HIGH COURT OF AUSTRALIA

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

DURHAM HOLDINGS PTY LTD APPLICANT

AND

THE STATE OF NEW SOUTH WALES RESPONDENT

Durham Holdings Pty Ltd v The State of New South Wales
[2001] HCA 7
15 February 2001
S155/1999

ORDER

Application for special leave to appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

D F Jackson QC with G D de Q Walker for the applicant (instructed by Allen Allen & Hemsley)

M G Sexton SC, Solicitor-General for the State of New South Wales with S J Gageler for the respondent (instructed by Crown Solicitor for New South Wales)

Interveners:

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)

P A Keane QC, Solicitor-General of the State of Queensland with G R Cooper intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Solicitor for Queensland)

D Graham QC, Solicitor-General for the State of Victoria with M K Moshinsky intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with C F Jenkins intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for Western Australia)

B M Selway QC, Solicitor-General for the State of South Australia with I K Haythorpe intervening on behalf of the Attorneys-General for the State of South Australia and the State of Tasmania (instructed by Crown Solicitor for South Australia and Crown Solicitor for Tasmania)

CATCHWORDS

Durham Holdings Pty Ltd v The State of New South Wales

Constitutional law (NSW) – Property – Acquisition by State – State acquired coal and paid compensation to owner – Amount of compensation "capped" below true value of coal by instruments made pursuant to *Coal Acquisition (Amendment) Act* 1990 (NSW) – Whether instruments ultra vires because Act must be read with a presumption that a State does not intend to acquire property without adequate compensation – Whether State is required to acquire property on just terms – Whether Act in the nature of a Bill of Pains and Penalties.

Mines and minerals – Coal – Acquisition by State – Compensation to owner pursuant to *Coal Acquisition (Amendment) Act* 1990 (NSW) – Whether instrument ultra vires the Act.

Statutes – Interpretation – Acquisition of property – Presumption that not intended to acquire without adequate compensation – Whether presumption rebutted.

Words and phrases – "acquisition of property" – "just terms".

Constitution, s 106.
Australia Act 1986 (Cth), s 2(2).
Constitution Act 1902 (NSW), s 5.
Coal Acquisition (Amendment) Act 1990 (NSW).

1 GAUDRON, McHUGH, GUMMOW AND HAYNE JJ. This application for special leave to appeal against a decision of the New South Wales Court of Appeal[1] should be dismissed with costs. An appeal would enjoy no prospects of success. We turn to explain shortly why this is so.

2 On 1 January 1982, coal in certain lands in New South Wales was vested in the Crown in right of that State by the operation of s 5 of the *Coal Acquisition Act* 1981 (NSW) ("the Act"). Pursuant to s 6 of the Act, an instrument was made by the Governor providing for payments of compensation described as interim payments ("the Arrangements"). Between 1986 and 1995, the applicant received payments under the Arrangements totalling $27,006,254.

3 Section 6 was amended by the *Coal Acquisition (Amendment) Act* 1990 (NSW) ("the 1990 Act"), which added s 6(3). This stated:

> "Arrangements under this section may differentiate between the persons to whom compensation is payable as a result of the enactment of this Act by providing that specified persons, or persons of a specified class, are not entitled to be paid more than a specified sum or specified sums of money in respect of coal vested in the Crown by the operation of section 5, irrespective of the amount of coal that they owned immediately before the commencement of this Act."

4 By instrument dated 27 June 1990, the Arrangements were amended with the object of limiting to $60 million the total amounts which might be paid as compensation to certain coal mining companies, of which the applicant was one. The rate of compensation was increased from 50 cents per tonne to 90 cents per tonne but the effect of the new cl 22AA(3) of the Arrangements was to "cap" the total amount of compensation payable to the applicant at $23,250,000.

5 The applicant instituted proceedings in the Supreme Court of New South Wales claiming compensation in the sum of $93,397,327, less the interim payments already received, plus interest. It also sought declaratory relief respecting the invalidity of the legislative scheme. The New South Wales Court of Appeal (Spigelman CJ, Handley and Giles JJA) ordered that the proceedings be dismissed.

6 In its application to this Court, the applicant contends that cl 22AA(3) of the Arrangements is invalid because it is beyond the power conferred by s 6 as

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1 *Durham Holdings Pty Ltd v State of New South Wales* (1999) 47 NSWLR 340.

amended by the 1990 Act. The applicant submits, as it did to the Court of Appeal, that s 6 must be read in accordance with the presumption that the legislature does not intend to acquire property without compensation. The terms of s 6(3) of the Act rebut any operation of the presumption. The reasons of the Court of Appeal on this contention are plainly correct[2]. Observations of Beaumont J in *Commissioner of Taxation v Northumberland Development Co Pty Ltd*[3], upon which the applicant relied, were made respecting s 6 in its form before the addition of sub-s (3).

7 The applicant also contends in this Court that the legislation in question is invalid because the Parliament of New South Wales lacks power to enact laws for the acquisition of property without compensation. There are numerous statements in this Court which deny that proposition[4]. Moreover, the existence of the presumption referred to above suggests that the power, against the exercise of which the presumption operates, indeed exists.

8 However, as the facts narrated above indicate, the acquisition occurred in 1982 by force of s 5 of the Act, with the then attendant compensation scheme. The substance of the applicant's complaint concerns not acquisition without compensation, but the quantum or measure of the additional compensation provided pursuant to the "cap" imposed by the 1990 Act. The applicant pleaded invalidity of cl 22AA(3) and of s 6(3), in so far as it authorised the introduction of that sub-clause, on the ground that the legislation purported to deprive it of its property "without just, or any properly adequate, compensation". In this Court, the applicant also asserted that it had been subjected to a legislative judgment which confiscated its property as a punishment and was in the nature of a Bill of Pains and Penalties[5]. However, there is nothing to show any punishment of the applicant, and this submission therefore need not further be considered.

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2 (1999) 47 NSWLR 340 at 352-355.

3 (1995) 59 FCR 103 at 114.

4 *The State of New South Wales v The Commonwealth* ("the *Wheat Case*") (1915) 20 CLR 54 at 66, 77, 98, 105; *P J Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 at 403, 405, 416, 419; *Pye v Renshaw* (1951) 84 CLR 58 at 78-80; *Minister for Lands (NSW) v Pye* (1953) 87 CLR 469 at 486; *Mabo v Queensland* (1988) 166 CLR 186 at 202; *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 58 [149].

5 See *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 535, 645, 719.

9 In *Union Steamship Co of Australia Pty Ltd v King*[6], the Court stated that, within the limits of the grant, a power such as that conferred on the New South Wales Parliament by s 5 of the *Constitution Act* 1902 (NSW) to make laws "for the peace, welfare, and good government of New South Wales" is "as ample and plenary as the power possessed by the Imperial Parliament itself"[7]. Moreover, at the time of the 1990 Act, the *Australia Act* 1986 (Cth) ("the Australia Act")[8] was in force. Section 2(2) thereof declared and enacted that the legislative powers of each State Parliament included all legislative powers that Westminster might have exercised before the commencement of that Act for the peace, order and good government of the State.

10 However, the universality of the power thus conferred is subject to the *Commonwealth of Australia Constitution Act* and to the Constitution of the Commonwealth[9]. It is to that Constitution that the States owe their existence[10], and s 106 continues, subject to the Constitution, "[t]he Constitution of each State of the Commonwealth".

11 In *Union Steamship*, the Court added[11]:

> "Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not

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6 (1988) 166 CLR 1 at 10.

7 The grant of legislative power in these terms is not, by those terms, limited by considerations which attend the exercise of discretionary powers conferred by statute upon public authorities and which have been identified as the *Wednesbury* doctrine; cf *R v Secretary of State for the Foreign and Commonwealth Office; Ex parte Bancoult* [2000] EWCA 78 at [53]-[58].

8 The Commonwealth rather than the Imperial statute is determinative for this purpose: *Sue v Hill* (1999) 199 CLR 462 at 490-491 [61].

9 Australia Act, s 5; and see *Arena v Nader* (1997) 71 ALJR 1604 at 1605. Section 2(2) is also subjected to the manner and form requirement of s 6 of the Australia Act.

10 *Victoria v The Commonwealth* (1971) 122 CLR 353 at 371, 395-396; *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 372; *McGinty v Western Australia* (1996) 186 CLR 140 at 171-173, 207-208, 216, 293.

11 (1988) 166 CLR 1 at 10.

secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score. Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law[12], a view which Lord Reid firmly rejected in *Pickin v British Railways Board*[13], is another question which we need not explore."

12 The question that the applicant posed for the Court of Appeal thus was whether or not the right to receive "just" or "properly adequate" compensation is such a "deeply rooted right" as to operate as a restraint upon the legislative power of the New South Wales Parliament. What the Court of Appeal said is true of the application to this Court, namely[14]:

> "The [applicant] was unable to point to any judicial pronouncements, let alone a decided case, which indicated, at any time, that any such principle existed in the common law of England, or of the colonies of Australasia, or of Australia. It advocated the development of the common law, by the recognition of such a principle for the first time in this case."

13 The applicant sought to rely upon statements respecting the common law in decisions respecting the powers of several of the States of the United States before the inclusion in those written State Constitutions of guarantees respecting the taking of property[15]. However, what would be involved if the applicant's submission were accepted would not be the development of the common law of Australia. Rather, it would involve modification of the arrangements which comprise the Constitutions of the States within the meaning of s 106 of the

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12 See *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 at 390; *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398.

13 [1974] AC 765 at 782.

14 (1999) 47 NSWLR 340 at 365.

15 The significant cases begin with the decision of Chancellor Kent in *Gardner v Newburgh* (1816) 2 Johns Ch 162 [7 Am Dec 526] and they are usefully discussed in Stoebuck, "A General Theory of Eminent Domain", (1972) 47 *Washington Law Review* 553 at 572-588.

Constitution[16], and by which the State legislatures are erected and maintained, and exercise their powers.

14 The applicant must seek to introduce into the constitutional text, in particular s 2(2) of the Australia Act, a limitation not found there. Undoubtedly, having regard to the federal system and the text and structure of "[t]he Constitution of each State of the Commonwealth" (the phrase used in s 106 of the Constitution), there are limits to the exercise of the legislative powers conferred upon the Parliament which are not spelled out in the constitutional text[17]. However, the limitation for which the applicant contends is not, as a matter of logical or practical necessity[18], implicit in the federal structure within which State Parliaments legislate. Further, whatever may be the scope of the inhibitions on legislative power involved in the question identified but not explored in *Union Steamship*, the requirement of compensation which answers the description "just" or "properly adequate" falls outside that field of discourse. The Court of Appeal correctly refused to disturb what, since the *Wheat Case*[19], has been taken to be the settled position respecting State legislative power.

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16 See *McGinty v Western Australia* (1996) 186 CLR 140 at 259-260; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 140-141.

17 See, for example, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568.

18 *McGinty v Western Australia* (1996) 186 CLR 140 at 168-170, 231; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 152.

19 (1915) 20 CLR 54.

15 KIRBY J. This application for special leave to appeal[20] concerns the validity, and if valid the interpretation, of the *Coal Acquisition Act* 1981 (NSW) ("the Act") and the Coal Acquisition (Compensation) Arrangements 1985 (NSW) ("the Arrangements"). The Arrangements were made by the Governor of the State of New South Wales, acting pursuant to s 6 of the Act[21].

16 The ultimate complaint is that, in effect, under the Act and the Arrangements the applicant has suffered expropriation of substantial property in coal in specified parcels of land in the State without compensation, or without just compensation. It contends that the provisions made by the Act and the Arrangements for payment in respect of the acquisition of such property afford only about "a quarter of the value assessed" by the Coal Compensation Board of the State[22]. And that having regard to accrued interest, the amount paid would be "a significantly smaller fraction of the admitted value"[23].

17 Normally, in Australia, where property is compulsorily acquired in accordance with law, the property owner is compensated justly for the property so acquired[24]. Australian society ordinarily attaches importance to protecting ownership rights in property. The present application was brought to test the constitutional right of a Parliament and Executive Government of a State of the Commonwealth to depart from the foregoing norms. The applicant asked this Court to consider whether, under the Act and the Arrangements, properly construed, the State had acquired its property and, if so, whether such laws were beyond the State's lawmaking powers.

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20 The application follows a judgment of the Supreme Court of New South Wales (Court of Appeal) ("the Court of Appeal") dismissing proceedings commenced in the Supreme Court of that State ("the Supreme Court"); *Durham Holdings Pty Ltd v State of New South Wales* (1999) 47 NSWLR 340 ("*Durham Holdings*"). The application was referred to the Full Court by order of McHugh and Callinan JJ on 10 March 2000.

21 Made on 19 June 1985. See *New South Wales Government Gazette*, No 95, 21 June 1985 at 2879 noted in *Durham Holdings* (1999) 47 NSWLR 340 at 344-345 [3].

22 Applicant's written submissions, par 4.30 by reference to the Notice of Determination, New South Wales Coal Compensation Board, Claim No CCB 8991, 15 September 1997.

23 Applicant's written submissions, par 4.30.

24 In respect of federal acquisitions, in accordance with the Constitution, s 51(xxxi) and the *Lands Acquisition Act* 1989 (Cth). In the State of New South Wales, see the *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW). See also Jacobs, *The Law of Resumption and Compensation in Australia*, (1998) at 194-201.

The facts

18 The facts relevant to the application were not contested[25].

19 Durham Holdings Pty Ltd ("the applicant") is a company incorporated in the State of New South Wales ("the State"). Between 1969 and 1974 it purchased certain coal deposits within the State ("the coal") with the intention of mining them. On 2 December 1981, the Parliament of the State enacted the Act. By s 5 of the Act, the Parliament purported to vest all coal, in its natural state on or below the surface of any land in the State, in the Crown. Specifically, the Act provided that the coal vested "freed and discharged from all trusts, leases, licences, obligations, estates, interests and contracts"[26]. If the law was valid, the Crown acquired all of the applicant's property interests in the coal.

20 By s 6 of the Act, the Governor was empowered to make what were called "arrangements". This section provided:

> "(1) The Governor may make arrangements –
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> (a) for the determination of the cases, if any, in which compensation is to be payable as a result of the enactment of this Act; and
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> (b) if there are any such cases – for the determination of the amount and method of payment of any such compensation.
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> (2) Except in the cases, if any, and to the extent, determined under subsection (1), compensation is not payable as a result of the enactment of this Act."

21 The relevant parts of the Act came into force on 1 January 1982[27]. Despite s 6(1) of the Act, no arrangements were made until 19 June 1985. On that day, the Governor made the Arrangements. By cl 4 of the Arrangements, the Coal Compensation Board ("the Board") was established. The applicant was eligible to make a claim to the Board for compensation pursuant to cll 9 and 11 of the Arrangements. In April 1986, the applicant duly lodged a claim.

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25 *Durham Holdings* (1999) 47 NSWLR 340 at 344-346 [3]; for the operation of the legislative and compensation schemes see at 346-349 [4]-[21].

26 s 5.

27 Pursuant to notification under s 2(2) of the Act.

22 In May 1990, the Parliament of the State enacted the *Coal Acquisition (Amendment) Act* 1990 (NSW). That law amended the Act. Relevantly, it added to s 6 a new sub-section, as follows:

> "(3) Arrangements under this section may differentiate between the persons to whom compensation is payable as a result of the enactment of this Act by providing that specified persons, or persons of a specified class, are not entitled to be paid more than a specified sum or specified sums of money in respect of coal vested in the Crown by the operation of section 5, irrespective of the amount of coal that they owned immediately before the commencement of this Act."

23 On 27 June 1990, the Governor, purporting to act in pursuance of the powers conferred by s 6 of the Act, made further arrangements amending the Arrangements. The amendments added to the latter a new cl 22AA(3) which purported to place a limit or "cap" of $23,250,000, together with interest, on the compensation payable to the applicant. Such limit was irrespective of the amount of compensation to which the applicant would otherwise have been entitled, including under the Arrangements as originally made.

24 On 22 August 1997, the Board determined the applicant's entitlements. It assessed the total compensation payable to the applicant, according to ordinary compensation principles, at $93,397,327, less certain interim payments totalling $27,001,727. However, by reason of the limit in cl 22AA(3), the Board determined that the applicant was not entitled to any compensation further than had already been paid.

25 The applicant lodged an appeal to the Coal Compensation Review Tribunal[28]. Proceedings were also commenced in the Supreme Court and these were removed to the Court of Appeal. The Court of Appeal dismissed the entire proceedings and in doing so rejected two submissions of the applicant which have not troubled this Court[29].

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28 The appeal before the Tribunal was adjourned to allow the appellant to seek a determination of the issues raised by these proceedings.

29 First, that by reason of s 30(1) of the *Interpretation Act* 1987 (NSW), cl 22AA(3) of the Arrangements did not apply to the applicant's pending claim for compensation, and secondly, that s 6(3) of the Act was inconsistent with s 10 of the *Racial Discrimination Act* 1975 (Cth) and was therefore invalid under the Constitution, s 109. These arguments were rejected by the Court of Appeal: see *Durham Holdings* (1999) 47 NSWLR 340 at 350-352 [23]-[40], 355-361 [54]-[85].

The proposed issues

26 The applicant sought special leave to appeal to this Court to raise two issues, namely:

(1) That the Court of Appeal had erred in holding that the presumption that a legislature, otherwise uncontrolled, does not intend to acquire property without compensation was rebutted in the present case by the terms of s 6(3) of the Act. Upon this point, the Court of Appeal concluded: "Once one places the provisions of s 6(3) of the Act side by side with the provisions of cl 22AA(3) of the Compensation Arrangements, it can readily be seen that the latter is expressly authorised by the former"[30]; and

(2) That the Court of Appeal had erred in rejecting the applicant's submission that, if s 6 of the Act authorised cl 22AA(3) of the Arrangements, that section was beyond the legislative power of the Parliament of the State. The excess of power was said to arise from the incapacity of the Parliament of a State to deprive persons, such as the applicant, of property without just, proper or adequate compensation. Although the Court of Appeal was prepared to assume that the compensation provided to the applicant was not just, proper or adequate, it concluded that the propositions advanced by the applicant were legally untenable. They were contrary to, or inconsistent with, a long line of authority in this Court and other established law[31]. The applicant, it was stated, had been "unable to point to any judicial pronouncements, let alone a decided case, which indicated, at any time, that any such principle existed in the common law of England, or of the colonies of Australasia, or of Australia"[32]. In so far as the Court of Appeal was urged to develop new common law doctrine, it declined to do so[33].

The presumption of compensation

27 It is usually appropriate (and often necessary) to consider any arguments of construction of legislation before embarking on challenges to constitutional validity. This rule is frequently observed in relation to attacks on the

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30 *Durham Holdings* (1999) 47 NSWLR 340 at 355 [51].

31 *Durham Holdings* (1999) 47 NSWLR 340 at 361-362 [88].

32 *Durham Holdings* (1999) 47 NSWLR 340 at 365 [105].

33 *Durham Holdings* (1999) 47 NSWLR 340 at 365 [106]-[107].

constitutionality of federal laws[34]. It is convenient to take this course in the present application because, if the applicant were to succeed on its construction argument, the challenge to the validity of the Act might fall away, or at least be postponed.

28 The foundation for the applicant's first argument is a principle which I did not take the respondent, the State, to contest. It is that, within the Australian legal system, courts will presume that legislation (federal, State or Territory), or subordinate laws made under such legislation, do not amend the common law to derogate from important rights enjoyed under that law, except by provisions expressed in clear language. This principle is sometimes described as a "presumption"[35] or as a "[rule] of construction"[36] or as an "intention" which is attributed to the lawmaker. It rests on the imputed aspiration of the law to attain, and not to deny, basic precepts of justice. The presumption, rule of construction or imputed intention certainly applies to the taking of property without compensation. This has been acknowledged by this Court in respect both of legislation[37] and delegated lawmaking[38]. Indeed, it has been suggested that "the general rule has added force in its application to common law principles respecting property rights"[39].

29 In addition to these principles of the common law, the applicant invoked a connected, but different, "presumption". This was that Australian legislation would be construed so as to accord with the basic principles of customary international law[40]. It submitted that this was particularly so where such law

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34 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186; *R v Hughes* (2000) 74 ALJR 802 at 816 [66]; 171 ALR 155 at 173-174; *Residual Assco Group Ltd v Spalvins* (2000) 74 ALJR 1013 at 1030 [81]; 172 ALR 366 at 389.

35 As it was in the Court of Appeal: *Durham Holdings* (1999) 47 NSWLR 340 at 353 [43].

36 *Bropho v Western Australia* (1990) 171 CLR 1 at 17.

37 *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18.

38 *C J Burland Pty Ltd v Metropolitan Meat Industry Board* (1968) 120 CLR 400 at 406-407, 415.

39 *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 at 683.

40 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363.

expressed established norms of fundamental human rights[41]. The applicant argued that the right of an individual, corporation or State in Australia to own property (and thus, by inference, not to be deprived of property by arbitrary process or without just terms) was implicit in contemporary customary international law[42]. According to the applicant "compensation", in this context, meant "the full money equivalent of the thing of which [the owner] has been deprived"[43].

30 There is little point in searching for additional expositions of, or foundations for, the principle that courts will presume that legislation does not overrule the common law in the absence of clear and express terms, given that it is so clear and that it was not really contested by the State. In English legal history the principle can be traced back for at least 300 years and probably further[44]. It has been applied countless times in Australia, including in the construction of legislation governing privately owned minerals and the public acquisition thereof[45].

31 However, any presumption, rule of construction, or imputed intention is subject to valid legislative provisions to the contrary. Judges may decline to read such legislation as having such an effect. The more peremptory, arbitrary and

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41 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384; cf *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; see Simpson and Williams, "International Law and Constitutional Interpretation", (2000) 11 *Public Law Review* 205.

42 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-660 in relation to constitutional interpretation; United Nations Commission on Human Rights, "The Right of Everyone to Own Property Alone as well as in Association with Others", UN Doc/E/CN.4/1994/19 (1993) at 90-92. See also Allen, *The Right to Property in Commonwealth Constitutions*, (2000).

43 *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 at 571.

44 In relation to property rights, see *Barrington's Case* (1610) 8 Co Rep 136b at 138a [77 ER 681 at 684]. A similar idea is reflected in Magna Carta (1215), cl 52. For recent English authority on the principle generally, see *R v Lord Chancellor; Ex parte Witham* [1998] QB 575 at 586; *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539 at 575, 588; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131; *R v Secretary of State for the Foreign and Commonwealth Office; Ex parte Bancoult* [2000] EWCA 78 at [28]-[38].

45 See *The Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552 at 563.

unjust the provisions, the less willing a judge may be to impute such a purpose to an Australian lawmaker. But a point will be reached where the law in question is "clear and unambiguous"[46]. Various other verbal formulae are used in the reasoning of this Court to describe that point. They are collected by the Court of Appeal in its reasons[47]. Once that point is reached, subject to any constitutional invalidity, the judge has no authority to ignore or frustrate the commands of the lawmaker. To do so would be to abuse judicial power, not to exercise it.

32 The applicant endeavoured to beguile this Court into a line of legal argument concerned with a subordinate presumption. This is that, in default of an express provision, a court would ordinarily afford compensation when contemplated by law but not expressly provided as the law apparently intended[48]. In this connection, the applicant relied on a minority opinion of Beaumont J in the Federal Court of Australia holding, in the context of income tax liability, that s 6(1) of the Act did not rebut the normal presumption that compensation would be paid for property taken under a statute[49]. The applicant suggested that this meant "just compensation".

33 There are a number of answers to this argument. The Act, as originally enacted, purported to reserve, as a legislative possibility, the circumstance that no compensation at all would be payable for the subject acquisition. It did so by referring to the determination of the case "if any" in which compensation was payable and to the determination of the amount and methods of payment but only "if there are any" cases determined to call forth such compensation[50].

34 Arrangements such as were contemplated by the Act were duly made. This is not, therefore, a case where the Court was being asked to fill a gap left by the Executive Government, in a scheme as contemplated and enacted by Parliament. Here, the Executive Government had acted. It had provided for

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46 *Bropho v Western Australia* (1990) 171 CLR 1 at 17; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 146-147; *Durham Holdings* (1999) 47 NSWLR 340 at 353 [44].

47 "[U]nambiguously clear", "irresistible clearness", "plain intendment", "clear words or necessary implication", "unmistakable and unambiguous" etc. See *Durham Holdings* (1999) 47 NSWLR 340 at 353-354 [44].

48 *Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd* [1919] AC 744 at 752; *Belfast Corporation v O D Cars Ltd* [1960] AC 490 at 523.

49 *Commissioner of Taxation v Northumberland Development Co Pty Ltd* (1995) 59 FCR 103 at 114.

50 The Act, s 6(1). See also s 6(2) and above at [20].

compensation. The provisions included one applicable to the applicant's case. Indeed, it was one which the applicant had, in fact, invoked in its claim for compensation. In such circumstances, the complaint of the applicant is not really about the failure to provide compensation, or to fulfil an assumption expressed in the Act. It is rather about the formula for the quantification of the compensation so provided. Given that s 6(1) of the Act purported to enact that no compensation at all might be provided in the arrangements made as delegated legislation, if such a law is valid the argument for the applicant would have faced difficulties even if no arrangements whatever had been made. But given that arrangements were made, this aspect of the applicant's argument is unsustainable.

35 Nor is the applicant otherwise assisted by the reasoning of Beaumont J referred to[51]. His Honour was not there concerned with the issue before the Court of Appeal or this Court[52]. His opinion differed from that of his colleagues[53]. Most importantly, his treatment of s 6 of the Act omitted reference to sub-s (3), inserted in 1990. It is by that sub-section, which founded the opinion of the Court of Appeal, that the Parliament of the State had purported expressly to authorise a provision for compensation precisely such as was made by cl 22AA of the Arrangements. The provision might be regarded as unjust, discriminatory, exceptional and a departure from ordinary Australian norms. But it undoubtedly constituted "compensation". And in the words of the cases, it was "clear and unambiguous" in its terms[54].

36 A glance at the legislative history of the Act, contained in the Parliamentary debates, indicates that a deliberate policy decision was made by the Government, and explained to the Parliament of the State prior to the enactment of s 6(3) of the Act. This was to impose the limit of $60 million on compensation for the three largest claimants, including the applicant[55]. This was said to be because of "the need for budgetary constraint"[56]. In the debates, the

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51 *Commissioner of Taxation v Northumberland Development Co Pty Ltd* (1995) 59 FCR 103 at 114.

52 *Durham Holdings* (1999) 47 NSWLR 340 at 355 [49].

53 (1995) 59 FCR 103 at 108 per Davies J, 117-118 per Einfeld J.

54 *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* (1927) 38 CLR 547 at 559; *Bropho v Western Australia* (1990) 171 CLR 1 at 17.

55 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 May 1990 at 3542.

56 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 May 1990 at 3542.

Minister was even more blunt: "The Government promised … fair and equitable compensation; and that is what people are getting – except the big fellows."[57] The terms of s 6(3) of the Act, therefore, contemplate precisely the Arrangements which ensued. The limits that were imposed, the discrimination that was effected and the "compensation" paid on terms less than just, were all deliberate acts of the Government and Parliament of the State.

37 The applicant persisted with a submission, in effect, that the only way in which such a law could be unmistakably clear was by naming the applicant and specifying the limit on recovery in the law itself, assuming that such a law would be valid[58]. It argued that it was possible to construe s 6(3) of the Act as authorising differential treatment only where normal principles of compensation might result in an injustice and necessitate observance of a different principle. This submission cannot stand with the clear terms of s 6(3). Moreover, were there any ambiguity, it is contradicted when those terms are read in the light of the Minister's statements to the Parliament.

38 The Court of Appeal was therefore correct to dismiss the construction argument. No occasion arises for this Court to disturb that Court's judgment on that basis.

Powers of State Parliament: the applicant's arguments

39 This conclusion obliges this Court to examine the applicant's second argument. This was that the Act, specifically s 6, construed as above, is outside the legislative powers of the State and, by inference, that the Arrangements are likewise unconstitutional.

40 It is not unusual to have challenges in this Court to the constitutional validity of State legislation. Such challenges have arisen ever since the Court was established[59]. Provisions in State statutes, including some of great importance to the State, are, from time to time, found constitutionally invalid[60]. But this result ordinarily follows a conclusion that the State law in question is

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57 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 May 1990 at 4473.

58 Applicant's written submissions, par 3.14; cf *Petroleum Act* 1955 (NSW), s 6(1) which, without naming titleholders, expressly provided that "[n]o compensation shall be payable by the Crown for any such petroleum or helium which before the commencement of this section was vested in any person other than the Crown".

59 The first such challenge arose in *D'Emden v Pedder* (1904) 1 CLR 91.

60 See eg *Ha v New South Wales* (1997) 189 CLR 465.

invalid because it is inconsistent with federal law[61], or with an express prohibition in the Constitution[62] or with an implication drawn from the language and structure of the Constitution[63]. What was unusual about the present application was that, for the most part, the applicant's argument did not rest on an invocation of the federal Constitution. It depended upon contentions about fundamental limitations said to exist in the legislative powers of a Parliament of a State to enact a law such as the Act.

41 In essence, the applicant submitted that the lawmaking powers of the Parliament of the State were "largely determined by the common law" and were therefore subject to such restrictions as the common law imposed. The applicant argued that the assumption that a legislature, such as the Parliament of the State, was "uncontrolled" and subject to no applicable constitutional limits (within the subjects of lawmaking otherwise open to it) was fundamentally misconceived. It was an assumption that could be traced to the Oxford lectures of the legal scholar A V Dicey[64]. According to the applicant, Dicey's assertion that there was no constitutional limit to the legislative power of the United Kingdom Parliament (and by derivation the legislature of New South Wales) was historically inaccurate, wrong in principle, "tragic" in its legacy and doubted by persuasive dicta in Australian courts[65]. It was made no more convincing by judicial repetition that rested on unexamined assumptions.

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61 Constitution, s 109: *Ex parte McLean* (1930) 43 CLR 472; *Airlines of NSW Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54.

62 Such as the Constitution, ss 52, 90, 112, 114, 115, 117: *Street v Queensland Bar Association* (1989) 168 CLR 461; *Ha v New South Wales* (1997) 189 CLR 465.

63 See eg the Constitution, Ch III: *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511. State laws may also be challenged on the grounds of impermissible extraterritorial operation: *Morgan v White* (1912) 15 CLR 1 at 13; *Lipohar v The Queen* (1999) 74 ALJR 282 at 313-314 [155]-[159]; 168 ALR 8 at 52-54.

64 Dicey, *Law of the Constitution*, 10th ed (1959) at 39-40. In *Sue v Hill* (1999) 199 CLR 462 at 492 [64], Gleeson CJ, Gummow and Hayne JJ noted Professor Wade's observation that "Dicey never explained how he reconciled his assertions that Westminster could destroy or transfer sovereignty and the proposition that it could not bind future Parliaments" (footnote omitted). See Wade, "The Basis of Legal Sovereignty", (1955) *Cambridge Law Journal* 172 at 196.

65 It referred to *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 ("*BLF Case*") at 383-385 per Street CJ, 420-422 per Priestley JA; *Seymour-Smith v Electricity Trust of South Australia* (1989) 17 NSWLR 648 at 652; *The Broken Hill Proprietary Co Ltd v Dagi* [1996] 2 VR 117 at 205; Cosgrove, *The Rule of Law:*

(Footnote continues on next page)

42 The applicant's submission was that, when examined against the background of preceding English constitutional law and history, it would be concluded that Dicey's assumption that Parliament (whether in the United Kingdom or of a State of Australia) was "sovereign" and "omnipotent"[66] was revealed to be a slogan, unsupported by proper analysis. As the applicant would have it, a distinguished academic had misled generations of British, Australian and colonial judges[67]. My own reasoning, both in the New South Wales Court of Appeal[68] and in this Court[69], was taken to task. The basic mistake made by so many judges was (it was submitted) in simply assuming that Dicey's parliamentary sovereignty or omnipotence theory was correct in law. In fact, according to the applicant, it was no more than an assertion, comparatively recent, which was denied by historical materials and logical scrutiny.

43 There is no doubt that there exist in England very old cases which suggest that a view was once held that the English Parliament was less than omnipotent, being subject to the laws of God[70]. Yet "[a]lthough many lawyers maintained that Parliament was bound by natural or divine law", there is, according to Professor Goldsworthy, "no evidence of substantial support in any period for the notion that the judiciary rather than Parliament possessed ultimate authority to interpret and enforce that law"[71].

44 Celebrated instances have arisen, from time to time, when English judges have held that an Act of the English Parliament could be treated as invalid where

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Albert Venn Dicey, Victorian Jurist, (1980) at 112; Blackburn, "Dicey and the Teaching of Public Law", (1985) *Public Law* 679 at 688.

66 Winterton, "The British Grundnorm: Parliamentary Supremacy Re-examined", (1976) 92 *Law Quarterly Review* 591 at 592.

67 See eg *Pickin v British Railways Board* [1974] AC 765 at 782, 792-795; *P J Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 at 405 per Latham CJ; *Pye v Renshaw* (1951) 84 CLR 58 at 79-80; *Minister for Lands (NSW) v Pye* (1953) 87 CLR 469 at 486; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 72-73.

68 *BLF Case* (1986) 7 NSWLR 372 at 387; *Eastgate v Rozzoli* (1990) 20 NSWLR 188 at 201-202.

69 *Levy v Victoria* (1997) 189 CLR 579 at 643.

70 See Goldsworthy, *The Sovereignty of Parliament*, (1999) at 224.

71 Goldsworthy, *The Sovereignty of Parliament*, (1999) at 233.

it conflicted with a basic principle of the common law, for example, that a person should not be a judge in his or her own cause[72]. The uncontrolled omnipotence of Parliament was rejected on a number of occasions by Lord Chief Justice Coke[73]. It was questioned by Lord Chief Justice Hale[74] and also, apparently, by Lord Chief Justice Holt[75], Lord Chief Justice Kenyon[76], Lord Mansfield[77] and Lord Chief Justice Camden[78]. Doubts about it appear in other writings[79]. In turn, this view came to influence the early development of the common law in the United States of America[80]. The assertion of the right of the courts in that country to strike down laws which were found to be invalid (a right not expressed in the Constitution itself)[81] may have been influenced as much by the foregoing assertions of common law judicial authority in England, as by the pre-existing exercise by the Privy Council of its power to strike down laws of the American colonies found to be incompatible with laws made by the British Parliament.

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72 *Dr Bonham's Case* (1610) 8 Co Rep 113b at 118a [77 ER 646 at 652].

73 *Proclamations* (1611) 12 Co Rep 74 at 76 [77 ER 1352 at 1354]; *Rowles v Mason* (1612) 2 Brownl & Golds 192 at 198 [123 ER 892 at 895].

74 cf Holdsworth, "Sir Matthew Hale on Hobbes: An Unpublished MS", (1921) 37 *Law Quarterly Review* 274.

75 Pollock, "A Plea for Historical Interpretation", (1923) 39 *Law Quarterly Review* 163 at 165.

76 *R v Inhabitants of the County of Cumberland* (1795) 6 TR 194 [101 ER 507].

77 *Heathfield v Chilton* (1767) 4 Burr 2015 at 2016 [98 ER 50 at 50-51].

78 Cited in *Parliamentary History of England*, (1813), vol 16 at 168.

79 cf Sherry, "Natural Law in the States", (1992) 61 *University of Cincinnati Law Review* 171 at 175.

80 Early decisions in the United States held that State legislatures had no power to take property without compensation: *Gardner v Newburgh* 2 Johns Ch 161 (NY) (1816); 7 Am Dec 526; *Sinnickson v Johnson* 2 Harrison 129 (NJ) (1839); 34 Am Dec 184; *Young v McKenzie* 3 Ga 31 at 42 (1847); *Parham v The Justices* 9 Ga 341 at 349-350 (1851); *Pumpelly v Green Bay Co* 80 US 166 (1871); *Chicago, Burlington and Quincy Railroad Co v Chicago* 166 US 226 at 236-238 (1897).

81 *Marbury v Madison* 5 US 87 (1803).

45 From the foregoing historical material, the applicant sought to build its argument, in effect, that in the nineteenth century the law had taken a wrong turning under the influence of Dicey's ideas. This had infected British thinking and spread to Britain's colonies, including in Australia[82]. But there had always been academic sceptics[83]. In more recent years, their numbers had increased[84]. At last, English judges were beginning to join in the criticism of Dicey's "crude absolute of statutory omnipotence"[85]. In numerous decisions of the courts the role of judicial review had been enlarged to apply to situations that once would have been unthinkable[86] – including even consideration of challenges to the validity of an Act of the United Kingdom Parliament by virtue of its suggested conflict with the *European Communities Act* 1972 (UK)[87].

46 The applicant urged this Court to adopt an approach in harmony with this enlarged understanding of the function of the courts, in relation to the Parliament

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82 See Hood Phillips, "Dicey's *Law of the Constitution*: A Personal View", (1985) *Public Law* 587 at 590; Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist*, (1980) at 112.

83 eg Salmond, *Jurisprudence*, 10th ed (1947) at 495-496; Hood Phillips, "Dicey's *Law of the Constitution*: A Personal View", (1985) *Public Law* 587 at 590.

84 Mann, "Britain's Bill of Rights", (1978) 94 *Law Quarterly Review* 512 at 513; Allott, "The Courts and Parliament: Who Whom?", (1979) *Cambridge Law Journal* 79 at 114; Craig, "Sovereignty of the United Kingdom Parliament after *Factortame*", (1991) 11 *Yearbook of European Law* 221 at 234, 238; Finn, "Statutes and the Common Law", (1992) 22 *University of Western Australia Law Review* 7 at 20; Allan, "Parliamentary Sovereignty: Law, Politics, and Revolution", (1997) 113 *Law Quarterly Review* 443 at 449.

85 Wade, *Constitutional Fundamentals*, rev ed (1989) at 87. See also Forsyth (ed), *Judicial Review and the Constitution*, (2000); Woolf, "Droit Public – English Style", (1995) *Public Law* 57 at 69; Laws, "Law and Democracy", (1995) *Public Law* 72 at 82; Sedley, "Human Rights: A Twenty-First Century Agenda", (1995) *Public Law* 386 at 389. The last-named author suggests that parliamentary sovereignty has been replaced by "a new and still emerging constitutional paradigm" comprising "a bi-polar sovereignty of the Crown in Parliament and the Crown in its courts".

86 eg *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

87 *R v Secretary of State for Transport; Ex parte Factortame Ltd* [1990] 2 AC 85 at 152-153; *R v Secretary of State for Transport; Ex parte Factortame Ltd [No 2]* [1991] 1 AC 603; see Wade, "Sovereignty – Revolution or Evolution?", (1996) 112 *Law Quarterly Review* 568 at 569-570, 573.

of the United Kingdom, by reference both to judicial opinions in early history and in more recent times. Putting it shortly, it submitted that the time had come for this Court to release Australian law from the intellectual prison into which Dicey had cast so many judges and lawyers for more than a century. His theory of the sovereignty and omnipotence of "uncontrolled" British legislatures was a left-over from the thinking of absolute monarchy whose mantle had been temporarily seized by absolute parliaments. It was an approach unsuitable to the law and society of today which recognised, and enforced, checks on power, not obedience to notions of absolute power[88].

47 In further support of its submission, the applicant invoked three additional considerations. The first comprised a series of decisions of the New Zealand Court of Appeal[89]. Justice Cooke, as he then was, expressed the opinion that "[s]ome common law rights presumably lie so deep that even Parliament could not override them"[90]. Such judicial statements were made with reference to the suggested limitations that would exist, even in the case of the Parliament of New Zealand, on the power to enact "literal compulsion, by torture for instance"[91]. Once such a principle was established as a matter of law, its operation would be elucidated by the traditional means of case-by-case determination.

48 Secondly, the applicant invoked Sir Owen Dixon's reminder that the principle of parliamentary supremacy is itself a doctrine of the common law[92]. What the judges had recognised for a time to be an omnipotent and unqualified

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88 An analogy might be drawn with previous assertions of the uncontrolled omnipotence of absolute monarchy: see eg speech of King Louis XV in France in 1766 in West et al, *The French Legal System*, 2nd ed (1998) at 31. Just as such extreme notions of unbridled monarchical power have been discarded so, it was suggested, should notions of uncontrolled legislative power.

89 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398; *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121. See also *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 at 390; *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 with respect to the power of Parliament to restrict fundamental human rights.

90 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398; see also *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121.

91 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398.

92 Dixon, "The Common Law as an Ultimate Constitutional Foundation", in *Jesting Pilate*, (1965) 203 at 206-211.

supremacy, they could now recognise to be subject to specified limitations[93]. Such limitations would include controls at least on such gross and discriminatory departures from basic civil rights as were reflected in the Act and the Arrangements.

49 Thirdly, the applicant invoked what it detected as a new willingness on the part of this Court to "define the powers" of the Parliament of a State, as instanced in its recent decision in *Egan v Willis*[94]. I was reminded of my own remarks in that decision[95]:

> "It is the nature of a federal polity that it constantly renders the organs of government, federal and State, accountable to a constitutional standard. ... Federation cultivates the habit of mind which accompanies constitutional superintendence by the courts."

50 The applicant raised a last, and separate, argument in support of its objection to the validity of the Act and the Arrangements. This was that these laws were analogous to, or a variety of, a Bill of Pains and Penalties which, by inference, was constitutionally impermissible.

51 It will be convenient to deal with this argument later. It rests on a suggested implication derived from the federal Constitution rather than a limitation inhering in a legislature (such as the Parliament of New South Wales) which draws its powers historically from the Parliament of the United Kingdom.

Powers of State Parliament: authority

52 In *Union Steamship Co of Australia Pty Ltd v King*[96], this Court left open the question whether, with respect to a Parliament of a State, there were any common law rights which were so fundamental as to be beyond legislative power. In its amended statement of claim[97] the applicant contended that the legislative powers of the Parliament of the State excluded the power to "deprive named persons of their property without just, or any properly adequate,

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93 Wade, "The Basis of Legal Sovereignty", (1955) *Cambridge Law Journal* 172 at 187-188, 192, 196; see also *Egan v Chadwick* (1999) 46 NSWLR 563 at 566 [4]-[7].

94 (1998) 195 CLR 424.

95 (1998) 195 CLR 424 at 493 [133].

96 (1988) 166 CLR 1 at 10.

97 Par 20(b).

compensation". However, the applicant could not point to any case in England, the colonies of Australasia or modern Australia, to support its argument that this was the kind of "fundamental" common law right that "lay so deep" contemplated by the New Zealand cases. It could point to no judicial opinion to support its attempt to revive the question reserved in *Union Steamship* and to require its answer in this case.

53 Before modern times, English legal history contained many examples of statutes, enforced by the courts, by which the Parliament at Westminster authorised the acquisition of property without compensation[98]. The statutes by which the Crown appropriated the lands of the monasteries in England provide an early illustration[99]. Of direct relevance to Australia are the Imperial Acts which necessarily deprived the indigenous peoples of Australia of any rights that they might have enjoyed in land acquired for the purposes of British settlement[100]. If the validity of such legislation has not hitherto been questioned, some point of distinction, connected with a different status belonging to the New South Wales Parliament, would have to be found to justify a legal approach different from the acceptance accorded to analogous laws of the Westminster Parliament.

54 It was suggested that a distinction was evident from colonial times. This was that, by statute[101] or by the common law, no law could be made by a colonial legislature "repugnant to the Law of England", that is, the common law of England. However, for many reasons, this argument is unavailable to the applicant. Most importantly, the status of the Parliament of New South Wales is no longer that of a colonial legislature, governed by imperial legislation. It is that of a State of the Australian Commonwealth as provided for in the Australian

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98 McIlwain, "Book Review", (1942) 56 *Harvard Law Review* 148; Goldsworthy, *The Sovereignty of Parliament*, (1999) at 58.

99 27 Hen VIII c 28 (1536); 31 Hen VIII c 13 (1539).

100 *Australian Land Sales Act* 1842 (Imp) (5 and 6 Vict c 36); *Australian Waste Lands Act* 1855 (Imp) (18 and 19 Vict c 56). The Court has held that, on the assumption of sovereignty, native title can be extinguished, without compensation, by a positive act inconsistent with the continuation of native title: *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 63; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 123-124, 207, 238-242; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 613; *Fejo v Northern Territory* (1998) 195 CLR 96 at 130-131 [51]-[55], 147 [95].

101 *Australian Constitutions Act* 1850 (Imp) (13 and 14 Vict c 59), s 14.

Constitution[102]. Yet even before that Constitution was enacted, and partly to resolve difficulties which had arisen from the views of Boothby J in the Supreme Court of South Australia[103], the *Colonial Laws Validity Act* 1865 (Imp)[104] had been enacted. It was there provided that "[n]o Colonial Law shall be or be deemed to have been void or inoperative on the Ground of Repugnancy to the Law of England, unless the same shall be repugnant to the Provisions of some such Act of Parliament, Order, or Regulation as aforesaid"[105]. Clearly enough, this enactment was designed to restrict the operation of previous doctrines of repugnancy which had been thought by some to limit the legislative powers of a Parliament such as that of New South Wales to conform with fundamental principles of the common law of England. By the time that legislature had become the Parliament of a State, such limitations had been swept away. There is therefore no applicable repugnancy on which the applicant could rely.

55 At one stage, a second basis for invalidity was suggested by reference to the words by which legislative authority was conferred on colonial Parliaments. Typically, and in the case of New South Wales, the grant of legislative power was, in terms, "to make laws for the peace, welfare, and good government" of the colony (later the State)[106]. The opinion has been expressed that those words are, or may sometimes have the effect of being, words of limitation[107]. In the context of a Parliament of a State I do not accept that this is so[108]. This Court in *Union Steamship*[109] established conclusively that the words are words of grant. They

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102 Constitution, ss 106, 107; cf *McGinty v Western Australia* (1996) 186 CLR 140 at 171-173.

103 *Hutchinson v Leeworthy* unreported, Supreme Court of South Australia, 28 May 1860; *Dawes v Quarrel* (1865) 0 SALR 1. The controversy is referred to in *Liyanage v The Queen* [1967] 1 AC 259 at 284-285.

104 28 and 29 Vict c 63, ss 2, 3.

105 *Colonial Laws Validity Act*, s 3.

106 *Constitution Act* 1902 (NSW), s 5.

107 *R v Secretary of State for the Foreign and Commonwealth Office; Ex parte Bancoult* [2000] EWCA 78 at [71]. See also Killey, "'Peace, Order and Good Government': A Limitation on Legislative Competence", (1989) 17 *Melbourne University Law Review* 24 at 41-54.

108 cf *BLF Case* (1986) 7 NSWLR 372 at 406.

109 (1988) 166 CLR 1 at 9. See also *Riel v The Queen* (1885) 10 App Cas 675 at 678; *Ibralebbe v The Queen* [1964] AC 900 at 923; *Winfat Enterprise (HK) Co Ltd v Attorney-General of Hong Kong* [1985] AC 733 at 747.

are therefore to be given the widest possible operation, consistent with the vast variety of matters upon which such a legislature may be expected to exercise its powers. They are not words of limitation to afford the applicant the means to question the validity of the exercise of such powers, relevantly in the Act and the Arrangements.

56 Thirdly, so far as the powers of a Parliament of a State of Australia to permit the acquisition of property without the payment of compensation are concerned, a long line of opinions in this Court upholds the existence of that power[110]. Clearly these opinions stand in the way of the second proposition advanced by the applicant. These decisions equate the power of a Parliament of a State to the uncontrolled legislative authority enjoyed by the Parliament of the United Kingdom in its own sphere[111]. Whereas in the federal Constitution, specific provision had been made requiring the provision of "just terms" as a precondition to the acquisition of property from any State or person by federal law[112], no equivalent provision was there included in respect of State acquisition laws.

57 The assumptions, and assertions, that the enactments of a Parliament of a State providing for acquisition may be valid, although "the terms are unjust"[113], and that such injustice "is of no consequence legally"[114], have continued into recent times. If *Teori Tau v The Commonwealth*[115] is put to one side (on the footing that it was concerned with the application of the federal constitutional requirement to the Territories and that its authority has recently been questioned[116]) there are other decisions expressly concerned with legislative powers of a Parliament of a State that contain remarks supportive of the

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110 *Pye v Renshaw* (1951) 84 CLR 58 at 79-80; *Minister for Lands (NSW) v Pye* (1953) 87 CLR 469 at 486; cf *P J Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 at 405.

111 Commencing with *The State of New South Wales v The Commonwealth* (1915) 20 CLR 54 at 77 per Barton J.

112 Constitution, s 51(xxxi).

113 *P J Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 at 397-398.

114 *Pye v Renshaw* (1951) 84 CLR 58 at 79-80.

115 (1969) 119 CLR 564 at 569-570.

116 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 610-614 per Gummow J (Gaudron J agreeing at 565), 652-657 of my reasons; cf at 560 per Toohey J.

traditional view. One such decision is *Mabo v Queensland* ("*Mabo*")[117]. The plaintiffs in that matter submitted that the Queensland Parliament lacked legislative power to deprive indigenous peoples of property rights without providing compensation[118]. All members of this Court rejected that argument[119]. To that extent, the decision in the case, and the legal rule for which the decision stands, bars the way of the applicant's argument in this application.

58 The only basis for distinguishing the Court's ruling in *Mabo* from the issue presented by the applicant in these proceedings was that a relevant difference exists between the "native title" in issue in that case[120] and other species of property, such as the interest in the coal acquired from the applicant. This would be an unconvincing point of distinction given that it was assumed, or stated, in *Mabo* that "native title" was a species of legal property[121]. Its subsequent recognition by the common law and enforcement in Australian courts depended upon its having such a quality[122]. In *Mabo*, Deane J foreshadowed the issues argued in this application. He specifically warned about the danger of attributing to the "prima facie rule of construction" (involved in the applicant's first argument) "a status equivalent to a constitutional constraint upon legislative power"[123] (involved in the second). It is implicit in the very susceptibility to rebuttal of the rule or presumption against statutory deprivation of property without compensation, that it is possible, by clear law, to exclude the rule, rebut the presumption and acquire property without compensation.

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117 (1988) 166 CLR 186.

118 (1988) 166 CLR 186 at 201, par 2(d).

119 (1988) 166 CLR 186 at 202 per Wilson J (Mason CJ and Dawson J agreeing), 213 per Brennan, Toohey and Gaudron JJ, 224 per Deane J.

120 In terms of which Brennan, Toohey and Gaudron JJ expressed themselves: see (1988) 166 CLR 186 at 209, 217.

121 See eg (1988) 166 CLR 186 at 209, 213, 217.

122 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 238-241.

123 *Mabo* (1988) 166 CLR 186 at 224.

59 Since *Mabo*, individual judges of this Court have repeated the traditional view in the course of their reasoning[124]. I myself have done so[125]. An application by this Court of its settled rule is fatal to the applicant's case. To succeed, the applicant would have to persuade the Court to overrule at least so much of its decision in *Mabo* as held that there was no constitutional or legal restriction on a Parliament of a State to acquire property without the provision of compensation, meaning just compensation. Having regard to the terms of the Act, the present application would not afford a suitable vehicle to permit the re-argument of such a large proposition.

Powers of State Parliament: the theory and reality

60 Apart from the expositions of judicial authority in the above decisions, considerations of legal policy and political theory reinforce, and to some extent explain, the judicial authority collected in the cases.

61 Members of a legislature, such as the Parliament of New South Wales, are regularly answerable to the electors, whereas judges in Australia are not[126]. Judges recognise that, whatever the deficiencies of electoral democracy, the necessity of answering to the electorate at regular intervals has a tendency to curb legislative excesses. Many judges reject "the role of a Platonic guardian" and are "pleased to live in a society that does not thrust [that role] upon [them]"[127]. Most judges in Australia would probably share this relatively modest conception of their role. In this conception, the duty of obedience to a law made by a Parliament of a State derives from the observance of parliamentary procedures and the conformity of the resulting law with the State and federal Constitutions. It does not rest upon judicial pronouncements to accord, or withhold, recognition of the law in question by reference to the judge's own notions of fundamental rights, apart from those constitutionally established.

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124 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 64-66 per Brennan CJ (diss), 71-76 per Dawson J (diss); *Kruger v The Commonwealth* (1997) 190 CLR 1 at 72-73, 142; *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 58 [149].

125 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 650. However, I was there dealing with the lack of "entrenched constitutional requirements" in the case of State legislation.

126 *BLF Case* (1986) 7 NSWLR 372 at 404-405.

127 Hoffmann, "Human Rights and the House of Lords", (1999) 62 *Modern Law Review* 159 at 161.

62 Ultimately, this conception of the judicial function rests on political facts. These include the existence and powers of the Parliaments of the States and the inappropriateness of judicial questioning of such basic political realities[128]. These are reasons why, in Australia, the notion that there are some basic common law rights that "lie so deep" that even a Parliament, otherwise acting within its powers, cannot contradict them, has so far gathered few adherents. To the contrary, the commonly expressed view about the common law in Australia envisages a "more modest"[129] role, at least where a legislature has made law within the ambit of its constitutional powers[130]. This is because, in Australia, the common law operates within an orbit of written constitutional laws and political realities.

63 One further consideration, to which the Court of Appeal referred[131], should also be mentioned in answering the applicant's submission that this Court should now turn its back on past authority, if necessary overrule its previous holdings, and uphold as a doctrine of the common law an entitlement of judges to invalidate State legislation found to breach fundamental or "deep lying" rights. It is a consideration of particular relevance to the present case. In 1988 a referendum of electors in Australia rejected a proposal to add to the federal Constitution a new provision requiring that, to be valid, a "law of a State" providing for the "acquisition of property from any person" had to afford "just terms"[132].

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128 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 153-154; *R v Foster; Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256 at 307-308; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 529, 605-606, 695-696, 714; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 355 [12], 368-369 [46]-[47].

129 *Breen v Williams* (1996) 186 CLR 71 at 115; see also *Kruger v The Commonwealth* (1997) 190 CLR 1 at 156.

130 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566; *Lipohar v The Queen* (1999) 74 ALJR 282 at 291 [57]; 168 ALR 8 at 22; *John Pfeiffer Pty Ltd v Rogerson* (2000) 74 ALJR 1109 at 1118 [44]; 172 ALR 625 at 638.

131 *Durham Holdings* (1999) 47 NSWLR 340 at 365 [106]-[107].

132 The proposed amendment was to insert a new s 115A in the Constitution. It was voted upon on 3 September 1988, together with several other proposals. It was defeated, having failed to pass in all States and nationally. The national vote in favour was 30.33% of the electors with 68.19% against and 1.48% informal. The affirmative vote in New South Wales was only 29.27%. See Blackshield and Williams, *Australian Constitutional Law and Theory*, 2nd ed (1998) at 1188.

64 Where the Constitution is amended pursuant to referendum, it is permissible, in my view, to take into account the history and purpose of the change that is thereby effected[133]. If this aid to construction is available where an amendment is adopted, I see no reason to reject it where an amendment is proposed but fails. It is true that defeat of a proposal may be explained by many reasons. These may include the fact that the proposal was combined with other amendments, arguably more controversial[134]. The proposed amendment in 1988 concerned the federal Constitution. The issues argued by the applicant here concern the powers of the Parliament of New South Wales under the *Constitution Act* of that State and of the courts of the State. Moreover, the applicant's submission raises a fundamental question, not one limited to the particular instance of uncompensated, or insufficiently compensated, expropriations.

65 Nevertheless, the rejection by the electors of the Commonwealth (including those in New South Wales) of a proposed amendment to the federal Constitution, which would have prevented or invalidated legislation such as the amending legislation adopted by the New South Wales Parliament in 1990, suggests a reason for special caution when this Court is invited, but 12 years later, effectively to impose on the Constitution of the State a requirement which the electors, given the chance, declined to adopt.

66 The referendum proposal of 1988, although it was lost, reinforces to some extent the orthodox theory of Australia's legal and political arrangements. Under the Australian Constitution, it is not necessary to depend on judges to prevent, or cure, all injustices, including those of the kind of which the applicant complains. At least in theory, it is open to the electors to do so. They may do so by dismissing the government and the Parliament responsible for creating such laws. Alternatively, it is open to the electors to influence the insertion in the federal and State constitutions of entrenched provisions that forbid repetition of such laws[135]. The practicalities are not always so straight-forward. However, the legal

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133 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 413 [157].

134 The other proposals presented at the constitutional referendum in 1988 concerned the establishment of maximum terms in both Houses of Parliament; limitations on deviation from equal electorates; provision for the establishment and continuance of local government; and guarantees of trial by jury and religious freedom extended to the States. All proposals were defeated and none was carried in any State of the Commonwealth. See Blackshield and Williams, *Australian Constitutional Law and Theory*, 2nd ed (1998) at 1188.

135 An entrenchment of provisions defensive of the independence and tenure of State judicial officers was included in the *Constitution Act* 1902 (NSW), ss 52-56 by the *Constitution (Amendment) Act* 1992 (NSW).

principle postulated by the applicant was one reserved for an extreme case. For such a case it may ordinarily (although not inevitably) be assumed that, ultimately, the political process will produce just laws on significant topics.

Not a law on pains and penalties

67 The applicant fell back on its last submission: that, properly understood, the Act and the Arrangements amounted to a Bill of Pains and Penalties, that is, a law exacting a form of punishment. The Act and the Arrangements were described as amounting to a legislative judgment that purported to confiscate the applicant's property as a form of punishment, in effect for being one of the three "big fellows", to use the Minister's description. It was said that Bills of Attainder, which once imposed a legislative penalty on an individual's life or person, had "disappeared from the English scene more than 250 years ago"[136]. By analogy, the applicant argued that legislative competence to enact a law of pains and penalties, burdening particular individuals, was beyond the power of the Parliament of the State.

68 When the colony of New South Wales was established, legislation imposing a punishment on an individual, even in England, was "looked upon as barbarous"[137]. The Parliament of the State had, therefore, so it was submitted, not received a power to enact such legislation, so alien to the "civilised world". It was argued that no such legislature could impose it[138]. The power of punishment belonged, of its nature, exclusively to the judiciary. The applicant made it clear that it rested this argument not on any notion of constitutional separation of powers in New South Wales[139] but upon contemporary conceptions of what was involved in legislative power as such.

69 There are many answers to these submissions, which the State described as "somewhat far fetched"[140]. Neither the provisions of the Act, nor the Arrangements, comprise anything analogous to a Bill of Pains and Penalties.

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136 Mann, "Outlines of a History of Expropriation", (1959) 75 *Law Quarterly Review* 188 at 211.

137 *Phillips v Eyre* (1870) LR 6 QB 1 at 25.

138 Mann, "Outlines of a History of Expropriation", (1959) 75 *Law Quarterly Review* 188 at 211.

139 Applicant's written submissions, par 4.44; cf *Liyanage v The Queen* [1967] 1 AC 259 at 291; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 536, 686, 721; *Nicholas v The Queen* (1998) 193 CLR 173 at 260-264 [202]-[208].

140 Respondent's written submissions, par 3.9.

Neither the Act nor the Arrangements constitute, or impose, punishment for guilt of any offence[141]. Neither imposes a judgment on the applicant. Neither involves a legislative exercise of judicial power, even assuming that to be forbidden to the New South Wales Parliament[142]. Accordingly, this argument fails at the threshold. In the result, every argument advanced for the applicant is rejected. The applicant therefore fails.

Judicial responses to extreme laws

70 Before parting with this application, I would mention briefly a number of points which were not argued. Some of them are relevant to meeting the suggestion that constitutional law in Australia, as expounded by this Court, particularly in respect of State laws, is devoid of any means of preventing, and providing redress against, extreme departures from fundamental rights in the form of State legislation. Such a conclusion would be mistaken.

71 Just as the available protections against extreme cases of discrimination and injustice do not arise in Australia from a comprehensive constitutional charter of civil rights[143] or from a binding treaty on fundamental rights given local legislative effect[144], nor do they arise from a belated attempt to assert for the common law (and the judges who expound and apply it) a role superior to legislation which judicial authority, legal history and political realities deny.

72 In Australia, the foundation for judicial protection against "extreme" derogation from fundamental rights lies, in part, in the presumptive principle of construction which judges, federal and State, regularly invoke[145]. But it also lies in the provisions of, and implications derived from, the federal Constitution itself. Whereas the role of the common law, in the face of legislation, is "modest", the role of the Constitution is substantial.

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141 *Kariapper v Wijesinha* [1968] AC 717 at 734, 736.

142 cf *Cummings v State of Missouri* 71 US 277 at 323 (1886); *United States v Lovett* 328 US 303 at 322-324 (1946).

143 Such as the *Canadian Charter of Rights and Freedoms* added to Canadian constitutional law in 1982. There is and for some time has been in Australia a debate concerning the incorporation of a general Bill of Rights in the Constitution: see eg Williams, *A Bill of Rights for Australia*, (2000).

144 cf *Human Rights Act* 1998 (UK); Hope, "The *Human Rights Act* 1998: The Task of the Judges", (1999) 20 *Statute Law Review* 185; Lewis, "The *Human Rights Act* 1998: Shifting the Burden", (2000) *Criminal Law Review* 667.

145 See above at [28].

73 An illustration of the way in which implications derived from the language and structure of the Constitution can sometimes afford protections from State legislation deemed incompatible with the Constitution is *Kable v Director of Public Prosecutions (NSW)*[146]. Further implications may be drawn from the language, structure and presuppositions of Ch III[147]. Any attempt to impose on State courts functions incompatible with the exercise of judicial power and due process of law might, in a given case, contravene the presuppositions of Ch III of the Constitution[148]. If this is so, an extreme case may well be constrained by other implications, derived from the Constitution, which limit and control the lawmaking of other branches of the government of a State, including a Parliament of a State.

74 In Australia, a State is not free-standing. Nor is it merely an historical colony given a different name. It is a State of the Commonwealth. It derives its constitutional status, as such, from the federal Constitution. It may be inferred, from that Constitution, that a State is a polity of a particular character. Thus s 107 of the Constitution provides, and requires, that each State should have a Parliament. Such Parliaments must be of a kind appropriate to a State of the Commonwealth and to a legislature that can fulfil functions envisaged for it by the Constitution[149]. Ultimately, a "law of a State"[150], made by such a Parliament, could only be a "law" of a kind envisaged by the Constitution. Certain "extreme" laws might fall outside that constitutional presupposition.

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146 (1996) 189 CLR 51 at 90 per Toohey J, 107 per Gaudron J, 115-116 per McHugh J, 139-143 per Gummow J. See also Saunders, "The Separation of Powers", in Opeskin and Wheeler (eds), *The Australian Federal Judicial System*, (2000) 3 at 19-20; Griffith and Kennett, "Judicial Federalism", in Opeskin and Wheeler (eds), *The Australian Federal Judicial System*, (2000) 37 at 45-46; Wheeler, "Federal Judges as Holders of Non-judicial Office", in Opeskin and Wheeler (eds), *The Australian Federal Judicial System*, (2000) 442 at 445.

147 References to the actual and possible significance of the implications of Ch III appear in *Johnson v Johnson* (2000) 74 ALJR 1380 at 1386 [37]; 174 ALR 655 at 664; *Ebner v Official Trustee in Bankruptcy* (2000) 176 ALR 644 at 661-662 [79]-[82].

148 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 536, 617, 686, 721; *Leeth v The Commonwealth* (1992) 174 CLR 455.

149 See eg ss 10, 15; cf *Taylor v Attorney-General of Queensland* (1917) 23 CLR 457 at 468-469, 474.

150 See Constitution, s 109; cf s 108.

75 The significance of the contemporary realisation that the foundation of Australia's Constitution lies in the will of the Australian people[151] has not yet been fully explored. It is not impossible that this conception would, in an extreme case, also reinforce the foregoing and affect judicial recognition of a purported "State law" that was not, in truth, a "law" at all. In Australia, considerations such as these, derived directly or indirectly from the Constitution, afford the likely future judicial response to any extreme affront masquerading as a State law. The answer lies in the implications derived from the Constitution, not in assertions by judges that the common law authorises them to ignore an otherwise valid law of a State[152]. Such an over-mighty assertion in relation to constitutional powers of lawmaking is as alien to our law as to our political realities. On the other hand, judicial derivation of implications from the federal Constitution is not alien but familiar[153].

76 The present case, although apparently involving discrimination and arguably injustice to the applicant, falls far short of the extreme instance that would enliven any of the foregoing constitutional implications, assuming they had been invoked. By the Act, and the Arrangements, compensation is provided to the applicant. It can be recovered by due process of law. The applicant has taken steps to do so. The law of the State is formally valid. It is not inconsistent with the express terms of the federal Constitution nor any applicable federal law. But neither is it invalid as incompatible with the *Constitution Act* of the State.

77 In these circumstances, decisions about the appropriateness or otherwise of the law, of the compensation provided and the procedures for its recovery,

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151 *McGinty v Western Australia* (1996) 186 CLR 140 at 230; cf Kirby, "Deakin: Popular Sovereignty and the true foundation of the Australian Constitution", (1996) 3 *Deakin Law Review* 129.

152 There is an analogous debate about the relationship between legislation and the rules of natural justice. Two theories have emerged. See *Kioa v West* (1985) 159 CLR 550 at 584, 615; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 652; *Annetts v McCann* (1990) 170 CLR 596 at 604-605; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 553 [111]-[112]; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 60-61 [38]-[42], 85-86 [168]-[169]; 176 ALR 219 at 230-231, 264-265.

153 It is beyond the scope of these reasons to explore the extent to which, in the exercise of historical powers, the Crown's representatives in a polity governed by a written constitution are authorised to delay or refuse the Royal Assent to a law, procedurally valid, which clearly offends basic constitutional norms provided by that constitution. See Evatt, *The King and his Dominion Governors*, 2nd ed (1967) at 148-152; Goldsworthy, *The Sovereignty of Parliament*, (1999) at 130-132.

were matters for the elected Parliament and government of New South Wales. The complaints of discrimination and injustice in these proceedings are therefore complaints of a political and not of a legal character. They must be addressed to the government and members of the Parliament of the State and ultimately to the electors. The courts cannot respond to them.

Orders

78 The application having been heard as on an appeal to the Full Court, extensive argument having been provided by the parties and by the intervening States, and the issues of legal principle and justice involved being, in my view, significant, I would have been inclined to favour the grant of special leave and dismissal of the appeal. However, as the other members of this Court would dismiss the application, and as nothing turns on the disposition of the matter, I will join in their order.

79 CALLINAN J. I would reserve my position on two matters which it is unnecessary to decide in this case: the existence or otherwise, or the nature of, any unexpressed limits upon the legislative powers of the States; and, as to the drawing of inferences to support substantive implications in the Constitution. Otherwise I agree generally with the reasons for judgment of Gaudron, McHugh, Gummow and Hayne JJ.