HIGH COURT OF AUSTRALIA

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

PALIFLEX PTY LIMITED APPELLANT

AND

CHIEF COMMISSIONER OF STATE REVENUE RESPONDENT

Paliflex Pty Limited v Chief Commissioner of State Revenue [2003] HCA 65
12 November 2003
S145/2003

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

N C Hutley SC with G A Moore, N Perram and K M Richardson for the appellant (instructed by Brock Partners)

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

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth of Australia with G Witynski and N L Sharp intervening on behalf of the Attorney-General of the Commonwealth of Australia (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales with I Mescher intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for the State of New South Wales)

C J Kourakis QC, Solicitor-General for the State of South Australia with J C Pritchard intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

C J Kourakis QC, Solicitor-General for the State of South Australia with C Bleby intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

P J Hanks QC with S G E McLeish intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

CATCHWORDS

Paliflex Pty Limited v Chief Commissioner of State Revenue

Constitutional law (Cth) – Exclusive powers of Commonwealth Parliament – Place acquired by Commonwealth for public purposes – Subsequent State laws – Whether State laws applied to place on enactment – Whether State laws valid on enactment – Subsequent disposition of place by Commonwealth – Whether State laws applied to place after disposition – Whether State laws valid in application to place after disposition – Whether imposition of land tax under State laws in respect of place enforceable – Constitution, s 52(i) – *Land Tax Act* 1956 (NSW) – *Land Tax Management Act* 1956 (NSW).

Taxation – Land tax – Place acquired by Commonwealth for public purposes – Subsequent State laws – Whether State laws applied to place on enactment – Whether State laws valid on enactment – Subsequent disposition of place by Commonwealth – Whether State laws applied to place after disposition – Whether State laws valid in application to place after disposition – Whether imposition of land tax under State laws in respect of place enforceable – Constitution, s 52(i) – *Land Tax Act* 1956 (NSW) – *Land Tax Management Act* 1956 (NSW).

Constitution, s 52(i).
Commonwealth Places (Administration of Laws) Act 1970 (NSW).
Commonwealth Places (Mirror Taxes) Act 1998 (Cth).
Commonwealth Places (Mirror Taxes Administration) Act 1998 (NSW).
Land Tax Act 1956 (NSW).
Land Tax Management Act 1956 (NSW).
State Revenue Legislation Amendment Act 1997 (NSW).

GLEESON CJ, McHUGH, GUMMOW, KIRBY AND HAYNE JJ.

The transfer of the Land

1 By written contract dated 5 September 1997 and completed 30 January 1998, the appellant, Paliflex Pty Ltd ("Paliflex"), purchased from the Commonwealth of Australia ("the Commonwealth") the property known as "Tresco" and located at 97 Elizabeth Bay Road, Elizabeth Bay ("the Land"). Elizabeth Bay is an inner suburb of Sydney bordering Sydney Harbour. The purchase price was $9 million. The transfer in favour of Paliflex was registered on 4 February 1998.

2 It appears that, at all material times, the Land has been registered under the provisions of the *Real Property Act* 1900 (NSW). From a date in 1922 until the registration of the transfer to Paliflex, the Commonwealth was the registered proprietor of the Land. The transferee, Paliflex, remains the registered proprietor.

3 The contract for sale had been assessed to stamp duty under the *Stamp Duties Act* 1920 (NSW) ("the Stamp Duties Act") in the sum of $480,490. The validity of the Stamp Duties Act to authorise that assessment and a fine for failure to pay the assessed duty was contested in proceedings in the Supreme Court of New South Wales[1].

4 In those proceedings, Austin J upheld the submission by Paliflex, which had been supported by the Attorney-General for the Commonwealth on an intervention, that no moneys were due and owing by Paliflex. This was because the Stamp Duties Act was outside the legislative competence of the New South Wales Parliament to the extent that its provisions purported to apply to a conveyance or agreement for the sale of a property which was, for the purposes of s 52(i) of the Constitution, a place acquired by the Commonwealth for public purposes. No appeal was taken from that decision and its correctness was not questioned in the present appeal.

5 This appeal also concerns the operation of s 52(i) of the Constitution but with respect to the application of New South Wales land tax legislation to the Land.

---

1 *Chief Commissioner of Stamp Duties v Paliflex Pty Ltd* (1999) 47 NSWLR 382.

The land tax litigation

6 On 20 February 2000, the respondent, the Chief Commissioner of State Revenue ("the Commissioner"), issued to Paliflex a notice of assessment for land tax totalling $98,836 in respect of ownership of the Land by Paliflex on 31 December 1999. Thereafter, on 29 April 2000, the Commissioner issued to Paliflex an assessment in respect of the Land as owned by Paliflex on 31 December 1998. Objections against the two assessments were disallowed.

7 An appeal to the Supreme Court against that disallowance and a cross-claim by the Commissioner to recover on the assessments were heard by Mason P[2] on a statement of agreed facts. His Honour dismissed the appeal and entered judgment for the Commissioner on the cross-claim. An appeal by Paliflex was taken to the Court of Appeal (Spigelman CJ, Stein and Heydon JJA)[3]. The appeal was dismissed but on grounds which went beyond, and differed from, those upon which Mason P had relied.

8 The scheme of the New South Wales legislation was that the tax was imposed by the *Land Tax Act* 1956 (NSW) ("the Tax Act") in respect of the taxable value of land owned at midnight on a specified date and a detailed regime for assessment and collection was provided by the *Land Tax Management Act* 1956 (NSW) ("the Management Act"). The tax was both imposed and charged upon the land immediately on that date and did not wait upon the issue of an assessment[4]. The particular provisions which founded the assessments of Paliflex were enacted by the *State Revenue Legislation Amendment Act* 1997 (NSW) ("the 1997 Act"). The operative provisions of the 1997 Act[5] amended the Tax Act and stated that, in respect of the taxable value owned by any person at midnight on 31 December 1997 and 1998, land tax at the scheduled rates was to be paid for the period of 12 months commencing on 1 January in the next succeeding year and in the manner prescribed under the Management Act.

---

2 *Paliflex Pty Ltd v Chief Commissioner of State Revenue (NSW)* 2002 ATC 4,124.

3 *Paliflex Pty Ltd v Chief Commissioner of State Revenue (NSW)* 2002 ATC 5,015.

4 *Tooth & Co Ltd v Newcastle Developments Ltd* (1966) 116 CLR 167 at 170.

5 Sched 2, Items 4, 5.

9 The land tax system thus illustrates the dictum of Isaacs J with respect to the previous federal tax system, pursuant to the *Land Tax Act* 1910 (Cth) and the *Land Tax Assessment Act* 1910 (Cth), that[6]:

> "[t]he taxing Act is always speaking in the present. It does not affect to change or menace men's actions, but is a standing declaration of the law with respect to landed estates as they appear to exist at a given moment."

10 Mason P rejected the submissions for Paliflex which he treated as[7]:

> "characterising [the Management Act and the Tax Act] as laws with respect to a Commonwealth place that were struck down at birth (1956) as regards the subject land; and were incapable of rising to touch it during a later era of private ownership unless reenacted generally or otherwise made to apply to the land by a specific enactment after [the registration of the transfer on] 4 February 1998",

and as putting a case[8]:

> "that the [Management Act] was and remains invalid in its application to the subject land because, in 1956, the [Management Act] was characterised as a law with respect to 'places acquired by the Commonwealth for public purposes' and because no legislation enacted after 4 February 1998 reinstated the [Management Act] in its application to the subject land".

11 His Honour concluded that, upon their proper construction, the Management Act and the Tax Act "failed to engage" with the Land in 1956, and s 52(i) did not operate to deny State legislative competence[9]. It is implicit in the reasoning of Mason P that the liability which later descended upon Paliflex by

---

6 *Attorney-General for Queensland v Attorney-General for the Commonwealth* (1915) 20 CLR 148 at 174. The relevant date under that legislation was the 30 June immediately preceding the year for which the land tax was levied and there was no provision for apportionment: *Rabett v Forrest* (1918) 18 SR (NSW) 131.

7 2002 ATC 4,124 at 4,127.

8 2002 ATC 4,124 at 4,128.

9 2002 ATC 4,124 at 4,128-4,129.

reason of its ownership of the Land on 31 December 1998 and 31 December 1999 was not pursuant to any State law with respect to a place acquired by the Commonwealth for public purposes, within the meaning of s 52(i) of the Constitution.

12 The conclusion that the relevant State legislation had no invalid operation with respect to the Land made it unnecessary for Mason P to determine any questions respecting s 14(2) of the *Commonwealth Places (Administration of Laws) Act* 1970 (NSW) ("the State Administration Act"). That legislation deals, among other topics, with the application of State laws when a place ceases to be a place to which s 52(i) of the Constitution applies. Subject to a qualification not presently relevant, s 14(2) states:

> "Subject to subsection (3), when a place ceases or has ceased to be a Commonwealth place at a particular time the laws of the State in force at that particular time apply or shall be deemed to have applied in or in relation to that place as if those laws had come into operation at that particular time and every Act, whether passed before or after the commencement of this Act, and every instrument made or having effect under any such Act, shall be read and construed as if it provided expressly that it was intended to so apply or to have so applied."

13 Section 14(2) was enacted in apparent anticipation of certain statements by this Court in *Attorney-General (NSW) v Stocks and Holdings (Constructors) Pty Ltd*[10]. These may suggest that, upon the transfer of that land which is the relevant place acquired by the Commonwealth for public purposes, the land ceases to attract the continued exercise of the exclusive federal legislative power and that State law may validly apply by a reference point which is fixed by the loss of the character of the land as a Commonwealth place.

14 The Court of Appeal disagreed with the reasoning of Mason P and went on to decide that *Stocks and Holdings* required a holding that s 14(2) of the State Administration Act was invalid. The Court of Appeal upheld the validity of the assessments of Paliflex to land tax, but only by reliance upon what was identified as the Mirror Taxes Legislation enacted in 1998[11] and including the

---

10 (1970) 124 CLR 262 at 267 per Barwick CJ, 275-276 per Menzies J, 280-281 per Windeyer J; cf at 285, 289 per Walsh J.

11 *Commonwealth Places (Mirror Taxes) Act* 1998 (Cth), *Commonwealth Places (Mirror Taxes Administration) Act* 1998 (NSW).

Commonwealth Places (Mirror Taxes) Regulations 2000 (Cth) and an Arrangement dated 14 February 2002 between the Governor-General and the Governor of New South Wales pursuant to that legislation.

The Paliflex submissions

15 Paliflex in this Court attacked the validity of the Mirror Taxes Legislation on various grounds. The appeal should be decided adversely to Paliflex without any reliance upon the Mirror Taxes Legislation to support the assessments and recovery of land tax. Thus, the Court should not enter upon those questions of alleged invalidity.

16 Two necessary steps in the submissions by Paliflex in this Court are that *(i)* the land tax legislation never applied to the Land at any time after 1956 but, contrary to the holding of Mason P, this was by reason of the denial of State legislative competency by s 52(i) of the Constitution; *(ii)* s 14(2) of the State Administration Act is invalid. This is said to be on the ground that a federal law tracking the terms of s 14(2) would be supported by s 52(i) of the Constitution; it would have a sufficiently close connection with the Land as a place acquired by the Commonwealth for public purposes, despite its transfer to Paliflex, so that the existence of the exclusive federal power denies that of the State to enact s 14(2).

17 The position which this Court should accept is that at no relevant time since 1956 have the Tax Act and the Management Act had any invalid application to the Land. More precisely, *(i)* the New South Wales land tax legislation was not invalid when enacted in 1956; there was no purported exercise by the State of what was the exclusive federal power conferred by s 52(i) of the Constitution; *(ii)* the Land ceased to have the character of a place acquired by the Commonwealth for public purposes on the registration of the transfer to Paliflex on 4 February 1998; and *(iii)* in its application to the Land on the critical dates of 31 December 1998 and 31 December 1999, the State legislation was not an exercise of power with respect to a place acquired by the Commonwealth for public purposes. These conclusions made it unnecessary formally to determine the validity of s 14(2) of the State Administration Act, but its validity is implicit in the reasoning leading to the above conclusions.

The situation in 1956

18 We turn to consider proposition *(i)* listed in [16] above and thus to the situation in 1956 when the Tax Act and the Management Act were enacted. At that stage the Land was "property of any kind belonging to the Commonwealth" within the meaning of s 114 of the Constitution and so, without the consent of the

Parliament of the Commonwealth, New South Wales could not impose any tax upon it. Further, the Land was one of the "places acquired by the Commonwealth for public purposes" within the meaning of s 52(i) of the Constitution. The Land had been acquired in 1922, but the phrase "acquired by the Commonwealth" carries within itself the notion of being the property of the Commonwealth as a consequence of that acquisition.

19 In *Essendon Corporation v Criterion Theatres Ltd*[12], decided in 1947, this Court had considered s 265(b) of the *Local Government Act* 1928 (Vic). This provided for the levying of municipal rates "[u]pon every person who occupies ... or if the occupier is the Crown ... then upon the owner" of the rateable property. The Commonwealth was the occupier of the relevant land for defence purposes. But it was held that it was not "the Crown" for the purposes of s 265(b). Nor was the Commonwealth a "person" who occupied the property. The upshot was that liability for rates was not imposed by s 265(b) upon the owner of the land, Criterion Theatres Ltd.

20 One of the grounds of decision taken by Latham CJ was that to construe the phrase "every person" so as to include the Commonwealth would be to impose a tax upon it contrary to s 114 of the Constitution[13]. Further, both McTiernan J and Williams J[14] had stressed that the phrase "every person" ordinarily is not construed as including a body politic. Dixon J had based his decision upon the ground that, independently of what might be the operation of s 114, it was a necessary consequence of the system of government established by the Constitution that the Constitution did not permit the taxing by a State law of the occupation of land for the carrying on by the Commonwealth of measures of defence[15]. His Honour also had emphasised that the presumption was that in a State statute references to the Crown did not cover the Commonwealth[16].

---

12 (1947) 74 CLR 1.

13 (1947) 74 CLR 1 at 13; cf *Bevelon Investments Pty Ltd v Melbourne City Council* (1976) 135 CLR 530 at 536-537, 538-539, 544, 548-549, 551.

14 (1947) 74 CLR 1 at 28, 30.

15 (1947) 74 CLR 1 at 18, 22. See also *Austin v Commonwealth* (2003) 77 ALJR 491; 195 ALR 321.

16 (1947) 74 CLR 1 at 26. See also *Commonwealth v Western Australia* (1999) 196 CLR 392 at 432-433 [112]-[114].

21 The Management Act provided in s 7:

> "Subject to the provisions of this Act, land tax at such rates as may be fixed by any Act shall be levied and paid upon the unimproved value of all lands situated in New South Wales which are owned by taxpayers, and which are not exempt from taxation under this Act."

That was to be read with s 9(1) which stated:

> "Land tax shall be payable by the owner of land upon the taxable value of all the land owned by him and not exempt from taxation under this Act."

The term "taxpayer" was defined in s 3 as meaning "any person chargeable with land tax", and "owner" was so defined as to include "every person" deemed by provisions such as s 32 (dealing with occupation, control or use by non-owners) to be the owner. In respect of the Land, there was no third party who could have been classified as a deemed owner. Further, the Commonwealth was not, upon the proper construction of the Management Act by application of the principles referred to in *Essendon Corporation*, an "owner" or a "taxpayer". The Land was situated in New South Wales within the meaning of s 7 of the Management Act, but it was not "owned" by a "taxpayer" as that section also required.

22 These conclusions are further supported by the opening words of s 2 of the Management Act, reflecting an awareness both of s 114 and of the doctrine of immunity explained by Dixon J in *Essendon Corporation* and developed very shortly thereafter in *Melbourne Corporation v The Commonwealth*[17]. Section 2 of the Management Act begins:

> "This Act shall be read and construed subject to the Commonwealth of Australia Constitution Act, and so as not to exceed the legislative power of the State ...".

The second limb of s 2 deals with severance to preserve partial validity. Provisions such as s 2 have appeared in a range of State laws[18]. Most of the

---

17 (1947) 74 CLR 31.

18 A general provision following the terms of s 2 was introduced as s 14A of the *Interpretation Act* 1897 (NSW) by the *Interpretation (Amendment) Act* 1969

(Footnote continues on next page)

decided cases have dealt with the second limb[19]. However, the significance here of s 2 is in the confirmation by the first limb of a legislative intention, achieved by the subsequent sections to which reference has been made, to stay within the constraints imposed by the Constitution upon the exercise of the property taxing powers of the State legislature. It may be true that in 1956 the scope of s 52(i) of the Constitution was not appreciated[20], but that of the other constraints was.

23 The conclusion which follows is that the 1956 legislation was not a law with respect to the Land. The phrase "with respect to" appears in both s 51 and s 52 of the Constitution. It should be given no different meaning in s 52 to that in s 51. That this is so appears from *Allders International Pty Ltd v Commissioner of State Revenue (Vict)*[21]. Further, it is not to the point that the law in question may have several characterisations; the task is not to isolate one only of those characterisations as the sole determinant of the sufficiency of connection with the head of legislative power in question. *Allders*[22] and earlier[23] and subsequent[24] authority confirm these propositions. In particular, *Allders* rejected the proposition which had been accepted in the Supreme Court of Victoria[25] that the

---

(NSW). The present provision in s 31 of the *Interpretation Act* 1987 (NSW) is expressed in different terms.

19 The cases include *Carter v The Potato Marketing Board* (1951) 84 CLR 460; *Johnson v Commissioner of Stamp Duties* [1956] AC 331. See also *Harrington v Lowe* (1996) 190 CLR 311 at 326-328.

20 See Rose, "The Commonwealth Places (Application of Laws) Act 1970", (1971) 4 *Federal Law Review* 263; Cowen, "Alsatias for Jack Sheppards?: The Law in Federal Enclaves in Australia", in *Sir John Latham and Other Papers*, (1965) 171 at 187-191.

21 (1996) 186 CLR 630 at 641-642, 661-662, 673.

22 (1996) 186 CLR 630 at 640, 676.

23 See, eg, *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 572.

24 See, eg, *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492 [16].

25 *Allders International Pty Ltd v Commissioner of State Revenue of Victoria* (1995) 129 ALR 678.

stamp duty legislation could not be a law with respect to a Commonwealth place because it was a law with respect to instruments[26].

24 *Allders* also confirms[27] that the boundaries of the power withdrawn by s 52(i) from the States are charted by the grant of exclusive power to the Commonwealth, so that a useful test is to ask whether a federal law similar to the 1956 State legislation would be supported in any of its operations as a law with respect to the Land. The answer must be that such a law would have no connection with the Land, accepting that something more than an insubstantial, tenuous or distant connection is required by the authorities just mentioned.

25 The primary submission, put particularly clearly by the Attorney-General for Victoria as an intervener, should be accepted. The State legislation was not a law with respect to the Land whilst it had the character of a place acquired by the Commonwealth for public purposes; the legislation did not purport to regulate the conduct of persons there, or have any real and substantial impact upon that place.

Stocks and Holdings

26 The decision in *Stocks and Holdings* does not present any obstacle in the path of these conclusions. The land with which that case was concerned had been acquired by the Commonwealth in 1929 as a place for public purposes, namely a rifle range for the defence forces. On 27 June 1951, the County of Cumberland Planning Scheme ("the Scheme") came into force pursuant to the *Local Government (Amendment) Act* 1951 (NSW) which amended the *Local Government Act* 1919 (NSW) ("the LG Act"). At that time the land was in use by the Commonwealth for the Long Bay Rifle Range. Stocks and Holdings (Constructors) Pty Ltd later acquired the land at some point prior to 7 February 1968 from the Randwick Council, to which it had been transferred by the Commonwealth in 1965.

27 The first question for the consideration of the Full Court of this Court asked whether, upon its enactment in 1951, the Scheme "bound the Commonwealth of Australia as owner of the subject land". All five members of the Court answered "No", but, without further explanation to be derived from the

---

26 (1996) 186 CLR 630 at 641-642, 675-676.

27 (1996) 186 CLR 630 at 638, 676.

reasons, the answer is equivocal. That is because the Scheme might not on its own terms have attempted to bind the Commonwealth, or it may have purported to do so but the attempt failed for the denial of State legislative power by s 52(i) of the Constitution.

28 In submissions[28] reliance had been placed upon the interpretation given to s 109 of the Constitution in *Butler v Attorney-General (Vict)*[29]. This was that the phrase in s 109, "to the extent of the inconsistency, be invalid", means not that the State law is beyond legislative power but that it has no legal operation for so long as the federal law is in force.

29 The submission, as recorded by Barwick CJ[30], had been that the Scheme:

> "should be construed as if it contained a provision that its terms should not apply to land being a place or forming part of a place acquired by the Commonwealth for public purposes so long as the Commonwealth should own or possess such place but that it should apply so soon as the Commonwealth ceased to own or to possess the place".

Barwick CJ continued[31]:

> "In my opinion, there are two answers to this submission. The first is that it would not be, in my opinion, an exercise of construction to import such a provision into the scheme. It would, in my opinion, amount to an attempt to legislate.
>
> But secondly and more importantly such a provision, in my opinion, would itself offend s 52(i) for the reasons expressed by my brother Walsh."

---

28 (1970) 124 CLR 262 at 265.

29 (1961) 106 CLR 268.

30 (1970) 124 CLR 262 at 267.

31 (1970) 124 CLR 262 at 267.

Walsh J[32] concluded that, even if the Scheme were construed as suggested, it would still offend s 52(i). His Honour said[33]:

> "It is only if the provisions should be understood as having no application at all to lands which had been acquired by the Commonwealth for public purposes and were still held by it, that the Ordinance would avoid the consequences of s 52(i). But if so understood, those lands, although marked upon the map, would not be within the scheme. The scheme would not apply to them."

McTiernan J concluded[34]:

> "In my opinion the Ordinance in question, which purported on its face, by cll 26-29, to require the consent of the responsible authority before any building might be erected on the range or the land used for any purpose, was a law with respect to the rifle range. The range was delineated and coloured grey on the scheme map which showed the details of the planning scheme. This colour indicated a 'Special Uses Area'. It is stated in cl 3 that 'special uses' include the use of land or buildings for defence areas."

Menzies J put the matter rather differently, saying[35]:

> "[T]he Long Bay Rifle Range was at all times within the scheme but ... the scheme imposed no limitation with respect to its use until the land had been acquired from the Commonwealth by the Council, ie until it ceased to be a place acquired by the Commonwealth."

Windeyer J[36] construed the Scheme as containing an implication that it did "not encroach upon matters that are within the exclusive power of the Commonwealth".

---

32 (1970) 124 CLR 262 at 288.

33 (1970) 124 CLR 262 at 288.

34 (1970) 124 CLR 262 at 269.

35 (1970) 124 CLR 262 at 278.

36 (1970) 124 CLR 262 at 280.

30 The Tax Act and the Management Act are not concerned with the uses to which any land within a delineated geographic area may be put. They impose fiscal burdens only upon those "owners" who are "taxpayers". These are terms which did not include the Commonwealth. Thus, unlike the situation in *Stocks and Holdings*, there is no occasion to read down the 1956 legislation to preserve its validity. Nor, that being so, does one find an attempted reading down which would produce a text which itself would fall foul of s 52(i), as did the proposed reading down in *Stocks and Holdings*.

31 The present case thus falls for decision without the initial complexities which attended the reading in *Stocks and Holdings* of the Scheme at the time of its commencement. If the premise for the decision in *Stocks and Holdings* was that the Scheme, in its terms, was a law with respect to a place acquired by the Commonwealth for public purposes, that premise is absent here. The case for Paliflex has to accept that, whilst the Land was owned by the Commonwealth, there was no State law which was a law with respect to it and so tainted by s 52(i) of the Constitution. The question presented in *Stocks and Holdings* – whether a law with respect to a place acquired by the Commonwealth for public purposes could be read down in such a way that it would no longer bear that characterisation – does not arise. That being so, there is no occasion to reconsider *Stocks and Holdings*.

The situation after the transfer to Paliflex

32 How then does the State legislation fail to support the assessments of Paliflex to tax imposed by reason of its ownership of the Land at dates subsequent to the registration of the transfer by the Commonwealth?

33 The answer, particularly as developed by Paliflex in oral submissions, appeared to depend upon two related propositions. One is that the land tax legislation altered the "incidents of title" to the Land even while it was owned by the Commonwealth because it was apt to decrease the consideration Paliflex had been prepared to pay to acquire it, or any purchaser of the *Spencer* species[37] would have been prepared to pay. Secondly, s 52(i), it was said, protected against State legislative interference with the interest of the Commonwealth in parting with places held by it for public purposes by turning them to maximum revenue account.

---

37 *Spencer v The Commonwealth* (1907) 5 CLR 418 at 431-432.

34 Hence, the submission appears to be that it is within the exclusive legislative competence of the Commonwealth to insulate Paliflex (and, perhaps, subsequent owners of the Land) from the imposition of land tax by reason of ownership of the Land at times after registration of a transfer by the Commonwealth. In argument, Paliflex propounded a federal law supported by s 52(i), the text of which was:

> "A person who acquires a Commonwealth place from the Commonwealth shall not, at the time of acquisition by that person, be then exposed by any enactment of the State to any tax referable to that person's ownership of the place."

35 There is an immediate difficulty with these submissions. It is of an evidentiary nature. The agreed facts do not reveal the manner of, nor considerations which affected, the computation of the purchase price and its acceptance by the Commonwealth as vendor.

36 Further, there may be a real question about what significance is to be attached to economic consequences of the kind asserted in deciding whether an impugned law is a law with respect to a subject-matter identified in s 52(i). As Kitto J said in *Fairfax v Federal Commissioner of Taxation*[38], the question of constitutional validity under s 51 of the Constitution:

> "is always one of subject matter, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes; it is a question as to the true nature and character of the legislation: is it in its real substance a law upon, 'with respect to', one or more of the enumerated subjects, or is there no more in it in relation to any of those subjects than an interference so incidental as not in truth to affect its character?"[39]

---

38 (1965) 114 CLR 1 at 7.

39 Kitto J referred to *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 185-187 per Latham CJ, and *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 409-411 per Higgins J. See also *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 334 per Mason CJ, 336-337 per Brennan J, 351-352 per Toohey J; *Leask v The Commonwealth* (1996) 187 CLR 579 at

(Footnote continues on next page)

It is unnecessary to explore this question of the significance to be given to economic consequences further than to notice that *Fairfax* was a case in which the economic consequences of the impugned law were held not to *deny* its character as a law with respect to taxation. There are considerations flowing from the scope and purpose of s 52(i) of the Constitution which, in any event, indicate that the assumptions in Paliflex's submissions should not be accepted.

The scope and purpose of s 52(i)

37 Section 52 of the Constitution states:

> "The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> (i) the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes;
>
> (ii) matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth;
>
> (iii) other matters declared by this Constitution to be within the exclusive power of the Parliament."

38 In *Svikart v Stewart*[40], Mason CJ, Deane, Dawson and McHugh JJ observed that the terminology of s 52(i) reflected that of cl 17 of s 8 of Art I of the United States Constitution, and that "the American experience was instructive" in the drafting of s 52. The United States provision is as follows:

590-591 per Brennan CJ, 634 per Kirby J; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 372 [58] per Gummow and Hayne JJ; *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 411 [202] per Gummow and Hayne JJ; and the judgment of the Court in *Re Maritime Union of Australia; Ex parte CSL Pacific Inc* (2003) 200 ALR 39 at 48 [35].

40 (1994) 181 CLR 548 at 561.

"The Congress shall have Power ...

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings".

The phrase "other needful Buildings" extends to "whatever structures are found to be necessary in the performance of the functions of the Federal Government"[41], and includes court buildings, customs houses, and locks and dams for the improvement of navigation[42].

39 In the joint reasons in *Svikart*, their Honours said of the United States provision[43]:

"The first part of cl 17, relating to the seat of government, is said to have been prompted by occurrences which took place near the close of the Revolutionary War when Congress in session in Philadelphia was surrounded and insulted by a body of mutineers of the Continental Army and the State did little to assist[44]. The second part, dealing with places purchased with the consent of the State, was thought necessary so that the consent of the State would carry with it political dominion and legislative authority. This was before the right of eminent domain was recognized[45], and the view was that, in the case of land acquired without consent, the possession of the United States would be simply that of an ordinary proprietor subject to the legislative authority and control of the State[46]."

---

41 *James v Dravo Contracting Co* 302 US 134 at 143 (1937).

42 *James v Dravo Contracting Co* 302 US 134 at 142-143 (1937).

43 (1994) 181 CLR 548 at 559.

44 See *Spratt v Hermes* (1965) 114 CLR 226 at 273.

45 See *Kohl v United States* 91 US 367 (1875).

46 See *Fort Leavenworth Railroad Co v Lowe* 114 US 525 at 538, 542 (1885).

40 Special considerations attend the first limb of s 52(i), that concerned with the seat of government of the Commonwealth. Section 125 required that seat to be within territory in New South Wales which was to be granted to or acquired by the Commonwealth. It was held in *Svikart*[47], and affirmed in *Re the Governor, Goulburn Correctional Centre; Ex parte Eastman*[48], that the seat of government and the Australian Capital Territory are not synonymous terms. The result is that s 122 has a large part to play and the power under the first limb of s 52(i) is concerned with political or constitutional aspects of the seat of government rather than with the government of the territory in which it is found.

41 In *Svikart*, Mason CJ, Deane, Dawson and McHugh JJ concluded[49] that the second limb of s 52(i) was intended to provide for exclusive Commonwealth legislative power with respect to places in a State acquired by the Commonwealth and that:

> "[t]o achieve this in an Australian context there was no need, as there was in the United States, to think in terms of territorial sovereignty. It was sufficient that acquisition of property should carry with it legislative authority without political dominion."

To that, reference to s 85[50] of the Constitution and to s 51(xxxi) might be added. In particular, *(a)* s 85(i) itself vested certain State property in the

---

47 (1994) 181 CLR 548 at 561.

48 (1999) 200 CLR 322 at 333-334 [14], 335-336 [22], 353 [82], 369 [120].

49 (1994) 181 CLR 548 at 560-561.

50 Section 85 states:

> "When any department of the public service of a State is transferred to the Commonwealth:
>
> (i) all property of the State of any kind, used exclusively in connexion with the department, shall become vested in the Commonwealth; but, in the case of the departments controlling customs and excise and bounties, for such time only as the Governor-General in Council may declare to be necessary;
>
> (ii) the Commonwealth may acquire any property of the State, of any kind used, but not exclusively used in connexion with the

(Footnote continues on next page)

Commonwealth[51], but with an obligation under s 85(iii) to provide compensation; *(b)* s 85(ii) conferred a specific power of acquisition of State property but for value; and *(c)* in so far as the acquisition of the place in question was the result of the exercise upon the State or any person of other compulsive powers, s 51(xxxi) required the acquisition to have been on just terms and for a purpose in respect of which the Parliament had power to make laws. Further, where the acquisition is the product, not of the exercise of powers of compulsion, but of agreement then, whilst s 51(xxxi) will have no application[52], s 52(i) will.

42 The United States position has developed rather differently in several respects. First, it was only in the second half of the nineteenth century that it was established by *Kohl v United States*[53] and *Fort Leavenworth Railroad Co v Lowe*[54] that the United States held a right of eminent domain "to take private property for public uses when needed to execute the powers conferred by the Constitution"[55] and this right was not dependent upon purchase by consent of the

---

department; the value thereof shall, if no agreement can be made, be ascertained in, as nearly as may be, the manner in which the value of land, or of an interest in land, taken by the State for public purposes is ascertained under the law of the State in force at the establishment of the Commonwealth;

(iii) the Commonwealth shall compensate the State for the value of any property passing to the Commonwealth under this section; if no agreement can be made as to the mode of compensation, it shall be determined under laws to be made by the Parliament;

(iv) the Commonwealth shall, at the date of the transfer, assume the current obligations of the State in respect of the department transferred."

51 See *R v Bamford* (1901) 1 SR (NSW) 337.

52 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 416-417.

53 91 US 367 (1875).

54 114 US 525 (1885).

55 114 US 525 at 531 (1885).

State legislature required by cl 17 of s 8 of Art I of the Constitution[56]. Secondly, it has been held that cl 17 is applicable to cases where the State conveys land for a purpose specified therein but reserves and the United States accepts "concurrent jurisdiction" which is "not inconsistent with the jurisdiction ceded to the United States"[57]. Finally, it was established in *Collins v Yosemite Park Co*[58] that a State may convey, and the Congress may accept, either exclusive or qualified jurisdiction over property acquired, within the geographical limits of a State, for purposes other than those identified in cl 17. These purposes include forests, parks, ranges, wild life sanctuaries and flood control[59].

43 However, the United States jurisprudence does assist in indicating the values of federalism which underpin both cl 17 and s 52(i). Writing in *The Federalist*[60], Madison explained the necessity of federal authority over forts, magazines and other "needful buildings" as being that[61]:

> "[t]he public money expended on such places, and the public property deposited in them, require that they should be exempt from the authority of the particular State".

Thereafter, in *Fort Leavenworth*[62], Field J adopted what had been said in this passage from *The Federalist*.

44 A significant pointer in the same direction is provided by the phrase in s 52(i) "*acquired* by the Commonwealth *for public purposes*" (emphasis added).

---

56 *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89 at 99.

57 *James v Dravo Contracting Co* 302 US 134 at 145 (1937).

58 304 US 518 at 528-530 (1938).

59 304 US 518 at 529-530 (1938).

60 Essay No 43, 23 January 1788.

61 Kurland and Lerner (eds), *The Founders' Constitution*, (1987), vol 3 at 219. See also Story, *Commentaries on the Constitution of the United States*, (1833), vol 3, §1219.

62 114 US 525 at 530 (1885).

In *Worthing v Rowell and Muston Pty Ltd*[63], Windeyer J said that these words "express a large and general idea". The terms "public use" and "public purpose" had had even before Federation a lengthy and significant history in Australia, particularly with respect to reservations from powers of disposition of the "waste lands" of the Crown[64]. In *Worthing*[65], Windeyer J expressed the view that the method of acquisition might be by "any process known to the law", including by voluntary disposition *inter vivos* or testamentary disposition in favour of the Commonwealth. His Honour continued[66]:

> "And public purposes are not necessarily purposes for which the Parliament can make laws. I can see no reason why the Commonwealth, or a Commonwealth statutory body on behalf of the Commonwealth, should not be able to accept a gift from a landowner by his deed or will of land for the purpose, say, of a public park, just as I suppose it could become by gift possessed of pictures or books for public use and enjoyment."

45 It is unnecessary for this appeal to determine whether these propositions as to the scope of the phrase "acquired ... for public purposes" in s 52(i) are to be accepted. What is significant is that *(a)* the "public purposes" spoken of in s 52(i) include at least those in respect of which the Parliament otherwise has power to make laws[67] and *(b)* the word "for" is indicative of a continued or continuing end to be attained or object met by the retention by the Commonwealth of the property consequent upon that process of law by which it was acquired. That retention thus has "a purposive aspect"[68]. The pursuit of

---

63 (1970) 123 CLR 89 at 125.

64 *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 589-590 [58]-[59]; *Western Australia v Ward* (2002) 76 ALJR 1098 at 1147-1155 [197]-[244]; 191 ALR 1 at 69-81.

65 (1970) 123 CLR 89 at 127.

66 (1970) 123 CLR 89 at 127.

67 cf *Victoria v The Commonwealth and Hayden* ("the *Australian Assistance Plan Case*") (1975) 134 CLR 338.

68 cf *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 487.

purpose is insulated against the intrusion of State legislative power by the reach of the phrase "with respect to" in the identification of the exclusivity of federal legislative power. The question will be whether the State law in question has a connection with the place concerned which is more than insubstantial, tenuous or distant.

46 In *Stocks and Holdings*, both Menzies J[69] and Windeyer J[70] referred to the decision of the Supreme Court of the United States in *SRA Inc v Minnesota*[71] in support of the construction of s 52(i). Windeyer J expressed his conclusion by relating it to the facts in *Stocks and Holdings* by saying[72]:

> "In 1965 the Commonwealth, no longer requiring the whole of its rifle range land, disposed of part by transfer to the Council of the Municipality of Randwick; and later the Council transferred a part of what it had thus acquired to the defendant, Stocks and Holdings (Constructors) Pty Ltd, which proposes to build an hotel there. *As I read s 52 of the Constitution, the exclusive power of the Commonwealth with respect to a place it has acquired subsists only so long as it holds the place for that purpose.* If the Commonwealth transfers land to the State, it becomes land of the Crown in right of the State. If the Commonwealth transfers it absolutely to a person, it becomes vested in the transferee as tenant in fee simple in right of the State. In either event the authority of the Commonwealth Parliament in respect of the place comes to an end: and so, in my view, do any laws that the Parliament made by virtue only of its exclusive power to make laws with respect to the place, unless the State Parliament legislates to keep them alive. This result flows from the nature of the Commonwealth power under s 52 with respect to places." (emphasis added)

Menzies J described[73] s 52(i) as an exclusive power to make laws for property so long as it fulfils the description of a place "acquired by the Commonwealth for

---

69 (1970) 124 CLR 262 at 276-277.

70 (1970) 124 CLR 262 at 280-281.

71 327 US 558 (1946).

72 (1970) 124 CLR 262 at 280-281.

73 (1970) 124 CLR 262 at 277.

public purposes" but not thereafter. The reasoning of Menzies J and Windeyer J reflected the statement in *SRA Inc*[74]:

> "As the purpose of Clause 17 was to give control over the sites of governmental operations to the United States, when such control was deemed essential for federal activities, it would seem that the sovereignty of the United States would end with the reason for its existence and the disposition of the property."

Conclusions with respect to the post-transfer period

47 The construction of the exclusive federal legislative power in s 52(i) and the terminal point fixed by Menzies J and Windeyer J should be accepted. That has fatal consequences for the submissions by Paliflex. The land tax legislation in its support of the liability of Paliflex to land tax by reason of its ownership of the Land on 31 December 1998 and 1999 was not a law with respect to a place acquired by the Commonwealth for public purposes.

48 The land tax legislation did not create or impose any obligation or duty upon the owner of the Land until a date after the registration of the transfer to Paliflex. That may be contrasted with the operation of the stamp duty law upon the transfer of the Land to Paliflex. That duty was imposed upon the instrument by which the Land ceased to have the character of a place acquired by the Commonwealth for public purposes. The stamp duty law was a law with respect to the Land having that character and so trespassed upon the ground marked out by s 52(i).

49 The interest or concern of the Commonwealth in aid of which s 52(i) gave to the Parliament exclusive legislative power subsisted for so long as the Commonwealth held the Land for public purposes and the grant of exclusive power was correspondingly circumscribed. That interest or concern did not extend to the exclusion of any exercise of State legislative power which might tax the ownership of the Land in the hand of a transferee from the Commonwealth. To the extent that it could be shown that the projected operation of a State tax regime might or could affect the price obtained on a transfer by the Commonwealth when land was no longer held for public purposes, the connection would be so insubstantial, tenuous and distant as to be beyond the preserve of federal exclusive legislative power. That is a

---

74 327 US 558 at 564 (1946).

consequence of the construction of the second limb of s 52(i) which sees it as being concerned with the fulfilment of the public purpose, freed from any exercise of State legislative power with respect to the place.

50 It was accepted in argument that there was contained within the exclusive grant in s 52(i) everything incidental to the main purpose of the power, within the sense of *McCulloch v Maryland*[75]. Without determining the point, it also may be accepted that, although found in s 51, the grant of law-making power with respect to matters incidental to the *execution* of legislative powers, conferred by par (xxxix), extends to the incidents in the exercise of the grant in s 52(i). The hypothetical federal law which would immunise Paliflex from liability to land tax would not be incidental to the main purpose of the grant in s 52(i), and would not concern the incidents of the exercise of that grant.

51 It remains to indicate that nothing inconsistent with the above reasoning appears in the treatment by the majority of the third question in *Stocks and Holdings*. After the transfer of the land by the Commonwealth to Randwick Council in 1965, a new interim development order ("the IDO") was made after suspension by the Minister of the pre-existing Scheme. It was held (Menzies J and Windeyer J dissenting) that upon the true construction of s 342Y of the LG Act the exercise of the power to make the IDO was conditioned upon the continued and valid operation with respect to the land in question of the Scheme the IDO superseded. As explained earlier in these reasons, the Scheme did not have that valid operation. For this reason, dependent upon the construction of s 342Y, not s 52(i) of the Constitution, the majority[76] answered "No" the question whether the notification of the IDO in 1965 bound the then owner and subsequent owners, including Stocks and Holdings.

Orders

52 For these reasons, which depart from those of the Court of Appeal, the appeal should be dismissed with costs.

---

75 17 US 159 at 206 (1819). See also *Le Mesurier v Connor* (1929) 42 CLR 481 at 497-498.

76 (1970) 124 CLR 262 at 268 per Barwick CJ, 270 per McTiernan J, 289-292 per Walsh J.

53 CALLINAN J. The facts, the relevant legislation and authorities, the submissions of the parties, and the course of the proceedings are fully stated in the judgment of Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ in whose proposed orders I would join.

54 The propositions advanced by the appellant immediately strike one as improbable, if not extraordinary. A State law is enacted in respect of land owned at the time of its enactment by the Commonwealth. That law cannot (absent valid mirror or applicable other subsequent legislation) have any valid operation in relation to that land no matter that it may have passed into other hands. Just how improbable the proposition is was brought home during the appellant's submissions when it was unable to say, when challenged, for how long, and for how many successive ownerships the asserted immunity from the State law should or could endure. Were it not for the decision of this Court in *Allders International Pty Ltd v Commissioner of State Revenue (Vict)*[77] and *Attorney-General (NSW) v Stocks and Holdings (Constructors) Pty Ltd*[78] ("*Stocks & Holdings*"), it is doubtful whether the appellant's arguments could have been credibly advanced at all.

55 The appeal fails on the basis that the two State enactments, the *Land Tax Management Act* 1956 (NSW) ("the LTMA") and the *Land Tax Act* 1956 (NSW), never had, or purported to have any application to the Commonwealth and any land owned by it within the State. Each of, and in combination, ss 3, 7 and 9 of the LTMA, the sections by which land tax is levied, refer or are intended to operate in relation to "land ... owned by taxpayers". As the Commonwealth is not a taxpayer it does not answer that description. Furthermore, the Commonwealth is, to put it at its lowest, constitutionally exempt from any obligation to pay land tax to the State.

56 Statements made by some members of the Court in *Stocks & Holdings* need to be read in the light of the first in particular of the questions stated and answered in that case[79]:

> "(1) Whether upon its enactment on 27th June 1951, the County of Cumberland Planning Scheme Ordinance bound the Commonwealth as owner of the subject land.
>
> No."

---

77 (1996) 186 CLR 630.

78 (1970) 124 CLR 262.

79 (1970) 124 CLR 262 at 292.

57 Walsh J (with whom Barwick CJ generally agreed[80]) said this of the State Act and Ordinance under consideration there[81]:

> "*If upon their proper construction, the 1951 Act and the Ordinance applied to the rifle range land, I think that those enactments must be held to have been to that extent beyond power and invalid. Unless they should be construed as less extensive in meaning than their general terms would indicate, they cannot be held to be wholly valid.* It was submitted that the provisions should be by construction confined so that they do not exceed what the Parliament of the State was competent to enact. The learned Solicitor-General for New South Wales submitted that the provisions were not intended to bind the Commonwealth or the land, whilst it remained in Commonwealth ownership, but were intended to bind the land and the owners of it for the time being (whether individuals, corporations or States) after the cessation of Commonwealth ownership. The submission is not simply that the provisions should be construed as not binding the Commonwealth. It is that they should be construed as not intended 'to bind the land' so long as it is owned by the Commonwealth ...
>
> To the extent that the 1951 Act and its Schedule should be read as having even the limited application to the land which the informant's arguments must postulate, it would be in my opinion invalid because of s 52(i). I do not mean that there would be any invalidity in showing the land on the map to which the Act refers in order to make it easier to understand the map or simply for the purpose of identifying land and stating facts as to its existing ownership and use. But if no more than that was done, I think that the land would not be brought within the scheme. It would not be land to which the scheme 'applies'. On the other hand, if the enactment is read as making the scheme apply to the land, and as issuing directions as to its use, whether in the present or in the future, I think that it is to that extent beyond legislative power." (emphasis added)

58 McTiernan J reached the same conclusion for similar reasons[82]. Menzies J expressed, with respect, a persuasive different view[83].

59 *Stocks & Holdings* may however be distinguished. The presence and language of s 7 of the LTMA relevantly bring that Act within the qualification

---

80 (1970) 124 CLR 262 at 266.

81 (1970) 124 CLR 262 at 285-287.

82 (1970) 124 CLR 262 at 269.

83 (1970) 124 CLR 262 at 275.

expressed by Walsh J in the first two sentences of the passages in his judgment that I have quoted. Section 7 is a provision which states in terms that the apparently general language "all land" is qualified, and is to be confined to "land owned by a taxpayer" or, to put it in the negative, to "land not owned by a non-taxpayer". Accordingly, it is not necessary, as the Court was invited to do, to re-open *Stocks & Holdings*, or to consider whether the view of Menzies J on this point should be preferred[84]:

> "Here, it seems to me, that the exclusion of the Commonwealth and of Commonwealth land from the restrictions and prohibitions of the scheme was so obviously necessary for validity that it is proper to conclude that such exclusion was intended, and, the mere fact that there are no express words of exclusion, does not warrant the invalidation of the scheme as a whole."

60 Nor is it necessary to explore a further possible, at least apparently valid, point of distinction: that because what was in issue there was a planning scheme, applying not only to the rifle range, but also to other land surrounding and near to it, the scheme at the time of its enactment had to be viewed, unlike for example, a land tax enactment, as a composite whole, which for its practical utility had to be wholly valid in its application to all lands to which it purported to apply. In a planning scheme the use to which one parcel of land is to be put may well influence the permissible or desirable uses of other land covered by the scheme and vice versa[85].

61 The appellant contended that the two Acts burdened Commonwealth land. It was unable to identify any effect upon it however, except as to its value: in short that the Commonwealth could sell it for more if it were exempt from land tax. Attempts by the appellant to liken this circumstance to a defect in title were unconvincing. That the Commonwealth might get a better price if it could immunise land it owned from land tax for a period, or indefinitely, has nothing to say about the nature and completeness of the title that it can convey. Apart from the more obvious policy considerations arguing against the result sought by the appellant, that land no longer in Commonwealth ownership and therefore no longer used for any public purpose should nonetheless continue to have a tax free status, there is this. The Commonwealth owned no land at the time of Federation. Everything it has (apart from land transferred or ceded to it pursuant to ss 85 and 125 of the Constitution or given to it), must have been acquired either by purchase, overshadowed no doubt by its ultimate power of compulsory

---

84 (1970) 124 CLR 262 at 275.

85 cf *Attorney-General (NSW) v Stocks and Holdings (Constructors) Pty Ltd* (1970) 124 CLR 262 at 280 per Windeyer J.

acquisition, or by compulsory acquisition. On acquisition it would have paid no additional sum for it because it was to be used for a Commonwealth public purpose, one relevant incident of which is freedom from State land tax. That follows from settled principle now enacted as s 60 of the *Lands Acquisition Act* 1989 (Cth) which relevantly provides:

> "In assessing compensation, there shall be disregarded:
>
> (a) any special suitability or adaptability of the relevant land for a purpose for which it could only be used pursuant to a power conferred by or under law, or for which it could only be used by a government, public or local authority;
>
> ...
>
> (c) any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the purpose for which the interest was acquired; and
>
> ..."

62 An enactment under the Constitution may not of course be used to construe the Constitution, but s 60 of the *Lands Acquisition Act* reflects the law in force in relation to compulsory acquisitions at the time of Federation and of which the drafters may be taken to have known. That law is described in *Corrie v MacDermott*[86] on appeal from this Court to the Privy Council which explained the much earlier cases of *Hilcoat v Archbishops of Canterbury and York*[87] and *Stebbing v Metropolitan Board of Works*[88]. The principle was shortly stated as[89]:

> "The value which has to be assessed is the value to the old owner who parts with his property, not the value to the new owner who takes it over."

It would be odd, if having acquired land for a price which was unaffected by the incidents of public ownership, an acquiring authority should be entitled to sell it to an ordinary purchaser at a price enhanced by the continuation of a status entirely inappropriate to its new ownership and usage.

---

86 (1914) 18 CLR 511; [1914] AC 1056.

87 (1850) 10 CB 327 [138 ER 132].

88 (1870) LR 6 QB 37.

89 *Corrie v MacDermott* (1914) 18 CLR 511 at 514; [1914] AC 1056 at 1062.

63 What I have said is sufficient to dispose of the appeal. It is unnecessary to deal with the applicability or otherwise of the mirror legislation to which the Court of Appeal had regard in deciding the appeal to it.

64 The appeal should be dismissed with costs.