596.

165 cf *Commonwealth of Australia v WMC Resources Ltd* (1998) 194 CLR 1 at 72-73 [193]-[195] per Gummow J.

166 cf as to the nature of a permit: *Commonwealth of Australia v WMC Resources Ltd* (1998) 194 CLR 1 at 29-31 [53]-[59] per Toohey J, 42 [99]-[101] per McHugh J, 80-81 [221]-[222] per Kirby J.

167 (1997) 190 CLR 513.

168 I say "effective benefit" because the relevant law left intact rights in respect of sub-surface land below 1000 metres, rights of no true utility at all.

opposed to a right merely to explore for them, and the somewhat less conditional nature of the Mining Tenement held by *Newcrest*. But that is only to say that a right to extract minerals may be a much more valuable right, and not, that an assignable permit to explore is without value, as the judgment of Gummow J in *WMC* recognises[169].

164 There are also statements in some of the cases which place significance on a shade of perceived difference in meaning between the word "taken" in the Fifth Amendment to the United States Constitution[170] and "acquisition" in s 51(xxxi) of the Australian Constitution. After discussing some of the authorities[171] in the United States, Mason J in *The Tasmanian Dam Case* said this[172]:

> "The emphasis in s 51(xxxi) is not on a 'taking' of private property but on the *acquisition* of property for purposes of the Commonwealth. To bring the constitutional provision into play it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be."

165 His Honour then went on to adopt a statement by Dixon J in the *Bank Nationalisation Case* which referred in terms to protection against "governmental interference" with proprietary rights and not to the acquisition of any particular item of property[173]:

> "I take *Minister of State for the Army v Dalziel*[174] to mean that s 51 (xxxi) is not to be confined pedantically to the taking of title by the

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169 (1998) 194 CLR 1 at 64 [166].

170 "**Fifth Amendment - Rights of Persons**

No person shall be …

deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

171 His Honour's views were referred to with approval in *Georgiadis* (1994) 179 CLR 297 at 304 per Mason CJ, Deane and Gaudron JJ.

172 (1983) 158 CLR 1 at 145.

173 (1948) 76 CLR 1 at 349.

174 (1944) 68 CLR 261.

> Commonwealth to some specific estate or interest in land recognized at law or in equity and to some specific form of property in a chattel or chose in action similarly recognized, but that it extends to innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property. Section 51(xxxi) serves a double purpose. It provides the Commonwealth Parliament with a legislative power of acquiring property: 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 proprietary rights without just recompense. In both aspects consistency with the principles upon which constitutional provisions are interpreted and applied demands that the paragraph should be given as full and flexible an operation as will cover the objects it was designed to effect."

166 I do not myself discern in that passage from the judgment of Dixon J, any express, or indeed implied, support for the narrow view which Mason J took of the provision in *The Tasmanian Dam Case*, or, for the attachment of any great significance to any distinction between a taking or an acquisition, whether perceived or actual. Indeed the statement by Dixon J that the provision has as one of its objects, the "protection against governmental interferences with … proprietary rights without just recompense" is clearly open to the interpretation that an interference with such rights, and not necessarily an acquisition of any particular right may be enough to attract the operation of s 51(xxxi). In any event, in my respectful opinion, in *The Tasmanian Dam Case*, it is easy to see that the Commonwealth really did acquire something, and that was a thing of immense value, the right to control virtually absolutely the use to which the area in question would be put.

167 In my opinion there is little or no significance to be attached to any apparent shade of difference in meaning between the two words, "take" and "acquire". In some contexts "acquisition" may even have a more expansive meaning than "taking" or "take". "Acquire" may be used in respect of the incidental picking up of some attribute or quality. For example, a person may acquire lustre, taste or knowledge by association or experience: a deliberate act or decision to possess a particular attribute may not be necessary to become possessed of it.

168 It is also difficult to reconcile the principle established before Federation (which was likely to be well known to the framers of the Constitution and which has been applied and referred to with approval in numerous cases in this Court[175])

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175 See *Stebbing v Metropolitan Board of Works* (1870) LR 6 QB 37 at 41 per Cockburn CJ; *The Moreton Club v The Commonwealth* (1948) 77 CLR 253 at 257

(Footnote continues on next page)

that in assessing compensation the assessment is to be made on the basis of the value *to the owner* and not on the basis of what the acquiring authority may have got, with any principle that there may be no compensation unless the acquiring authority has got and holds in its hands something tangible or of value. The very nature of the Commonwealth's powers and the flexibility and ingenuity with which they can be exercised mean that what a dispossessed owner has lost, in the hands of the Commonwealth or some other beneficiary of the Commonwealth's enactment, may assume an entirely different, even elusive shape or character, from what it possessed earlier. After the enactment of the legislation to ensure placement of the region of the Franklin River in Tasmania upon the World Heritage List, that region remained in exactly the same natural state, and title to it continued to reside in the State of Tasmania, as it had before that enactment. But in proprietary terms it had assumed a quite different character. It had become an area of land from which almost all of the conventional, commercially exploitable attributes had been stripped or rendered highly conditional. In short, almost all of the components of the sum of the property rights had been effectively taken away. To use the language of Gaudron and Gummow JJ in the present matter, there was also "an effective sterilisation [of many] of the rights constituting the property in question"[176]. And the same might be said, to only a slightly lesser degree, of the effect of the Regulations under consideration in *The Commonwealth of Australia v The State of Western Australia* ("the *WA Mining Act Case*")[177].

169 *Airservices Australia v Canadian Airlines International Ltd*[178] is the last case in which this Court considered the application of s 51(xxxi) of the Constitution, and once again the Justices who were in the majority, Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ; Gaudron and Callinan JJ dissenting)

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per Dixon J; *Commissioner of Succession Duties (SA) v Executor Trustee and Agency Co of South Australia Ltd* (1947) 74 CLR 358 at 373-374 per Dixon J:

> "[T]here is some difference of purpose in valuing property for revenue cases and in compensation cases. In the second the purpose is to ensure that the person to be compensated is given a full money equivalent of his loss, while in the first it is to ascertain what money value is plainly contained in the asset so as to afford a proper measure of liability to tax. While this difference cannot change the test of value, it is not without effect upon a court's attitude in the application of the test. In a case of compensation doubts are resolved in favour of a more liberal estimate, in a revenue case, of a more conservative estimate."

176 See the reasons of Gaudron and Gummow JJ at [22].

177 (1999) 196 CLR 392 at 480-484 [268]-[270] per Callinan J.

178 (1999) 74 ALJR 76; 167 ALR 392.

did not reach their conclusion that the placitum had no application there by the same chain of reasoning. The considerations which led Gleeson CJ and Kirby J to conclude as they did were set out in this passage[179]:

> "Having regard to the relationship between the services provided by the CAA and the safety of the aircraft concerned, the reasonableness of a system which provides that those who operate aircraft must pay charges which, in totality, will defray the cost of providing the services, the possibility that operators will have few assets in the jurisdiction apart from aircraft, the mobility of aircraft, and the desirability of providing adequate security for liabilities incurred, it is at least as easy to draw a conclusion supportive of the legislation as it was in *Ex parte Lawler*."[180]

170 McHugh J accepted that the liens created by the statutory scheme did effect an acquisition of property[181] but that the laws in question were reasonably capable of being seen as appropriate and adapted to the achievement of a purpose within the scope of s 51(i) of the Constitution and were therefore valid[182], albeit that no "just terms" were provided.

171 Gummow J (with whom Hayne J agreed on this aspect[183]) summarised his opinion in the following paragraph[184]:

> "The bundle of rights and remedies held by the Authority constituted the exchange for the provision of the services. In the events that occurred, the services were provided, but the charges and penalties were not recouped to the Authority. For the Authority then to assert its rights and remedies against the respondents is not to compulsorily acquire property from the respondents with an attendant obligation of fair compensation to the respondents from the Authority. The lien provisions are not invalid as laws which must answer the condition imposed by s 51(xxxi) of the Constitution in order to be valid."

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179 (1999) 74 ALJR 76 at 94 [100]; 167 ALR 392 at 416.

180 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270.

181 (1999) 74 ALJR 76 at 132 [329]; 167 ALR 392 at 468.

182 (1999) 74 ALJR 76 at 138 [357]; 167 ALR 392 at 477.

183 (1999) 74 ALJR 76 at 166 [519]; 167 ALR 392 at 516.

184 (1999) 74 ALJR 76 at 164 [503]; 167 ALR 392 at 512.

172 The nature of the charges imposed in *Air Services* and their connexion with the services provided there, and the different lines of reasoning of the majority mean that that case does not assist in the resolution of this one.

173 In *Georgiadis*[185] (Mason CJ, Deane and Gaudron JJ) said that an acquisition of property may occur if the acquirer receive, as a result of what has been done, a direct benefit. The expression, "direct benefit" I would take to be capable of embracing advantages or benefits extending beyond and not necessarily of a proprietary kind in any conventional sense as understood by property lawyers. In all of the cases that I discuss in these reasons it is not difficult to see how the Commonwealth, or somebody else did derive some form of benefit and there is no reason to say of any of them that the benefit was not directly derived. In *The Tasmanian Dam Case* the Commonwealth gained effective control[186] of a wilderness area, and, no doubt, prestige and influence with international bodies concerned with environmental and other matters. In *WMC* the Commonwealth gained relief from its contractual obligations and freedom to enter into an international treaty. In *Peverill* the Commonwealth gained relief from a considerable liability for payment in respect of professional services that had been performed for reward. In the *WA Mining Act Case* the Commonwealth obtained a right to use land for dangerous defence activities to the exclusion of, or a substantial reduction in, the owner's right to exploit its land.

174 So too, the legislation considered in *Waterhouse v Minister for the Arts & Territories*[187], could only have had one purpose, to reserve the right to retain, ultimately for the Australian community, works of art and other objects, albeit that they might be and remain in private hands indefinitely. There could be no doubt that what the owner of the property in question might lose (if an export permit were refused) was considerable, the right to sell the painting on the more lucrative international market. And other rights, to sell a mortgage would also have been adversely affected because of its reduced value on that account. Furthermore, it is difficult to resist the inference that there was an underlying purpose in the legislation, to enable eventually the acquisition of the painting by some Commonwealth or public authority or museum, at a local and not an international price. The right to restrict or limit the number of buyers in a market place, especially one in which the party enjoying the right is a potential purchaser, is clearly a valuable right.

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185 (1994) 179 CLR 297 at 305.

186 cf a negative covenant: See the *WA Mining Act Case* (1999) 196 CLR 392 at 488-489 [282]-[283] per Callinan J.

187 (1993) 43 FCR 175 (Black CJ, Lockhart and Gummow JJ).

175 Another strand in some of the decisions is that a law will not be a law with respect to the acquisition of property on just terms unless it has a distinct character in that regard. This was the language which was most recently used by Mason CJ, Deane and Gaudron JJ in *Georgiadis*[188]. Earlier their Honours had pointed out that there will inevitably be borderline cases in which the question whether the law bears the distinct character of a law with respect to the acquisition of property is finely balanced[189].

176 I would, with respect, make two observations about that statement. First, it is important to bear in mind that when the task of characterisation is to be undertaken it is not simply the task of deciding whether the law bears the distinct character of a law with respect to the acquisition of property, but whether it bears the distinct character of a law "with respect to the acquisition of property *on just terms*". And if it does not it cannot be valid. Attention needs to be focused on the whole expression for the purposes of characterisation. As Kirby J said in *WMC*[190]:

> "Each word of s 51(xxxi) is important and has been scrutinised by this Court. But it is essential to view the paragraph as a whole. In particular, the acquisition of property is a compound conception[191]. There is a danger in dissecting the words that the achievement of the purposes of the paragraph as a guarantee may be lost."

177 The second observation is that the statement itself acknowledges the difficulty of characterisation. A distinction may be very much in the eyes of the beholder. When what has been acquired is some form of *benefit* rather than an item of property as pedantically defined, or is of an innominate kind, its character is very likely to present problems of identification. It would not be surprising in those circumstances if the law in question, asserted to be effecting an acquisition, were itself to present problems of distinct characterisation.

178 Another strand of authority holds that a law which is not directed towards the acquisition of property as such but involves the adjustment of competing claims is unlikely to be a law with respect to the acquisition of property.

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188 (1994) 179 CLR 297 at 308.

189 (1994) 179 CLR 297 at 308.

190 *Commonwealth of Australia v WMC Resources Ltd* (1998) 194 CLR 1 at 90-91 [237].

191 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285; cf *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290.

179 Language to this effect was used by Mason CJ, Brennan, Deane and Gaudron JJ in *Australian Tape Manufacturers Association Ltd v The Commonwealth*[192] and repeated by those Justices and Toohey and McHugh JJ in *Nintendo Co Ltd v Centronics Systems Pty Ltd*[193]:

> "The cases also establish that 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 is unlikely to be susceptible of legitimate characterization as a law with respect to the acquisition of property for the purposes of s 51[(xxxi)] of the Constitution.[194]"

Their Honours' statement, in my respectful opinion, poses a test quite different from that mandated by the Constitution: whether a law is "directed towards the acquisition of property as such", and not, as the Constitution requires, whether it is a law with respect to the acquisition of property on just terms. The concepts are too different from each other for the former to shed very much light on the latter.

180 In *Mutual Pools & Staff Pty Ltd v The Commonwealth* Deane and Gaudron JJ said that a law will generally not be a law for the acquisition of property if it provides for[195]:

> " … 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 citizens in relationships or areas which need to be regulated in the common interest."

I would respectfully make three comments about this passage. The operation of the Constitution may not be subverted because an activity might only produce a proscribed consequence incidentally, or because it occurs as a result of an enforcement process undertaken under some other purported head of power.

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192 (1993) 176 CLR 480 at 510.

193 (1994) 181 CLR 134 at 161.

194 See, for example, *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 171-173, 177-178 and 188-189; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285-286; *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 236-238; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305-308.

195 (1994) 179 CLR 155 at 189-190.

Were it otherwise the Commonwealth would be able to achieve indirectly what it may not do directly.

181 Much legislation affecting private property enacted by the Commonwealth acting bona fide will seek to adjust, effect or resolve competing claims, the claims of the persons adversely affected by it on the one hand, and the claims for the greater good of the community at large advantaged by it on the other. The statements in the cases about competing rights and obligations have generally not defined the rights and obligations in question, or made clear what the competition is, whether between rights and rights, or obligations and rights, or what "rights" are so fragile that they must give way to some other right or obligation. And nor have they said whether there must be any reciprocity of right and obligation. Some would argue that there are very few areas of human conduct, or of rights and obligations, or of relationships between citizens, which do not call for some general regulation in the common interest. In short, much of the business of government is the general regulation of the conduct, rights and obligations of citizens, but that regulation must, like any other governmental activity, be conducted within the constitutional framework and not otherwise. I am unable to accept that if an acquisition occurs in such a situation (taxation and duties apart) as a means of enforcing regulation, the Commonwealth may escape liability to pay for the property which has been acquired whether incidently or directly as a result thereof. And, I would think that any view to the contrary would be generally regarded today, just as it would have been by the Founders, as a startling one. Why, it might be asked, should the legislation, which destroyed Dr Peverill's chose in action against the Commonwealth, be any more or less an adjustment of rights in the common interest than the deprivation of Mr Georgiadis' cause of action against his employer in circumstances in which a scheme of compensation without fault was to be substituted for common law rights? The test of what I will call for convenience, "general regulation" has two other defects. It is inconsistent with the long established principle that s 51(xxxi) is a constitutional guarantee. And it is too imprecise and subjective in my opinion for general application.

182 Yet another strand in the cases is the view expressed by McHugh J in *Peverill*[196] and which his Honour applied again in *WMC*, that in circumstances in which no specific property right previously existed under State or general law, the Commonwealth Parliament retained the authority to extinguish that right, even if in consequence some property or benefit became vested in the Commonwealth or some other person[197].

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196 (1994) 179 CLR 226 at 260.

197 (1998) 194 CLR 1 at 56-57 [146].

183 In my opinion there will be difficulty in seeking to apply such a far-reaching proposition literally. Take the case of estates or interests granted by the Commonwealth in the Australian Capital Territory after the seat of government was established there, under legislation[198]. At least arguably those estates or interests in land had no existence before, and depended entirely for their existence upon the making of the relevant provisions by the Commonwealth. It seems unlikely that the Commonwealth, having conferred specific extensive proprietary rights that did not previously exist in the Territories, might retain the power to extinguish those rights without compensation. So too, patents and copyrights, as pointed out by Gummow J in *WMC*[199], subsist under Commonwealth law, and, subject to the special considerations affecting them to which his Honour referred, constitute property to which s 51(xxxi) of the Constitution applies. I do not think that legislation which withdraws or alters pension entitlements provides a true analogy. Those entitlements arise as a result of general revenue raising for those purposes and are not entitlements arising out of any identifiable payment, forbearance or service made or performed by any particular person. It is highly unlikely that Dr Peverill would have done the professional work that he did or have done it in the way that he did but for the statutory promise by the Commonwealth to make payment in respect of it.

184 Gummow J stated a narrower principle in *WMC*, a test of inherent susceptibility to change or termination. His Honour's opinion was that the permit to explore there suffered from a congenital infirmity[200], of being subject to the legislation in the form it might assume from time to time, and that therefore any proprietary rights in respect of the permit were liable to defeasance, which, upon its occurrence would not attract compensation[201].

185 In his reasons in *WMC*, Gummow J said[202]:

> "The present case has an affinity to, but is not on all fours with, those cases involving gratuitous payments, whether as pensions or otherwise, made by the Executive Government under statutory authority. It has been said that the 'rights' to receive such payments are the creation

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198 See, for example, the *Real Property Ordinance* 1925-1938 (ACT), s 17.

199 (1998) 194 CLR 1 at 70-74 [184]-[199].

200 cf *Norman v Baltimore & Ohio Railroad Co* 294 US 240 at 308 (1935).

201 (1998) 194 CLR 1 at 75 [203].

202 (1998) 194 CLR 1 at 73 [197].

> of the legislature and are always liable to alteration or abolition by later legislation.[203]"

186 His Honour then went on to emphasise that the enactment under which the permits had been granted included the definition of a permit "as varied for the time being under [the] Act". His Honour also referred to another section which provided that[204]:

> "A permit … authorises the permittee, *subject to* [*the*] *Act* … to carry on such operations … as are necessary for that purpose, in the permit area". (original emphasis)

187 These provisions brought his Honour to the conclusion that from the moment of its grant the scope and incidents of the permit were subject to amendment of the form in which it had been granted. It followed that his Honour thought that any property rights to which the permit gave rise were liable to defeasance[205]. His Honour was of this opinion notwithstanding that the enactment recognised that the permits and dealings there had commercial value and that rights and obligations were created inter partes by them which were supported by the law of contract and the general law; that the subsequent legislation diminished the commercial value of the permits; that the Commonwealth was advantaged in that its international law obligations to Indonesia were more likely of fulfilment[206]; and, that there is a real difference between a "variation" and an effective revocation of a permit.

188 I have, with respect, several concerns about the ways in which their Honours have stated the various propositions to which I have referred. Very few enactments over time remain unamended. I do not think that because an enactment may make specific reference to the possibility of a change to it, or to the nature of rights and interests created by or arising under it, that enactment is necessarily to be singled out from other legislation silent about such a possibility. The position might be different if the legislation were to make provision, in

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203 *Allpike v The Commonwealth* (1948) 77 CLR 62 at 69, 76-77; *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 245, 256, 263-265; cf the proprietary nature of statutory rights to compensation payments under federal compulsory acquisition schemes, *National Trustees Executors and Agency Co of Australasia Ltd v Federal Commissioner of Taxation* (1954) 91 CLR 540 at 557-558, 571-572, 580-587.

204 (1998) 194 CLR 1 at 74 [199].

205 (1998) 194 CLR 1 at 75 [203].

206 (1998) 194 CLR 1 at 72-73 [193].

terms, at the outset, for the possible extinguishment, without compensation of rights and interests created by or arising under it[207]. The Commonwealth, in order to undertake the ordinary business of government enters into innumerable commercial engagements. This is a matter of heightened significance in current times in which some corporations are either wholly or partly owned and controlled by government but are exhorted to deal and act commercially[208], and in which "outsourcing" is strongly encouraged. The capacity of the Commonwealth to engage and act in this way, and the attractiveness of it as a contracting party to others, must depend, even without recourse to the Constitution, upon an underlying assumption that the Commonwealth will neither arbitrarily nor otherwise generally repudiate its obligations, however created, without compensation. The Constitution should, and in my opinion does, by s 51(xxxi) underpin that assumption as a literal guarantee of it. I would with respect adopt what was said by Kirby J (dissenting) in *WMC*[209]:

> "One of the institutional strengths of the Australian economy is the constitutional guarantee of just terms where the property interests of investors are acquired under federal law. This Court should not undermine that strength by qualifying the guarantee. Neither the Court's past authority not economic equity require such a result. If it can happen here it can happen again and investors will draw their inferences."

189 It follows that I do not think 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.

190 And the assumption to which I have referred has a close affinity with another assumption, that a responsible government will only unusually, and perhaps only in highly exigent circumstances act in such a way, retrospectively or otherwise, to take away something granted and owned, or lawfully enjoyed, and for which payment or consideration has been made or provided, or upon which effort or money has been expended. Furthermore, notwithstanding some of its imperfections and susceptibility to legislative and executive change, the permit in *WMC* still answered the description of property, "pedantically" defined by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth*[210]:

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207 See, for example, the Mining Regulation prescribing forms of grant in *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 618 per Gummow J.

208 cf *Puntoriero v Water Administration Ministerial Corporation* (1999) 73 ALJR 1359 at 1376 [86]; 165 ALR 337 at 360.

209 *Commonwealth of Australia v WMC Resources Ltd* (1998) 194 CLR 1 at 102 [259].

210 [1965] AC 1175 at 1247-1248.

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

191 Although Toohey J was in dissent in *WMC* his observations about the nature of the permit there cannot, in my respectful opinion, be gainsaid[211]:

> "The rights attaching to the Permit were transient, only in the sense that they lasted as long as the Permit lasted. But the Permit was for a finite term and capable of renewal for finite terms. The fact that the Commonwealth was not obliged to renew the Permit has a bearing upon its value. But it does not carry the consequence that, during any period of its operation, the Permit did not confer rights capable of acquisition.[212]"

192 It is unnecessary however in this case for me to give further consideration to these last strands of reasoning by McHugh and Gummow JJ because *Georgiadis* holds that rights of the kind enjoyed by the appellant here before the enactments were common law rights, and not rights conferred by, or arising as a result of legislation of the Commonwealth, either conditionally or otherwise. (The reasons why this is so are fully explained by Gaudron and Gummow JJ in their judgment in this case and require no repetition by me.)

193 The various strands in the cases that I have discussed which sit uncomfortably with, and indeed, cannot, in my opinion be reconciled with the language of s 51(xxxi) itself, and the strong statements of earlier Justices of the Court about the strength and nature of the constitutional guarantee to which s 51(xxxi) gives effect, were all relied on, by either the respondent or the Attorney-General for the Commonwealth, who intervened to support the respondent. Such are my doubts and reservations, that to the extent that I were free to do so, I would not follow and adopt those strands of reasoning. Their very diversity, and, in my view, inconsistency with the precepts to which I first referred, dictate the need for the application of those well settled precepts if proper effect is to be given to s 51(xxxi) as a genuine constitutional guarantee. I need however say no more about them as I do think that this case may, and should be resolved by reference to what was unanimously decided in *Georgiadis*. But it is necessary, before stating my reasons for that conclusion, to deal with a separate argument that was presented by the respondent.

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211 (1998) 194 CLR 1 at 29 [54].

212 See also (1998) 194 CLR 1 at 92-97 [238]-[247] per Kirby J (dissenting).

194 The respondent submitted that it is necessary to compare the "substance" of what the appellant had immediately before the enactment, with the "substance" of what he had after it, and argued that in each instance, it was the same, a right to sue for breach of duty. I do not think that the question in this case can be answered by seeking to discover and define the "substance" of a right or interest. The requirement that what has to be assessed in acquisition cases is the value to the owner of the lost right or interest, denies that its value is to be confined to one only, even predominant attribute or quality that it possesses. The proper approach is to look to all of the advantages or benefits that the property, right or interest carries or has. The right possessed by this appellant here before the enactments was a considerably more ample right than that with which he was left afterwards. He had previously had available to him the right to sue at any time during a relatively long period. Just how long a period depended upon the jurisdiction in which he chose to sue. Afterwards his right in this regard was truncated by the provision that it would be completely lost within six months after the enactment. The loss or disadvantage occurring as a result of the enactment may not have been as great as the loss sustained by the appellant in *Georgiadis*, but there was nonetheless a loss. The difference is one of degree only and goes to value rather than to characterisation.

195 I am therefore of the opinion that there has been an acquisition of property in this case. The acquisition was of a right to sue within a period of more than six months. The right was a common law right. The limitation provision in s 54 of the *Seafarers Act* had a substantial and real impact upon the appellant. It was not a mere procedural provision as the Commonwealth contended[213]. What has been acquired is the extinction of that extended right. No provision has been made for the assessment, or the payment of compensation in respect of that acquisition. The provisions therefore have no valid operation in relation to this appellant's cause of action.

196 It was argued here that because the legislation made provision for a no-fault scheme of compensation in lieu of common law rights, it involved no more than an adjustment of competing rights and obligations. I have expressed my opinion about such a test. But in any event, in *Georgiadis* the advent of a new scheme and regime for workers did not avail the Commonwealth there.

197 Some attention was paid during argument to the question whether the respondent had been, or continued to be, the Commonwealth or an emanation of it in the same way as the Commonwealth Bank was held to be in the *Bank*

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213 See *John Pfeiffer Pty Ltd v Rogerson* (2000) 74 ALJR 1109 at 1127-1128 [103] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ, 1133-1134 [131]-[134] per Kirby J, 1146 [199] per Callinan J; 172 ALR 625 at 651, 659-660, 677.

Nationalisation Case[214]. It is unnecessary to explore that matter as s 51(xxxi) of the Constitution is not confined in its operation to acquisitions by the Commonwealth itself[215].

198 Earlier, I pointed out that the fact that the value of the property acquired might not be great, or that it might be very difficult to calculate, was not a reason for holding that property had not been acquired. I suspect that the "property" which has been lost here is not of any very large value in strict monetary terms and that its calculation would be difficult and very much a matter of opinion. This quite frequently is so in compensation cases when truly comparable situations are absent. A valuation of what the appellant has lost would require, I think, assessments, of the jurisdiction in which he was most likely to sue, of his likely prospects of success and the quantum of his damages, of when he would have been likely to recover damages, and, the making of a comparison between what he would have retained by way of compensation and damages had he sued and succeeded, with what he might obtain and retain under the scheme which the enactment established. The value that all of those might establish would fall for calculation on my view as at the date of the enactment of s 54 of the *Seafarers Act*. That in my opinion was the act of acquisition because it there and then cut down the right that the appellant possessed, the right to sue within a period extending beyond six months. Sometimes value to the acquirer may be, and sometimes may not be, the same as the value to the dispossessed owner. However, the former may provide a yardstick for the latter. A possible question might be whether a valuer, advising a person purchasing the business of the respondent, would be likely to value it immediately after the enactment as having a certain increased value as a result of the likely or possible relief from liability, from the appellant's claim, taking into account the risks and contingencies involved generally in litigation. That the calculation might be a very difficult one to make, can provide no answer to invalidity. The defect here is that the legislation makes no provision for just terms, that is to say the payment and assessment of compensation in an appropriate way, the proper basis for the calculation which may itself be a matter upon which minds might well differ[216]. But on any view s 13 of the *Transitional Provisions Act* did not, in this case, provide just terms for the deprivation, that is also to say, the acquisition by the respondent, of the appellant's right to sue within a longer period.

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214 (1948) 76 CLR 1 at 157, 162 per Latham CJ.

215 *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 510-511, 526.

216 cf *Commonwealth of Australia v State of Western Australia* (1999) 196 CLR 392 at 461-462 [193]-[196] per Kirby J, 491 [290] per Callinan J.

199 I would allow the appeal. I would join in the orders proposed by Gaudron and Gummow JJ.