HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

ICM AGRICULTURE PTY LTD
ABN 32 006 077 765 & ORS PLAINTIFFS

AND

THE COMMONWEALTH OF AUSTRALIA & ORS DEFENDANTS

ICM Agriculture Pty Ltd v The Commonwealth [2009] HCA 51
9 December 2009
S24/2009

ORDER

Order that the questions stated in the special case be answered as follows:

Question 1: By reason of s 51(xxxi) of the Constitution:

(a) did the Commonwealth lack executive power to enter into the Funding Agreement?

(b) is the [*National Water Commission Act* 2004 (Cth)] invalid insofar as it authorised the CEO to enter into the Funding Agreement on behalf of the Commonwealth?

Answer: *The replacement of the plaintiffs' bore licences did not constitute an acquisition of property within the meaning of s 51(xxxi) of the Constitution. Accordingly, the questions of invalidity posed in paragraphs (a) and (b) of Question 1 do not arise.*

Question 2: If the answer to either part of Question 1 is "yes", are all or any of:

(a) the Amendment Regulation;

(b) the Proclamation;

(c) the Amendment Order;

invalid or inoperative as a consequence?

Answer: *Does not arise.*

Question 3: Do the plaintiffs remain the holders of all or any of the bore licences issued to them under the [*Water Act* 1912 (NSW)]?

Answer: *No.*

Question 4: If the answers to Questions 2 and 3 are "no", do the plaintiffs have an implied right under the Constitution to recover from the Commonwealth such compensation for the loss of their bore licences as would constitute "just terms" within the meaning of s 51(xxxi) of the Constitution?

Answer: *Does not arise.*

Question 5: Who should pay the costs of this Special Case?

Answer: *The plaintiffs.*

Representation

R J Ellicott QC with M G McHugh and W A D Edwards for the plaintiffs (instructed by Martine Anderson Legal Counsel for ICM Australia Pty Ltd)

S J Gageler SC, Solicitor-General of the Commonwealth with A Robertson SC and C L Lenehan for the first and second defendants (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales with J K Kirk for the third and fourth defendants (instructed by Crown Solicitor (NSW))

Interveners

R J Meadows QC, Solicitor-General for the State of Western Australia and R M Mitchell SC intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor for Western Australia)

P M Tate SC, Solicitor-General for the State of Victoria with K L Emerton SC and G A Hill intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

W Sofronoff QC, Solicitor-General of the State of Queensland with G J D del Villar intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Law (Qld))

M G Hinton QC, Solicitor-General for the State of South Australia with S T O'Flaherty intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor (South Australia))

ICM Agriculture Pty Ltd v The Commonwealth

Constitutional law (Cth) – Powers of Commonwealth Parliament – Agreement between Commonwealth and a State – *National Water Commission Act* 2004 (Cth) authorised Chief Executive Officer ("CEO") of National Water Commission to enter into funding agreement with State – Whether CEO authorised to enter into funding agreement with State for purpose of State acquiring property on other than just terms – Whether legislative power conferred by s 96 of Constitution, or by s 96 with s 51(xxxvi), is subject to limitations contained in s 51(xxxi) – Relevance of distinction between coercive and non-coercive legislative power.

Constitutional law (Cth) – Powers of Commonwealth Parliament – Acquisition of property on just terms – Plaintiffs held bore licences under *Water Act* 1912 (NSW) ("Water Act") – Plaintiffs' licences replaced with aquifer access licences under *Water Management Act* 2000 (NSW) – Whether Water Act divested common law rights with respect to extraction of groundwater – Whether plaintiffs' Water Act licences property within s 51(xxxi) of Constitution – Whether replacement of licences amounted to acquisition of property.

Words and phrases – "abstraction", "acquisition", "coercive and non-coercive power", "control", "just terms", "property", "the use and flow".

Constitution, ss 51(xxxi), 51(xxxvi), 61, 96.
Irrigation, Water, Crown Lands and Hunter Valley Flood Mitigation (Amendment) Act 1966 (NSW), s 3.
National Water Commission Act 2004 (Cth), s 24.
Water Act 1912 (NSW).
Water Management Act 2000 (NSW), s 45(1), Sched 10, item 3.
Water Rights Act 1896 (NSW), s 1(I).

FRENCH CJ, GUMMOW AND CRENNAN JJ.

Introduction

1 The Lower Lachlan Groundwater System ("the LLGS") in central New South Wales covers some 29,770 square kilometres, extending from the upper limits of the Wyangala Dam to the junction of the Lachlan River with the Murrumbidgee River. Agricultural enterprise in the LLGS is dependent on a combination of groundwater and surface water. Groundwater is water occurring under the surface of the ground, regardless of whether it is moving or still, and regardless of the geological structure in which it is contained. The expression can also include artesian and sub-artesian water. Surface water is water occurring naturally that is not groundwater and includes water occurring in the whole or part of a river, lake or estuary.

2 Demand for water for agricultural purposes in the LLGS, as in many other agricultural regions in Australia, has been affected from time to time by water shortages. Water in these areas also has an important part to play in the maintenance of environmental balance and natural ecosystems.

3 Successive governments of the State of New South Wales ("the State") have long monitored, regulated and restricted access to and use of both groundwater and surface water. Policies have been formulated and pursued so as to achieve equitable access among water users, to mitigate adverse effects on the environment, and to ensure that water, as a finite and fluctuating natural resource, is able to be replenished for future use. The extraction and use of water has been regulated by statute since 1896, and, in particular, from 1912 principally by the *Water Act* 1912 (NSW) ("the 1912 Act" or "the Water Act"). The *Water Management Act* 2000 (NSW) ("the 2000 Act") provided[1] for the repeal of the 1912 Act. This litigation follows upon the replacement of the one statutory regime with the other.

4 The three plaintiffs conduct farming businesses on land in the State which is near the Lachlan River and within the LLGS. Extraction of groundwater from the LLGS began in the early 1960s. Before the changes to the law of the State the plaintiffs used for irrigation groundwater extracted pursuant to a number of "bore licences" issued under the 1912 Act.

5 Water for irrigation also was drawn by the plaintiffs under licences issued pursuant to the 1912 Act for the drawing of surface water. These licences are not

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1 Section 401 and Sched 7.

in issue in this case. However, when dealing with submissions respecting the nature of water rights as understood both at common law and in the statute law of the State, it will be necessary to consider the legal character of both groundwater and surface water.

6 On 1 February 2008 the bore licences were replaced by a new system of licences issued under the 2000 Act and styled aquifer access licences. These permit the plaintiffs to take less water than had been allowed under the bore licences. The loss represents a decrease in entitlements under the bore licences of about 70 per cent in the case of the first and second plaintiffs (together "ICM") and 66 per cent in the case of the third plaintiff ("Hillston"). Reference will be made later in these reasons to the steps by which the State introduced this new system.

The proceedings

7 On 6 February 2009 the plaintiffs were offered by the State what were called structural adjustment payments. These comprised a total of $818,730 to ICM and $93,830 to Hillston. The plaintiffs complain of the inadequacy of the proposed structural adjustment payments. It is conceded by the Commonwealth that the making of these payments would not amount to "just terms" within the meaning of s 51(xxxi) of the Constitution.

8 By action commenced in the original jurisdiction of this Court, the plaintiffs contend that the steps taken under the 2000 Act to reduce their access to groundwater amount to an acquisition of their property otherwise than on just terms, contrary to the constitutional guarantee found in s 51(xxxi) of the Constitution and interpreted by decisions of this Court. Pursuant to r 27.08 of the High Court Rules 2004, there is before the Full Court a special case posing five questions for determination. The questions are so expressed as not immediately to reflect all of the issues debated before the Full Court. It is convenient to defer setting out the text of the questions, and to deal first with the circumstances of the case and the legislation of the Commonwealth and the State, and then with the fate of the submissions of the parties and interveners.

9 The starting point is the text of s 51(xxxi), which is directed to laws made by the Parliament of the Commonwealth with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which that Parliament has power to make laws. In the present case, where is there in play any relevant law of the Commonwealth? The answer the plaintiffs give to that question requires attention to dealings between the Commonwealth and the State which preceded the replacement of the bore licences on 1 February 2008.

The National Water Commission

10 The offers of structural adjustment payments were made to ICM and Hillston by the State acting pursuant to provision in the Schedule to an instrument ("the Funding Agreement") dated 4 November 2005. The parties to the Funding Agreement are the Commonwealth (the first defendant) "as represented by and acting through the National Water Commission" ("the NWC") (the second defendant) and the State (the third defendant) "as represented by and acting through the Department of Natural Resources". The Schedule stated requirements that the State, relevantly: (a) implement Water Sharing Plans, as provided for in the 2000 Act, that reduce over a 10 year period the water entitlements of licence holders to ensure sustainable future use of a number of groundwater systems including the LLGS; and (b) make "up-front *ex gratia* structural adjustment payments" to licence holders. The Minister administering the 2000 Act ("the Minister") is the fourth defendant.

11 Provision of funds for the structural adjustment payments under the Funding Agreement is to be shared equally by the State and the Commonwealth. Clause 4.1 stated that, subject to sufficient appropriations and compliance by the State with the Funding Agreement, the Commonwealth would provide the State with the funding detailed in the Schedule. The term "Commonwealth" was so defined as to mean the Commonwealth as represented by and acting through the NWC.

12 The NWC was established by s 6 of the *National Water Commission Act* 2004 (Cth) ("the NWC Act" or "the National Water Commission Act"). Its functions include (s 7(1)(a)) assisting with the implementation of an intergovernmental agreement first entered into on 25 June 2004 and known as the National Water Initiative ("the NWI"). The Funding Agreement recites the provision of funding by the NWC for activities that assist in implementing the NWI and the requirement for the provision of Commonwealth funding that the State be actively implementing the NWI. One of the key objectives of the NWI was to return currently overallocated or overused water systems to environmentally sustainable levels of extraction.

13 Section 40 of the NWC Act established "the Australian Water Fund Account" ("the Account"). The Account is a Special Account for the purposes of s 21 of the *Financial Management and Accountability Act* 1997 (Cth). There is thus a standing appropriation for s 83 of the Constitution, from the Consolidated Revenue Fund established by s 81, for expenditure for the purposes of the Account. Under the NWC Act, the functions of the Chief Executive Officer ("the CEO") of the NWC include (s 24) the administration by debits from the Account of financial assistance awarded by the Minister under s 42 to particular projects relating to Australia's water resources.

14 Section 42 of the NWC Act states:

"The purposes of the Special Account, in relation to which amounts may be debited from the Account, are:

(a) to provide financial assistance that is:

(i) awarded by the Minister to particular projects relating to Australia's water resources; and

(ii) determined by the Minister to be provided from the Account; or

(b) to pay or discharge the costs, expenses or other obligations incurred by the Commonwealth in the performance of the NWC's functions under this Act or the regulations; or

(c) to pay any remuneration or allowances payable to any person under this Act."

15 On 9 June 2005, that is to say before the date of the Funding Agreement, the Prime Minister announced the provision of moneys from the Australian Water Fund as an equal contribution to that of the State with the objective, in accordance with the aims and objectives of the NWI, of achieving sustainable groundwater systems including the LLGS.

16 The Premier of the State previously had nominated for such funding a project including a plan for the LLGS to achieve sustainable levels of groundwater extraction by significantly reducing over a 10 year period the water access entitlements of licence holders. This was consistent with the State's Groundwater Policy, announced in 1997, which recognised the stress placed upon groundwater extraction in some areas, jeopardising the long-term sustainability of supply.

The 2008 Order, the Proclamation and the 2008 Regulation

17 On 11 January 2008 the Minister, acting pursuant to s 45(1) of the 2000 Act, made an order ("the 2008 Order" or "the Amendment Order") amending the existing Water Sharing Plan for the LLGS ("the Lower Lachlan Plan"). The Minister did so after written advice by Departmental Minute dated 19 December 2007 to the effect that the amendments were necessary to align the plan with approvals under the Funding Agreement. The phrase in the advice "the joint $130 million" refers to the total amount to be provided by the Commonwealth to the State pursuant to the Funding Agreement.

18 By Proclamation dated 30 January 2008[2], the provisions of Pt 2 (dealing with access licences) and Pt 3 (dealing with approvals) of Ch 3 of the 2000 Act were applied to the LLGS ("the Proclamation"). A regulation made under the 2000 Act, with a commencement date of 1 February 2008, the Water Management (General) Amendment (Lower Lachlan) Regulation 2008 ("the 2008 Regulation" or "the Amendment Regulation"), established the new water access licence system for the LLGS in place of the bore licences under the 1912 Act. The Proclamation and the 2008 Regulation are so drawn as to assume and depend upon the validity of the 2008 Order.

19 The Lower Lachlan Plan had been made by the Minister by order published 26 February 2003, but its commencement had been deferred on a number of occasions prior to 1 February 2008. An effect of s 45(1) of the 2000 Act was to empower the Minister to make the 2008 Order amending the Lower Lachlan Plan "if satisfied it is in the public interest to do so".

20 The term "in the public interest" is one of broad import. When used in a statute, the term classically imports a discretionary value judgment to be made by reference to undefined factual matters confined only by the subject matter, scope and purpose of the statute in question[3]. As employed in s 45(1), the term must include, in its application to the circumstances obtaining when the Minister made the 2008 Order, the implementation of the Funding Agreement with respect to the LLGS. At that stage the State had not taken, within the times stipulated in the Funding Agreement, various steps required on its part to secure the federal funding in respect of the LLGS. Notwithstanding that delay, the Commonwealth intends to make payments in respect of the LLGS upon being satisfied of other matters stipulated in the Funding Agreement. These Commonwealth payments will be in the amount of $2.7 million.

The plaintiffs' case

21 It is against this background that the plaintiffs submit that from the operation of s 51(xxxi) of the Constitution two conclusions follow. The first is that the executive power of the Commonwealth under s 61 of the Constitution did not extend to its entry into the Funding Agreement. The second is that the NWC Act is invalid insofar as it authorised the CEO to enter into the Funding

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2 Expressed to be made pursuant to ss 55A and 88A of the 2000 Act, and to have effect on and from 1 February 2008.

3 *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; [1989] HCA 61.

Agreement on behalf of the Commonwealth and to administer the financial assistance pursuant to the Funding Agreement.

22 If either or both of those submissions be accepted, the plaintiffs then submit that, as a consequence, the 2008 Order, and therefore the Proclamation and the 2008 Regulation, are invalid or inoperative. This appears to be on the footing that, given the operation of the Constitution, it was beyond the scope of the power conferred upon the Minister by s 45(1) of the 2000 Act to exercise the power by treating implementation of the Funding Agreement by the State as "in the public interest". The result is said to be that the introduction of the new licensing system, of which the plaintiffs complain, miscarried and they could not be deprived of their bore licences issued under the 1912 Act. The plaintiffs contend that they remain the holders of those licences.

23 In the course of oral argument, the plaintiffs sought to develop a further argument directed to the New South Wales legislation. Section 6 of the 2000 Act provides for the making of a State Water Management Outcomes Plan ("SWMOP") for the development, conservation, management and control of the water resources of the State in furtherance of the objects of the 2000 Act set out in s 3. SWMOP was established by order of the Governor made 18 December 2002. In the structure of the 2000 Act SWMOP sits above management plans, of which the Lower Lachlan Plan is one.

24 The making of SWMOP preceded the making of the Funding Agreement in 2005. The plaintiffs complained that SWMOP was not then revised so as explicitly to refer to the Funding Agreement. This complaint was made for the first time in oral argument.

25 A management plan is required by par (a) of s 16(1) of the 2000 Act to be consistent with SWMOP. SWMOP is designed "to set out the over-arching policy context, targets and strategic outcomes". It did not cease to do so by reason of the subsequent entry by the State into the Funding Agreement.

26 A management plan also is required (by par (e) of s 16(1)) to "be consistent with ... government policy ...". It may be that a New South Wales policy connected with infringement by federal law of s 51(xxxi) would not answer the description of "government policy" in that paragraph of s 16(1). But, even if so, what would follow would be that such a policy was not a mandatory consideration dictated by s 16(1)(e). It would not necessarily follow that such a policy would be an irrelevant consideration in making a management plan. There is no occasion here to pursue the matter, because, as will appear, there is no engagement of s 51(xxxi) in this case.

The Commonwealth case

27 The Attorneys-General for Victoria, Queensland, South Australia and Western Australia intervened and presented submissions generally supportive of those of the defendants.

28 The Commonwealth Solicitor-General, who appeared for the first and second defendants, analysed the relevant operation of the NWC Act as follows: (i) the Prime Minister as Minister administering that statute made a decision under s 42(a)(i) to award financial assistance, as indicated by his announcement of 9 June 2005; (ii) the CEO had the function conferred by s 24 of administering that financial assistance and the Funding Agreement was entered into to further that end; (iii) further, s 61 of the Constitution authorised the Commonwealth to enter into the Funding Agreement as a principal; (iv) the legislative power of the Commonwealth under s 96 or s 96 with s 51(xxxvi)[4] extends to the grant of financial assistance to a State for the purpose of the State acquiring property on other than just terms; (v) the power of the CEO under s 24 of the NWC Act to administer financial assistance is to be read down, if necessary, to financial assistance which it is within the legislative power of the Commonwealth to provide; (vi) but by reason of (iv), no such occasion for reading down arises.

29 With respect to the executive power to enter the Funding Agreement, the Commonwealth Solicitor-General correctly accepted that if, contrary to his submission (iv) respecting legislative power, s 96 was relevantly qualified by s 51(xxxi), an agreement to facilitate such a grant which could not be authorised by s 96 would not be supported by s 61. In this way, limitations upon legislative power may indicate whether the ends of an agreement are consistent with the

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4 This reads: "matters in respect of which this Constitution makes provision until the Parliament otherwise provides". Section 96 states: "During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."

Constitution[5]. The Solicitor-General properly emphasised the reference in the joint reasons in *R v Hughes*[6] to the statement by Mason J[7]:

> "It is beyond question that [the executive power] extends to entry into governmental agreements between Commonwealth and State on matters of joint interest, including matters which require for their implementation joint legislative action, so long at any rate as the end to be achieved *and the means by which it is to be achieved are consistent with and do not contravene the Constitution*." (emphasis added)

30 In further elaboration of his argument respecting the relationship between s 96 and s 51(xxxi), the Solicitor-General emphasised that (a) s 51(xxxi) operates by abstracting the power of compulsory acquisition from the subject of other "coercive" grants of power that, in the absence of s 51(xxxi), would permit compulsory acquisition by force of Commonwealth law, (b) whether read alone or with s 51(xxxvi), s 96 is a "non-coercive" power, and (c) "terms and conditions" within the meaning of s 96 may extend to the exercise of State legislative power in a coercive way, but, being supported by s 96, will be outside the reach of s 51(xxxi).

Coercive and non-coercive powers

31 The classification of legislative authority by a dichotomy between coercive and non-coercive powers may have its antecedents in observations made by Dixon CJ in the *Second Uniform Tax Case*[8]. After expressing some disquiet at the course of authority indicating that the power conferred by s 96 "is susceptible of a very wide construction in which few if any restrictions can be implied", the Chief Justice continued:

> "For the restrictions could only be implied from some conception of the purpose for which the particular power was conferred upon the Parliament

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5 See Saunders, "Intergovernmental agreements and the executive power", (2005) 16 *Public Law Review* 294 at 306.

6 (2000) 202 CLR 535 at 554-555 [38] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [2000] HCA 22.

7 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 560; [1983] HCA 29.

8 *The State of Victoria v The Commonwealth* (1957) 99 CLR 575 at 605; [1957] HCA 54.

> or from some general constitutional limitations upon the powers of the Parliament which otherwise an exercise of the power given by s 96 might transcend. In the case of what may briefly be described as coercive powers it may not be difficult to perceive that limitations of such a kind must be intended. But in s 96 there is nothing coercive. It is but a power to make grants of money and to impose conditions on the grant, there being no power of course to compel acceptance of the grant and with it the accompanying term or condition."

32 Of that passage, three things may be said. The first concerns the nature of the terms or conditions which accompany a grant. These may, as is the case here with the Funding Agreement, be expressed in terms of an agreement between the polities involved. Such agreements may take many forms, with some but not all of the characteristics of a contract between the executive government and a private party, citizen or corporation, and of a treaty between sovereign powers. Secondly, for many years the incidental power conferred by s 51(xxxix) has been used to create offences to support the making of grants under s 96 and the implementation of intergovernmental agreements[9]. Thirdly, in *P J Magennis Pty Ltd v The Commonwealth*[10] Latham CJ rejected the proposition that a federal statute giving financial assistance to States was for that reason not a law with respect to the acquisition of property. The Court did not accept the submission for the defendants[11] that a law could not be with respect to the acquisition of property unless it (a) directly acquired property by force of its own terms, (b) created a previously non-existing power in some person to acquire property, or (c) came into operation upon the acquisition of property. Latham CJ said[12]:

> "All such laws doubtless would be laws with respect to the acquisition of property. But there is nothing in the words of s 51(xxxi) of the Constitution which supplies any warrant for limiting the application of this provision to laws which fall within the classes mentioned."

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9 Examples are ss 12 and 13 of the *Commonwealth Grants Commission Act* 1933 (Cth); and s 8A of the *States Grants (Petroleum Products) Act* 1965 (Cth), as introduced by the *States Grants (Petroleum Products) Amendment Act* 1985 (Cth).

10 (1949) 80 CLR 382 at 403; [1949] HCA 66.

11 (1949) 80 CLR 382 at 402.

12 (1949) 80 CLR 382 at 402.

Magennis

33 To the extent that his submissions were contrary to *Magennis*, the Commonwealth Solicitor-General contended that that case should be re-considered and overruled. The better view, he submitted, is that indicated subsequently in *Pye v Renshaw*[13]. There, in rejecting the plaintiff's argument, the Court noted the absence of any allegation that the moneys to fund the impugned acquisitions had not been duly appropriated or that their payment for any reason would be unlawful. The proposition of law, rejected by the Court, was that "an appropriation by the Commonwealth Parliament for the purposes mentioned is unconstitutional". The Court said that proposition could not be supported. It explained why:

> "The argument really comes to this. The Commonwealth cannot itself acquire land except upon just terms. A State can resume land on any terms, just or unjust, authorized by its Parliament. But the Commonwealth is not authorized by s 96 or any other provision of the Constitution to provide money for a State *in order that* the State may resume land otherwise than on just terms. This is the very argument which was rejected in *Victoria v The Commonwealth*[14]: see also *South Australia v The Commonwealth*[15], where Latham CJ said: 'The Commonwealth may properly induce a State to exercise its powers ... by offering a money grant'." (emphasis added)

34 However, the two earlier authorities referred to in the last sentence do not require rejection of the particular argument respecting s 96 which was in issue in *Pye v Renshaw*. The unsuccessful submission presented by Mr R G Menzies for Victoria in *Victoria v The Commonwealth*[16] had been that the *Federal Aid Roads Act* 1926 (Cth) was not supported by s 96 because (i) it attached to the grant conditions which in substance amounted to the exercise of legislative power with respect to road construction, a subject beyond s 51, (ii) the terms and conditions referred to in s 96 must be of a financial character unless they are terms and conditions falling within a head of power in s 51, and (iii) the terms and conditions must be imposed by the Parliament and cannot be fixed by executive

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13 (1951) 84 CLR 58 at 83; [1951] HCA 8.

14 (1926) 38 CLR 399; [1926] HCA 48.

15 (1942) 65 CLR 373 at 417; [1942] HCA 14.

16 (1926) 38 CLR 399 at 405.

authority. In the second case, the *First Uniform Tax Case*[17], Latham CJ, who later was in the majority in *Magennis*, took *Victoria v The Commonwealth* as establishing that by offering a money grant under s 96 the Commonwealth may properly induce a State to exercise its powers with respect to a particular subject (eg road making) or to abstain from exercising its powers with respect to, for example, banking or insurance.

35 Counsel for the present plaintiffs correctly submitted that what was said in *Victoria v The Commonwealth* and the *First Uniform Tax Case* did not address "the very argument" which was put in *Pye v Renshaw*[18]. This concerned the application to the exercise of the legislative power conferred by s 96 (read with s 51(xxxvi)) of the restriction found in s 51(xxxi).

36 Counsel for the plaintiffs also pointed to the use in the critical passage in *Pye v Renshaw* set out above of the phrase "in order that" when encapsulating the argument the Court was rejecting. It is significant that from the legislation under consideration in *Pye v Renshaw* any arrangement or agreement with the Commonwealth had been, as Professor Saunders has said, "decoupled"[19] in 1950 upon the repeal of the *War Service Land Settlement Agreement Act* 1945 (NSW)[20]. The argument rejected in *Pye v Renshaw* was that the exercise of the power to grant financial assistance under s 96 would be vitiated if shown to be for the purpose of inducing the State to exercise its powers of acquisition on less than just terms. The concept of improper purpose as a vitiating characteristic was rightly rejected. Section 96 says nothing about purpose. It authorises the making of grants on "such terms and conditions as the Parliament thinks fit". The constraints imposed by constitutional prohibitions or guarantees will be directed to the range of permissible terms and conditions rather than their underlying purpose.

37 That there was some understanding or arrangement reached between the Commonwealth and the State after *Magennis* later appeared from *Gilbert v Western Australia*[21]. There, Dixon CJ, Kitto and Windeyer JJ in the course of

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17 (1942) 65 CLR 373 at 417.

18 (1951) 84 CLR 58 at 83.

19 Saunders, "Intergovernmental agreements and the executive power", (2005) 16 *Public Law Review* 294 at 301.

20 By s 2 of the *War Service Land Settlement and Closer Settlement Validation Act* 1950 (NSW).

21 (1962) 107 CLR 494 at 505; [1962] HCA 7.

explaining the sequel to *Magennis* referred to correspondence at the Ministerial level and went on:

> "In one letter (dated 19th December 1951) the Prime Minister [Mr Menzies], having in mind that the decision in *Magennis's Case*[22] was regarded as having struck down Commonwealth participation in the 1945 Agreement, said: 'The Commonwealth wishes to avoid, for constitutional reasons disclosed by the *Magennis Case*, any arrangement of a formal character.' ... And 'In all the circumstances we feel strongly that the best legal foundation for future action can be provided by means of a grant of financial assistance pursuant to s 96 of the Constitution supplemented by an informal arrangement (in the form say of an exchange of letters) between governments setting out the conditions to be observed.' This proposal was adopted."

38 The assumption being made was that the terms and conditions attached to a s 96 grant may sufficiently be disclosed in an informal fashion, falling short of an intergovernmental agreement of the kind seen in this case in the Funding Agreement. It is unnecessary to consider whether that reflected a correct understanding of s 96 and of its relation to s 61 of the Constitution.

39 Further, it is significant – as the Victorian Solicitor-General stressed – that, in *Pye v Renshaw*, *Magennis* was not said to be overruled and that the reason why the Court found it unnecessary to do so is to be found in the "decoupling" effected by the changes to the legislation in the intervening period. In *Pye v Renshaw*[23] the Court referred to the deletion from all relevant State legislation of all reference to any agreement with the Commonwealth and all reference to any direct or indirect participation of the Commonwealth in any scheme of soldier settlement. In the companion decision upon the Victorian soldier settlement legislation, *Tunnock v The State of Victoria*[24], Williams and Webb JJ, who had been in the majority in *Magennis*, concluded[25] that the Victorian Parliament had not intended the power of acquisition conferred by its statute "to be mere machinery" for carrying out the agreement with the Commonwealth.

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22 (1949) 80 CLR 382.

23 (1951) 84 CLR 58 at 79.

24 (1951) 84 CLR 42; [1951] HCA 55.

25 (1951) 84 CLR 42 at 56.

40 Leave to re-open *Magennis* should be refused because, in particular, the reasoning upon which it was based is sound, all the more so in the light of developments in interpretation of the Constitution since *Magennis* was decided.

41 Several developments since the decision in *Magennis* tend to support the view taken by the majority of the relationship between s 51(xxxi) and s 96. First, it is now settled[26] that the provisions, referred to above, in s 81 of the Constitution for establishment of the Consolidated Revenue Fund and in s 83 for Parliamentary appropriation, do not confer a substantive spending power and that the power to expend appropriated moneys must be found elsewhere in the Constitution or the laws of the Commonwealth.

42 Secondly, it is settled since *Trade Practices Commission v Tooth & Co Ltd*[27] that s 51(xxxi) is not confined to the acquisition of property by the Commonwealth or its instrumentalities. In particular, Mason J[28] said that remarks by Sir Owen Dixon which might be thought to throw doubt on that proposition should not be accepted[29]. In his dissenting reasons in *Magennis*, Dixon J had said that "perhaps" s 51(xxxi) applied to acquisition by persons standing in no such position as the Commonwealth, its agencies and instrumentalities[30].

43 Thirdly, in *Tooth* Barwick CJ described s 51(xxxi) as "a very great constitutional safeguard"[31] and shortly thereafter, in the joint reasons of six Justices in *Clunies-Ross v The Commonwealth*[32], it was said that s 51(xxxi) "has

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26 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; [2009] HCA 23.

27 (1979) 142 CLR 397 at 403, 407-408, 426, 451-452; [1979] HCA 47. See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 197; [1992] HCA 45.

28 (1979) 142 CLR 397 at 426.

29 Mason J referred to *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372-373; [1961] HCA 21; and *Andrews v Howell* (1941) 65 CLR 255 at 281-282; [1941] HCA 20.

30 (1949) 80 CLR 382 at 411.

31 (1979) 142 CLR 397 at 403.

32 (1984) 155 CLR 193 at 201-202 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; [1984] HCA 65. Subsequent statements to like effect are collected

(Footnote continues on next page)

assumed the status of a constitutional guarantee of just terms ... and is to be given the liberal construction appropriate to such a constitutional provision".

44 Fourthly, that construction involves looking beyond matters of legal form and to the practical effect of the law in question[33]. Indeed, shortly before the decision in *Magennis*, in *Bank of NSW v The Commonwealth*[34], Dixon J had used the expression "circuitous device" when concluding that the effect of the federal law was that the banks and their shareholders, in a real sense, albeit not formally, were stripped of the possession and control of their entire undertaking, without compliance with s 51(xxxi).

45 Finally, passages in the reasons of several members of the Court in *Attorney-General (Vict); Ex rel Black v The Commonwealth*[35], respecting the relationship between s 96 and the guarantee or prohibition provided by s 116 with respect to matters of religion, suggest that s 96 and s 51(xxxi) also should be read together. Wilson J said that *Magennis* remained a persuasive analogy respecting s 96 and s 116[36]. Gibbs J said he considered[37]:

> "that ss 96 and 116 should be read together, the result being that the Commonwealth has power to grant financial assistance to any State on such terms and conditions as the Parliament thinks fit, provided that a law passed for that purpose does not contravene s 116."

Conclusions respecting s 96 and s 51(xxxi)

46 The result is that the legislative power of the Commonwealth conferred by s 96 and s 51(xxxvi) does not extend to the grant of financial assistance to a State

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in *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 211 [501]; [2006] HCA 52.

33 See, for example, *Tooth* (1979) 142 CLR 397 at 433; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 633-635; [1997] HCA 38; and, as to s 92, *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 464 [47]; [2008] HCA 11.

34 (1948) 76 CLR 1 at 349; [1948] HCA 7.

35 (1981) 146 CLR 559; [1981] HCA 2.

36 (1981) 146 CLR 559 at 650.

37 (1981) 146 CLR 559 at 593; see also at 618 per Mason J.

on terms and conditions requiring the State to acquire property on other than just terms. The plaintiffs' case, to that extent, should be accepted.

47 But that is not the end of the matter. It is necessary now to consider whether the replacement of the plaintiffs' bore licences issued under the 1912 Act involved the acquisition of property other than on just terms within the meaning of s 51(xxxi).

48 The plaintiffs placed heavy reliance upon what they said were the rights, recognised at common law in England and applicable to Australian conditions, of an overlying landowner to take and use groundwater. They relied upon English authorities, particularly *Chasemore v Richards*[38], which were referred to in *Perth Corporation v Halle*[39]. These rights were said to amount to an interest in land with an existence apart from statute. The statutory intervention by the 1912 Act was but a particular form of regulation in the perceived public interest, and, in any event, the bore licences held by the plaintiffs themselves created rights which were "property" within the meaning of s 51(xxxi).

49 It is convenient first to consider the position at common law both in England and Australia and, in doing so, to detail the development of the statute law, particularly in New South Wales.

Water use

50 Water is a finite and fluctuating natural resource. Both within Australia[40] and internationally[41], the need for sustainable and efficient management of water

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38 (1859) 7 HLC 349 [11 ER 140].

39 (1911) 13 CLR 393 at 398-399, 403-407, 410-411, 413; [1911] HCA 57.

40 See, for example, Agriculture and Resource Management Council of Australia and New Zealand, Standing Committee on Agriculture and Resource Management, *Allocation and Use of Groundwater*, Occasional Paper 2, December 1996; Gray, "Legal Approaches to the Ownership, Management and Regulation of Water from Riparian Rights to Commodification", (2006) 1(2) *Transforming Cultures eJournal* 64; Gardner, "The Administrative Framework of Land and Water Management in Australia", (1999) 16 *Environmental and Planning Law Journal* 212.

41 See, for example, Hardin, "The Tragedy of the Commons", (1968) 162 *Science* 1243; Blomquist et al, "Institutional and Policy Analysis of River Basin Management: The Murray Darling River Basin, Australia", World Bank Policy Research Working Paper 3527, February 2005; Ostrom, *Governing the Commons:*

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resources has attracted a good deal of attention. Questions of the ownership[42] and the need for the conservation of water resources[43] were serious legal issues in Australia even prior to Federation. The first statutes significantly regulating water resources were passed by New South Wales and Victoria during the 1880s and 1890s[44]. Since that time, the regulation of water has developed as understanding of the resource has progressed, and the need for irrigation has intensified. The regulation of groundwater extraction in New South Wales, particularly in recent decades, discloses a growing awareness of the need to carefully manage water for agricultural use. Nevertheless, it appears that there is "no single understanding or definition of sustainable yield across Australia"[45].

The Evolution of Institutions for Collective Action, (1990); Barnes, *Property Rights and Natural Resources*, (2009).

42 Second Reading Speech, New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 2 July 1896 at 1282, 1283, 1288, 1290, 1292, 1293, 1301-1303 and 1307; New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 July 1896 at 1408; Second Reading Speech, New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 2 September 1896 at 2798-2801 and 2806; see also Second Reading Speech of Mr Alfred Deakin, Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 June 1886 at 432-433, 436 and 440.

43 Second Reading Speech, New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 2 July 1896 at 1282, 1286-1287, 1291-1292 and 1295; Second Reading Speech, New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 2 September 1896 at 2798; New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 10 June 1897 at 1038; Second Reading Speech, New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 11 August 1897 at 2888; see also Second Reading Speech of Mr Alfred Deakin, Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 June 1886 at 432-433, 436 and 440.

44 *Water Rights Act* 1896 (NSW); *Artesian Wells Act* 1897 (NSW); *Irrigation Act* 1886 (Vic).

45 Agriculture and Resource Management Council of Australia and New Zealand, Standing Committee on Agriculture and Resource Management, *Allocation and Use of Groundwater*, Occasional Paper 2, December 1996, par 4.1.

The common law

51 Early explorers of the inland geography of Australia discovered "that strange phenomenon of Australia" where even apparently substantial rivers evaporated, especially during drought, "from the intense heat of the plains"[46].

52 Partly as a result of water scarcity during recurrent droughts[47], access to and use of water in New South Wales has long been regulated by statute. However, it is useful to consider aspects of the common law position before the passing of pre-Federation water legislation, as such statutes were expressly intended to move away from the common law.

53 For example, the *Irrigation Act* 1886 (Vic) provided: "*The right to the use of all water* at any time in any river stream watercourse lake lagoon swamp or marsh *shall … be vested in the Crown …*"[48] (emphasis added). The relevant Minister, Mr Alfred Deakin, explained that the provision was designed to overcome perceived difficulties with riparian rights developed in England by the common law[49].

54 New South Wales followed suit. The *Water Rights Act* 1896 (NSW) ("the 1896 Act") provided: "The right to the use and flow and to the control of the water in all rivers and lakes … shall … vest in the Crown."[50] Section 6 of the 1912 Act retained this language. Similar language was adopted in water

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46 Scott, *A Short History of Australia*, 7th ed (1947) at 121.

47 As to which see the Second Reading Speech, New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 2 July 1896 at 1295:

> "There are many persons now living in New South Wales who remember the drought of 1837, 1838, and 1839, and anyone remembering the great drought of 1850-51 must know that it would be much better to conserve water for the purposes of averting such a great calamity, and that it is desirable a fair amount of public money should be spent on works of water conservation."

48 Section 4.

49 Second Reading Speech of Mr Alfred Deakin, Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 June 1886 at 440-441.

50 Section 1(I).

legislation in other parts of Australia[51]. Of significance for this case is that the vesting of rights to the "use" and "control" of water constituted an exercise of sovereignty in the sense that the rights so vested were based on the political power of the State. Accordingly, the reasoning of the Full Court of the Supreme Court of New South Wales in *Hanson v The Grassy Gully Gold Mining Co*[52], that the 1896 Act vested in the Crown the common law rights of riparian owners, is to be preferred to the slightly delphic observation of Fullagar J in *Thorpes Ltd v Grant Pastoral Co Pty Ltd*[53] suggesting that riparian rights survived those vesting provisions. The assertion of control over water was assumed to include the power to issue licences[54].

55 The second point of interest is that the language of the 1896 Act and the 1912 Act does not disturb the common law notion that water, like light and air, is common property not especially amenable to private ownership and best vested in a sovereign state[55]. The common law position in relation to flowing water, which adapted Roman law doctrine[56], was settled in *Embrey v Owen*[57]. Baron

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51 *Rights in Water and Water Conservation and Utilization Act* 1910 (Q); *Rights in Water and Irrigation Act* 1914 (WA); *Control of Waters Act* 1919 (SA); Control of Waters Ordinance 1938 (NT); Lake Burley Griffin Ordinance 1965 (ACT).

52 (1900) 21 NSWR (L) 271.

53 (1955) 92 CLR 317 at 331; [1955] HCA 10. These observations were not followed by Cohen J in *Van Son v Forestry Commission of New South Wales* (1995) 86 LGERA 108, and the reasoning in *Hanson* was preferred.

54 See discussion relating to the proposed Water Rights Bill, New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 November 1895 at 2597:

> "The bill we propose to introduce will be a very short one. It will deal in the first place with riparian rights. The Government will take power to issue licences in respect of all works which have already been constructed upon proper inquiry being made. We propose in respect of other works to take power to issue a licence for a period of five years, with the right of renewal for a further term if the Minister thinks it advisable in the public interest."

55 Blackstone, *Commentaries on the Laws of England*, (1766), bk 2, c 1 at 14-15.

56 For a detailed account see Rodger, *Owners and Neighbours in Roman Law*, (1972) esp at 1-37 and 141-166.

57 (1851) 6 Ex 353 [155 ER 579].

Parke adopted the view of Chancellor Kent[58] that flowing water is *publici juris* in the sense that no-one has "property in the water itself, but a simple usufruct while it passes along"[59]. This reflected Blackstone's classification of water as a "moveable, wandering thing" which was "common"[60] property. As such it is "beyond individual appropriation and alienation"[61]. Riparian rights did not depend on ownership of the soil of a stream; they attached to land in either lateral or vertical contact with a stream[62].

56 This can be contrasted with the common law position in relation to groundwater settled in England in *Chasemore v Richards*[63]. Lord Chelmsford distinguished between "water flowing in a definite channel, and water whether above or underground not flowing in a stream at all, but either draining off the surface of the land, or oozing through the underground soil in varying quantities"[64]. Such water could be intercepted by a landowner.

57 The proposition that water in general cannot form the subject matter of property had the consequence that the grant by a landowner to another of a watercourse did not mean the grant of the water itself[65]. The grant of "a watercourse" meant, as Sir George Jessel MR explained in *Taylor v Corporation of St Helens*[66], an easement or right to the running of water, or, if there was a relevant context, either the channel, pipe or drain containing the water, or the land over which the water flowed.

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58 *Commentaries on American Law*, (1828), vol 3, Lecture 51 at 353.

59 *Embrey v Owen* (1851) 6 Ex 353 at 370 [155 ER 579 at 586].

60 Blackstone, *Commentaries on the Laws of England*, (1766), bk 2, c 2 at 18.

61 Getzler, *A History of Water Rights at Common Law*, (2004) at 66.

62 *Lyon v Fishmongers' Company* (1876) 1 App Cas 662 at 683 per Lord Selborne.

63 (1859) 7 HLC 349 [11 ER 140].

64 (1859) 7 HLC 349 at 375 [11 ER 140 at 150].

65 *Halsbury's Laws of England*, 1st ed, vol 11, title "Easements and Profits a Prendre", par 603.

66 (1877) 6 Ch D 264 at 271.

New South Wales legislation

Groundwater

58 In 1895, the need for legislation dealing with artesian bores was linked to the need to conserve water[67]. The *Artesian Wells Act* 1897 (NSW) provided for government involvement in sinking bores. The *Water and Drainage and Artesian Wells (Amending) Act* 1906 (NSW) required that artesian bores not sunk by the Crown be licensed. From 1912 bore licences were governed by Pt 5, Div 3 of the 1912 Act.

59 From 1930, a bore was not to be sunk, enlarged, deepened or altered to increase its flow without a licence[68], and by 1955 a licence under the 1912 Act was required for all bores[69]. Such licences were generally issued without limitation as to time and other conditions, although on occasion licences were issued subject to a variety of conditions. From 1973 to 1984, it was the usual practice to issue licences for new bores for renewable periods of five years and to impose conditions which were set out in those licences. The conditions typically restricted the purpose for which water could be extracted and typically permitted extraction for irrigation of an area of up to 162 hectares on any one property. The conditions also typically did not impose a volumetric restriction. This policy was applied by the Department administering the relevant parts of the 1912 Act ("the Department") or the Water Resources Commission ("the Commission")[70].

60 From March 1984, the Department, and later the Ministerial Corporation constituted by s 7 of the *Water Administration Act* 1986 (NSW) ("the 1986 Act"), concerned to avoid resource exhaustion, adopted a policy of imposing on all

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67 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 November 1895 at 2600 and 2601. It can be noted that the then Department of Water Conservation had completed some works on the Lower Lachlan.

68 Section 112(1) of the 1912 Act, inserted by *Water (Amendment) Act* 1930 (NSW).

69 *Irrigation, Water and Rivers and Foreshores Improvement (Amendment) Act* 1955 (NSW), s 12.

70 First constituted as the Water Conservation and Irrigation Commission under ss 4 and 4A of the *Irrigation Act* 1912 (NSW) (as amended by s 6 of the *Irrigation (Amendment) Act* 1916 (NSW)) and reconstituted as the Water Resources Commission (being a continuation of the same legal entity as the Water Conservation and Irrigation Commission) under s 4 and cl 1 of Sched 4 of the *Water Resources Commission Act* 1976 (NSW).

licences, except those used to access domestic and stock requirements, a condition limiting the volume of water that could be extracted in a particular year. The policy outlined a need to modify allocation policies on the basis of continued monitoring of particular groundwater systems.

61 In each case, a condition was imposed on bore licences in the following, or similar, terms:

> "The [authority/person administering the 1912 Act] shall have the right during the currency of this licence to vary at any time the volumetric allocation, or the rate at which this allocation is taken."

62 From 1981, on top of the volumetric allocation under each licence (known as an "entitlement"), "allocations" specifying the actual amount of water that could be taken out of each entitlement were from time to time notified to licence holders.

63 In 1966, amendments were made to the 1912 Act empowering the entity administering the 1912 Act (later the Ministerial Corporation) to make declarations regarding areas, which would then have implications for the way in which water in those areas could be managed[71]. Section 117A(3)(a) provides that, in respect of a "restricted sub-surface water area", the Ministerial Corporation may:

> "by order in writing direct the licensee of any bore, whether sunk or commenced to be sunk before or after the proclamation of the restricted sub-surface water area:
>
> (i) to restrict or control the rate of flow or pumping or the manner of extraction of water from the bore, or the quantity of water which may be allowed to flow or be pumped therefrom in any stated period of time or its usage;
>
> (ii) to take such measures or precautions as may be specified in the order for the protection of the quality and prevention of pollution or contamination of any sub-surface water …;
>
> (iii) to furnish the Ministerial Corporation at such intervals as may be specified in the order a report of static water level in the bore from

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71 *Irrigation, Water, Crown Lands and Hunter Valley Flood Mitigation (Amendment) Act* 1966 (NSW), s 4.

a point of measurement predetermined by the Ministerial Corporation and of the quantities of water pumped from the bore;

(iv) to provide, fit and maintain a metering or measuring device acceptable to the Ministerial Corporation which will adequately and continuously record the quantity of water flowing or pumped from a bore from which water is used,

and may, in any such order, set forth such requirements as it deems necessary for proper compliance with a direction contained therein".

64 In 1985, the "sub-surface water basin known as the Lachlan River Basin" was declared to be a "prescribed area" under s 117B(2). Section 117B permits the Ministerial Corporation to fix a charge upon licensees of any bore within the prescribed area. From June 1996, the Ministerial Corporation imposed, in respect of each licence, a fixed charge per megalitre of entitlement, plus a fixed charge for each megalitre used, under s 117B(4) of the 1912 Act.

65 In 1994, all sub-surface water basins in New South Wales were declared to be "restricted sub-surface water areas" under s 117A.

Surface water

66 Licences entitling the holder to construct works for the extraction of surface water have been issued in New South Wales since the commencement of the 1912 Act. From 1981, surface water was allocated volumetrically for "Regulated Rivers", including the Lachlan River. Pursuant to s 20W of the 1912 Act, the Governor declared that each surface water licence in respect of a Regulated River was subject to the relevant volumetric water allocations scheme, by orders published in the Gazette. Volumetric allocations were prepared by the Commission, which assessed the total quantity of water likely to be available to be taken from a Regulated River in a given year and the total quantity of water that should be reserved for other uses or future uses, and determined in respect of each surface water licence the maximum quantity of water that could, subject to Pt 2, Div 4B, be taken from the Regulated River that year. These announced allocations were notified to licence holders, and a condition limiting the maximum volume of water that could be extracted in a particular year to the amount so determined was added to each surface water licence when next renewed.

Conjunctive use

67 From March 1984 to July 1998, the Department adopted a policy applying where licences in respect of both groundwater and surface water had been issued

in respect of the same property. If the announced surface water allocation for the relevant surface water licence was, as at 1 October of a particular year, less than 100 per cent of the surface water licence entitlement, the conditions of the relevant bore licence were to permit extraction of the "Conjunctive Use Amount", being the shortfall between the surface water licence entitlement and the surface water allocation. It should be here noted that it is generally more expensive to pump groundwater to the surface than it is to use surface water. This policy was applied to the plaintiffs' bore licences. The policy was revoked from 23 July 1998. New bore licences would not include a Conjunctive Use Amount, and existing licences would be amended to remove any entitlement to a Conjunctive Use Amount. This policy was implemented in the LLGS, and in respect of the plaintiffs' licences, in or around 2002.

Conclusions respecting "replacement" of bore licences

68 The 2000 Act provided for the repeal[72] of the 1912 Act and the 1986 Act. The effect of other provisions[73] of the 2000 Act was to replace licences under Pt 5 of the 1912 Act, including the bore licences of the plaintiffs, with aquifer access licences under the 2000 Act. This was to be taken to occur on "the appointed day" fixed by proclamation under s 55A of the 2000 Act. This day was 1 February 2008.

69 On the assumption that all other conditions for the engagement of s 51(xxxi) thus were satisfied, can it be said that on 1 February 2008 there was an acquisition of property of the plaintiffs on other than just terms? The answer is that on that date: (i) the plaintiffs had no common law rights with respect to the extraction from the land of groundwater for the purposes of their businesses, (ii) whatever proprietary characteristics the bore licences of the plaintiffs may have had, there was no acquisition of property within the meaning of s 51(xxxi), and (iii) these conclusions make it unnecessary further to consider the conceded insufficiency of the offered structural adjustment payments as just terms.

70 We turn to explain the answer in point (i) and then that in point (ii).

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72 Section 401 and Sched 7.

73 Section 403 and Sched 10.

Common law rights

71 The subject of common law rights (point (i)) has been considered earlier in these reasons[74], but further reference to statute is necessary. This puts beyond dispute the absence of such rights in the plaintiffs.

72 By additions made in 1966[75] the 1912 Act vested in what was then the Commission and "for the benefit of the Crown" the right "to the use and flow and to the control of all sub-surface water" (s 4B) and it was made an offence, except in accordance with the 1912 Act or with written permission of the Commission, to "interfere in any way with sub-surface water or obstruct its flow" (s 4C). The vesting effected by s 4B for the benefit of the Crown was apt to divest any common law rights, whether otherwise existing and whether classified as an interest in land, as the plaintiffs would have it. That conclusion is consistent with the reasoning in *Hanson v The Grassy Gully Gold Mining Co*[76] to which reference was made earlier in these reasons[77].

73 Section 4B was repealed in 1986[78]. Thereafter the rights to "the use and flow" and "the control" of groundwater vested in the Ministerial Corporation under s 12(1) of the 1986 Act. It will be noted that the language used in s 4B and repeated later is the same as the language used in respect of surface water in the late 19th century as described earlier; it is language consonant with a recognition that water is a common resource[79].

The character of the bore licences

74 The remaining issues with respect to the possible engagement of s 51(xxxi) concern the constitutional character of the plaintiffs' bore licences and their alleged "acquisition" on 1 February 2008.

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74 At [51]-[57].

75 By the *Irrigation, Water, Crown Lands and Hunter Valley Flood Mitigation (Amendment) Act* 1966 (NSW).

76 (1900) 21 NSWR (L) 271.

77 At [54].

78 *Water (Amendment) Act* 1986 (NSW), Sched 1(4).

79 Cf *Chasemore v Richards* (1859) 7 HLC 349 [11 ER 140].

75 The bore licences operated for the benefit of the lawful occupier for the time being of the land whereon the bores were sunk (s 117). From 15 October 2003, s 117J applied to the area in which the plaintiffs' licences were granted. Section 117J provided for the transfer (permanently or for a period) of the whole or part of the water allocations for a licence, whether or not the transferee held another licence. In New South Wales, the assessment of the value of irrigable land takes into account rights to take water[80]. Bore licences attached to irrigable land enhanced its market value and were commonly taken into account by lenders when assessing the value of security to be provided. But the approval of the Ministerial Corporation was necessary to any transfer and it might impose such conditions in relation to the transfer as it thought fit (s 117J(11)).

76 It often has been remarked that the facility given by statute for the transfer of rights created by or pursuant to that statute is an indication that for the general purposes of the law the rights may be classified as proprietary in nature. An example is provided by the speech of Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth*[81]. But as Mason J, in the course of discussing *Ainsworth*, observed in *R v Toohey; Ex parte Meneling Station Pty Ltd*[82], where a licensing system is subject to Ministerial or similar control with powers of forfeiture, the licence, although transferable with Ministerial consent, nevertheless may have an insufficient degree of permanence or stability to merit classification as proprietary in nature.

77 The Commonwealth and New South Wales Solicitors-General, in particular, emphasised the presence in the 1912 Act of provisions which rendered the bore licences, it was said, inherently susceptible of variation within the meaning of authorities upon s 51(xxxi) of the Constitution. These include *The Commonwealth v WMC Resources Ltd*[83]; *Attorney-General (NT) v Chaffey*[84]; *Minister for Primary Industry and Energy v Davey*[85] and *Bienke v Minister for Primary Industries and Energy*[86].

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80 *Valuation of Land Act* 1916 (NSW), s 6A(3).

81 [1965] AC 1175 at 1247-1248.

82 (1982) 158 CLR 327 at 342; [1982] HCA 69.

83 (1998) 194 CLR 1; [1998] HCA 8.

84 (2007) 231 CLR 651; [2007] HCA 34.

85 (1993) 47 FCR 151.

86 (1996) 63 FCR 567.

78 As examples of the insubstantial character of the bore licences issued under the 1912 Act, reference was made to the subjection of the licences (by s 116D) both to the limitations and conditions of the licence and to the provisions of Pt 5 (ss 105-129), including the power of restriction or suspension during periods of water shortage (s 117E) and the power (s 117H) of cancellation or suspension for failure to comply with the requirements imposed by Pt 5 or with the limitations and conditions of the licence.

79 The plaintiffs referred to the legislative history which we have detailed earlier in these reasons, including policies adopted from time to time in the administration of the legislation. They then countered that it was never an object of the 1912 Act to use its provisions or to impose conditions to reduce permanently the entitlements of licensees or to terminate licences; the object, rather, had been to deal with occasions of scarcity.

80 It is unnecessary to resolve that particular dispute and to determine whether the bore licences were of such an insubstantial character as to be no more than interests defeasible by operation of the legislation which called them into existence.

Acquisition of property?

81 This is because, whatever the proprietary character of the bore licences, s 51(xxxi) speaks, not of the "taking"[87], deprivation or destruction of "property", but of its acquisition. The definition of the power and its attendant guarantee by reference to the acquisition of property is reflected in a point made by Dixon J in *British Medical Association v The Commonwealth*[88]. This is that the wide protection given by s 51(xxxi) to the owner of property nevertheless is not given to "the general commercial and economic position occupied by traders".

82 The scope of the term "acquisition" was explained as follows by Deane and Gaudron JJ in *Mutual Pools & Staff Pty Ltd v The Commonwealth*[89]:

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87 The term is used in the Fifth Amendment to the United States Constitution and the destruction of property rights may amount to a "taking": *Pennsylvania Coal Co v Mahon* 260 US 393 (1922).

88 (1949) 79 CLR 201 at 270; [1949] HCA 44.

89 (1994) 179 CLR 155 at 185; [1994] HCA 9.

> "Nonetheless, the fact remains that s 51(xxxi) is directed to 'acquisition' as distinct from deprivation. The extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property[90]. For there to be an 'acquisition of property', there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property. On the other hand, it is possible to envisage circumstances in which an extinguishment, modification or deprivation of the proprietary rights of one person would involve an acquisition of property by another by reason of some identifiable and measurable countervailing benefit or advantage accruing to that other person as a result[91]."

83 Their Honours went on to give the example of the extinguishment of a chose in action, to the benefit of the obligee[92]. It is now settled that an action in contract or tort, like any chose in action arising at common law or in equity, is to be classified as "property" for the operation of s 51(xxxi), and that relief of the obligee from what otherwise would be the full measure of liability may be an "acquisition" in the constitutional sense[93].

84 However, in the present case, and contrary to the plaintiffs' submissions, the groundwater in the LLGS was not the subject of private rights enjoyed by them. Rather, and as these reasons have sought to demonstrate, it was a natural resource, and the State always had the power to limit the volume of water to be taken from that resource. The State exercised that power from time to time by legislation imposing a prohibition upon access to and use of that natural resource,

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90 See *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 270-271 per Dixon J; *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 145-146 per Mason J, 181-182 per Murphy J, 247-248 per Brennan J, 283 per Deane J; [1983] HCA 21; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 528 per Dawson and Toohey JJ; [1993] HCA 10. It is relevant to note that the Privy Council has also, in the context of interpreting the Malaysian Constitution, drawn a distinction between deprivations and acquisitions: *Government of Malaysia v Selangor Pilot Association* [1978] AC 337 at 347-348.

91 See, generally, *The Tasmanian Dam Case* (1983) 158 CLR 1 at 283-284.

92 (1994) 179 CLR 155 at 185.

93 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297; [1994] HCA 6; *Smith v ANL Ltd* (2000) 204 CLR 493; [2000] HCA 58.

which might be lifted or qualified by compliance with a licensing system. The changes of which the plaintiffs complain implemented the policy of the State respecting the use of a limited natural resource, but that did not constitute an "acquisition" by the State in the sense of s 51(xxxi)[94]. Nor can it be shown that there has been an acquisition in the necessary sense by other licensees or prospective licensees. They have at best the prospect of increasing or obtaining allocations under the new system applying to the LLGS.

85 The decision in *Newcrest Mining (WA) Ltd v The Commonwealth*[95] does not assist the plaintiffs. To acquire the substance of proprietary interests in the mining tenements considered in that case is one thing, to cancel licences to extract groundwater is another. The mining tenements were interests carved out of the radical title of the Commonwealth to the land in question, and the radical title was augmented by acquisition of the minerals released from the rights of another party to mine them. As Brennan CJ later explained[96], the property of the Commonwealth had been enhanced because it was no longer liable to suffer the extraction of minerals from its land in exercise of the rights conferred by the mining tenements held by Newcrest.

86 Nor is assistance respecting "acquisition" provided by *Bank of NSW v The Commonwealth*[97]. The *Banking Act* 1947 (Cth) provided for "nationalisation" not by the direct expedient of simply closing down the businesses of the targeted banks, but by the compulsory acquisition of their businesses through indirect as well as direct means[98]. There was an acquisition of property, but it was on other than just terms.

Remaining issue

87 The plaintiffs contend that (a) if the 2008 Order, the Proclamation and the 2008 Regulation be valid, so that as a matter of State law their bore licences have

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94 See *Chapman v Luminis Pty Ltd (No 4)* (2001) 123 FCR 62 at 264-274; *Walden v Administration of Norfolk Island* (2007) 212 FLR 345 at 352.

95 (1997) 190 CLR 513.

96 *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 17 [17]; see also *Smith v ANL Ltd* (2000) 204 CLR 493 at 505 [22].

97 (1948) 76 CLR 1.

98 Aronson, "The Great Depression, This Depression, and Administrative Law", (2009) 37 *Federal Law Review* 165 at 188-189.

been cancelled and no longer exist, but (b) nevertheless there has been an acquisition of their property otherwise than on just terms within the meaning of s 51(xxxi), then (c) they have an implied right under the Constitution to recover by action against the Commonwealth such amount as would constitute just terms, and (d) cases indicating the contrary of (c), notably *Kruger v The Commonwealth*[99], should be re-opened.

88 The submissions fail at step (b). There has been no such "acquisition". That makes it unnecessary to enter upon the fields of controversy in (c) and (d).

Orders

89 The questions in the special case should be answered:

1. By reason of s 51(xxxi) of the Constitution:

   (a) did the Commonwealth lack executive power to enter into the Funding Agreement?

   (b) is the National Water Commission Act invalid insofar as it authorised the CEO to enter into the Funding Agreement on behalf of the Commonwealth?

Answer: The replacement of the plaintiffs' bore licences did not constitute an acquisition of property within the meaning of s 51(xxxi) of the Constitution. Accordingly, the questions of invalidity posed in pars (a) and (b) of Question 1 do not arise.

2. If the answer to either part of Question 1 is "yes", are all or any of:

   (a) the Amendment Regulation;

   (b) the Proclamation;

   (c) the Amendment Order;

   invalid or inoperative as a consequence?

Answer: Does not arise.

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99 (1997) 190 CLR 1; [1997] HCA 27.

3. Do the plaintiffs remain the holders of all or any of the bore licences issued to them under the Water Act?

Answer: No.

4. If the answers to Questions 2 and 3 are "no", do the plaintiffs have an implied right under the Constitution to recover from the Commonwealth such compensation for the loss of their bore licences as would constitute "just terms" within the meaning of s 51(xxxi) of the Constitution?

Answer: Does not arise.

5. Who should pay the costs of this Special Case?

Answer: The plaintiffs.

90 HAYNE, KIEFEL AND BELL JJ. In Australia, water and rights to use water are of critical importance, not just to those who are immediately interested in particular water rights, but to society as a whole. Governments have wrestled with the problems presented by Australia's limited water resources since well before federation. The determinative issue in this case is constitutional. That issue neither requires nor permits consideration of any of the large and difficult policy questions that may lie behind the legislative and executive acts which give rise to this proceeding.

91 The three plaintiffs conduct farming enterprises near Hillston in New South Wales. Each plaintiff is a registered proprietor of an estate in fee simple of at least a part of the land on which it conducts its enterprise. The land is near the Lachlan River and within the area of what is called the Lower Lachlan Groundwater System. This litigation, in the original jurisdiction of this Court, concerns the use that the plaintiffs may make of water in the Lower Lachlan Groundwater System. The parties have joined in a Special Case stating questions for the opinion of the Full Court.

92 Until 1 February 2008 the plaintiffs had a number of "bore licences" issued under the *Water Act* 1912 (NSW) ("the 1912 Act"). Those licences permitted the holder to use a bore to extract water from the ground. The plaintiffs used the groundwater to irrigate their properties.

93 The plaintiffs also had licences to take water from the Lachlan River, and this surface water was also used in irrigation. Because it is usually cheaper to use surface water rather than groundwater, surface water was generally used in preference to groundwater extracted under the bore licences. The amount of groundwater the plaintiffs have used in the past has varied from year to year. The licences that permitted the plaintiffs to take surface water are not in issue in this case.

94 On 1 February 2008, the bore licences held by the plaintiffs were replaced[100] by new licences, called aquifer access licences, issued under the *Water Management Act* 2000 (NSW). The new aquifer access licences permitted the plaintiffs to take less water than the bore licences had allowed. The plaintiffs' central complaint in this litigation is that their entitlement to water was thus reduced, without any legal right to compensation, and that therefore there has been an acquisition of their property otherwise than on just terms, contrary to s 51(xxxi) of the Constitution.

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100 *Water Management Act* 2000 (NSW), Sched 10, item 3.

95 The factual and legal steps to which the plaintiffs pointed as engaging the arguments about acquisition otherwise than on just terms can be described as follows. First, in June 2004 the governments of the Commonwealth, New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory made an "Intergovernmental Agreement on a National Water Initiative"[101]. It is convenient to call this agreement "the NWI". As contemplated by the NWI, federal legislation (the *National Water Commission Act* 2004 (Cth) – "the NWC Act") was passed which established the National Water Commission ("the NWC") "as an independent statutory body"[102]. One of the "general functions" of the NWC was[103] "to assist with the implementation of the NWI, and to undertake activities that promote the objectives and outcomes of the NWI".

96 The NWC Act contemplated the awarding, by the Minister administering the Act, of "financial assistance ... to particular projects relating to Australia's water resources"[104] and provided that the Chief Executive Officer of the NWC had the function of administering that financial assistance.

97 The second set of factual and legal steps to which the plaintiffs pointed concerned the award of financial assistance to a particular project proposed by New South Wales with respect to the Lower Lachlan Groundwater System. The State's proposal having been accepted by the relevant federal Minister (then the Prime Minister) a Funding Agreement was made on 4 November 2005. The parties to the Funding Agreement were described as the "Commonwealth of Australia, as represented by and acting through the National Water Commission" and the "State of New South Wales, as represented by and acting through the Department of Natural Resources". Many of the clauses of the Funding Agreement were cast in terms that would be apt to a contract made between commercial entities. So, for example, there was an express choice of law clause and a non-exclusive submission to the jurisdiction of the courts of New South Wales. The way in which the Funding Agreement was drafted provoked

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101 Tasmania and Western Australia joined the NWI subsequently.

102 Section 3 of the *National Water Commission Act* 2004 (Cth) ("the NWC Act") provided:

> "The object of this Act is to establish the National Water Commission, as an independent statutory body, as required by the National Water Initiative."

103 NWC Act, s 7(1)(a).

104 s 24(1)(a).

argument about whether, and to what extent, it was capable of enforcement as a contract. Those debates need not be decided.

98 The Funding Agreement provided that "[s]ubject to sufficient appropriations for the Programme and the State's compliance with this Agreement, the Commonwealth will provide the State with the Funding at the times, on the conditions and in the manner specified" in a schedule to the Agreement. The maximum amount to be provided by the Commonwealth under the Agreement was $55 million. Subject to the State meeting certain "Milestones", most of the money to be provided by the Commonwealth was to be paid by 1 July 2006. The State was to contribute $55 million to the project.

99 By the Funding Agreement the State agreed to carry out "the Project". So far as immediately relevant, it is enough to notice that "the Project" required the State (a) to convert all water licences in the Lower Lachlan Groundwater System to licences under the *Water Management Act* 2000; (b) to develop a method for reducing water entitlements to the Groundwater System that took into account a licence holder's historical extraction of water from the relevant system; and (c) once that method had been agreed by the Prime Minister and the Premier of New South Wales, to achieve a reduction of 56 per cent in water entitlements in respect of the Lower Lachlan Groundwater System by 1 July 2016. The Funding Agreement provided for making ex gratia "structural adjustment payments" to affected licence holders but that each payment was not to exceed two-thirds of the final value of a licence holder's water entitlement reduction at the end of the 10 year period over which the reduction was to occur. The budget for structural adjustment payments was $100 million (half to be provided by the Commonwealth and half by the State). No party or intervener submitted that, if there was an acquisition of property, the making of these ex gratia structural adjustment payments would constitute the provision of just terms.

100 The third set of factual and legal steps concerned the processes by which, as contemplated by the Funding Agreement, the State sought to convert water licences in the Lower Lachlan Groundwater System from licences under the 1912 Act to licences under the *Water Management Act* 2000, and the processes by which the State reduced water entitlements. Particular attention was directed to three State instruments that converted water licences under the 1912 Act and effected the reduction in entitlements: the Water Sharing Plan for the Lower Lachlan Groundwater Source Amendment Order 2008; the Water Management (General) Amendment (Lower Lachlan) Regulation 2008 (NSW); and a Proclamation dated 30 January 2008 stated to be made pursuant to ss 55A(1) and 88A(1) of the *Water Management Act* 2000. It is convenient to adopt the terms used in the Special Case and to refer to these three instruments as the Amendment Order, the Amendment Regulation and the Proclamation.

101 In their Special Case, the parties identified "the questions of law arising in the proceeding"[105] in the following terms:

> "1. By reason of s 51(xxxi) of the Constitution:
>
> (a) did the Commonwealth lack executive power to enter into the Funding Agreement?
>
> (b) is the National Water Commission Act invalid insofar as it authorised the CEO to enter into the Funding Agreement on behalf of the Commonwealth?
>
> 2. If the answer to either part of Question 1 is 'yes', are all or any of:
>
> (a) the Amendment Regulation;
>
> (b) the Proclamation;
>
> (c) the Amendment Order;
>
> invalid or inoperative as a consequence?
>
> 3. Do the plaintiffs remain the holders of all or any of the bore licences issued to them under the Water Act?
>
> 4. If the answers to Questions 2 and 3 are 'no', do the plaintiffs have an implied right under the Constitution to recover from the Commonwealth such compensation for the loss of their bore licences as would constitute 'just terms' within the meaning of s 51(xxxi) of the Constitution?
>
> 5. Who should pay the costs of this Special Case?"

Questions 1–3: An invalid acquisition of property?

102 It is convenient to deal with the first three questions together. The general framework of the plaintiffs' arguments in relation to them can be identified as having four elements:

(a) The plaintiffs' water entitlements under the bore licences are no more than a regulation of the common law rights of the plaintiffs, as landowners, to

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105 High Court Rules 2004, r 27.08.1.

take and use groundwater; they are rights of a proprietary kind with which s 51(xxxi) deals.

(b) Neither the NWC Act nor the Funding Agreement is valid to the extent to which either the Act or the Agreement provides for, or contemplates, the acquisition of the plaintiffs' property otherwise than on just terms. And any law by which the Consolidated Revenue Fund is appropriated for the Commonwealth to make payments under the Funding Agreement is likewise invalid.

(c) Steps taken by the State in furtherance of the Funding Agreement (by the Amendment Order, the Amendment Regulation and the Proclamation) are steps taken in breach of the Constitution and the guarantee in s 51(xxxi), whether by application of covering cl 5[106] or s 106[107] of the Constitution, and for that reason are invalid.

(d) The steps taken by the State to convert the plaintiffs' bore licences to aquifer access licences being thus invalid, the plaintiffs retain their existing bore licences.

103 Each of those four elements of the plaintiffs' arguments necessarily depended upon a number of premises, some constitutional, some not. So, for example, the propositions that the NWC Act does not provide, or does not validly provide, for an acquisition of property otherwise than on just terms depended upon premises about the construction of the NWC Act, and about the head or heads of legislative power that supported the NWC Act in one or more of its operations. Most importantly, the propositions about the NWC Act depended upon the premise that s 51(xxxi) was engaged in a relevant respect. The engagement of s 51(xxxi) was said to proceed by four steps. First, the NWC Act is otherwise a valid law of the Commonwealth. Second, the NWC Act permits or requires the fixing of terms and conditions upon which a grant of financial assistance to a State is to be made under s 96 of the Constitution. Third, the

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106 "This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State ...".

107 "The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State."

power given by s 96 to the Parliament to "grant financial assistance to any State on such terms and conditions as the Parliament thinks fit" does not extend to fixing, directly or indirectly, as a term or condition of a grant, a requirement that a State acquire property otherwise than on just terms. Fourth, because the Funding Agreement provided for an acquisition of the plaintiffs' property otherwise than on just terms, the making of the Funding Agreement by the Commonwealth was not authorised by the NWC Act (or otherwise) and the Funding Agreement was invalid.

104 The submissions about the intersection of ss 96 and 51(xxxi) directed particular attention to this Court's earlier decisions in *P J Magennis Pty Ltd v The Commonwealth*[108] and *Pye v Renshaw*[109]. The plaintiffs submitted that *Magennis* was directly in point because, so they submitted, the object of the Funding Agreement was, and its terms required, that there be an acquisition of property otherwise than on just terms and *Magennis* holds that a law which authorises the making of an agreement in those terms is invalid. By contrast, the first and second defendants (the Commonwealth and the NWC) sought leave to reopen *Magennis* and submitted that it should be overruled. The third and fourth defendants (New South Wales and the Minister Administering the *Water Management Act* 2000) and Victoria and Queensland intervening submitted that it was not necessary to decide whether *Magennis* was correct but that, if the Court were to consider the matter, the Court should overrule the decision. Western Australia and South Australia intervening submitted that *Magennis* should be distinguished.

105 The plaintiffs' submission that the Funding Agreement was invalid (sometimes advanced as an argument that it was not "enforceable") was a necessary premise for the next step in their argument: that the Amendment Order, the Amendment Regulation and the Proclamation are invalid. The three instruments were connected. It was not disputed that if, as the plaintiffs submitted, the Amendment Order was invalid, the Amendment Regulation and the Proclamation had no operation because each depended upon there first having been a valid Amendment Order.

106 As noted earlier, questions about whether, or to what extent, the Funding Agreement could be enforced as a contract need not be considered. It is enough to observe that invalidity of the three State instruments was said to follow from the application of either covering cl 5 or s 106 (and its reference to the

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108 (1949) 80 CLR 382; [1949] HCA 66.

109 (1951) 84 CLR 58; [1951] HCA 8.

Constitution of each State continuing "subject to this Constitution"). Nor will it be necessary to examine the plaintiffs' further submission that the Amendment Order was made by the relevant New South Wales Minister on the basis of an error of law (that the Funding Agreement was valid) and that its making was capricious and unreasonable.

107 Just as some of the more particular arguments advanced by the plaintiffs need not be considered, the accuracy of many of the premises that lie behind the four main elements of the plaintiffs' arguments need not be examined or decided in this matter. All of the arguments advanced by the plaintiffs depended upon the validity of one central proposition: that there had been an acquisition of property. That is, the central proposition in the plaintiffs' arguments was that the replacement of bore licences issued under the 1912 Act by aquifer access licences issued under the *Water Management Act* 2000 (permitting extraction of less water than had been allowed under the bore licences) worked an acquisition of property.

108 These reasons will demonstrate that this central proposition should not be accepted. Since 1906, it has not been lawful to bore for, and thus obtain access to, groundwater in New South Wales without a licence to do so[110]. Since 1930, the quantity of groundwater that may be taken could be fixed as a condition of being licensed to dig or to use a bore[111]. Since 1966, groundwater has been

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110 *Water and Drainage and Artesian Wells (Amending) Act* 1906 (NSW), s 22(1), which provided, so far as now relevant, that:

> "No artesian well shall be commenced or be enlarged, deepened, or be altered to increase the flow of water therefrom, unless –
>
> (a) in pursuance of a licence under this Act ...".

Section 22 was to be construed with the *Artesian Wells Act* 1897 (NSW) which defined (s 7) "Artesian Well" as including "an artesian well from which the water does not flow naturally, but has to be raised by pumping or other artificial means".

111 The *Water (Amendment) Act* 1930 (NSW) ("the 1930 Amendment Act") amended the *Water Act* 1912 (NSW) ("the 1912 Act") by repealing and re-enacting ss 115 and 116 of the 1912 Act. The new sections provided that any licence granted with respect to the sinking of what thereafter were referred to as "bores" should be subject to such limitations and conditions as the licensing authority may think fit to make.

vested in the State[112]. And since that date, the amount of water that could be taken under a bore licence, and the rate at which it could be taken, could be restricted or controlled[113]. This being the legal regime that governed groundwater in New South Wales, replacement of the bore licences under the 1912 Act by new aquifer access licences permitting extraction of less water was not an acquisition of property. In order to explain why, it is necessary to say something further about the English common law concerning water, and on that foundation to examine the plaintiffs' submission that the relevant legislation was no more than a regulation of the common law rights of the plaintiffs as landowners.

English common law rights to water

109 By the middle of the 19th century, the English common law had settled many of the issues about rights to the use of water that had emerged during the industrial revolution. Common law riparian doctrine regarding natural surface streams was settled in *Embrey v Owen*[114] after full consideration of not only earlier English decisions but also Roman, American and French law. *Embrey v Owen* held that a riparian owner could make reasonable use of the water in a stream and that what was reasonable depended upon whether the natural flow of

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112 The *Irrigation, Water, Crown Lands and Hunter Valley Flood Mitigation (Amendment) Act* 1966 (NSW) ("the 1966 Amendment Act") amended the 1912 Act to insert a new s 4B providing in sub-s (1) that:

> "The right to the use and flow and to the control of all sub-surface water shall vest in the Commission for the benefit of the Crown and in the exercise of that right the Commission, by its officers, servants and agents, may enter any land and take such measures as may be thought fit or as may be prescribed for the conservation and supply of such water, its more equal distribution and beneficial use, its protection from pollution and for preventing, removing or rendering ineffective any unlawful interference with or obstruction to such flow."

113 The 1966 Amendment Act amended the 1912 Act to provide for declaration of restricted sub-surface water areas (s 117A(1)) and for the Commission, by notice, to direct the licensee of any bore in a restricted sub-surface water area "to restrict or control the rate of flow or pumping or the manner of extraction of water from the bore, or the quantity of water which may be allowed to flow or be pumped therefrom in any stated period of time or its usage" (s 117A(3)(a)(i)).

114 (1851) 6 Ex 353 [155 ER 579]. See also *Dickinson v The Grand Junction Canal Company* (1852) 7 Ex 282 [155 ER 953].

the stream was diminished[115]. The underlying proposition which informed these principles was that water, like light and air, is common property ("for the common benefit of man"[116]). Although the right to have the stream flow in its natural state without diminution or alteration was held[117] to be an incident in the property in the land through which the stream flows, flowing water was held[118] to be:

> "publici juris, not in the sense that it is a bonum vacans, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, *that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only*". (emphasis added)

110 After the decision in *Embrey v Owen* had more or less settled riparian rights in English common law, there remained uncertainty about rights to groundwater, rights to surface waters forming no channel, and the extent to which water rights, as a species of property incidental to land ownership, could be assigned to persons having no riparian land or privity of estate[119]. In 1859, in *Chasemore v Richards*[120], the House of Lords settled the common law with respect to groundwater. The House of Lords held[121] that the principles established with respect to flowing waters or streams were inapplicable to water percolating through underground strata and not forming a "known subterranean channel". Water of the latter kind "has no certain course, no defined limits, but

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115 The significance of diminution of flow was further considered by the Privy Council in *Miner v Gilmour* (1858) 12 Moo PC 131 [14 ER 861]. There it was held that use could be made for domestic purposes or watering stock, regardless of effect on flow: (1858) 12 Moo PC 131 at 156 [14 ER 861 at 870].

116 (1851) 6 Ex 353 at 372 [155 ER 579 at 587].

117 (1851) 6 Ex 353 at 369, 372 [155 ER 579 at 585, 587].

118 (1851) 6 Ex 353 at 369 [155 ER 579 at 585].

119 Getzler, *A History of Water Rights at Common Law*, (2004) at 296.

120 (1859) 7 HLC 349 [11 ER 140].

121 (1859) 7 HLC 349 at 374-377 [11 ER 140 at 150-151].

... oozes through the soil in every direction in which the rain penetrates"[122]. As Lord Chelmsford continued[123]:

> "There is no difficulty in determining the rights of the different proprietors to the usufruct of the water in a running stream. Whether it has been increased by floods or diminished by drought, it flows on in the same ascertained course, and the use which every owner may claim is only of the water which has entered into and become a part of the stream. But the right to percolating underground water is necessarily of a very uncertain description. When does this right commence? Before or after the rain has found its way to the ground? If the owner of land through which the water filters cannot intercept it in its progress, can he prevent its descending to the earth at all, by catching it in tanks or cisterns? And how far will the right to this water supply extend?"

111 No limit was placed upon the use that a proprietor could make of groundwater[124]. As the editors of the relevant volume of the first edition of *Halsbury's Laws of England* put the matter[125], in 1914,

> "*The owner of land containing underground water which percolates or flows by unknown channels to a neighbour's land may divert or appropriate it as he pleases*, so that his neighbour may have no underground water in his land, or so that the stream that he owns may be diminished in consequence of the underground water which has been so appropriated not coming into his stream. *This right of diversion, or appropriation, may be exercised whatever the motive may be*, and it matters not how long his neighbour has enjoyed the use of the percolating water, for the neighbour thereby acquires no rights in law, because *water in an unknown channel or percolating water cannot be the subject of prescription or grant.* Consequently any person may by drainage or other works on his own land drain his neighbour's well, for this is a case of *damnum absque injuria*." (emphasis added)

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122 (1859) 7 HLC 349 at 374 [11 ER 140 at 150].

123 (1859) 7 HLC 349 at 374-375 [11 ER 140 at 150].

124 (1859) 7 HLC 349 at 374-379 [11 ER 140 at 150-152].

125 vol 28 at 430-431, par 860 (footnotes omitted).

The settlement in the 19th century of these common law rules about riparian rights and use of groundwater must not be permitted to obscure some important underlying ideas that find reflection in the rules that were established.

112 First and foremost there was then, and still must be, a clear recognition of the difficulty of applying notions of ownership or property to water in the ground or in a flowing stream. What exactly would be the subject of property rights? While still allowed to flow, no part of the water that flows in a stream can be isolated and tagged as the water "owned" by some person. And water in the ground may move more slowly but there is no less difficulty in identifying what would be the subject of the proprietary rights. As Getzler has rightly said in his work *A History of Water Rights at Common Law*[126], "flowing water is a thing in constant state of change which may be diverted, abstracted, or polluted by competing users, and hence destroyed". It is this "quality of instability" that Getzler identifies[127] as creating difficulties of legal characterisation because "underlying the law's intricate structure of property rights corporeal and incorporeal, of tenures, estates, and trusts, lay an abiding principle of physical possession (or rights to the fruits of possession) as the foundation of right".

113 Next, even if these difficulties of identifying the object in respect of which proprietary rights were to exist could be overcome, should any private proprietary right be recognised? In *Embrey v Owen*[128], Parke B spoke of water flowing in a stream (like air and light) as "bestowed by Providence for the *common benefit* of man" (emphasis added). And James Kent in his *Commentaries on American Law* (quoted at length in *Embrey v Owen*) made the same point when he said that[129]: "Streams of water are intended for the use and comfort of man". It was upon this footing that he formulated[130] the principle (taken up and applied in *Embrey v Owen*) that a person, by or over whose land a stream passes, must use the water "in a reasonable manner, and so as not to destroy, or render useless, or materially diminish, or affect the application of the water by the proprietors below on the stream".

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126 (2004) at 43.

127 at 43 (footnote omitted).

128 (1851) 6 Ex 353 at 372 [155 ER 579 at 587].

129 (1828), vol 3, Lecture 51 at 354.

130 (1828), vol 3, Lecture 51 at 354.

114 Further, the law that was stated in *Chasemore v Richards* with respect to groundwater must be understood having regard to two matters. First, little was then known about groundwater resources beyond the fact that water could sometimes be recovered by digging for it. Hence the references in *Chasemore v Richards* to water which "has no certain course, no defined limits". Secondly, the actual decision in *Chasemore v Richards* anticipated what was later decided in *Allen v Flood*[131]: that an act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to civil action. A landowner who dug a well lawfully, and took water from it lawfully, was not liable to another simply because the other suffered some damage, or even if the taker of the water acted to harm the other[132].

115 Finally, it is of the very first importance to recognise that the common law principles established in the 19th century were directed to the adjustment of rights between landowners. The issue in this case arises, not because there has been some adjustment of those rights, but because the polity has sought to regulate generally the access allowed to a common resource.

Water regulation in Australia

116 The plaintiffs' submission, that the legislation which provided for the creation of the "property" which they alleged had been acquired otherwise than on just terms (the bore licences or that part of their water entitlements which was not carried through into the new aquifer access licences) was no more than the regulation of common law rights, assumes that the content of those common law rights was or is settled. The controversy reflected in this Court's decision in *Thorpes Ltd v Grant Pastoral Co Pty Ltd*[133] about the correctness of the decision in the Supreme Court of New South Wales in *Hanson v The Grassy Gully Gold Mining Co*[134] may deny that premise. And whether or not the content of those common law rights was settled by the end of the 19th century, or even the middle of the 20th century, there would seem to be much force in the view that *Hanson's Case* was rightly decided when it held[135] that common law riparian rights were abolished in New South Wales by the *Water Rights Act* 1896 (NSW).

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131 [1898] AC 1.

132 *Acton v Blundell* (1843) 12 M & W 324 [152 ER 1223].

133 (1955) 92 CLR 317; [1955] HCA 10.

134 (1900) 21 LR (NSW) 271.

135 (1900) 21 LR (NSW) 271 at 275-277.

117 Be this as it may, the plaintiffs' submission that the bore licences were no more than a regulation of common law rights does not withstand close attention to and consideration of the course of legislative regulation of the extraction and use of groundwater in New South Wales. To explain why that is so it is desirable to look at some aspects of the history of water regulation in the Australian colonies.

118 During the last quarter of the 19th century, the Australian colonial legislatures gave close attention to regulating water resources. At first the focus fell upon domestic water supply, especially in and near country towns[136]. But during and after the New South Wales Royal Commission on the Conservation of Water (whose first report was delivered in 1885) and the Victorian Royal Commission on Water Supply (of which Alfred Deakin was chairman and which delivered successive reports between 1885 and 1887) interest turned to irrigation. Irrigation was seen as necessary to future development.

119 An important issue to be resolved was whether riparian rights attached to land. In his speech in the Victorian legislature, in support of the Bill for what was to become the *Irrigation Act* 1886 (Vic), Mr Deakin noted[137] that in both South Australia and New South Wales proposals had been made for the abolition of riparian rights and that the Bill then before the Victorian Parliament sought to declare the law in regard to riparian rights in that colony. In South Australia, the proposal was to permit proclamation of an order bringing surface water under the exclusive control and management of the colony's Water Commission. In New South Wales, that colony's Water Commission proposed that landowners have rights to only so much water as was needed for domestic use or the watering of stock but that otherwise surface water belong to the Crown. The proposal in Victoria, to which s 4 of the *Irrigation Act* 1886 gave effect, was to deem surface water to be vested in the Crown ("until the contrary be proved by establishing any other right than that of the Crown to the use of such water") and to limit riparian rights to use for domestic and stock supply.

120 Legislation vesting surface water in the Crown was enacted in New South Wales in 1896[138]. Section 1(I) of the *Water Rights Act* 1896 provided that:

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136 See, for example, *Water Conservation Act* 1881 (Vic).

137 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 June 1886 at 441-442.

138 *Water Rights Act* 1896 (NSW).

> "The right to the use and flow and to the control of the water in all rivers and lakes which flow through or past or are situate within the land of two or more occupiers, and of the water contained in or conserved by any works to which this Act extends, shall, subject only to the restrictions hereinafter mentioned, vest in the Crown."

Riparian proprietors were given[139] the right to use water for domestic purposes, for watering stock, or for gardens not exceeding five acres used in connection with a dwelling house.

121 Some attention was given to recovery of groundwater for irrigation in both the New South Wales and Victorian Royal Commissions on water supply, but the chief focus fell upon use and conservation of surface water. From the 1870s, bores were dug and groundwater extracted in various parts of Australia, particularly for use in pastoral production[140]. By 1897, the New South Wales Minister introducing the Artesian Wells Bill 1897 (NSW) could record that about 150 artesian bores had been sunk in New South Wales and 372 in Queensland[141]. Some bores had been sunk by government, some privately. The evident purpose of the *Artesian Wells Act* 1897 (NSW) was to encourage recovery of groundwater. But the encouragement given was not for individual landholders to recover water for the landholder's private purposes. What was encouraged was drilling for water that would be used by all landholders in the area. Thus, the *Artesian Wells Act* 1897 provided (in effect) that on the petition of owners, occupiers or mortgagees of land in an area, and approval of the proposal, the Crown could construct, at public expense, an artesian well and such channels and other works as were necessary to supply water to the petitioners' lands. Charges would then be assessed and levied against occupiers but were not to exceed[142] "the yearly value to each occupier of the direct benefit accruing to his land from the construction of the well, and from the supply to the said land of water from the well".

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139 s 2.

140 Tyrrell, *True Gardens of the Gods: Californian-Australian Environmental Reform, 1860-1930*, (1999) at 126.

141 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 11 August 1897 at 2873-2874.

142 s 2(II).

122 In 1906, the construction of new bores and the enlargement of existing bores in New South Wales was prohibited unless licensed[143]. Provision was made[144] to permit the Minister to give directions that would prevent wasteful or improper use of water from artesian wells. Although, as noted earlier, legislation vesting groundwater in the State was not enacted in New South Wales until 1966, the 1906 provisions (re-enacted in the 1912 Act[145]) sufficed to give control over the extraction of groundwater to the State. Subject to any qualification that might then have been necessary in relation to any existing private bores, from 1906 a landowner or occupier in New South Wales had no right to recover groundwater under land owned or occupied by that person without a licence. If a licence was issued, it was deemed[146] to be held by and operate for the benefit of the lawful occupier for the time being of the land on which the well was sunk or to be sunk. But the bare fact of ownership or occupation of land gave no right to sink a bore or well. And without a bore or well, there could be no recovery of groundwater.

123 Later steps to alter the regulation of recovery of groundwater may be noticed only briefly. In 1930, the 1912 Act was amended[147] to provide for the issue of what thereafter were to be known as "bore licences" permitting the sinking, enlarging, deepening or alteration of bores. After the 1930 amendments, subject to certain provisions of the 1912 Act as then in force, and subject to such limitations and conditions as the licensing authority may think fit to make, bore licences issued for a term were to be renewed by the authority on the application of the holder and payment of the prescribed fee[148]. To that extent the licences acquired a degree of permanence. From 1955[149] all bores, whenever sunk, had to be licensed.

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143 *Water and Drainage and Artesian Wells (Amending) Act* 1906, s 22(1).

144 s 30.

145 ss 112, 113, 123.

146 *Water and Drainage and Artesian Wells (Amending) Act* 1906, s 28; re-enacted in the 1912 Act, s 117.

147 1930 Amendment Act, s 4.

148 1912 Act, s 116, as inserted by the 1930 Amendment Act, s 4(l).

149 *Irrigation, Water and Rivers and Foreshores Improvement (Amendment) Act* 1955 (NSW), s 12(f) inserting s 115A in the 1912 Act.

124 Bore licences, though renewable and operating for the benefit of the occupier of the land for the time being, could be and were altered by subsequent legislation. The most notable of those changes was made in 1966, by the Act which vested the right to use and flow and to control of all sub-surface water in the Water Commission for the benefit of the Crown[150]. The 1966 Act amended the 1912 Act to permit[151] the Governor, by proclamation, to "declare any sub-surface water basin, or any part thereof, to be a restricted sub-surface water area". "Sub-surface water" was defined[152] as "water occurring naturally under the surface of the ground whatever may be the geological structure in which it is standing or moving". If the area was declared to be a restricted sub-surface water area, the Commission could direct[153] the licensee of any bore "to restrict or control the rate of flow or pumping or the manner of extraction of water from the bore, or the quantity of water which may be allowed to flow or be pumped therefrom in any stated period of time or its usage".

125 The Special Case in this matter records that in March 1984 the relevant New South Wales department adopted a policy of imposing on all bore licences, other than those used for domestic and stock requirements, a condition limiting the amount of water that could be extracted in a particular year. In addition, when a condition limiting the amount of water extracted was imposed, a further condition was fixed, which permitted the authority administering the 1912 Act to vary at any time the amount of water that was allocated, or the rate at which the allocation was to be taken. The amounts of water allocated to the plaintiffs as amounts that could be extracted under their bore licences thereafter varied from time to time.

126 In 1984, an area which included the Lower Lachlan Groundwater System was declared to be a restricted sub-surface water area. In 1994, all sub-surface water basins in New South Wales were declared to be restricted sub-surface water areas.

127 In 1997, the New South Wales Government published "The NSW State Groundwater Policy Framework Document", together with what were called its "Component Policies". The objectives of the policy included to "slow and halt, or reverse any degradation of groundwater resources" and to "ensure long term

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150 1966 Amendment Act.

151 1912 Act, s 117A(1) inserted by s 4(b) of the 1966 Amendment Act.

152 1912 Act, s 105 inserted by s 4(a) of the 1966 Amendment Act.

153 1912 Act, s 117A(3)(a)(i) inserted by s 4(b) of the 1966 Amendment Act.

sustainability of the systems' ecological support characteristics". The document recorded that the policy objectives would be achieved through application of resource management principles including the principle that "[n]on-sustainable resource uses should be phased out". To that end, it was said that a "Quantity Management Policy" would be developed to provide "a set of objectives relating to the sustainable management of groundwater extractions and their impact on dependent ecosystems" and to establish "the basis for sharing the State's groundwater resources".

128 In 1997, the 1912 Act was amended[154] to permit restriction or suspension of rights held under licences during periods of water shortage. In 1998 and 1999, the whole of the Lower Lachlan Groundwater System was declared to be a "water shortage zone". Thereafter, no application for new bore licences creating additional entitlements to water were accepted.

129 The 1997 amendments also provided[155] for the transfer of water allocations in such sub-surface water basins (or parts of basins) as the relevant authority determined. The Lower Lachlan groundwater management zone was determined to be an area subject to the relevant provisions. Allocations of water that could be extracted under bore licences thereafter were objects of commerce. They could be and were traded.

An acquisition of property otherwise than on just terms?

130 As noted earlier, there was a deal of controversy in this matter about whether s 51(xxxi) was engaged in any relevant respect. It will be necessary to consider some but not all aspects of that controversy. It is convenient to begin that consideration, however, by noting some principles about the application of s 51(xxxi) that are not disputed.

131 First, it is well established that, as was said in *Minister of State for the Army v Dalziel*[156], the guarantee effected by s 51(xxxi) of the Constitution

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154 *Water Legislation Amendment Act* 1997 (NSW), Sched 1, item [15], inserting s 117E in the 1912 Act.

155 *Water Legislation Amendment Act* 1997, Sched 1, item [15], inserting s 117J in the 1912 Act.

156 (1944) 68 CLR 261 at 290; [1944] HCA 4. See also *Bank of NSW v The Commonwealth* ("the *Banking Case*") (1948) 76 CLR 1 at 299, 349; [1948] HCA 7; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509; [1993] HCA 10; *Mutual Pools & Staff Pty Ltd v The*

(Footnote continues on next page)

extends to protect against the acquisition, other than on just terms, of "*every species of valuable right and interest* including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action" (emphasis added). Second, as was said in *Telstra Corporation Ltd v The Commonwealth*[157]:

> "[R]eferences to statutory rights as being 'inherently susceptible of change' must not be permitted to mask the fact that '[i]t is too broad a proposition ... that the contingency of subsequent legislative modification or extinguishment removes all statutory rights and interests from the scope of s 51(xxxi)'[158]."

Rather, as the Court went on to point out in *Telstra*[159]: "[A]nalysis of the constitutional issues must begin from an understanding of the practical and legal operation of the legislative provisions that are in issue" (here the 1912 Act and the *Water Management Act* 2000).

132 Third, it is now well established[160] that:

> "To bring the constitutional provision [s 51(xxxi)] into play it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an

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Commonwealth (1994) 179 CLR 155 at 172, 176, 184, 194, 201, 222; [1994] HCA 9; *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 559 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; [1996] HCA 56; *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 663 [21] per Gleeson CJ, Gummow, Hayne and Crennan JJ; [2007] HCA 34; *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 232 [49] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ; [2008] HCA 7.

157 (2008) 234 CLR 210 at 232 [49].

158 *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 664 [24].

159 (2008) 234 CLR 210 at 232 [49].

160 *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 145 per Mason J; [1983] HCA 21. See also at 247-248 per Brennan J, 282-283 per Deane J; *Tape Manufacturers* (1993) 176 CLR 480 at 499-500 per Mason CJ, Brennan, Deane and Gaudron JJ, 528 per Dawson and Toohey JJ.

> acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be."

133 Fourth, as is evident from the passage just quoted from *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*), s 51(xxxi) can be engaged where there is an acquisition of property by the Commonwealth or *by another*[161]. As Aickin J pointed out in *Trade Practices Commission v Tooth & Co Ltd*[162]:

> "It would be a serious gap in the constitutional safeguard which is the manifest policy of par (xxxi) if the Parliament could legislate for compulsory acquisition of property without just terms by statutory bodies which were not the Commonwealth itself or its agents or by persons or bodies having no connexion with the government. Neither the words of s 51 nor the context require the adoption of so anomalous a view."

134 Finally, and more fundamentally, proper account must be taken of the principles which underpin the application that has been given to s 51(xxxi) in this Court's decisions. The root principle was identified by Dixon J in *Bank of NSW v The Commonwealth* ("the *Banking Case*")[163]:

> "Section 51(xxxi) serves a double purpose. It provides the Commonwealth Parliament with a legislative power of acquiring property: at the same time as a condition upon the exercise of the power it provides the individual or the State, affected with a protection against governmental interferences with his proprietary rights without just recompense. In both aspects consistency with the principles upon which constitutional provisions are interpreted and applied demands that the paragraph should be given as full and flexible an operation as will cover the objects it was designed to effect. Moreover, when a constitution undertakes to forbid or restrain some legislative course, there can be no prohibition to which it is more proper to apply the principle embodied in the maxim *quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud*. In requiring

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161 *Jenkins v The Commonwealth* (1947) 74 CLR 400 at 406; [1947] HCA 41; *McClintock v The Commonwealth* (1947) 75 CLR 1 at 23-24, 36; [1947] HCA 39; *P J Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 at 401-402, 411, 423; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 427, 451-452; [1979] HCA 47.

162 (1979) 142 CLR 397 at 452.

163 (1948) 76 CLR 1 at 349-350.

just terms s 51(xxxi) fetters the legislative power by forbidding laws with respect to acquisition on any terms that are not just."

135 It has been sought to capture this root principle in the metaphor of "abstraction" from power, coined by Aickin J in *Trade Practices Commission v Tooth & Co Ltd*[164] and discussed in *Wurridjal v The Commonwealth*[165]. And just as in *Wurridjal* the notion of s 51(xxxi) "abstracting" the power of acquisition was used to suggest that there could be no relevant intersection between s 51(xxxi) and s 122, echoes of like arguments could be heard in this case when it was said that there was no intersection between s 51(xxxi) and s 96 because s 96 is not to be read as a head of legislative power. But as was pointed out[166] in *Wurridjal*, the critical observation to make about the application of the principle of interpretation stated in the *Banking Case*, and later in *Attorney-General (Cth) v Schmidt*[167], is that it cannot be confined to construction of the heads of power enunciated in s 51. "The principle, the soundness of which is not disputed, must be applied to all heads of the power of the Parliament."[168]

136 Because s 51(xxxi) "undertakes to forbid or restrain some legislative course"[169] and "should be given as full and flexible an operation as will cover the objects it was designed to effect"[170], its operation is not to be circumvented by some "circuitous device"[171]. But no issue of circuitous device arises here. The question argued in this matter by reference to *Magennis* is whether s 51(xxxi) intersects in some relevant manner with s 96. More particularly, in fixing "such terms and conditions as the Parliament thinks fit" for the grant of financial assistance to a State under s 96, may the Parliament fix a term or condition that requires compulsory acquisition of property by the State otherwise than on just terms?

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164 (1979) 142 CLR 397 at 445.

165 (2009) 237 CLR 309 at 387 [186]; [2009] HCA 2.

166 (2009) 237 CLR 309 at 386-387 [185].

167 (1961) 105 CLR 361 at 371-372; [1961] HCA 21.

168 (2009) 237 CLR 309 at 386-387 [185].

169 *Banking Case* (1948) 76 CLR 1 at 349-350.

170 (1948) 76 CLR 1 at 349.

171 (1948) 76 CLR 1 at 349. See also *O Gilpin Ltd v Commissioner for Road Transport and Tramways (NSW)* (1935) 52 CLR 189 at 211-212; [1935] HCA 8.

137 That question was answered in the negative in *Magennis*. The law impugned in that case (the *War Service Land Settlement Agreements Act* 1945 (Cth)) approved the making by the Commonwealth of intergovernmental agreements with States that, when made in 1945, would provide for States to acquire land compulsorily at prices fixed at 1942 values. The majority in *Magennis* characterised the law as a law with respect to acquisition of property. The dissenting view, expressed by Dixon J, depended upon confining the considerations relevant to the characterisation of the impugned law to the rights and duties created by the law and excluding from consideration the practical effect of the law. The impugned law, in the opinion[172] of Dixon J, did no more than authorise the making of an agreement; the Act itself neither authorised the acquisition of property nor contained any provision about property. In his Honour's opinion[173], the law was not to be characterised as a law with respect to an acquisition of property because, under an agreement, the making of which by the Commonwealth was authorised by federal law, the State undertook to exercise *its* powers of acquisition.

138 For the purposes of this case it is enough to make only the following points. First, it is now well established that the practical operation of a law is not irrelevant to questions of characterisation[174]. Of course, the character of the law must be determined by reference to the rights, powers, liabilities, duties and privileges which it creates[175]. But the practical operation of the law must also be considered in determining the sufficiency of the connection.

139 Second, a law may contravene the constitutional restraint on the power of acquisition – that just terms be provided – directly or indirectly, explicitly or implicitly. To adopt and adapt what Dixon J said in the context of s 92 in *O Gilpin Ltd v Commissioner for Road Transport and Tramways (NSW)*[176],

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172 (1949) 80 CLR 382 at 410.

173 (1949) 80 CLR 382 at 411.

174 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 368-369; [1995] HCA 16; *Leask v The Commonwealth* (1996) 187 CLR 579 at 601-602, 621, 633-634; [1996] HCA 29; *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16]; [2000] HCA 14.

175 *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7; [1965] HCA 64; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 352-353 [7], 372 [58]; [1998] HCA 22.

176 (1935) 52 CLR 189 at 211-212.

however circuitous or disguised it may be, once it appears that the law is a law with respect to acquisition otherwise than on just terms, it is discovered to be an infringement of the restriction upon power contained in s 51(xxxi).

140 Third, no textual or other reason was identified in argument, beyond the conclusion about characterisation reached by Dixon J in *Magennis*, which led inexorably to the conclusion that the power given by the Parliament to fix terms and conditions for grants of financial assistance to the States under s 96 is unrestrained by s 51(xxxi). More particularly, the debate about whether the reference in s 96 to "such terms and conditions as the Parliament thinks fit" is properly described as a head of legislative power is a debate more about taxonomy than about the critical question of how s 96, when read in the context of the Constitution as a whole, is to be understood.

141 In the end, however, it will not be necessary to decide whether *Magennis* should be reopened or to decide an issue about the intersection of s 96 and s 51(xxxi). That will not be necessary because there has been no acquisition of property. And because it is not necessary to decide questions about the intersection of s 96 and s 51(xxxi), it is necessary not to decide them. Since its earliest days[177], the Court has followed the precept that constitutional questions should not be decided unless it is necessary "to do justice in the given case and to determine the rights of the parties"[178]. There is no occasion in this matter to depart from that principle.

No acquisition of property

142 The acquisition of property of which the plaintiffs complain is alleged to have been effected by the replacement of their bore licences by aquifer access licences with smaller extraction entitlements. (In argument the plaintiffs often referred to this process as a "cancellation" of their bore licences and the issue of the new licences. Nothing turns on the accuracy of this description.) The closer

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177 See, for example, *Attorney-General for NSW v Brewery Employés Union of NSW* (1908) 6 CLR 469 at 590; [1908] HCA 94; *Universal Film Manufacturing Co (Australasia) Ltd v New South Wales* (1927) 40 CLR 333 at 347, 356; [1927] HCA 50.

178 *Lambert v Weichelt* (1954) 28 ALJ 282 at 283; *Cheng v The Queen* (2000) 203 CLR 248 at 270 [58]; [2000] HCA 53; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 473-474 [249]-[252]; [2001] HCA 51; *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 443 [94], 468 [177]; [2004] HCA 61; *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159 at 171 [28]; [2005] HCA 35.

management of groundwater resources in New South Wales that has been applied in the 1990s and thereafter should not be permitted to obscure four considerations essential to an examination of whether the steps described effected an acquisition of property.

143 The first point to recall is that, unlike minerals, if groundwater is extracted it will ordinarily be replaced, over time and at least to some extent, by natural processes. An important purpose for regulating access to groundwater is thus to ensure that the resource is neither depleted nor degraded. That is, control is directed not just to the use, consumption, or extraction of the resource, but to ensuring its continuing availability.

144 The second point to bear in mind is that bore licences and aquifer access licences are each creatures of statute. And each form of licence is, or was, a statutory dispensation from a general prohibition against the taking of groundwater. Because all sub-surface water was vested in the State in 1966, none of the licences was a regulation of some common law right to extract groundwater. That right had disappeared altogether in 1966 with the vesting of sub-surface water in the State, if, that is, it had not been extinguished previously by the earlier legislation regulating bores. And because the rights given by the licences were statutory rights, they were inherently susceptible[179] to change or termination. (As the description of legislative history set out earlier shows, those rights have often been changed.) Since at least 1966, the rights to extract specified volumes of water in accordance with the bore licences could be restricted or controlled. And from 1984, the terms and conditions of the licences included a condition permitting variation of the water allocation.

145 The third point is that to speak of groundwater (before extraction) as a subject of "property", whether "owned" by the State or a person, seeks to engage legal concepts that have not hitherto been applied by the common law to water before it is reduced to possession. Water in the ground is a replaceable but fugitive resource. As was said in the passage from *Embrey v Owen*[180] that is set out earlier in these reasons, in connection with riparian rights, flowing surface water is "publici juris, not in the sense that it is a bonum vacans ... but that it is

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179 *Health Insurance Commission v Peverill* (1994) 179 CLR 226; [1994] HCA 8; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513; [1997] HCA 38; *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651.

180 (1851) 6 Ex 353 at 369 [155 ER 579 at 585].

public and common". No one has, or can have, property in it until it is reduced to possession. Or as Blackstone had put the same point, much earlier[181],

> "water is a moveable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein".

The point, made in *Embrey v Owen* and by Blackstone with respect to surface water, applies with as much, if not greater, force to groundwater before it is extracted and reduced to possession.

146 The fourth point to recall is that the particular rights which the State now has with respect to groundwater, like the rights the plaintiffs had under their bore licences, or now have under their aquifer access licences, are creatures of statute. In 1966, the State's rights with respect to groundwater were described as the "right to the use and flow and to the control of all sub-surface water"[182]. Those rights were vested[183] in a public authority for the benefit of the Crown. The *Water Management Act* 2000 now makes substantially identical provision in s 392(1) and (2)[184]. The vesting of the rights to the control, use and flow of sub-surface water thus effected in the Crown is to be understood at least by

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181 Blackstone, *Commentaries on the Laws of England*, (1766), bk 2, c 2 at 18.

182 1912 Act, s 4B, as inserted by s 3(c) of the 1966 Amendment Act.

183 1912 Act, s 4B, as inserted by s 3(c) of the 1966 Amendment Act.

184 Section 392 provides, in part:

> "(1) For the purposes of this Act, the rights to the control, use and flow of:
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> (a) all water in rivers, lakes and aquifers, and
>
> (b) all water conserved by any works that are under the control or management of the Minister, and
>
> (c) all water occurring naturally on or below the surface of the ground,
>
> are the ***State's water rights***.
>
> (2) The State's water rights are vested in the Crown, except to the extent to which they are divested from the Crown by or under this or any other Act."

reference to, if not as limited in effect by, the statutory purposes to be fulfilled in consequence of the vesting[185]. Those purposes can be described as controlling access to a public resource. So understood, the vesting of groundwater effected in 1966 was but a further step along a path that had been set at least by 1930 if not much earlier. Moreover, the references to "control", "use" and "flow" are important. Those are the rights that are vested in the Crown[186].

147 It may readily be accepted that the bore licences that were cancelled were a species of property. That the entitlements attaching to the licences could be traded or used as security amply demonstrates that to be so. It must also be accepted, as the fundamental premise for consideration of whether there has been an acquisition of property, that, until the cancellation of their bore licences, the plaintiffs had "entitlements" to a certain volume of water and that after cancellation their "entitlements" were less. Those "entitlements" were themselves fragile. They could be reduced at any time, and in the past had been. But there can be no *acquisition* of property unless some identifiable and measurable advantage is derived by another from, or in consequence of, the replacement of the plaintiffs' licences or reduction of entitlements[187]. That is, another must acquire "an interest in property, however slight or insubstantial it may be"[188].

148 The only possible recipient of an advantage in this matter is the State. Did it derive some advantage from replacing the bore licences or reducing water entitlements?

149 The four considerations set out earlier in these reasons (the replaceable and fugitive nature of groundwater; that the licences in issue are a creature of statute and inherently fragile; that groundwater has not hitherto been thought to be a subject of property; and that the rights vested in the State are statutory rights

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185 *H Jones & Co Pty Ltd v Kingborough Corporation* (1950) 82 CLR 282 at 320-322 per Dixon J; [1950] HCA 11.

186 Compare, in this respect, the legislation considered in the *Kingborough Corporation Case* where "every river, creek, or watercourse" within a designated area was vested in the council of the relevant municipality.

187 *Newcrest* (1997) 190 CLR 513 at 560 per Toohey J, 561 per Gaudron J, 634 per Gummow J.

188 *The Tasmanian Dam Case* (1983) 158 CLR 1 at 145 per Mason J; *Tape Manufacturers* (1993) 176 CLR 480 at 500 per Mason CJ, Brennan, Deane and Gaudron JJ, 528 per Dawson and Toohey JJ.

for the purpose of controlling access to a public resource) all point towards the conclusion that the State gained no identifiable or measurable advantage from the steps that have been taken with respect to the plaintiffs' water licences and entitlements.

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

151 The plaintiffs submitted that the cancellation of their bore licences and the issue of new licences permitting extraction of less water was as much an acquisition of their property as the legislation considered in *Newcrest Mining (WA) Ltd v The Commonwealth*[189] was an acquisition of Newcrest's mining tenements. But the cancellation of licences to extract groundwater stands in sharp contrast with the effective acquisition of the substance of the proprietary interests in mining tenements considered in *Newcrest*. The rights enjoyed under those mining tenements included a grant and demise of the relevant parcel of land, and the mines and mineral deposits in or under the land together with appurtenant rights. By the legislation in issue in *Newcrest*, the land in question, except for minerals, was vested in the Director of National Parks and Wildlife, and operations for recovering minerals were forbidden. Both the Director and the Commonwealth thus acquired identifiable and measurable advantages. The Director acquired land freed from the rights of Newcrest to occupy it and conduct mining operations; the Commonwealth acquired the minerals freed from the rights of Newcrest to mine them.

152 The property which Newcrest had was held to be more than a statutory privilege under a licensing system. The statutes by which the mining tenements were created carved those interests out of the radical title of the Commonwealth to the land. The mining tenements were a species of property in the land and in the minerals which, when the rights under the mining tenements came to an end, enlarged the Commonwealth's radical title to the land. For the reasons given earlier, that is not the case here.

153 Although all sub-surface water is now, and since 1966 has been, vested in the State, it is not right to describe the consequence of that vesting as giving the State ownership of, or property in, the groundwater. It is not right to do so

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189 (1997) 190 CLR 513.

because, as explained earlier, the difficulties and incongruities of treating water in the ground as a subject of property are insuperable. And in any event, the measure of control which the State has over the resource was unaltered by the cancellation of any particular entitlements to extract groundwater. The amount of water that the State could permit to be extracted was bounded only by the physical state and capacity of the aquifer, and such policy constraints as the State chose to apply. Neither the existence, nor the replacement or cancellation, of particular licences altered what was under the control of the State or could be made the subject of a licence to extract. If, as was hoped or expected, the amount of water in the aquifer would thereafter increase (or be reduced more slowly) the State would continue to control that resource. But any increase in the water in the ground would give the State no new, larger, or enhanced "interest in property, however slight or insubstantial"[190], whether as a result of the cancellation of the plaintiffs' bore licences or otherwise.

154 There has been no acquisition of property.

Conclusion and answers

155 For these reasons, the questions in the Special Case should be answered adversely to the plaintiffs. It is desirable, however, to give more than a bare negative answer to Question 1, lest the brevity of the answer be misunderstood as accepting some or all of the further premises that were implicit in that question. Question 1 should be answered: "The replacement of the plaintiffs' bore licences did not constitute an acquisition of property within the meaning of s 51(xxxi) of the Constitution. Accordingly, the questions of invalidity posed in pars (a) and (b) of Question 1 do not arise."

156 Question 3 should be answered "No". It is not necessary to answer Questions 2 or 4.

157 The plaintiffs must pay the costs of the Special Case. Question 5 should be answered accordingly.

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190 *The Tasmanian Dam Case* (1983) 158 CLR 1 at 145 per Mason J; *Tape Manufacturers* (1993) 176 CLR 480 at 500 per Mason CJ, Brennan, Deane and Gaudron JJ.

158 HEYDON J. The circumstances are fully set out in other judgments.

The plaintiffs' loss of their bore licences

159 The plaintiffs occupy properties in the Lower Lachlan for the purposes of farming (including growing grapes, oranges and crops) and producing livestock. Before 1 February 2008 they had bore licences under the *Water Act* 1912 (NSW) in relation to those properties. Those licences gave them "entitlements" to extract water from what is known as the Lower Lachlan Groundwater System – a group of aquifers in that region which have some degree of hydrological connection. On 1 February 2008 their bore licences were replaced by "aquifer access licences" issued pursuant to the Water Management (General) Amendment (Lower Lachlan) Regulation 2008 (NSW) made under the *Water Management Act* 2000 (NSW). The Special Case called this "the Amendment Regulation". While in recent years the amount of water the plaintiffs were actually allocated and took under the bore licences was much less than 100 percent of their entitlements, the entitlements of the plaintiffs under the new aquifer access licences were 6,131 megalitres per annum – less than one-third of their entitlements under the bore licences and significantly less than what they had been taking. Thus, for example, while the first two plaintiffs in the year 1 July 2006 to 30 June 2007 had entitlements to take 18,638 megalitres, and their permitted allocation was 10,251 megalitres, under the aquifer access licences they were only entitled to 5,198 megalitres. For the plaintiffs, this development was potentially calamitous. By what route had it come to pass?

The history

160 In August 1997 the Government of New South Wales published "The NSW State Groundwater Policy Framework Document". That document evinced a concern to provide a framework for the sustainable management of groundwater.

161 That concern also underlay the *Water Management Act* 2000.

162 On 26 February 2003, pursuant to s 50 of the *Water Management Act* 2000, the relevant Minister made the Water Sharing Plan for the Lower Lachlan Groundwater Source 2003 Order. It provided for lower extraction limits in relation to Lower Lachlan groundwater. That Plan never commenced in the form in which it was made. But it did commence on 1 February 2008, in an amended form, as a result of the following events.

163 On 25 June 2004 an inter-governmental agreement between (inter alia) the Commonwealth and New South Wales was entered. It is known as "the National Water Initiative". One of its objectives was to "complete the return of all currently overallocated or overused systems to *environmentally-sustainable*

levels of extraction" (italics in original). It required the Commonwealth to establish a "National Water Commission".

164 On 13 September 2004 the Commonwealth announced a "Water Smart Australia" program involving the establishment of an "Australian Water Fund" from which funding would be available in order to advance the objectives of the National Water Initiative.

165 On 17 December 2004 the *National Water Commission Act* 2004 (Cth) commenced. As contemplated by the National Water Initiative, s 6 created a National Water Commission. Section 7(1)(a) provided that one of the National Water Commission's functions was to assist in the implementation of the National Water Initiative. Section 40 created "the Australian Water Fund Account". Section 24(1)(a)(i) provided that the functions of the Chief Executive Officer of the National Water Commission included administering "financial assistance, awarded by the Minister to particular projects relating to Australia's water resources", from the Australian Water Fund Account, and s 42(a)(i)[191] provided that amounts could be debited from the Australian Water Fund Account for that purpose.

166 On 9 February 2005 the Premier of New South Wales asked the Commonwealth for $55 million from the Australian Water Fund, to be matched with $55 million from New South Wales, in order to assist water sharing in (inter alia) the Lower Lachlan.

167 On 4 November 2005 the Commonwealth and New South Wales entered a Funding Agreement. The Commonwealth agreed to pay New South Wales $55 million. In return New South Wales promised to fulfil the goals of the National Water Initiative. It promised to implement "Water Sharing Plans" which reduced the water entitlements of water licence holders in the Lower Lachlan by 56 percent. And it promised to convert (inter alia) the plaintiffs' bore licences under the *Water Act* 1912 to aquifer access licences under the *Water Management Act* 2000.

168 On 19 December 2007 the relevant New South Wales Minister was advised by his Department that it was necessary to amend the Water Sharing Plan for the Lower Lachlan Groundwater Source 2003 Order in order to align it with "the recent approvals under the joint $130 million NSW and Commonwealth Governments' Achieving Sustainable Groundwater Entitlements … program." That was a reference to the total amount of money intended on 19 December 2007 to be provided under the Funding Agreement of 4 November 2005. The

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191 See [14].

Department advised that it was necessary to reduce water entitlements further, to the "sustainable yield limit."

169 In reliance on that advice, on 11 January 2008 the Minister, acting under s 45(1) of the *Water Management Act* 2000, made the Water Sharing Plan for the Lower Lachlan Groundwater Source Amendment Order 2008. The Special Case called this "the Amendment Order".

170 On 30 January 2008 a Proclamation was issued declaring that the *Water Management Act* 2000, Ch 3, Pt 2 (access licences) and Pt 3 (approvals), applied to each water source to which the Water Sharing Plan for the Lower Lachlan Groundwater Source 2003 applied. The Special Case called this "the Proclamation". Its practical efficacy thus depended on the validity of the Amendment Order.

171 Two days later the Amendment Regulation was made. It substituted the aquifer access licences for the plaintiffs' bore licences. Its practical efficacy, too, depended on the Amendment Order, since the reduced entitlements were framed by reference to the methodology in the Amendment Order.

172 By those last three steps New South Wales fulfilled the promise it had made in the Funding Agreement to reduce water entitlements in the Lower Lachlan and convert the plaintiffs' bore licences to aquifer access licences.

The starting point of the plaintiffs' case

173 The plaintiffs attack the validity of the Amendment Regulation which replaced their bore licences with aquifer access licences. They submit that its validity depends on the validity, in turn, of the Proclamation, the Amendment Order and the Funding Agreement. They submit that the validity of the Funding Agreement is not supported by the executive power of the Commonwealth under s 61 of the Constitution. Nor is it supported by the *National Water Commission Act* 2004. That is because, they submit, that Act, though otherwise validly enacted pursuant to Commonwealth legislative power, in authorising the Chief Executive Officer on behalf of the Commonwealth to enter the Funding Agreement, permitted the provision of financial assistance to New South Wales. The financial assistance was provided on the condition that New South Wales acquire property in the form of the plaintiffs' bore licences, in a manner contravening s 51(xxxi) of the Constitution, since that acquisition was not on just terms.

The irrelevance of s 61

174 Can s 61 support the validity of the Funding Agreement? Section 61 can be put aside at the outset. The legislation permitting the grant of Commonwealth funding to New South Wales was supported by s 96 read with s 51(xxxvi).

Contrary to the submissions of the Solicitor-General of the Commonwealth, s 51(xxxi) applies to s 96 for reasons given above[192]. The Solicitor-General accepted that in that event an agreement to facilitate the grant which could not be supported by s 96 because of non-compliance with s 51(xxxi) could not be supported by s 61 either. Accordingly the key issue is whether there was an acquisition of property by New South Wales otherwise than on just terms within the meaning of s 51(xxxi).

Section 51(xxxi): general

175 There is a common law rule of statutory interpretation requiring that "clear and unambiguous words be used before there will be imputed to the legislature an intent to expropriate or extinguish valuable rights relating to property without fair compensation."[193] According to Griffith CJ, one of the framers of the Constitution, though not of s 51(xxxi), the necessary intent had to be "expressed in unequivocal terms incapable of any other meaning"[194]. There is also a common law rule of statutory construction that an "executive power to deprive a citizen of his property by compulsory acquisition should be construed as being confined within the scope of what is granted by the clear meaning or necessary intendment of the words by which it is conferred"[195]. Further, a "body …, authorized to take land compulsorily for specified purposes, will not be permitted to exercise its powers for different purposes, and if it attempts to do so, the Courts will interfere."[196] But s 51(xxxi) goes beyond rules of construction or judicial review of administrative action. Section 51(xxxi) is incapable of being

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192 See [31]-[45]. For the most part these reasons are structured by reference to the arguments of the Solicitor-General of the Commonwealth. The arguments of the other defendants, and of the interveners, in general corresponded with his. But there were some contradictions between some of the arguments advanced by those opposed to the plaintiffs. Not all other parties and interveners advanced all the Solicitor-General's arguments. Some of their arguments were not advanced by him. Where necessary, those last-mentioned arguments will be dealt with in the appropriate places.

193 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 111 per Deane and Gaudron JJ; [1992] HCA 23.

194 *The Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552 at 563 per Griffith CJ and Rich J; [1918] HCA 75.

195 *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; [1984] HCA 65.

196 *Municipal Council of Sydney v Campbell* [1925] AC 338 at 343 per Viscount Cave, Lord Blanesburgh, Duff J and Sir Adrian Knox.

overridden by statutory words, clear or not. It provides that the Parliament has power to make laws with respect to "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws".

176 In *Minister of State for the Army v Dalziel*[197] Latham CJ said that s 51(xxxi) "is plainly intended for the protection of the subject". How does it protect the subject? In part, plainly, it does so simply because as a matter of justice compensation is to be given for something which the subject has lost as a result of the legislature having pursued a wider public goal[198]. A democratic electorate would not regard expropriation without compensation in time of peace with equanimity. "What the public enjoys should be at the public, and not [at] private expense."[199] That was certainly what Dixon J saw as the purpose of the "just terms" requirement: "to prevent arbitrary exercises of the power [of compulsory acquisition] at the expense of a State or the subject."[200]

177 There are, however, functions served by s 51(xxxi) which extend beyond the simple protection of the subject, whether this was intended by the framers or not, and whether contemporaries of the framers would have perceived them as being served or not. One of these functions was seen by Hayek as fundamentally significant. He said[201]:

> "The principle of 'no expropriation without just compensation' has always been recognized wherever the rule of law has prevailed[202]. It is,

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197 (1944) 68 CLR 261 at 276; [1944] HCA 4.

198 Hayek, *The Constitution of Liberty*, (1960) at 218.

199 *Smith v ANL Ltd* (2000) 204 CLR 493 at 542 [156] per Callinan J; [2000] HCA 58.

200 *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 291; [1946] HCA 11.

201 *The Constitution of Liberty*, (1960) at 217-218.

202 This is an extreme and not wholly accurate statement, but it does not stand alone. Thus in the Supreme Court of India, in *The State of Bihar v Maharajadhiraja Sir Kameshwar Singh of Darbhanga* [1952] SCR 889 at 1008, Chandrasekhara Aiyar J said that:

> "From very early times, law has recognized the right of Government compulsorily to acquire private properties of individuals for a public purpose … But it is a principle of universal law that the acquisition can only be on payment of just compensation."

> however, not always recognized that this is an integral and indispensable element of the principle of the supremacy of the law. Justice requires it; but what is more important is that it is our chief assurance that those necessary infringements of the private sphere will be allowed only in instances where the public gain is clearly greater than the harm done by the disappointment of normal individual expectations. The chief purpose of the requirement of full compensation is indeed to act as a curb on such infringements of the private sphere and to provide a means of ascertaining whether the particular purpose is important enough to justify an exception to the principle on which the normal working of society rests. In view of the difficulty of estimating the often intangible advantages of public action and of the notorious tendency of the expert administrator to overestimate the importance of the particular goal of the moment, it would even seem desirable that the private owner should always have the benefit of the doubt and that compensation should be fixed as high as possible without opening the door to outright abuse. This means, after all, no more than that the public gain must clearly and substantially exceed the loss if an exception to the normal rule is to be allowed."

The requirement to provide just terms thus compels the legislature to consider the true cost of the legislation – not merely the political pain to be endured, which, where the persons whose property is being acquired have little electoral weight, may be quite small[203].

178 Some other factors have been identified by economists[204]. Unless they have a duty to pay compensation, legislatures will tend to experience undue temptation to acquire the property of citizens, and will tend to give into it, because this will usually be cheaper than employing some alternative technique. The threat that legislatures will acquire property without just compensation will result in people electing not to generate property by saving, or developing their property to less than optimal levels, or seeking a greater rate of return to meet the risk of acquisition, or pursuing investment opportunities in jurisdictions which do

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203 Kirby J said that s 51(xxxi) ensures that "proper consideration is given to the costs for which the Commonwealth is thereby rendered accountable": *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 462 [194]; [1999] HCA 5.

204 Evans and Quigley, "Compensation for Takings of Private Property Rights and the Rule of Law", unpublished paper delivered at the *Modern Challenges to the Rule of Law Conference*, Auckland, New Zealand, 23 October 2009 at 5-7.

provide compensation for compulsory acquisition[205]. The threat of acquisition without compensation thus damages incentives to invest. It damages the prospect of a dynamically efficient economy in which incentives to invest improve long-term social welfare by creating an optimal level and allocation of investment resources. To fulfil public purposes by taking private property without compensation is functionally equivalent to fulfilling those purposes by levying specific taxes on the owners of that property, and only those owners – a less efficient technique than levying taxes much more broadly in order to fund the just compensation. And there is a peculiar injustice in removing what may be the whole of one citizen's assets without compensation instead of funding compensation for that citizen by taking a very small part of the assets of all taxpayers. Like the Fifth Amendment to the United States Constitution, s 51(xxxi) has the effect of barring "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[206] Acquiring property without compensation imposes high costs on a small social group, sometimes at the behest of other groups having influence with the legislature: the need to pay compensation protects the position of the former and diffuses the relative power of the latter.

179 For these reasons it has long been thought that governments ought to pay compensation when they acquire property by compulsion.

180 Quick and Garran saw the requirement for just compensation in s 51(xxxi) as being "consistent with the common law of England and the general law of European nations."[207]

181 So far as English law is concerned, this is an exaggeration in theory, but, at least for a long time, there was a practice of giving compensation on expropriation. In 1215 Magna Carta forbad constables or their bailiffs taking corn or other chattels without payment (Ch 19) and also forbad sheriffs and bailiffs from taking horses, carts, wood or other goods necessary for the King's household without payment (Ch 21); in the 15th century Sir John Fortescue

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205 See *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 102 [259] per Kirby J; [1998] HCA 8 ("investors will draw their inferences"), approved by Callinan J in *Smith v ANL Ltd* (2000) 204 CLR 493 at 554 [188].

206 *Armstrong v United States* 364 US 40 at 49 (1960) per Black J, delivering the opinion of five Justices. See also *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 462 [194], where Kirby J said that s 51(xxxi) ensures "that the true costs of the Commonwealth's activities … will not fall unjustly on those whose property rights are extinguished or diminished."

207 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 641.

reaffirmed those duties, and it has been claimed that they were never doubted thereafter[208]. In 1765 Blackstone asserted that the legislature could "interpose, and compel the individual to acquiesce" in the compulsory acquisition of the latter's property.

> "But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. … All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform."[209]

In the next year Lord Camden, in his maiden speech to the House of Lords, said that Parliament "cannot take away any man's private property without making him a compensation. A proof of which is the many private bills, as well as public, passed every session."[210] At least in time of peace, property could not be acquired without legislation, which very often provided for compensation; and the right to requisition property in time of war under the prerogative was only exercised, and could only be exercised, on payment of compensation[211]. But while it was very common for expropriation only to be effected on payment of compensation, it is not correct to say that there could be no expropriation without compensation. It was clearly established in England before federation that although there was a presumption of construction against the compulsory acquisition of property without compensation, the legislature could "override or disregard" it[212]. And it is clearly established in this Court that there is no rule of law (apart from s 51(xxxi) and statutes specifically providing for compensation) that the legislature is incapable of acquiring property without just terms[213]. But,

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208 Mann, "Outlines of a History of Expropriation", (1959) 75 *Law Quarterly Review* 188 at 194. For a more detailed account, see Stoebuck, "A General Theory of Eminent Domain", (1972) 47 *Washington Law Review* 553 at 575-579.

209 *Commentaries on the Laws of England*, (1765), bk 1, c 1 at 135.

210 *The Parliamentary History of England from the Earliest Period to the Year 1803*, (1813), vol 16 at 168.

211 *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508; *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75.

212 *London and North Western Railway Co v Evans* [1893] 1 Ch 16 at 28 per Bowen LJ.

213 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399; [2001] HCA 7.

at least in the late 19th century, legislative acquisition of property without compensation was regarded as highly undesirable.

182 So far as "the general law of European nations" to which Quick and Garran referred is concerned, F A Mann has offered the following summary. In Greece expropriation without compensation was regarded as inconsistent with the nature of property, and in Rome expropriation was almost unknown. In the Middle Ages, as a general rule, where expropriation was effected for the public benefit, compensation was payable. Grotius thought that it ought to be. That view was common throughout Europe before the French Revolution. In France it appeared in the Declaration of the Rights of Man and of the Citizen on 28 August 1789, was incorporated into the Constitution of 1791 and appeared in Art 545 of the *Code Civil*. It was also introduced into many constitutions[214].

183 The age when the Constitution was drafted was the apogee of liberalism, and the protection of property rights was central to the liberal creed. Locke had taught: "the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should *have Property*"[215]. Bentham had said[216]:

> "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.
>
> As regards property, security consists in receiving no check, no shock, no derangement to the expectation founded on the laws, of enjoying such and such a portion of good. The legislator owes the greatest respect to this expectation which he has himself produced. When he does not contradict it, he does what is essential to the happiness of society; when he disturbs it, he always produces a proportionate sum of evil."

Maine had contended that the history of individual property rights and the history of civilisation "cannot be disentangled."[217] Lord Acton thought that "a people averse to the institution of private property is without the first element of

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214 Mann, "Outlines of a History of Expropriation", (1959) 75 *Law Quarterly Review* 188 at 193, 201-210. See generally Garner (ed), *Compensation for Compulsory Purchase: A Comparative Study*, (1975).

215 Locke, "An Essay Concerning the True Original, Extent, and End of Civil Government", in *Two Treatises of Government*, Laslett ed (1960) 285 at 378 (emphasis in original).

216 *Theory of Legislation*, Hildreth tr (1864) at 113.

217 *Village-Communities in the East and West*, 7th ed (1895) at 230.

freedom."[218] So deeply was the age of federation steeped in respect for property rights that Sir George Turner, Premier of Victoria, told the Third Session of the Convention at Melbourne on 25 January 1898, with all the innocent naiveté of someone who could not foresee how far 20th century governments all over the world were to go in seeking to make property rights precarious, that the proposed provision for just terms was unnecessary: "We assume that the Federal Parliament will act strictly on the lines of justice."[219]

184 That background tends to fortify the numerous statements which have been made in this Court about the width of s 51(xxxi) and its key terms.

Section 51(xxxi): approach to construction

185 *General.* Section 51(xxxi) is a "provision of a fundamental character"[220]. There are many cases, particularly in the last quarter century, in which Justices of this Court have concurred in Dixon J's description of it as a constitutional guarantee[221]. It is one of "the relatively few guarantees of rights thought so

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218 *The History of Freedom and Other Essays*, (1907) at 297.

219 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 25 January 1898 at 153.

220 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 285 per Rich J.

221 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349 per Dixon J; [1948] HCA 7. See *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 282 per Deane J; [1983] HCA 21; *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 202 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509 per Mason CJ, Brennan, Deane and Gaudron JJ; [1993] HCA 10; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 168 per Mason CJ, 180 per Brennan J and 184-185 per Deane and Gaudron JJ; [1994] HCA 9; *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 241 per Brennan J; [1994] HCA 8; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 277 per Brennan J and 283-285 per Deane and Gaudron JJ; [1994] HCA 10; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303 per Mason CJ, Deane and Gaudron JJ, 312 per Brennan J and 320 per Toohey J; [1994] HCA 6; *Gambotto v Resolute Samantha Ltd* (1995) 69 ALJR 752 at 754 per Gummow J; 131 ALR 263 at 267; [1995] HCA 48; *Victoria v The Commonwealth* (1996) 187 CLR 416 at 559 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; [1996] HCA 56; *The Commonwealth v Mewett* (1997) 191 CLR 471 at 534-535, 550, 552 and 556-557 per Gummow and Kirby JJ; [1997] HCA 29; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 542 per Brennan CJ, 560 per Toohey J,

(Footnote continues on next page)

fundamental to the … people of Australia that they had to be expressly stated in the constitutional text."[222] It is "a very great constitutional safeguard"[223]. It is "an important provision of the Constitution which deals with individual rights"[224]. It is an "express constitutional promise"[225]. It is "relevant to the fundamental rights of all persons from whom property is compulsorily acquired"[226]. It "is to be given the liberal construction appropriate to such a constitutional provision"[227]. That is because a constitutional guarantee "calls for 'a generous interpretation … suitable to give to individuals the full measure of the fundamental rights and

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561 and 565 per Gaudron J, 585 per McHugh J, 589, 595, 601, 602-603, 605, 607, 611, 612, 614 and 618 per Gummow J and 653 and 654 per Kirby J; [1997] HCA 38; *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 15 [12] per Brennan CJ, 27 [45] per Toohey J, 35 [77] per Gaudron J, 69 [181] and 73 [194] per Gummow J and 90 [237], 99 [252]-[253], 100-101 [256]-[257] and 102 [259] per Kirby J; *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 193 [147] per Gaudron J; [1999] HCA 62; *Smith v ANL Ltd* (2000) 204 CLR 493 at 500 [7] and 501 [9] per Gleeson CJ, 520 [74] per Kirby J and 542 [157] and 555 [193] per Callinan J; *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 232 [49] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ; [2008] HCA 7. In *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 48 [126] McHugh J denied that s 51(xxxi) was a constitutional guarantee, but said "it may do no great harm" to use that language in "cases where the existence of the property in issue depends on the general law and not a federal enactment". The bore licences depended on State law derived from the common law, not on a federal enactment: see [195]-[196] below.

222 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 654 per Kirby J.

223 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 403 per Barwick CJ; [1979] HCA 47.

224 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 613 per Gummow J.

225 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 655 per Kirby J.

226 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 661 per Kirby J.

227 *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 202 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ. A precursor to this proposition, which has been repeatedly approved, is found in *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 276.

freedoms referred to'"[228]. Thus Dixon J said[229]: "the paragraph should be given as full and flexible an operation as will cover the objects it was designed to effect."

186 The liberality to be employed in the construction of s 51(xxxi) extends to each of its integers, not just one or two. "Property" is to be liberally construed[230]. But so is "acquisition"[231]. So is the expression "just terms"[232]. What is more, s 51(xxxi) must be construed as a whole.

187 *Construction of s 51(xxxi) as a whole.* In *Grace Brothers Pty Ltd v The Commonwealth*[233] Dixon J said that s 51(xxxi) is "an express grant of specific power". He also said of the phrase "on just terms" that it "forms part of the definition of the power." He continued:

> "The legislative power given by s 51(xxxi) is to make laws with respect to a compound conception, namely, 'acquisition-on-just-terms.' 'Just terms' doubtless forms a part of the definition of the subject matter, and in that sense amounts to a condition which the law must satisfy. But the question for the Court when validity is in issue is whether the legislation answers the description of a law with respect to acquisition upon just terms."

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228 *Street v Queensland Bar Association* (1989) 168 CLR 461 at 527 per Deane J; [1989] HCA 53. He was quoting *Minister of Home Affairs v Fisher* [1980] AC 319 at 328.

229 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349.

230 See, for example, *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285 n 62; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303; *Smith v ANL Ltd* (2000) 204 CLR 493 at 533 [119] n 160.

231 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303 n 16; *Smith v ANL Ltd* (2000) 204 CLR 493 at 533 [119].

232 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 310-311; *Smith v ANL Ltd* (2000) 204 CLR 493 at 533 [120].

233 (1946) 72 CLR 269 at 290. See also *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 417; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 219; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285; *Smith v ANL Ltd* (2000) 204 CLR 493 at 512 [48] and 520 [76].

188 In *Re Director of Public Prosecutions; Ex parte Lawler*[234] Deane and Gaudron JJ said of the expression "acquisition of property on just terms":

> "That phrase must be read in its entirety and, when so read, it indicates that s 51(xxxi) applies only to acquisitions of a kind that permit of just terms. It is not concerned with laws in connexion with which 'just terms' is an *inconsistent or incongruous notion*. Thus, it is not concerned with a law imposing a fine or penalty, including by way of forfeiture, or a law effecting or authorizing seizure of the property of enemy aliens or the condemnation of prize. Laws of that kind do not involve acquisitions that permit of just terms and, thus, they are not laws with respect to 'acquisition of property', as that expression is used in s 51(xxxi)." (emphasis added)

The idea that persons possessing entitlements to take water pursuant to licences granted under statutory power should not lose those entitlements by governmental compulsion unless they are given just terms is not an inconsistent or incongruous notion.

189 *Property.* The word "property" in s 51(xxxi) is "the most comprehensive term that can be used."[235] Rich J said[236]:

> "What we are concerned with is not a private document creating rights *inter partes*, but a Constitution containing a provision of a fundamental character designed to protect citizens from being deprived of their property by the Sovereign State except upon just terms. The meaning of property in such a connection must be determined upon general principles of jurisprudence, not by the artificial refinements of any particular legal system or by reference to *Sheppard's Touchstone*. The language used is perfectly general. It says the acquisition of property. It is not restricted to acquisition by particular methods or of particular types of interests, or to particular types of property. It extends to any acquisition of any interest in any property."

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234 (1994) 179 CLR 270 at 285. See also *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 219-220; *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 68 [179] and 90-91 [237]; *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 304 [517]; *Smith v ANL Ltd* (2000) 204 CLR 493 at 550 [176].

235 *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 21 per Knox CJ and Starke J; [1923] HCA 34.

236 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 284-285.

So the taking merely of a right to possession was an acquisition of property. In the same case Starke J said[237]:

> "Property, it has been said, is *nomen generalissimum* and extends to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action. And to acquire any such right is rightly described as an 'acquisition of property.'"

Four years later Dixon J said[238]:

> "[Section] 51(xxxi) is not to be confined pedantically to the taking of title by the Commonwealth to some specific estate or interest in land recognized at law or in equity and to some specific form of property in a chattel or chose in action similarly recognized, but … extends to innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property."

Hence "one should lean towards a wider rather than narrower concept of property, and look beyond legal forms to the substance of the matter."[239] Examples of the width may be seen in the inclusion of common law native title rights[240], broadcasters' licences[241] and confidential information[242] within "property".

190 *Acquisition.* Termination of property is not enough to attract s 51(xxxi). Nor is destruction of property. Nor is interference with property. "[T]here must

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

238 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349.

239 *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 at 121 per Gummow J.

240 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 110-111; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 613 (pointing out, however, the inherent susceptibility of native title to defeasance by the grant of freehold or other estates inconsistent with it); cf at 560.

241 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 166 and 198-199; [1992] HCA 45.

242 *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 at 120-122.

be an acquisition whereby the Commonwealth *or another*[243] acquires an interest in property, however slight or insubstantial it may be."[244] However, given that even a slight acquisition of property will suffice, if "there is a receipt, there is no reason why it should correspond precisely with what was taken."[245] It has been said that this "is particularly so with 'innominate and anomalous interests'."[246] "[T]here does not need to be correspondence either in appearance, value or characterisation between what has been lost and what may have been acquired. Indeed what has been acquired may often be without any analogue in the law of property and incapable of characterisation according to any established principles of property law."[247]

191 Where legislation provided for nominees of the Treasurer and the Commonwealth Bank to be placed in control of the property and activities of other banks, leaving shareholders only with their entitlement to dividends "if the nominees see fit to declare any"[248] and their entitlement as contributories on a

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243 It is now well established, and the contrary was not submitted, that s 51(xxxi) applies to acquisitions by persons other than the Commonwealth: *Jenkins v The Commonwealth* (1947) 74 CLR 400 at 406; [1947] HCA 41; *McClintock v The Commonwealth* (1947) 75 CLR 1 at 23 and 36; [1947] HCA 39; *P J Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 at 401-402, 411 and 423; [1949] HCA 66; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 403, 407, 426-427 and 451-452; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 510-511 and 526; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 595; *Smith v ANL Ltd* (2000) 204 CLR 493 at 506 [27].

244 *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 145 per Mason J (emphasis added). See also, for example, *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 304. Cf *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349; *Smith v ANL Ltd* (2000) 204 CLR 493 at 545-547 [164]-[168]. Since the proposition was not challenged in these proceedings, it is inappropriate to examine its validity.

245 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305 per Mason CJ, Deane and Gaudron JJ. See also *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 634.

246 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305 per Mason CJ, Deane and Gaudron JJ, quoting Dixon J in *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349.

247 *Smith v ANL Ltd* (2000) 204 CLR 493 at 542 [157] per Callinan J (footnote omitted).

248 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 348.

winding up, Dixon J said that the "company and its shareholders are in a *real sense*, although not formally, stripped of the possession and control of the entire undertaking."[249] If the question is whether the loss of property is to be examined in a "real sense", the question whether that loss entails acquisition must be examined in the same fashion.

192 Hence, Dixon J said, s 51(xxxi) extends to "a circuitous device to acquire indirectly the substance of a proprietary interest"[250]. "The protection which s 51(xxxi) gives to the owner of property is wide. It cannot be broken down or avoided by indirect means."[251] The legislature cannot "achieve by indirect or devious means what s 51[(xxxi) does] not allow to be done directly."[252]

193 *Just terms.* In assessing whether terms are just, the courts will give the Parliament "a measure of latitude"[253]. But, at least on one line of authority, the legislation "must provide for the claimant receiving the full value of his property"[254] – "adequate compensation" or "full value"[255]. "When a person is deprived of property, no terms can be regarded as just which do not provide for payment to him of the value of the property as at date of expropriation, together with the amount of any damage sustained by him by reason of the expropriation, over and above the loss of the value of the property taken. The amount so

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249 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349 (emphasis added).

250 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349. See also *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 510.

251 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 270 per Dixon J; [1949] HCA 44.

252 *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 283 per Deane J, discussing Dixon J's statements in *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 350.

253 *Smith v ANL Ltd* (2000) 204 CLR 493 at 512 [48] per Gaudron and Gummow JJ.

254 *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77 at 85 per Williams J; [1942] HCA 37. See also *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 310-311.

255 *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77 at 106-107 per Rich J.

ascertained is no more than the just equivalent of the property of which he has been deprived."[256]

Section 51(xxxi): were the bore licences property?

194 *The plaintiffs' argument: common law proprietary rights?* The plaintiffs argued that the legislative regime affecting water in New South Wales did not create rights sourced only in statute; that it was merely a regulation of a common law right to extract water; and that that common law right was a proprietary interest in land.

195 That argument must be rejected. From 1930, ss 112, 115 and 116 of the *Water Act* 1912 followed earlier enactments providing for bore licences permitting the sinking, enlarging, deepening or alteration of bores. From 1955, s 115A required all bores to be licensed. In 1966 sub-surface water was vested in the State of New South Wales by the insertion of s 4B(1) into the *Water Act* 1912[257]. It provided that the "right to the use and flow and to the control of all sub-surface water shall vest in the Commission for the benefit of the Crown …". (In 1986 that right vested in the Water Administration Ministerial Corporation ("the Ministerial Corporation"): s 12(1) of the *Water Administration Act* 1986 (NSW).) Section 4C provided that no person was to interfere with sub-surface water or obstruct its flow except in accordance with the provisions of the Act or with the written consent of the Commission. And s 117A gave power to the Commission to restrict or control the rate of flow or pumping or the manner of extraction of water from bores in a restricted sub-surface water area[258]. In 1984 the Lower Lachlan Groundwater System was declared to be a restricted sub-surface water area. From 1997 all bore licences other than those used for domestic and stock requirements were subjected to conditions imposed under s 116C limiting the amount of water to be extracted and permitting a variation of the amount allocated or the rate of extraction.

196 Hence while bore licences gave rights, from 1966 on they were rights operating by way of an exemption from a general prohibition through s 4C on extracting groundwater which had been vested in the Commission for the benefit of the Crown by s 4B. They were rights which were created by the legislature. They were subject to conditions imposed by the legislature. It is true that they derived from, and had close but far from complete resemblances with, the right

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256 *The Commonwealth v Huon Transport Pty Ltd* (1945) 70 CLR 293 at 306-307 per Rich J; [1945] HCA 5.

257 See [108] n 112.

258 See [108] n 113.

of landowners at common law to abstract water percolating or running beneath the surface of the land. Like the common law right of landowners, although the right of bore licensees did not give a right of ownership in groundwater, it did give a right to abstract it if it was there[259]. The resemblances are far from complete because the bore licences were highly regulated. But at least from 1966, although the rights conferred by bore licences derived from those recognised at common law, it cannot be said that any common law right has survived.

197 *Statutory proprietary rights.* However, although the bore licences were not common law rights, they were a form of property. Lord Wilberforce said in *National Provincial Bank Ltd v Ainsworth*[260]:

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

He was speaking in relation to a problem different from the present, but his words have been applied in many contexts in this Court[261], including the context of s 51(xxxi)[262]. A bore licence was definable. It was identifiable by third parties. It had a considerable degree of permanence and stability. Once granted, it could not be terminated, except for cause, before its lapse or expiry[263]. The Ministerial Corporation was under a duty to renew it on payment of the prescribed fee[264]. And it was capable of assumption by third parties – either by transfer with the land to which it was connected or by transfer separately from that land.

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259 *Ballard v Tomlinson* (1885) 29 Ch D 115 at 120-121. See generally Getzler, *A History of Water Rights at Common Law*, (2004).

260 [1965] AC 1175 at 1247-1248. Something can be property without being assignable, but "the want of assignability of a right is a factor tending against the characterization of a right as property": *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 166 per Brennan J.

261 Eg *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342; [1982] HCA 69.

262 *Smith v ANL Ltd* (2000) 204 CLR 493 at 554-555 [190].

263 The bore licences could not be cancelled except for breach of condition: *Water Act* 1912, ss 116(2) and 117H.

264 *Water Act* 1912, s 116(1).

198 The *Water Act* 1912, s 117, provides:

> "A licence shall be deemed to be held by and shall operate for the benefit of the lawful occupier for the time being of the land whereon the bore is sunk or is proposed to be sunk."

It follows that as one occupier who owned the land sold to another, the licence passed to the new owner. That proposition is also assumed by s 117K, introduced in 1997.

199 Further, the *Valuation of Land Act* 1916 (NSW), s 6A(3), provides that in determining the land value of any land in relation to which there was a water right, the land value shall include the value of the right, and it shall be assumed that the right shall continue to apply in relation to the land. A "water right" is defined in s 4(1) as meaning a right or authority (however described) under the *Water Management Act* 2000, the *Water Act* 1912 or any other Act, being a right or authority to construct, install or use works of irrigation, or to use water supplied by works of irrigation. The expression "water right" thus includes the rights conferred by bore licences.

200 But a licence could be transferred even if the land was not. In 1997, s 117J was inserted into the *Water Act* 1912. It applied to sub-surface water basins which the Ministerial Corporation had determined to be subject to it: s 117J(1). It permitted the holders of licences in relation to those sub-surface water basins to transfer the whole or part of the water allocation for the licence to any other person, whether or not that person was the holder of another licence: s 117J(1) and (2). The power to transfer depended on approval of the Ministerial Corporation: s 117J(2). Conditions could be imposed on that approval: s 117J(11). Transfers could be temporary or permanent: s 117J(3). A temporary transfer was for a period determined by the Ministerial Corporation, after which time the transferred water allocation reverted to the transferor: s 117J(3)(a). If the transfer were permanent, the transferor's rights to take and use the water concerned were cancelled on completion of the transfer: s 117J(3)(b). If the Ministerial Corporation approved the transfer, s 117J(10) provided that it could give effect to the transfer in one or more of three ways:

> "(a) by making such adjustments with respect to the transferor's and transferee's water allocations as the Ministerial Corporation considers appropriate,
>
> (b) if the whole of the transferor's water allocation is being transferred, by cancelling the transferor's licence,

(c) if the transferee does not hold a licence, by issuing a licence to the transferee in accordance with this Part and including the transferred water allocation in the conditions of the licence."

If the Ministerial Corporation acted under s 117J(10)(a) or (b), the transfer transaction was in substance an assignment. If the Ministerial Corporation acted under s 117J(10)(c), the transfer transaction was in substance a novation.

201 The Solicitor-General of the Commonwealth contended that s 117J gave only a limited capacity to transfer water allocations. The contention was advanced as part of an argument that the aquifer access licences granted in 2008 are "far more readily tradeable." The contention did not face up to the fact that whether or not the aquifer access licences are more tradeable, much trading took place before 2008 in the bore licences. On 15 October 2003 the Ministerial Corporation determined that s 117J should apply to (inter alia) the Lower Lachlan groundwater management zone. Between that time and 2007, a total of 74 temporary transfers took place in the Lower Lachlan Groundwater System, each of them for valuable consideration.

202 Not only were bore licences transferable with the land, not only was their value taken into account in determining the value of the land to which they were attached, and not only were bore licences transferable separately from the land, but they were also commonly taken into account, together with the land, by lenders in securing loans to the owner or occupiers of the land, and they were provided to the lenders as part of the security. Thus in the case of the operations conducted on the plaintiffs' properties, the bore licences were part of the security given to banks from time to time for monies advanced in relation to the conduct of the businesses conducted on those properties.

203 There has been legislative recognition of that practice of using bore licences as security for loans. Schedule 10 to the *Water Management Act* 2000 deals with the conversion of bore licences to access licences and approvals. Clause 2 of Sched 10 defines "entitlement" as meaning, inter alia, "a licence referred to in Part 5" of the *Water Act* 1912 – that is, the plaintiffs' bore licences were entitlements. Clause 19(1) provides that a "person who, immediately before the appointed day, had an interest in an entitlement (being an interest in the nature of a security interest) is taken to have an equivalent security interest in the replacement access licence." Clause 19(2) provides that if the interest in the entitlement arose from a mortgage over land, "the equivalent security interest in the access licence is taken to be a mortgage over the replacement access licence." The legislation thus assumes the legality of using bore licences as security for loans before 2008.

204 That the plaintiffs' bore licences had value is suggested by the fact that they could be taken into account in valuing the licensee's land, sold and mortgaged. But from 1998 they were likely to have increased in value, because

in that year they became a finite resource. Pursuant to s 113A of the *Water Act* 1912, the whole of the Lower Lachlan Groundwater System was declared a water shortage zone. The consequence is that no applications for new bore licences creating additional entitlements were accepted after 23 October 1998. This added value to the plaintiffs' land, since, according to the Special Case, after 1998 "purchasers of irrigable land would pay more for land which had bore licences in respect of bores sunk in that land if those licences enabled significant areas of the land to be irrigated."

205 *Right inherently susceptible to modification or adjustment.* The principal answer to that reasoning advanced by the Solicitor-General of the Commonwealth was that the right conferred by a bore licence under the *Water Act* 1912 was "so slight or insubstantial" that it did not constitute "a proprietary interest". The quoted language is that of Black CJ and Gummow J in *Minister for Primary Industry and Energy v Davey*[265], on which the Solicitor-General relied. That language is inapplicable to this case. That is because their Honours illustrated what they had in mind by referring to Mason J's judgment in *R v Toohey; Ex parte Meneling Station Pty Ltd*[266]. He held that the holder of a grazing licence under the *Crown Lands Act* (NT) did not have an estate or interest in land. The licence lacked the "degree of permanence" quality referred to by Lord Wilberforce, because it could be cancelled by the Minister, "the only pre-condition being that he give three months' notice in writing of his intention to do so."[267] And the licence was not "capable in its nature of assumption by third parties" because it was not assignable[268]. Bore licences stood in contrast to that grazing licence. As noted above, they could not be cancelled except for breach of a condition[269] and the Ministerial Corporation had a duty to renew them on payment of the prescribed fee[270]. And they could be assigned[271].

206 The Solicitor-General of the Commonwealth contended that the plaintiffs' rights under the bore licences were inherently susceptible of modification or

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265 (1993) 47 FCR 151 at 165.

266 (1982) 158 CLR 327.

267 (1982) 158 CLR 327 at 342.

268 (1982) 158 CLR 327 at 343, quoting Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1248.

269 See above at [197] n 263.

270 See above at [197].

271 See above at [200].

extinguishment, because they could be modified without legislative action – merely by reduction of the amount of water which the plaintiffs were entitled to extract from their bores. He submitted that they were thus afflicted by a "congenital infirmity"[272] which was even "more pressing than the statutory rights" considered in *Health Insurance Commission v Peverill*[273], *The Commonwealth v WMC Resources Ltd*[274] and *Attorney-General (NT) v Chaffey*[275]. The Solicitor-General referred to the restrictions imposed from 1984 onwards and to the capacity to vary the volumetric allocation or the rate conferred by a condition in the licences[276].

207 In assessing this submission, some key characteristics of the bore licences must be borne in mind. Not only were the bore licences renewable, non-cancellable and transferable. Not only could the water allocations under the bore licences not be reduced at will. But they had other relevant characteristics as well. Callinan J said, speaking of exploration permits granted under a statutory power, that it was relevant to the application of s 51(xxxi) that "the permittee would have incurred expense in obtaining, holding or exploiting the permit"[277]. Kirby J saw as material factors whether the relevant interest could be said to "require substantial investment" or "impose significant obligations"[278]. These ideas are material to the bore licences. Bore licensees were persons who in some cases had paid consideration for a transfer; in all cases had paid fees; in all cases were entitled to rely on the licences as increasing the value of their land; in many cases were obliged, in order to maintain the licences, to sink bores; in many cases relied on the licences as having sufficient practical content to justify

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272 *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 75 [203] per Gummow J, quoting Hughes CJ, giving the opinion of the majority of the Court in *Norman v Baltimore & Ohio Railroad Co* 294 US 240 at 307-308 (1935): "Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."

273 (1994) 179 CLR 226.

274 (1998) 194 CLR 1.

275 (2007) 231 CLR 651; [2007] HCA 34.

276 See above at [195].

277 *Smith v ANL Ltd* (2000) 204 CLR 493 at 544 [163].

278 *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 99 [253].

investment by sinking bores, introducing and maintaining equipment capable of extracting water from those bores, developing surface irrigation channels, and buying overhead sprinkler systems (in the case of the first two plaintiffs, $7.5 million worth); in many cases had used the licences as security for loans; and in that respect had dealt with lenders who were entitled to have relied in good faith on the continuation of the licences.

208 The Solicitor-General submitted that the plaintiffs did not have any right to "an immutable quantity of water." That is true. But the Solicitor-General's argument goes too far. The argument was that conditions could be imposed, and powers exercised pursuant to them, which were not constrained by such considerations as "scarcity, fair distribution amongst water users or by environmental considerations". That argument does not deal with the factors just referred to. Considerations like scarcity, fair distribution and environmental considerations corresponded with express powers in the *Water Act* 1912, such as, for example, s 117A(3)(a)(i), (iii) and (iv) (quantities), s 117A(3)(a)(ii) (protecting water quality and preventing pollution or contamination), and s 117E (restricting the entitlement of licensees in order to prevent shortfalls in meeting the requirements of licensees). Even if the powers conferred by licence conditions could extend beyond scarcity, fair distribution and environmental considerations, they could not extend so widely as to give New South Wales officials an uncontrolled discretion to reduce allocations at will. Indeed the Solicitor-General submitted that the officials "would be able to have regard to a broad range of public interest considerations and would be subject to relatively few constraints". There are concessions inherent in that submission. Another way of putting the matter is to say that the officials were subject to the constraints imposed by the public interest considerations to which they were obliged to have regard. Thus the powers did not render the bore licences so "slight" or "insubstantial", or so "inherently susceptible to modification or extinguishment", that they were incapable of being property. The breadth of the powers might affect the value of the property, but they were not so broad as to prevent it being categorised as property.

209 The Solicitor-General of the Commonwealth did not appeal directly to analogies with the three cases on infirm statutory rights to which he referred. However, any appeal of that kind must fail.

210 The earliest of the three cases was *Health Insurance Commission v Peverill*[279]. Different members of the Court gave different reasons for not striking down legislation reducing benefits to medical practitioners. The reasons

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279 (1994) 179 CLR 226.

most closely in point are those of Mason CJ, Deane and Gaudron JJ in the following passage[280]:

> "It is significant that the rights that have been terminated or diminished are statutory entitlements to receive payments from consolidated revenue which were not based on antecedent proprietary rights recognized by the general law. Rights of that kind are rights which, as a general rule, are inherently susceptible of variation. That is particularly so in the case of both the nature and quantum of welfare benefits, such as the provision of medicare benefits in respect of medical services. Whether a particular medicare benefit should be provided and, if so, in what amount, calls for a carefully considered assessment of what services should be covered and what is reasonable remuneration for the service provided, the nature and the amount of the medicare benefit having regard to the community's need for assistance, the capacity of government to pay and the future of health services in Australia. All these factors are susceptible of change so that it is to be expected that the level of benefits will change from time to time. Where such change is effected by a law which operates retrospectively to adjust competing claims or to overcome distortion, anomaly or unintended consequences in the working of the particular scheme, variations in outstanding entitlements to receive payments under the scheme may result. In such a case, what is involved is a variation of a right which is inherently susceptible of variation and the mere fact that a particular variation involves a reduction in entitlement and is retrospective does not convert it into an acquisition of property."

There is no analogy between the bore licences and the statutory rights of medical practitioners considered in that case. And the reasoning suggests that "rights … inherently susceptible of variation" do not comprise a large category.

211 In the second case, *The Commonwealth v WMC Resources Ltd*[281], the four members of the majority gave divergent reasons for not holding invalid legislation altering rights under a permit to explore the continental shelf. Brennan CJ's reasoning did not turn on the present point. Gaudron J held that the legislation "simply modified a statutory right which had no basis in the general law and which was inherently susceptible to that course"[282]. The rights of the bore licensees in the present case rested on a statute which did have a basis in the general law in the sense that it derived from and modified it. McHugh J held that the provisions of the legislation themselves indicated the possibility of

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280 (1994) 179 CLR 226 at 237.

281 (1998) 194 CLR 1.

282 (1998) 194 CLR 1 at 38 [86].

amendment[283]. That was the ground of Gummow J's decision as well[284]. The Solicitor-General of the Commonwealth did not in the present case point to any formula equivalent to those which were relied on by McHugh and Gummow JJ in the *WMC Resources Ltd* case.

212 The third case to which the Solicitor-General referred, *Attorney-General (NT) v Chaffey*[285], is similar to *Health Insurance Commission v Peverill*: the nature of a worker's rights under workers' compensation legislation made those rights liable to variation by legislative amendment in order to adjust and ensure the continuing operation of the scheme over long periods of time during which economic and commercial conditions were likely to fluctuate[286].

213 The Solicitor-General of the Commonwealth also argued that by 2008 the bore licensees' rights under the *Water Act* 1912 were inherently susceptible of variation under the *Water Management Act* 2000 in the way contemplated by the Funding Agreement. But nothing can turn on whether the *Water Management Act* 2000 existed antecedently to expropriation or came into force at the same time.

214 The Solicitor-General for New South Wales advanced two arguments not put by the Commonwealth. One was that the "main economic value" of the bore licences only arose when New South Wales decided to restrict the grant of further entitlements after 1998. The Special Case Book contains nothing directly supporting that conclusion; and even if it were correct, that does not take from the bore licences the indicia of property which they possessed just before they were expropriated in 2008. The other argument advanced by the Solicitor-General for New South Wales was that the New South Wales Government could have achieved its goal of preserving groundwater by reducing allocations pursuant to the conditions in the bore licences. Perhaps it could have; but the

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283 (1998) 194 CLR 1 at 56-57 [146]. He also said at 56 [145] that the rights of the permit holder, having been created by a federal statute under s 51(xxix) of the Constitution, were always liable to amendment by legislation enacted under s 51(xxix). That broad approach has never attracted much support. See *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 664 [24] and *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 232 [49].

284 (1998) 194 CLR 1 at 73-75 [198]-[203].

285 (2007) 231 CLR 651.

286 There was no challenge to the correctness of the reasoning in the three cases just discussed, and hence it is not necessary to consider the merits of various criticisms made by Callinan J of some aspects of the first two in *Smith v ANL Ltd* (2000) 204 CLR 493 at 552-555 [182]-[193].

question is whether the course it actually took is legally sound, not whether another course which it did not take was legally sound.

215 Accordingly the contention that the bore licences were not property on the ground that they conferred only rights which were inherently susceptible to modification or adjustment must be rejected.

Acquisition: adjusting or regulating competing rights, claims and obligations

216 The next submission of the Solicitor-General of the Commonwealth assumed, contrary to his primary position, that the bore licences were property. The argument was that the *National Water Commission Act* 2004, in its operation in conjunction with the Funding Agreement, was not directed at the acquisition of property as such. Rather, he said, in the words of Deane and Gaudron JJ in *Mutual Pools & Staff Pty Ltd v The Commonwealth*[287], it fell into a category:

> "of laws which provide for the creation, modification, extinguishment or transfer of rights and liabilities as an incident of, or a means for enforcing, some general regulation of the conduct, rights and obligations of citizens in relationships or areas which *need* to be regulated in the common interest."[288] (emphasis added)

217 The Solicitor-General submitted that the object of the Funding Agreement was to assist in reducing the level of licence holders' entitlements, including entitlements in the Lower Lachlan Groundwater System, with the goal of achieving long-term sustainable water use. It was part of an effort by the

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287 (1994) 179 CLR 155 at 189-190.

288 The principal cases he cited were the following. The first was *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 510 per Mason CJ, Brennan, Deane and Gaudron JJ, where the doctrine is stated as turning on "a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity". This statement was a dictum, uttered without specific citation of authority supporting the doctrine in terms, although there is at least one precursor, *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 283, a case not relied on by the Solicitor-General. The other cases relied on were *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 171-172, 177-178 and 189-190; *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 236-237; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 307; *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 161; [1994] HCA 27; and *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 298-300 [497]-[503] and 304-305 [517]-[519].

Commonwealth Government, State Governments and Territory Governments to achieve that goal. It was an effort which had been underway for some time, particularly for surface water, more recently for groundwater. The Solicitor-General pointed to the fact that between 2000 and 2002 the relevant New South Wales Minister constituted water management areas under s 11 of the *Water Management Act* 2000, one of which included the Lower Lachlan Groundwater System; and to the fact that the Minister directed the formulation of draft Water Sharing Plans for areas including the Lower Lachlan Groundwater System. He submitted that during that process it was determined that the total value of entitlements conferred by bore licences in each of the "Major New South Wales Groundwater Systems" either exceeded the average volume of water returned to the system each year or exceeded the amount that could be extracted from the system without causing damage to dependent ecosystems or surface water sources. It was also determined by the New South Wales Government that total entitlements should be reduced to ensure that the total volume extracted annually from each of the Major New South Wales Groundwater Systems was below those levels. Initially the New South Wales Government proposed to reduce entitlements on an "across the board basis". However, in March 2004 it decided to apply a "history of extraction methodology". From then on the New South Wales Government took steps towards obtaining Commonwealth funding for financial assistance to affected bore licence holders in a fashion which led to the Funding Agreement. The Solicitor-General submitted that there was an obvious common or public interest in seeking to ensure that groundwater extraction is limited to what is available to be extracted on an ongoing basis without causing environmental harm. He submitted that by seeking to provide that groundwater extraction takes place on the same basis as surface water extraction, the Funding Agreement recognises the fact that there is a relationship between the availability of surface water and the use of groundwater. Adopting the approach of Deane and Gaudron JJ quoted above in *Mutual Pools & Staff Pty Ltd v The Commonwealth*[289], he submitted that the "need" for the regulation effectuated is even more apparent since average annual rainfall in most parts of New South Wales has been declining over time.

218 The doctrine on which the Solicitor-General relied has been subjected to several criticisms by Callinan J, at least some of which have, with respect, considerable power[290]. But the plaintiffs did not contend that that doctrine was wrong, and hence there is no occasion to examine its correctness. They did, however, contend that the doctrine should be narrowly construed. The vague and

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289 (1994) 179 CLR 155 at 189-190: see [216].

290 *Smith v ANL Ltd* (2000) 204 CLR 493 at 550-552 [178]-[181], particularly the criticism that the doctrine is "inconsistent with the long established principle that s 51(xxxi) is a constitutional guarantee": see [185] above.

undeveloped character of the doctrine does call for caution in considering its application. It is one thing to reason that since s 51 confers legislative powers to work forfeitures of prohibited imports (for example, s 51(i)), or provide for the disposition of a bankrupt's property (s 51(xvii)), or enact statutes relating to enemy property (for example, s 51(vi)), it is inappropriate to characterise laws of that kind as involving acquisitions of property on other than just terms, since the notion of "just terms" is simply inconsistent with the specific power[291]. It is another thing to do what Mason CJ did in *Mutual Pools & Staff Pty Ltd v The Commonwealth*[292]. He selected legislation enacted pursuant to these powers as mere examples of a wide genus of statutes which provide:

> "a means of resolving or adjusting competing claims, obligations or property rights of individuals as an incident of the regulation of their relationship, eg, the relationship between a bankrupt and the creditors in

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291 Different kinds of argument have been advanced to support the conclusion that s 51(xxxi) does not apply in these circumstances. Some were put by Aickin J in *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 453-457. One is that the forfeiture of prohibited imports, like fines and penalties, would not be described either in 1900 or 1979 as "acquisition of property": at 455. Another is that the seizure of enemy property, as analysed by Dixon CJ and Taylor J in *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361; [1961] HCA 21, is not acquisition of the beneficial ownership, because it leaves that matter for later decision. Aickin J commented at 456-457:

> > "Some provision was at least desirable for the preservation of the property or its equivalent during the progress of the war, so that it might await both the result of the war itself and a determination, by a variety of means including perhaps a final peace treaty, of the matters to be dealt with by international agreements. Beneficial ownership was in effect suspended throughout the period of the war and then dealt with pursuant to the international arrangements referred to in the judgments.
> >
> > … No doubt for the time being the enemy nationals lost control of their property though it was not vested beneficially in anyone else."

Aickin J saw the proper analogy as being with forfeiture: at 455-457. And taking the property of a bankrupt in order to pay those creditors whom the bankrupt ought to have paid earlier and then pay the bankrupt the surplus (if any) is not to make an acquisition: Walker, "The Constitutional Protection of Property Rights: Economic and Legal Aspects", in James (ed), *The Constitutional Challenge: Essays on the Australian Constitution, Constitutionalism and Parliamentary Practice*, (1982) 135 at 153 (discussing an intervention in argument by Barwick CJ in the *Tooth* case).

292 (1994) 179 CLR 155 at 171.

> the bankruptcy, between the Crown and the person who brings in prohibited imports, and between the Crown and an enemy alien with respect to enemy property."

The doctrine appealed to speaks of general regulation of relationships independently of specific powers of the kinds just referred to. The doctrine appealed to cannot be given an extensive scope. "[M]uch of the business of government is the general regulation of the conduct, rights and obligations of citizens"[293]. A lot of this regulation affects property rights, and involves what may loosely be called an adjustment of competing rights, claims or obligations. Hence "it may not be easy"[294] to draw a line between a law to which s 51(xxxi) applies and a law resolving competing claims which "need to be regulated", in the words of Deane and Gaudron JJ in *Mutual Pools & Staff Pty Ltd v The Commonwealth*[295]. What is more, to give the doctrine under discussion an extensive scope would be to erode the "constitutional guarantee" in s 51(xxxi) very deeply. That would make it merely a dignified rather than an efficient part of the Constitution. It would be decorative rather than significant. It would sink from being a constitutional guarantee to the depths of a purely formal provision. The language used in the authorities suggests that that outcome would be quite incorrect[296].

219 It is desirable to commence dealing with the Solicitor-General's arguments by examining his reliance on two authorities. One held that a fee for a commercial fishing licence was not an excise because it was "part of a system for preserving a limited public natural resource in a society which is coming to recognize that, in so far as such resources are concerned, to fail to protect may destroy and to preserve the right of everyone to take what he or she will may eventually deprive that right of all content."[297] In the other authority it was said that legislation making it an offence to sell beer in a container which did not show the amount of the refund payable when the container was returned to a depot would be consistent with s 92 of the Constitution so long as any burden imposed on interstate trade was incidental and not disproportionate to the

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293 *Smith v ANL Ltd* (2000) 204 CLR 493 at 551 [181] per Callinan J. See also at 514 [51] per Gaudron and Gummow JJ: "Many laws may be so described."

294 *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 299-300 [500] per Gummow J.

295 (1994) 179 CLR 155 at 190.

296 See above at [185]-[193].

297 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 325 per Mason CJ, Deane and Gaudron JJ; [1989] HCA 47. See also at 335-336.

attempted solution to problems of litter and energy resource depletion[298]. These authorities were directed to constitutional problems quite different from that of assessing whether an "acquisition" for the purposes of s 51(xxxi) had taken place. They did not discuss s 51(xxxi) from any point of view.

220 Further, there is no analogy between the present case and cases in which it has been held that there was no acquisition, only an adjustment or regulation of competing rights. Take first the instances referred to by Mason CJ in the passage from *Mutual Pools & Staff Pty Ltd v The Commonwealth*[299] quoted above. The relationship between one bore licensee and another has no analogy with the relationships between bankrupts and their creditors, or the Crown and the owners of prohibited goods which have been seized, or the Crown and those owning enemy property. Nor is there any analogy with the relationships over time between injured workers, employers and workers' compensation insurers[300], or between patients, medical practitioners, the government and taxpayers[301]. There is no analogy with statutory liens on aircraft to secure the payment by owners, lessees or operators of aircraft of monies owing for services rendered which was necessary for commercial operations by the aircraft to take place[302]. And there is no analogy with the primary case which the Solicitor-General relied on, *Nintendo Co Ltd v Centronics Systems Pty Ltd*[303]. The legislation considered in that case was enacted pursuant to the power in s 51(xviii) of the Constitution to make laws with respect to copyrights. The legislation conferred an exclusive right of commercial exploitation of certain intellectual property in return for payment of a fee to the owner of the property. One ground assigned by six Justices for treating the legislation as being outside s 51(xxxi) was that it could not be:

> "characterized as a law with respect to the acquisition of property for the purposes of [s 51(xxxi)]. Its relevant character is that of a law for the adjustment and regulation of the competing claims, rights and liabilities of

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298 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473-474 and 479; [1990] HCA 1.

299 (1994) 179 CLR 155 at 171: see [218].

300 *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651.

301 *Health Insurance Commission v Peverill* (1994) 179 CLR 226.

302 *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 300 [501] and 304-305 [519].

303 (1994) 181 CLR 134 at 161.

> the designers or first makers of original circuit layouts and those who take advantage of, or benefit from, their work."[304]

The legislation under consideration created new rights. The Justices said that it is "of the nature" of laws made under s 51(xviii) that they confer intellectual property rights on "authors, inventors and designers, other originators and assignees and that they conversely limit and detract from the proprietary rights which would otherwise be enjoyed by the owners of affected property. Inevitably, such laws may, at their commencement, impact upon existing proprietary rights."[305] The new rights created by the legislation necessarily had an impact on the interests and rights of others and this called for adjustments to minimise the resulting conflicts[306].

221 There being no decisive assistance available by comparing the existing authorities considered as specific decisions with the present case, it is necessary to see whether any principle stated in them assists in resolving it.

222 *Is acquisition without just terms a means appropriate and adapted to achieve the legislative end?* In *Mutual Pools & Staff Pty Ltd v The Commonwealth*[307] Brennan J endeavoured to explain, among other things, the cases said to turn on "genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity"[308]. He said:

> "In each of the cases in which laws for the acquisition of property without the provision of just terms have been held valid, such an acquisition has been a necessary or characteristic feature of the means selected to achieve an objective within power, the means selected being appropriate and adapted to that end. Therefore a law which selects and enacts means of achieving a legitimate objective is not necessarily invalid because the means involve an acquisition of property without just terms. What is critical to validity is whether the means selected, involving an acquisition of property without just terms, are appropriate and adapted to

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304 (1994) 181 CLR 134 at 161 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

305 (1994) 181 CLR 134 at 160 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

306 See *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 32 [63].

307 (1994) 179 CLR 155 at 179-180.

308 *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 510 per Mason CJ, Brennan, Deane and Gaudron JJ.

> the achievement of the objective. The absence of just terms is relevant to that question, but not conclusive. Where the absence of just terms enhances the appropriateness of the means selected to the achievement of the legitimate objective, the law which prescribes those means is likely to fall outside s 51(xxxi) and within another supporting head of power. If it were otherwise, the guarantee of just terms would impair by implication the Parliament's capacity to enact laws effective to fulfil the purposes for which its several legislative powers are conferred."

This way of putting the doctrine under consideration, like others, has been criticised as resting on the fallacy that a law can only have a single characterisation[309]. Further, in equating what is "necessary or characteristic" with what is "appropriate and adapted", particularly since "necessary" does not mean "indispensable"[310], the test saps s 51(xxxi) of content in a manner inconsistent with its frequent recognition as an important constitutional guarantee[311]. Moreover, Brennan J's reasoning is difficult to apply to the present case. It is relatively easy to apply to heads of Commonwealth legislative power relating to Commonwealth activity, involving a comparison between a relatively confined head of power and the means employed. The reasoning is not so easy to apply in relation to laws enacted under s 51(xxxvi) with a view to making s 96 grants, for they relate to the financing of State activity, without limitation to relatively confined heads of Commonwealth power. This approach perhaps calls for an inquiry whether, assuming the Commonwealth had power to achieve the goals at which New South Wales was aiming, it can be said that the acquisition of property without just terms was a necessary or characteristic feature of the means prescribed. It was neither necessary[312] nor characteristic. If licences constitute property rights, there is no inconsistency between acquiring them and paying just terms in the form of fair compensation. Another inquiry which this approach calls for is whether the legislative means selected by New South Wales, which involve non-payment of compensation as of right, are appropriate and adapted to the achievement of its objective in securing the future of a scarce resource. It is convenient from the point of view of New South Wales and its financial backer, the Commonwealth, not to pay compensation, but that does not render the means "appropriate and adapted". The scheme in question can proceed just as efficiently, though more expensively, if compensation is paid. There was no

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309 *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 247-250 [333]-[339]. See also at 312 [543].

310 *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 180 [98] per Gleeson CJ and Kirby J.

311 See [185] above.

312 See *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 654.

submission, and it is not the case, that applying s 51(xxxi) to the current circumstances precludes the enactment of the legislation.

223 *Acquisition merely incidental to, consequential on or subservient to the legislative scheme.* In *Mutual Pools & Staff Pty Ltd v The Commonwealth*[313] Deane and Gaudron JJ explained the doctrine to which the Solicitor-General appeals thus:

> "A law falling within [this category] may, as an *incident* of its operation or enforcement, adjust, modify or extinguish rights in a way which involves an 'acquisition of property' within the wide meaning which that phrase bears for the purposes of s 51(xxxi). Yet, if such a law is of general operation, it is unlikely that it will be susceptible of being properly characterized … as a law with respect to the acquisition of property for a purpose in respect of which the Parliament has power to make laws. The reason why that is so is that, even though an 'acquisition of property' may be an *incident* or a *consequence* of the operation of such a law, it is unlikely that it will constitute an element or aspect which is capable of imparting to it the character of a law with respect to the subject matter of s 51(xxxi)." (emphasis added)

Similarly, in the same case Mason CJ said[314]:

> "the Court has decided that acquisitions of various kinds, even though they might perhaps fall prima facie within the general power, are to be regarded as authorized by the exercise of specific powers otherwise than on the basis of just terms. Of these instances, it may be said that they are all cases in which the transfer or vesting of title to property or the creation of a chose in action was *subservient* and *incidental to* or *consequential upon* the principal purpose and effect sought to be achieved by the law so that the provision respecting property had no recognizable independent character." (emphasis added)

These approaches, too, have been criticised as resting on the fallacy that a law can only have a single characterisation[315]. Putting that criticism on one side, the expropriation of bore licences was not a mere "incident" or "consequence" or "subservient" feature of the legislative scheme. It was at the heart of the scheme. The scheme could not have operated without a reduction in the entitlements of

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313 (1994) 179 CLR 155 at 190.

314 (1994) 179 CLR 155 at 171.

315 *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 247-250 [333]-[339]. See also at 312 [543].

bore licensees, and it depended on abolishing those entitlements and replacing them with different and lesser ones.

224 *Law not directed to acquisition of property "as such".* The third formulation of the doctrine was put in *Nintendo Co Ltd v Centronics Systems Pty Ltd*[316]:

> "a law which is not directed towards the acquisition of property *as such* but which is concerned with the adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity is unlikely to be susceptible of legitimate characterization as a law with respect to the acquisition of property for the purposes of s 51 of the Constitution." (emphasis added)

However difficult the determination of what a law directed to the acquisition of property "as such" may be in some circumstances, it is not difficult here. The legislation acquiring the bore licences was directed towards the acquisition of property: they were its prime target. It was directed towards the acquisition of property in the bore licences "as such".

225 *Benefit as adjustment contrasted with identifiable and measurable advantage.* In *The Commonwealth v Tasmania*[317] Deane J said:

> "Difficult questions can arise when one passes from the area of mere prohibition or regulation into the area where one can identify some benefit flowing to the Commonwealth or elsewhere as a result of the prohibition or regulation. Where the benefit involved represents no more than the adjustment of competing claims between citizens in a field which needs to be regulated in the common interest, such as zoning under a local government statute, it will be apparent that no question of acquisition of property for a purpose of the Commonwealth is involved. Where, however, the effect of prohibition or regulation is to confer upon the Commonwealth or another an identifiable and measurable advantage or is akin to applying the property, either totally or partially, for a purpose of the Commonwealth, it is possible that an acquisition for the purposes of s 51(xxxi) is involved."

Here, there is no analogy with zoning laws. In any event, a change in zoning laws normally effects no acquisition. And here, for reasons given below, the effect of the legislation was to confer upon "the Commonwealth or another",

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316 (1994) 181 CLR 134 at 161.

317 (1983) 158 CLR 1 at 283.

namely New South Wales, an identifiable and measurable advantage[318]. It was applied for a shared purpose of the Commonwealth and New South Wales.

226 *Non-application of doctrine.* Finally, it is far from clear that when the doctrine is cautiously construed and applied independently of the authorities, its language applies to this case. The bore licensees were not making competing claims against each other. Nor did their rights compete with their or anyone else's obligations. Their rights put them in a position of competition with those who had no rights, but the changes made in 2008 did nothing in relation to the latter category of people. In a sense the bore licensees' rights were in competition among themselves because of the shortage of water. But the bore licensees were not in any "particular relationship". Nor were they, taken as a class, really in a single "area of activity". One farmer would pursue certain agricultural and pastoral activities. Another would pursue others. The fact that their pursuits may have had similarities does not make the behaviour of the farmers something conducted in a single area of activity beyond their attempt to sell their produce on Australian and world markets. If the doctrine applied in this case, it would apply to any class of traders having similar inputs and customers. So wide an application of the doctrine would, if sound, falsify the many descriptions in this Court of s 51(xxxi) as a guarantee stated in very broad language[319].

Acquisition generally

227 *The law.* "On occasions the identification and valuation of what has been acquired may be difficult matters, but that an acquisition has occurred may not be denied by reason of those difficulties."[320]

228 A conclusion that there was an acquisition depends on the identification of some advantage accruing to New South Wales. In *Mutual Pools & Staff Pty Ltd v The Commonwealth*, Deane and Gaudron JJ said[321]:

> "it is possible to envisage circumstances in which an extinguishment, modification or deprivation of the proprietary rights of one person would involve an acquisition of property by another by reason of some identifiable and measurable countervailing benefit or advantage accruing to that other person as a result."

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318 See [235] below.

319 See above at [185].

320 *Smith v ANL Ltd* (2000) 204 CLR 493 at 543 [157] per Callinan J.

321 (1994) 179 CLR 155 at 185.

229 In *Georgiadis v Australian and Overseas Telecommunications Corporation*[322] Mason CJ, Deane and Gaudron JJ said that an acquisition would arise from the extinguishment of a cause of action by legislation if it conferred a "direct benefit" on the obligee. In *Smith v ANL Ltd*[323] Callinan J took the reference to "direct benefit" as a sign of acquisition "to be capable of embracing advantages or benefits extending beyond and not necessarily of a proprietary kind in any conventional sense as understood by property lawyers."

230 *The defendants' submissions.* The Solicitor-General of the Commonwealth submitted that while the plaintiffs' rights may have been modified or extinguished, New South Wales had not acquired them. Before 2008, New South Wales had the power to reduce the volume of water available to bore licensees. The reduction in entitlements in 2008 was a reduction to what was available. Hence the annual water volume reflected in the difference between the entitlements of the bore licensees and those of the aquifer access licensees is not available for use by anyone. The benefit gained by New South Wales is not water, but the serving of certain public interest purposes.

231 These submissions must be rejected on three grounds.

232 *Control.* The plaintiffs submitted that the necessary element of benefit or advantage accruing to New South Wales was that the expropriation caused it to regain complete control over water resources, namely the difference between the actual allocations under the bore licensees' entitlements and the allocations under the aquifer access licences.

233 That submission is correct. In *Bank of New South Wales v The Commonwealth* Dixon J held that s 51(xxxi) applied because the legislation operated as an "assumption and indefinite continuance of exclusive … control … of" the relevant subject of property[324]. What were property rights in the plaintiffs' hands, to the extent to which they have been reduced, became in the hands of New South Wales rights of control.

234 *Extinguishment of liability.* In *The Commonwealth v WMC Resources Ltd*, Brennan CJ said[325]:

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322 (1994) 179 CLR 297 at 305.

323 (2000) 204 CLR 493 at 548 [173].

324 (1948) 76 CLR 1 at 349.

325 (1998) 194 CLR 1 at 17 [16].

> "If statutory rights were conferred on A and a reciprocal liability were imposed on B and the rights were proprietary in nature, a law extinguishing A's rights could effect an acquisition of property by B."

Before the actions of the New South Wales Government in 2008, the bore licensees had rights to water, and New South Wales had a liability to ensure that they received it so far as there was water to be enjoyed, without interference from the Government of New South Wales. As stated earlier, and contrary to the present submissions of the Solicitors-General of the Commonwealth and for South Australia, the power of New South Wales to reduce the volume of water allocated to bore licensees was not an untrammelled one[326]. The existence of the bore licensees' rights entailed a liability in New South Wales not to interfere with them unlawfully. There was also a duty on the Ministerial Corporation to give notice in relation to the imposition of limitations and conditions on bore licences, to give a reasonable opportunity for written submissions, and to have regard to them: *Water Act* 1912, s 116C(2). Section 117H(2) made similar provision for a right to receive and a duty to give a hearing in relation to cancellation or suspension of licences for failure to comply with limitations or conditions of the licence, or any requirement imposed by or under Pt 5. The extinguishment of the bore licensees' rights relieved New South Wales of those liabilities. By the extinguishment of that liability, New South Wales obtained "relief from suit by the" holders of the bore licences[327], and the obtaining of that relief was an acquisition of property by New South Wales.

235 *Contingent increase in capacity of New South Wales to take or grant rights to water.* The arguments of the Solicitor-General of the Commonwealth rest on the assumption that if groundwater resources are to be employed sustainably, the allocations of 2008 will leave no surplus water available to New South Wales or anyone but the aquifer access licensees. That assumption rests on the estimations and predictions of experts in a field full of imponderables. The assumption may be correct, or over-optimistic, or over-pessimistic. Which of the three it is will not be known for many years. But to the extent that it turns out to be pessimistic, New South Wales will have gained something it did not have before 2008 – a capacity to take more water itself or to issue more rights to others without damaging the goal of sustainability. This capacity, if it turns out that it has been gained, will be a benefit or advantage which New South Wales has acquired within the meaning of s 51(xxxi). And the possibility that that capacity will be gained is a presently existing, direct and identifiable benefit or advantage accruing to New South Wales as a result of the extinguishment of the

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326 See [208].

327 *Smith v ANL Ltd* (2000) 204 CLR 493 at 545 [163] per Callinan J.

bore licensees' rights, even though it may not be proprietary in a conventional sense: it is thus an acquisition of property by New South Wales.

Section 51(xxxi): just terms

236 Ex gratia "structural adjustment payments" were offered to the plaintiffs, to be funded by the payments to be made by the Commonwealth and New South Wales. The Solicitor-General of the Commonwealth accepted that these were not "just terms", on the ground that "just terms" must depend on law, not grace and favour.

237 The defendants made important admissions on the pleadings to the effect that the sum of the value to the first and second plaintiffs of their bore licences and land was greater than the sum of the value to the first and second plaintiffs of their land and aquifer access licences, even taking into account the structural adjustment payments.

238 The Solicitor-General of the Commonwealth submitted that the "just terms" requirement did not call for "full money equivalence" between what the plaintiffs lost and what they gained, and that it was sufficient that there be "fair dealing between the Australian nation and the plaintiffs." It is unnecessary to decide whether that controversial and somewhat obscure construction of s 51(xxxi) is correct. That is because there was in any event no fair dealing.

239 The Solicitor-General submitted that there was fair dealing for the following reasons.

240 His first contention was that the bore licensees could never have enjoyed their entitlements in full. There was not enough water to go around. Instead, the aquifer access licences gave them "a realistic and sustainable version of those entitlements." This argument would have had more force if it had been demonstrated that the aquifer access licences gave the maximum amount to licensees which was sustainable. The relevant governments may have believed this, and they may well be right, but it was not actually demonstrated. The argument echoed an earlier argument that bore licensees did not have "a secure right to a specified share of the available water resource" because the licence conditions controlling what they could receive might always be varied. The Solicitor-General contended that s 56(1)(a) of the *Water Management Act* 2000, in contrast, did confer on aquifer access licensees a secure right to a specified share. Section 56(1)(a) does provide:

> "An access licence entitles its holder:
>
> (a) to specified shares in the available water within a specified water management area or from a specified water source (the *share component*)".

The truth is that both before and after 2008 New South Wales did not have an untrammelled power to reduce entitlements[328]. Section 68A(1) provides:

> "The Minister may amend the share component or extraction component of an access licence in accordance with this Act or the relevant management plan."

And s 66 provides that aquifer access licences are subject to conditions imposed on them by the relevant management plan or by the Minister. The rights of the bore licensees before 2008 were not wholly insecure; the rights of the aquifer access licensees after 2008 are not wholly secure either. In the end, in both periods, everything depends on availability.

241 The second contention of the Solicitor-General was that even if the Funding Agreement had never been made, New South Wales would have reduced entitlements in the Lower Lachlan Groundwater System from 215,417 megalitres per year to 120,000, and the actual amount to be extracted would have been reduced to 96,000. The primary difference between this 2003 scheme and the scheme introduced in 2008 was that the methodology changed from an "across the board basis" to a "history of use" basis. This was within a legitimate margin of legislative appreciation. The flaw in this argument is that even if the Funding Agreement had never been made and New South Wales could and would have proceeded without it, the Funding Agreement, the Amendment Regulation, the Proclamation and the Amendment Order are not rendered lawful by the possibility that another avenue towards expropriation could have been selected. The use of constitutionally invalid means to achieve a goal is not rendered constitutionally valid by the circumstance that the same goal could have been achieved by constitutionally valid means.

242 Thirdly, the Solicitor-General submitted that bore licensees' rights "were not readily tradeable and were in effect attached to the land." Their monetary value could only be determined "in an inexact and general fashion". The aquifer access licences were more readily tradeable. They rested on a basis of more sustainable extraction from the aquifers. Hence they had greater value than the bore licences. In this argument the Commonwealth went to the verge of, and perhaps beyond, the stage of contending that New South Wales did the bore licensees a big favour by destroying their property rights. But the argument fails, even if the assumption is made, which the plaintiffs contest, that the aquifer access licences amounted to a "realistic and sustainable version" of the entitlements under the bore licences. Difficulties in valuation are not obstacles to assessing the justness of terms[329]. It has not been demonstrated that before 2008

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328 See [208].

329 See above at [227].

the bore licensees' rights were not readily tradeable or that they were attached to the land: the fact is that they were frequently traded, as objects both of sale and mortgage[330]. The Solicitor-General endeavoured to support the proposition he advocated by saying:

> "The development of more secure and more readily tradeable rights to water was an object which had been pursued for some time by Commonwealth and State and Territory governments, including through intergovernmental agreements and other arrangements for coordinated action."

He referred to numerous documents. The submission ignores the fact that the critical date for assessing transferability is early 2008 when the Amendment Regulation was introduced. All the documents to which the Solicitor-General referred predate early 2008 by significant periods. The "development of more secure and more readily tradeable rights to water" is a goal which had been substantially achieved before the enactment of the *Water Management Act* 2000, and it was a development which bore licensees in the Lower Lachlan Groundwater System were enjoying well before their licences were expropriated in 2008.

243 The Solicitor-General's submissions that the aquifer access licensees' rights are more tradeable or that they are more valuable than the bore licensees' rights were have not been demonstrated to be correct.

244 The first and third contentions of the Solicitor-General are completely inconsistent with the admissions in the pleadings[331].

245 It follows that question 1(b)[332] should be answered "Yes".

246 The Solicitor-General for South Australia advanced a very brief submission that the *National Water Commission Act* 2004 should be read down. No party made this submission, and the first two defendants specifically declined to advance it. To accept it might leave the Funding Agreement invalid or unenforceable on another ground, with possible consequences for the defendants which may be controversial as between them. In view of their decision not to advance the submission, it should not be acceded to.

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330 See [201]-[204] and [207] above.

331 See above at [237].

332 See [101].

Validity of Amendment Regulation, Proclamation and Amendment Order

247 The next question is whether the Amendment Regulation, the Proclamation and the Amendment Order are also invalid or inoperative in consequence of the invalidity of the *National Water Commission Act* 2004.

248 The Funding Agreement had as its goal the reduction of groundwater usage by destroying the entitlements of bore licensees, including those of the plaintiffs, in the groundwater systems of New South Wales, and replacing them with other and lesser entitlements. It was a goal conceived with the best of intentions to deal with a major public problem. But that did not absolve the participants from the need to comply with the Constitution. It was a necessary step in the achievement of that goal that the plaintiffs' licences be cancelled. That was effectuated partly by Commonwealth legislation – the *National Water Commission Act* 2004 – which authorised the supply of funding to New South Wales pursuant to s 96 of the Constitution. And it was effectuated partly by New South Wales legislation – the Amendment Regulation made pursuant to the *Water Management Act* 2000 – the operation of which in turn depended on the Proclamation and the Amendment Order.

249 Section 51(xxxi) prevented the *National Water Commission Act* 2004 from being validly enacted in terms as wide as it was because it was legislation providing for the acquisition by New South Wales of property otherwise than on just terms. The Act was therefore invalid. So was the Funding Agreement. Section 106 of the Commonwealth Constitution provides that the Constitution of New South Wales is subject to the Commonwealth Constitution[333]. Covering cl 5 provides that the Commonwealth Constitution is binding on the people of every State[334]. It follows that the New South Wales Government, which operates under the Constitution of New South Wales, has no power to participate in conduct which is in contravention of s 51(xxxi). The Amendment Regulation, the Proclamation and the Amendment Order were seen by New South Wales and by the Commonwealth as steps in a scheme or plan designed to achieve the goal of terminating the rights of bore licensees in the Lower Lachlan Groundwater System. They were steps – together with many other steps of cooperation between the Commonwealth and New South Wales – taken in concert to achieve a goal which depended on a contravention by the Commonwealth of s 51(xxxi). It was not contemplated that the goal could be achieved without the contravention. It does not matter that none of those three steps is in terms expressed to be "contingent on the operation of a binding agreement or operative Commonwealth law", to use the language of the Solicitor-General for South Australia: they were part of the scheme contemplated. In consequence none of

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333 See [102] n 107.

334 See [102] n 106.

those three steps can survive. A contrary view would annihilate the effectiveness of s 51(xxxi).

250 The Solicitor-General of the Commonwealth contended that any difficulty caused by the Funding Agreement could have been overcome by an agreement to terminate it, and by the Commonwealth providing funds in some other way. The merits of this submission are immaterial. The fact is that those things were not done.

251 The Solicitor-General of the Commonwealth also submitted that *Pye v Renshaw*[335] was inconsistent with the plaintiffs' arguments. But that case is distinguishable. For one thing, in that case, unlike this case, there was no challenge to the validity of State legislation[336].

252 Various of the interveners, together with the Solicitor-General of the Commonwealth, contended that to invalidate the Amendment Regulation, the Proclamation and the Amendment Order would wrongly impose s 51(xxxi) on the States. It does not do that. The States, subject to their own legislation, are at liberty to make uncompensated expropriations, at least in fields which s 109 of the Constitution leaves open to them. But they are not at liberty to embark on schemes with the Commonwealth involving steps which include a failure by the Commonwealth to comply with s 51(xxxi).

253 The Solicitor-General for New South Wales submitted in effect that the plaintiffs' submissions produced an absurd result in that their victory would only be Pyrrhic: the entitlements of the plaintiffs could be terminated by New South Wales acting alone without any compensation or ex gratia payments. Whether or not that will be so must be left to the future. It does not reveal absurdity in the plaintiffs' arguments. The plaintiffs are entitled to have their arguments considered, irrespective of any consequences adverse to them which may flow.

254 The Solicitor-General for New South Wales also advanced detailed arguments for the following proposition:

> "There is no constitutional impropriety, nor any attempt to defeat the operation of the constitutional guarantee, merely because the Commonwealth provides financial assistance to a State to achieve a legitimate State objective even if, had the Commonwealth attempted to achieve that objective itself, it would have been subject to some constitutional prohibition."

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335 (1951) 84 CLR 58; [1951] HCA 8.

336 (1951) 84 CLR 58 at 80.

Even if that is accepted, the present case is different. In this case, part of the achievement of the "legitimate State objective" depended on the Commonwealth enacting legislation which was subject to the prohibition in s 51(xxxi).

255 Hence all three steps are invalid.

Continuing validity of bore licences

256 The third question in the Special Case is whether the plaintiffs remain owners of their bore licences. Correctly, the defendants did not contend for any answer other than an affirmative one.

Answers to questions

257 The questions[337] should be answered:

1. (a) Need not be answered.

   (b) Yes.

2. Each is invalid.

3. Yes.

4. Does not arise.

5. The defendants.

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337 See [101].