

HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

BARRY THOMAS CUNNINGHAM & ORS

PLAINTIFFS

AND

COMMONWEALTH OF AUSTRALIA & ANOR

DEFENDANTS

Cunningham v Commonwealth of Australia
[2016] HCA 39
12 October 2016
S140/2015

ORDER

The questions stated by the parties in the special case dated 4 February 2016 and referred for consideration by the Full Court be answered as follows:

Question One

Do any, and if so which, of the following laws and Determinations of the Remuneration Tribunal constitute or authorise an acquisition of any, and if so what, property of the plaintiffs, or any of them, otherwise than on just terms, within the meaning of s 51(xxxi) of the Constitution:

- a. Remuneration Tribunal Act 1973 (Cth), ss 7(1A), 7(1B), 7(1C) and 7(2A);*
- b. Remuneration and Other Legislation Amendment Act 2011 (Cth), s 3 (insofar as it made the amendments or repeals provided for in Sched 2, items 1, 16A, 17A, 19, 20, 21(2));*
- c. Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act 2012 (Cth), s 3 (insofar as it made the amendments or repeals provided for in Sched 2, items 1, 2, 3, 5, 6, 7, 8 and 9);*

2.

- d. Members of Parliament (Life Gold Pass) Act 2002 (*Cth*), s 11(2) (as originally enacted);
- e. Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act 2012 (*Cth*), s 3 (insofar as it made the amendments or repeals provided for in Sched 1, item 6);
- f. Determination 2012/02, Pt 2 (cl 2.2);
- g. Determination 2012/03, Pt 2 (cl 2.3), Pt 3 (cl 3.1);
- h. Determination 2012/15, Pt 1 (cl 1.3 and cl 1.4 (insofar as it relates to cl 1.3));
- i. Determination 2013/13, Pt 2 (cl 2.2), Pt 3 (cl 3.3), Pt 4 (cl 4.1);
- j. Determination 2014/10, Pt 2 (cl 2.2), Pt 3 (cl 3.3), Pt 4 (cl 4.1);
- k. Determination 2015/06, Pt 2 (cl 2.2), Pt 3 (cl 3.3), Pt 4 (cl 4.1)?

Answer

No.

Question Two

If the answer to Question One is yes, to what, if any relief are the plaintiffs, or any of them, entitled in the proceedings?

Answer

Unnecessary to answer.

Question Three

Who should pay the costs of the proceedings?

Answer

The plaintiffs.

Representation

A J Myers QC and T O Prince for the plaintiffs (instructed by Hazan Hollander)

J T Gleeson SC, Solicitor-General of the Commonwealth and D F C Thomas for the first defendant (instructed by Australian Government Solicitor)

Submitting appearance for the second defendant

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Cunningham v Commonwealth of Australia

Constitutional law (Cth) – Legislative power – Acquisition of property on just terms – Where amendments to *Parliamentary Contributory Superannuation Act* 1948 (Cth) and *Remuneration Tribunal Act* 1973 (Cth) and Determinations by Remuneration Tribunal modified method by which allowances paid to retired members of Parliament calculated – Where enactment of and subsequent amendment to *Members of Parliament (Life Gold Pass) Act* 2002 (Cth) modified entitlement conferred on retired members of Parliament to payment of travel expenses – Whether amendments and Determinations constitute or authorise acquisition of property otherwise than on just terms within meaning of s 51(xxxi) of Constitution.

Words and phrases – "acquisition of property", "inherently defeasible", "inherently liable to variation", "just terms", "Life Gold Pass", "parliamentary allowance", "property", "retiring allowance", "subject to this Act", "until the Parliament otherwise provides".

Constitution, ss 48, 51(xxxi), 51(xxxvi), 66.

Members of Parliament (Life Gold Pass) Act 2002 (Cth), s 11(2).

Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act 2012 (Cth), s 3.

Parliamentary Contributory Superannuation Act 1948 (Cth), ss 18, 22T.

Remuneration and Other Legislation Amendment Act 2011 (Cth), s 3.

Remuneration Tribunal Act 1973 (Cth), ss 7(1A), 7(1B), 7(1C), 7(2A).

1 FRENCH CJ, KIEFEL AND BELL JJ. Each of the four plaintiffs served as a member of the House of Representatives of the Commonwealth Parliament for not less than eight years between 1969 and 2001, although in the case of the first and second plaintiffs, their service was over two separate periods. Three of the plaintiffs also held parliamentary offices and two were Ministers of State for a time.

2 Whilst serving as members of Parliament the plaintiffs became entitled to, and received, a parliamentary allowance and a parliamentary office holder allowance and/or a ministerial salary under various legislation as amended from time to time¹. In addition the plaintiffs also received certain other entitlements, such as for travel, accommodation and office facilities. Whilst in receipt of the parliamentary allowance and, where relevant, parliamentary office holder allowance and/or ministerial salary, the plaintiffs paid a proportion of what was received to the Commonwealth pursuant to the *Parliamentary Contributory Superannuation Act* 1948 (Cth) ("the Superannuation Act")².

3 On ceasing to serve as a member of Parliament, whether because they were not re-elected or had resigned, each of the plaintiffs became entitled to a retiring allowance under the Superannuation Act, together with an additional retiring allowance for former parliamentary office holders and/or Ministers of State (together the "retiring allowances")³. The fourth and third plaintiffs, who retired respectively in 1990 and 2001, were also entitled on retirement to use a "Life Gold Pass" for domestic travel at Commonwealth expense.

4 The plaintiffs contend that they have rights in the nature of property, within the meaning of s 51(xxxi) of the Constitution, in respect of their retiring allowances and, in the case of the third and fourth plaintiffs, their Life Gold Passes. The plaintiffs further contend that changes made by certain legislative provisions⁴ and by Determinations made by the Remuneration Tribunal pursuant

1 *Parliamentary Allowances Act* 1952 (Cth); *Remuneration Tribunal Act* 1973 (Cth); *Remuneration and Allowances Act* 1990 (Cth); *Ministers of State Act* 1952 (Cth).

2 *Parliamentary Contributory Superannuation Act* 1948 (Cth), ss 13-14.

3 *Parliamentary Contributory Superannuation Act* 1948 (Cth), s 18.

4 *Remuneration Tribunal Act* 1973 (Cth), ss 7(1A), 7(1B), 7(1C), 7(2A); *Remuneration and Other Legislation Amendment Act* 2011 (Cth), s 3 (insofar as it made the amendments or repeals provided for in Sched 2, items 1, 16A, 17A, 19, 20, 21(2)); *Members of Parliament (Life Gold Pass) Act* 2002 (Cth), s 11(2) (as originally enacted); *Members of Parliament (Life Gold Pass) and Other Legislation* (Footnote continues on next page)

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to the *Remuneration Tribunal Act* 1973 (Cth)⁵ ("the Remuneration Tribunal Act") effect alterations of those property rights or interests which amount to acquisitions of their property otherwise than on just terms, within the meaning of s 51(xxxi)⁶.

The parliamentary allowance

- 5 Section 48 of the Constitution itself provided for an initial allowance to be paid to members of Parliament⁷. Even at Federation, payment of some kind of remuneration to members of Parliament was regarded not as a modern

Amendment Act 2012 (Cth), s 3 (insofar as it made the amendments or repeals provided for in Sched 1, item 6 and Sched 2, items 1, 2, 3, 5, 6, 7, 8, 9).

- 5 Remuneration Tribunal Determination 2012/02, Pt 2 (cl 2.2); Remuneration Tribunal Determination 2012/03, Pt 2 (cl 2.3), Pt 3 (cl 3.1); Remuneration Tribunal Determination 2012/15, Pt 1 (cl 1.3 and cl 1.4 (insofar as it relates to cl 1.3)); Remuneration Tribunal Determination 2013/13, Pt 2 (cl 2.2), Pt 3 (cl 3.3), Pt 4 (cl 4.1); Remuneration Tribunal Determination 2014/10, Pt 2 (cl 2.2), Pt 3 (cl 3.3), Pt 4 (cl 4.1); Remuneration Tribunal Determination 2015/06, Pt 2 (cl 2.2), Pt 3 (cl 3.3), Pt 4 (cl 4.1).

- 6 Section 51(xxxi) provides:

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

...

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

- 7 Section 48 provides: "Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of four hundred pounds a year, to be reckoned from the day on which he takes his seat." Similarly, s 66 provides: "There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, until the Parliament otherwise provides, shall not exceed twelve thousand pounds a year."

3.

innovation, but as an essential aspect of democratic government⁸. During the Convention Debates, there was discussion about whether the payment was really an allowance for the reimbursement of expenses, as opposed to salary⁹, but the wording of s 48 retained the general term "an allowance". The term might be thought to cover both.

6 The allowance was fixed by s 48 at a sum to be paid "[u]ntil the Parliament otherwise provides"¹⁰. Section 51(xxxvi)¹¹ contains a grant of power in respect of matters for which the Constitution makes provision "until the Parliament otherwise provides". That phrase conveys that the Commonwealth Parliament is free to legislate from time to time as may appear appropriate.

7 Quick and Garran¹² were of the view that neither the principle that a parliamentary allowance should be provided nor the amount of such an allowance were intended as permanent constitutional provisions and that the Commonwealth Parliament could reduce, increase or abolish the allowance. This special case does not require consideration of the exact breadth of the Parliament's powers in this regard. The provisions in question do not effect an extinguishment of the retiring allowances. It may, however, be observed that in fact the allowance provided since Federation has not always been increased by

8 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 499.

9 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 2 April 1891 at 653-654.

10 Similarly, the annual sum appropriated for the payment of salaries of the Ministers of State under s 66 is also "until the Parliament otherwise provides".

11 Section 51(xxxvi) provides:

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

...

(xxxvi) matters in respect of which this Constitution makes provision until the Parliament otherwise provides".

12 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 499.

legislation and that this accords with the discretion generally given to the Parliament.

8 The Parliament initially "otherwise provided" in 1907, when the allowance under s 48 was increased¹³. Since then the allowance has for the most part been increased, but it has also been reduced at certain points, such as during the Great Depression¹⁴, evidently because of prevailing social conditions.

9 In 1973 the Remuneration Tribunal, created under the Remuneration Tribunal Act, was given power to determine parliamentary allowances. Section 7(1) of that Act provides:

"The Tribunal shall, from time to time as provided by this Part, inquire into, and determine, the allowances (including allowances in accordance with section 48 of the Constitution) to be paid out of the public moneys of the Commonwealth to members of the Parliament by reason of their membership of the Parliament or by reason of their holding particular offices ..."

It does not appear to be in dispute that s 7(1) is authorised by s 51(xxxvi) and s 48 of the Constitution, together, so far as concerns the parliamentary and associated allowances.

10 As the terms of s 7(1) imply, the allowances which may be the subject of a Remuneration Tribunal Determination are not limited to these allowances, which have been treated as parliamentarians' remuneration for some time. The annual parliamentary allowance is sometimes called "salary" or "basic salary", as is the Minister's salary. The Remuneration Tribunal also determines the allowances to be provided for travel, electorate, office and other expenses.

11 A Determination of the Remuneration Tribunal is a legislative instrument, which until 5 August 2011 was subject to disallowance by either House of Parliament¹⁵. Pursuant to s 7(9)(b), allowances provided for in a Determination under s 7(1) are to be paid out of Consolidated Revenue.

13 *Parliamentary Allowances Act 1907* (Cth). In respect of s 66, see *Ministers of State Act 1915* (Cth).

14 *Financial Emergency Act 1931* (Cth); *Financial Emergency Act 1932* (Cth).

15 As from 5 August 2011, the *Remuneration Tribunal Act* was amended by the insertion of s 7(8AA), the effect of which was to provide that Determinations were not subject to disallowance.

5.

The retiring allowances

12 The same head of legislative power which supports the parliamentary allowance supports provisions of the Superannuation Act concerning benefits to retired members of Parliament¹⁶. However, a retiring allowance has only been payable since the passing of that Act, in 1948¹⁷.

13 Section 18(1) of the Superannuation Act has at all relevant times provided that:

"Subject to this Act, a member who ceases to be entitled to a parliamentary allowance shall be entitled to benefits in accordance with this section."

The benefits are to be paid by the Commonwealth¹⁸.

14 The principal benefit referred to in s 18(1) is a retiring allowance payable during the member's lifetime at the rate applicable according to the scale in sub-s (6)¹⁹. A minimum period of service is required for eligibility for a retiring allowance. Sub-section (6) provides that the rate of retiring allowance is a percentage of the rate of parliamentary allowance "for the time being payable to a member". The percentage provided in the scale depends upon the number of years served.

15 Provision is also made in the Superannuation Act for the payment of additional retiring allowances to former parliamentary office holders²⁰ and to former Ministers of State²¹, which are calculated by reference to a percentage of

16 *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 121 [37]; [2006] HCA 18.

17 Formerly named the *Parliamentary Retiring Allowances Act* 1948 (Cth).

18 *Parliamentary Contributory Superannuation Act* 1948 (Cth), s 14A.

19 *Parliamentary Contributory Superannuation Act* 1948 (Cth), ss 18(1A), 18(1B), 18(2).

20 *Parliamentary Contributory Superannuation Act* 1948 (Cth), s 18(9)(b).

21 *Parliamentary Contributory Superannuation Act* 1948 (Cth), s18(9)(a).

the allowance or salary for the time being payable to the holder of office or Minister²².

16 Section 22T was inserted into the Superannuation Act in 1996. It is not necessary to set it out. It is common ground that its purpose was to protect retired parliamentarians who were in receipt of a retiring allowance and/or an additional retiring allowance from the effect that decreases in real terms in the rate of a parliamentary allowance, a parliamentary office holder allowance or ministerial salary would have on the rate of those retiring allowances.

17 The amount of benefits payable by way of retiring allowance may be reduced in certain circumstances, such as where a person entitled to a retiring allowance becomes a member of a State Parliament or a Territory Legislative Assembly²³ or where they hold an office of profit under a State or under the Commonwealth²⁴.

18 The method of calculating the retiring allowance has changed over time. Originally the retiring allowance was fixed by s 18 as a weekly amount²⁵. It is not necessary to detail all the changes but, by way of example, in some of the subsequent iterations of s 18, the retiring allowance has been fixed to a percentage of the parliamentary allowance to which a retired parliamentarian was entitled immediately before he or she became entitled to a retiring allowance, the percentage being calculated on the basis of the age of the member²⁶; later the percentage was fixed on the basis of the period of parliamentary service²⁷.

19 The contributory nature of schemes for retirement benefits has also varied over time. When it was first passed, the Superannuation Act made provision for a Parliamentary Retiring Allowances Fund²⁸ out of which pensions were payable.

22 *Parliamentary Contributory Superannuation Act* 1948 (Cth), s 18(10).

23 *Parliamentary Contributory Superannuation Act* 1948 (Cth), s 21.

24 *Parliamentary Contributory Superannuation Act* 1948 (Cth), s 21B.

25 *Parliamentary Retiring Allowances Act* 1948 (Cth), s 18 (as enacted).

26 *Parliamentary Retiring Allowances Act* 1948 (Cth), s 18 (as amended by the *Parliamentary Retiring Allowances Act* 1964 (Cth)).

27 *Parliamentary Retiring Allowances Act* 1948 (Cth), s 18 (as amended by the *Parliamentary and Judicial Retiring Allowances Act* 1973 (Cth)).

28 *Parliamentary Retiring Allowances Act* 1948 (Cth), Pt III.

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Members of Parliament paid, by instalments, an annual sum to the Fund²⁹ and the Commonwealth was required to make provision for 60% of what was to be paid by way of pension³⁰. This scheme ended in 1973³¹.

20 The legislative scheme under which the plaintiffs were required to pay a proportion of their parliamentary and other allowances (at the rate of 11.5% for those that served less than 18 years) did not have a fund and the Commonwealth did not make contributions to it. The plaintiffs made their payments to the Commonwealth, by deduction from their allowances, and the Commonwealth paid the retiring allowances provided for by the Superannuation Act.

The changes to the retiring allowances

21 In 2011, the *Remuneration and Other Legislation Amendment Act 2011* (Cth) amended the Superannuation Act and the Remuneration Tribunal Act. The effect of the amendments was to confer power on the Remuneration Tribunal to determine the "parliamentary base salary" of members of Parliament. The term was defined in the Remuneration Tribunal Act, as amended, as referable to the annual allowances payable for the purpose of s 48 of the Constitution and as identified in the relevant Determination as base salary. The Remuneration Tribunal Act now also provided³² the Remuneration Tribunal with power to determine that a portion of parliamentary base salary is *not* "parliamentary allowance" for the purposes of the Superannuation Act. The definition of "parliamentary allowance" in the Superannuation Act was amended accordingly. Similar amendments were made in 2012 by the *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act 2012* (Cth) ("the 2012 Act") to the additional retiring allowances payable to parliamentary office holders and Ministers³³ (together with the above amendments, "the 2011/12 amendments").

22 It would appear that the purpose of these amendments is that particular allowances made to serving members, such as electorate and office allowances, which are not referable to the circumstances of retired members, should not be

29 *Parliamentary Retiring Allowances Act 1948* (Cth), s 13 (as enacted).

30 *Parliamentary Retiring Allowances Act 1948* (Cth), s 14 (as enacted).

31 *Parliamentary and Judicial Retiring Allowances Act 1973* (Cth).

32 *Remuneration Tribunal Act 1973* (Cth), s 7(1A).

33 *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act 2012* (Cth), Sched 2, items 1, 2, 5, 6.

automatically passed on through the parliamentary allowance as a retirement benefit³⁴.

23 It will immediately be appreciated that there now exists the possibility that the retiring allowances could be reduced through the exercise by the Remuneration Tribunal of its powers. It is possible that the amount of parliamentary allowance for the purposes of the calculation in s 18(6) of the Superannuation Act may be reduced. Whether there is a reduction in the retiring allowance may depend on the initial determination of what is parliamentary base salary. Similarly, the amount of the parliamentary office holder allowance or ministerial salary may be reduced for the purposes of the calculations in s 18(9) and (10).

24 The terms of the 2011/12 amendments do not oblige the Remuneration Tribunal to fix parliamentary base salary and determine a portion which is not parliamentary allowance. In its Determinations since 2011 the Remuneration Tribunal has done so, but the Determinations have not resulted in a reduction of the retiring allowance. Although the plaintiffs contend that the amount payable was less than would have been payable before the 2011/12 amendments, they do not attempt to show how that conclusion is reached. It is, in any event, not necessary to their arguments to do so. Their point is that the rights which they previously had have been modified so that the quantum of their retiring allowances can be less than before. A question which arises is whether that to which the plaintiffs are entitled has always been subject to modification.

The Life Gold Pass

25 The "Life Gold Pass" has its origins in long-standing executive arrangements made between the Commonwealth and State governments for the provision of travel privileges to certain serving, and later retired, parliamentarians. The privileges have at times been controversial. Until 1976 the Life Gold Pass had no connection to statute and was supported only by Commonwealth executive powers.

26 In 1976 the Remuneration Tribunal enquired into, and determined, the question of parliamentary allowances under s 7(1) of the Remuneration Tribunal Act. Section 7(4)(b) provides that, if the Minister considers a further matter is significantly related to that question, the Remuneration Tribunal shall also enquire into the further matter and either determine it or report upon it. The

34 Australia, Senate, Remuneration and Other Legislation Amendment Bill 2011, Supplementary Explanatory Memorandum at 1.

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Minister requested the Remuneration Tribunal also to enquire into the matter of the Life Gold Pass.

27 The Remuneration Tribunal dealt with the issue of the Life Gold Pass in Pt 2 of its Determination 1976/6, which was headed "Entitlements". Part 1 was headed "Salaries and Allowances". The Remuneration Tribunal determined that a member, on retirement from the Parliament, shall be eligible for the issue of a Life Gold Pass entitling the member to travel "at official expense" for non-commercial purposes within Australia on scheduled air, rail and motor coach and other services³⁵. The number of trips which could be undertaken was not limited in any way. The period of qualification for members of the House of Representatives was stated to be 20 years or the life of seven Parliaments³⁶, but the entitlement to use the Pass was suspended until the member retired from Parliament³⁷.

28 Aspects of this Determination were altered by the Remuneration Tribunal at various times thereafter. In 1993 it determined that an annual cap of 25 domestic return trips should apply to those members to whom a Life Gold Pass issued on or after 1 January 1994³⁸.

29 At issue in these proceedings are the provisions made by statute in 2002 and 2012. Section 11(2) of the *Members of Parliament (Life Gold Pass) Act* 2002 (Cth) ("the 2002 Act") as originally enacted restricted all holders of a Life Gold Pass, other than a former Prime Minister, to a maximum of 25 domestic return trips per annum. That Act also contained a "historic shipwrecks clause"³⁹, which provided for compensation in the event that the Act effected an acquisition other than on just terms and such acquisition might, on that account, be invalid. The 2012 Act further amended s 11(2) to reduce the number of trips to 10⁴⁰ and

35 Remuneration Tribunal Determination 1976/6 at 18 [2.28].

36 Remuneration Tribunal Determination 1976/6 at 18 [2.29].

37 Remuneration Tribunal Determination 1976/6 at 19 [2.34].

38 Remuneration Tribunal Determination 1993/18 at 32 [7.1].

39 *Members of Parliament (Life Gold Pass) Act* 2002 (Cth), s 32.

40 *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act* 2012 (Cth), Sched 1, item 6.

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bring to an end the issue of passes for members of Parliament after 6 March 2012⁴¹.

30 Because of the date of the fourth plaintiff's retirement in February 1990, he was not affected by the 1993 Remuneration Tribunal Determination. The extent of his use of the Life Gold Pass before the 2002 Act was therefore unlimited but it has now been restricted. In contrast, the third plaintiff retired in February 2001 and whilst his use was never unlimited it has now been restricted by the 2012 Act.

The plaintiffs' arguments

Retiring allowances

31 Section 51(xxxi) does not operate to protect a person's entitlement to payments under a Commonwealth statute from change. It applies only to statutes which contain provisions for the acquisition of property and it guarantees that where the Commonwealth legislates to acquire property, for a constitutionally permissible purpose, it must do so on just terms.

32 The question which arises from s 51(xxxi) is therefore whether the 2011/12 amendments are laws with respect to the acquisition of property. This enquiry necessitates a close analysis of the "property" which is said to have been acquired. Both enquiries – as to the rights making up the property and the character of the law changing them – require, in the first place, consideration of the nature of the entitlement to retiring allowances under the Superannuation Act.

33 The plaintiffs' case is that they became entitled, upon retirement, to receive a benefit, payable fortnightly during their lifetime, by way of retiring allowances. Each of the retiring allowances was defined by reference to a specified percentage of the parliamentary allowance and, where relevant, parliamentary office holder allowance and ministerial salary which was for the time being payable. The plaintiffs' statutory right, arising under the Superannuation Act, to receive money is a presently existing debt and it is therefore property. Further, the plaintiffs contend that they each have a vested chose in action to recover monies from the Commonwealth on account of the contributions made by them under the Superannuation Act.

34 The plaintiffs' argument then proceeds, that the 2011/12 amendments and the Determinations made thereafter effected a substantial modification to that

41 *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act* 2012 (Cth), Sched 1, item 5.

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property, by reducing the amount which might be payable by way of retiring allowances and at the same time giving a corresponding advantage to the Commonwealth. They point out that it is not necessary that property be extinguished in order to effect an acquisition. It is sufficient that a corresponding advantage, of a proprietary nature, accrues to the Commonwealth, such as where the Commonwealth's liability as a debtor is reduced.

35 It is no doubt correct to say that former members of Parliament could recover contributions made by them if for some reason they did not receive benefits under the Superannuation Act, for example because they did not become eligible for benefits. Section 14A of the Superannuation Act acknowledges this. The making of contributions may be regarded as a condition of eligibility for benefits under the Superannuation Act, but there the connection to what is paid by way of benefits ends. In the scheme provided for by the Superannuation Act there is no connection between the contributions made and the quantum of the benefits which are payable.

36 The plaintiffs' comparison of their entitlements under the Superannuation Act with a debt which is reduced, which is to say partially extinguished, implies that their entitlements have at all times been of a fixed and certain kind and that these entitlements were, to an extent, taken away. This description is apt to mislead. The 2011/12 amendments do not purport to reduce the plaintiffs' entitlements to retiring allowances. They operate to alter the method by which the quantum of the retiring allowances is calculated.

37 The plaintiffs do not identify when and how their rights became fixed and certain. Had they suggested that this occurred at the time they first became entitled to retiring allowances, it would seem to follow that they would not be entitled to the variations which increased the allowances, but they do not contend for this. Their argument consists principally of assertions which have no basis in the Superannuation Act or in the terms of the sections that provide the entitlement for which they claim.

38 The plaintiffs accept that the parliamentary allowance, on which the calculation of the retiring allowance was based before and after the 2011/12 amendments, may be either increased or decreased at any time, with the consequence that the retiring allowance can be reduced. That is because s 7(1) of the Remuneration Tribunal Act is expressed in terms such that the Remuneration Tribunal shall "from time to time" enquire into and determine parliamentary allowances. The parliamentary allowance, as the plaintiffs accept, is subject to variation. The same is true for the parliamentary office holder allowance and ministerial salary. The question is whether, having regard to the terms of the Superannuation Act, the retiring allowances stand in any different position.

39 Retiring allowances are, and at all relevant times have been, benefits payable "in accordance with" s 18 of the Superannuation Act and are benefits which are expressed by s 18(1) to be "[s]ubject to this Act". A reference to "this Act" clearly enough refers to the whole Act and the form which it may take from time to time⁴². Amendments which may be made to the Superannuation Act provisions respecting retiring allowances relevantly include the method of calculating the allowance. This is the answer to the plaintiffs' contention that their rights are free from any condition permitting a variation in the nature of a reduction of the value of their benefits.

40 More generally the plaintiffs contend that any amendments which are made may not effect an acquisition of their property without compensation. However, their argument assumes that s 51(xxxi) applies, which is the very question that must first be addressed. It is addressed by identifying the nature of the rights making up the plaintiffs' property in order to determine whether the changes made to those rights by the 2011/12 amendments make those amendments laws "with respect to" the acquisition of property.

41 In *Attorney-General (NT) v Chaffey*⁴³, the statute provided that "[s]ubject to this Part" (being Pt V) and "in accordance with this Part", compensation "as is prescribed" was payable where a worker suffers injury. "Prescribed" meant prescribed by the Act or by an instrument made under the Act. At the time of the employee's injury compensation was to be calculated by reference to the "normal weekly earnings" of the employee. Amendments to the statute had the effect of excluding superannuation contributions made by the employer from the definition of "normal weekly earnings" and therefore from the calculation of compensation. In the joint judgment⁴⁴ it was said that the expressions "subject to" and "in accordance with" Pt V were naturally to be construed as identifying Pt V as amended from time to time. Their Honours went on to add that the reference to "such compensation as is prescribed" is naturally to be construed as a reference to such compensation as is prescribed from time to time. It followed that the method for quantifying the amount of compensation payable to a worker had not been fixed in any permanent form at the time the employee suffered injury and was always subject to variation.

42 *Ocean Road Motel Pty Ltd v Pacific Acceptance Corporation Ltd* (1963) 109 CLR 276 at 280, 282-283; [1963] HCA 22; *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 74 [200]; [1998] HCA 8.

43 (2007) 231 CLR 651; [2007] HCA 34.

44 *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 662 [18], 663 [20].

42 The plaintiffs submit that the critical feature of *Chaffey* was not what the words "subject to this Part" conveyed about the form that the statute would take, but rather the fact that the compensation payable was to be prescribed by regulation, which may be understood to be subject to change. The submission reflects neither a fair reading of the joint judgment nor the meaning given to the term "prescribed". The point made in *Chaffey* was that the method by which the amount of compensation payable was derived was liable to change. That would be so regardless of the means by which the change was effected.

43 The term "property" in s 51(xxxi) has always attracted a liberal construction in this Court⁴⁵. Some cases concerning s 51(xxxi) have drawn a distinction between rights recognised by the general law and those which have no existence apart from statute and whose continued existence depends upon statute⁴⁶. The dichotomy is useful. Rights which have only a statutory basis are more liable to variation than others. As was said in *Chaffey*, however, where the asserted "property" has no existence apart from statute, further analysis is imperative⁴⁷. It is a truism that statutory rights, which are not constitutionally protected, may be subject to variation or extinguished by legislative action. There are, however, some statutory rights which, having regard to their character and the context and purpose of the statute creating them, can be regarded as inherently variable. Statutory remuneration falls into that category. So too does an entitlement to a retiring allowance.

44 In the joint judgment in *Chaffey*⁴⁸ it was pointed out that it could not be said that the prospect of subsequent modification, or extinguishment, removes all statutory rights from the scope of s 51(xxxi). The question whether that provision was attracted depended upon the nature of the right. In *The Commonwealth v WMC Resources Ltd*⁴⁹, as in *Chaffey*, the right stipulated in the

45 *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 20-21; [1923] HCA 34; *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 276, 290; [1944] HCA 4; *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349; [1948] HCA 7; *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 230-231 [44]; [2008] HCA 7.

46 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305-306; [1994] HCA 6; *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 16-17 [16], 35-36 [78], 54 [140], 70 [182].

47 *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 664 [23].

48 *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 664 [24]-[25].

49 (1998) 194 CLR 1.

statute depended for its content upon the will of the legislature from time to time. The same may be said here of the provisions for calculating retiring allowances from time to time.

45 The plaintiffs take issue with descriptions which have been given to statutory rights of this kind, as "inherently susceptible" to modification and extinguishment⁵⁰, or "inherently unstable"⁵¹. They argue that such phrases should be deprecated because they are misleading and circular. All statutory provisions are liable to amendment and all are subject to s 51(xxxi), they contend.

46 The plaintiffs' submissions overlook that these descriptions identify within particular statutory rights a feature which is critical to their nature as "property" for the purposes of the application of s 51(xxxi). If a right or entitlement was always, of its nature, liable to variation, apart from the fact that it was created by statute, a variation later effected cannot properly be described as an acquisition of property. The Commonwealth does not as a result of an amendment effecting a variation receive a release from an existing liability and therefore acquire property, as the plaintiffs contend. The Commonwealth's liability corresponds with the variation made.

47 The statutory right to which the plaintiffs refer was said to be subject to increase, but it was not liable to be decreased. An argument that the Commonwealth Parliament could not decrease the retiring allowances has no basis in the Superannuation Act or in s 48 of the Constitution. It would appear to accord those benefits the same status and protection as is given to the remuneration of constitutional office holders under ss 3 and 72 of the Constitution⁵², but those provisions are in terms which differ from those of s 48. The plaintiffs' case, in any event, is not based upon any constitutional protection but rather upon statutory rights of a proprietary nature, and ignores the limitations inherent in those rights.

48 The 2011/12 amendments are laws which effect modifications of the plaintiffs' and others' entitlements to retiring allowances, but they are not laws with respect to the acquisition of property and s 51(xxxi) has no application to

50 *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 38 [86]. See also *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305-306.

51 *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 73 [195].

52 For example, s 3 of the Constitution does not permit any alteration of the Governor-General's remuneration.

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them. Given the view we have reached on the plaintiffs' arguments, it is not necessary to consider the Commonwealth's broader argument, that s 51(xxxi) does not qualify ss 48 and 51(xxxvi) as heads of power.

Life Gold Passes

49 The third and fourth plaintiffs argue, by analogy with their case regarding the retiring allowances, that the effect of s 7(9) of the Remuneration Tribunal Act is that, upon becoming eligible for a Life Gold Pass, a holder has a vested right to the benefits provided by the Pass and that the object and effect of the 2002 Act and the 2012 Act was to acquire those plaintiffs' property in respect of the Passes. On extinguishment of that right the Commonwealth acquired a correlative benefit of a proprietary kind.

50 Assuming, for present purposes, that the Remuneration Tribunal's 1976 Determination with respect to the Life Gold Pass was made under s 7(1) of the Remuneration Tribunal Act, the plaintiffs' argument would suffer from the same defects as their argument respecting the retiring allowances. Section 7(1) provides that the Remuneration Tribunal shall determine the allowances to be paid to members of Parliament "from time to time as provided by this Part", which clearly enough implies that allowances are subject to variation. Indeed the plaintiffs' arguments concerning the retiring allowances accepted that parliamentary allowances determined under s 7(1) were liable to variation, by way of increase or decrease.

51 It would be sufficient to dispose of the plaintiffs' arguments with respect to the Life Gold Pass for the reasons given with respect to the retiring allowances. The Commonwealth Parliament could legislate to alter the content of the right at any time. However, the plaintiffs' argument is founded upon an assumption that s 7(1) applies to the Life Gold Pass as an allowance. Something more needs to be said about the nature of a Life Gold Pass.

52 It appears to be common ground that s 7(1) of the Remuneration Tribunal Act was authorised by ss 48 and 51(xxxvi) of the Constitution to the extent that the Remuneration Tribunal made Determinations with respect to the Life Gold Pass. The parties appear to accept that the Determinations were made under s 7(1).

53 The terms of s 7(1) refer to allowances to be paid out of public monies to members of Parliament. Section 7(9) confirms that the allowances are payments of money, to be paid in accordance with the Remuneration Tribunal's Determination. A Life Gold Pass, and the privileges which attach to it, is arguably not an allowance within the meaning of these provisions.

54 The Remuneration Tribunal made its Determination in 1976 with respect to the matter of the Life Gold Pass following a request by the Minister under s 7(4)(b). It will be recalled that this provision allows for a further Determination by the Remuneration Tribunal of a matter which the Minister regards as "significantly related" to the principal question placed before the Tribunal, namely the parliamentary allowance and, inferentially, whether adjustments should be made to it. Questions as to the Minister's view of the relationship of a Life Gold Pass with a parliamentary allowance may be put to one side. The Determination made about the "matter" of the Life Gold Pass did not make it a Determination with respect to an allowance and the Remuneration Tribunal did not treat it in that way.

55 The Remuneration Tribunal dealt with the matter of the Life Gold Pass as an existing "entitlement" of some kind. The Life Gold Pass had, in fact, been provided for some time by the executive government although it was under no obligation to do so. The 1976 Determination dealt with matters of eligibility and the extent of the benefits which were to be provided under it. Whilst the Determination was no doubt intended to formalise the Life Gold Pass, to use a neutral term, it did not alter what it had always been, namely a gratuity. As such the Life Gold Pass was a privilege of a kind which was liable not only to modification, but to extinguishment.

Conclusion and orders

56 The questions stated for the opinion of the Court should be answered as follows:

Question One: Do any, and if so which, of the following laws and Determinations of the Remuneration Tribunal constitute or authorise an acquisition of any, and if so what, property of the plaintiffs, or any of them, otherwise than on just terms, within the meaning of s 51(xxxi) of the Constitution:

- a. *Remuneration Tribunal Act 1973* (Cth), ss 7(1A), 7(1B), 7(1C) and 7(2A);
- b. *Remuneration and Other Legislation Amendment Act 2011* (Cth), s 3 (insofar as it made the amendments or repeals provided for in Sched 2, items 1, 16A, 17A, 19, 20, 21(2));
- c. *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act 2012* (Cth), s 3 (insofar as it made the amendments or repeals provided for in Sched 2, items 1, 2, 3, 5, 6, 7, 8 and 9);
- d. *Members of Parliament (Life Gold Pass) Act 2002* (Cth), s 11(2) (as originally enacted);

17.

- e. *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act 2012 (Cth)*, s 3 (insofar as it made the amendments or repeals provided for in Sched 1, item 6);
- f. Determination 2012/02, Pt 2 (cl 2.2);
- g. Determination 2012/03, Pt 2 (cl 2.3), Pt 3 (cl 3.1);
- h. Determination 2012/15, Pt 1 (cl 1.3 and cl 1.4 (insofar as it relates to cl 1.3));
- i. Determination 2013/13, Pt 2 (cl 2.2), Pt 3 (cl 3.3), Pt 4 (cl 4.1);
- j. Determination 2014/10, Pt 2 (cl 2.2), Pt 3 (cl 3.3), Pt 4 (cl 4.1);
- k. Determination 2015/06, Pt 2 (cl 2.2), Pt 3 (cl 3.3), Pt 4 (cl 4.1)?

Answer: No.

Question Two: If the answer to Question One is yes, to what, if any relief are the plaintiffs, or any of them, entitled in the proceedings?

Answer: Unnecessary to answer.

Question Three: Who should pay the costs of the proceedings?

Answer: The plaintiffs.

GAGELER J.

Constitutional context

57 Section 51(xxxi) of the Constitution, in providing for the Commonwealth Parliament to have 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", subjects the power of the Parliament to make any law "with respect to ... the acquisition of property" for any legislative purpose to the condition that the acquisition occur only "on just terms". The just terms condition was "included to prevent arbitrary exercises of the power" at the expense of the State or individual⁵³ and guarantees to an individual that any law answering the description of a law with respect to the acquisition of his or her property contains provisions ensuring that the acquisition is on terms amounting to "a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property, fair and just as between him and the government of the country"⁵⁴.

58 To answer the description of a law with respect to the acquisition of property within the meaning of s 51(xxxi), a law must meet two basic conditions. First, the law must authorise or effect an acquisition of property: the law must provide for the taking of property from a person and for the conferral of a corresponding interest in property on the Commonwealth or on another person⁵⁵. Second, that acquisition of property must fit within the conception of an acquisition that can be on just terms: the acquisition must be of a nature that is consistent or congruent with provision of compensation or rehabilitation to the former owner⁵⁶.

59 Whether a law meets those two conditions is a question of substance which can involve considerations of degree. Whether a legislative alteration of a right of property takes property from one person and confers a corresponding

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

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

55 *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 145; [1983] HCA 21; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 499-500; [1993] HCA 10; *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 33-34 [42], 53 [118], 68 [169], 99 [278], 130-131 [365]; [2012] HCA 43.

56 *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 124-126 [56]-[60]; [2006] HCA 18.

interest in property on another person, so as to constitute an acquisition of property, turns in part on the characteristics of the right and in part on the extent of the alteration⁵⁷. Whether a legislative acquisition of property is congruent with provision of compensation or rehabilitation to the former owner turns on whether acquisition without compensating or rehabilitating the former owner is a necessary or characteristic feature of legislatively chosen means that are appropriate and adapted to achieving some other objective within power⁵⁸.

60 If those two conditions are met, a law may still not answer the description of a law with respect to the acquisition of property. There remains an ultimate question of characterisation. For example, the law may fail to meet that description because the acquisition of property for which the law provides is no more than incidental to or consequential upon the law's adjustment of competing rights, claims or obligations of persons in a particular relationship or area of activity⁵⁹. No universal discriminant has emerged to guide that ultimate question of characterisation, and perhaps none can be expected.

61 Where a law does answer the description of a law with respect to the acquisition of property, however, enactment of the law will be beyond the power of the Parliament unless the law complies with the just terms condition. That is because, "by an implication required to make the condition of just terms effective", s 51(xxxi) "abstracts the power to support a law for the compulsory acquisition of property from any other legislative power"⁶⁰. The operative principle of interpretation is that⁶¹:

"when you have, as you do in par (xxxi), an express power, subject to a safeguard, restriction or qualification, to legislate on a particular subject or

57 *Smith v ANL Ltd* (2000) 204 CLR 493 at 504-506 [22]-[23]; [2008] HCA 58; *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 233-234 [52]; [2008] HCA 7; *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 54-64 [119]-[154].

58 *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 180-181 [98]-[99]; [1999] HCA 62, applying *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 179-180; [1994] HCA 9.

59 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 161; [1994] HCA 27.

60 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 177.

61 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371-372; [1961] HCA 21. See also *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 285-286; [1990] HCA 29.

to a particular effect, it is in accordance with the soundest principles of interpretation to treat that as inconsistent with any construction of other powers conferred in the context which would mean that they included the same subject or produced the same effect and so authorized the same kind of legislation but without the safeguard, restriction or qualification."

- 62 Applied to s 51(xxxi), that principle of interpretation fits both the inherently expansive nature of a constitutional power to acquire property and the purposes served by its separate and qualified conferral. According to settled understanding⁶²:

"[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 that it extends to innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property. Section 51(xxxi) serves a double purpose. It provides the Commonwealth Parliament with a legislative power of acquiring property: at the same time as a condition upon the exercise of the power it provides the individual or the State, affected with a protection against governmental interferences with his proprietary rights without just recompense. In both aspects consistency with the principles upon which constitutional provisions are interpreted and applied demands that the paragraph should be given as full and flexible an operation as will cover the objects it was designed to effect. 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 just terms s 51(xxxi) fetters the legislative power by forbidding laws with respect to acquisition on any terms that are not just."

- 63 Section 51(xxxi)'s abstraction of power in that way qualifies the generality of the principle that the "power to make laws includes a power to unmake them" and that "the powers conferred on the Parliament under s 51 extend to the repeal, in part or in whole, of what the Parliament has validly enacted"⁶³. The Parliament has ample power to create rights of property in the exercise of other

62 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349-350; [1948] HCA 7; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 197 [134]; [2009] HCA 51.

63 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 355 [13]; [1998] HCA 22.

grants of legislative power. But the power of the Parliament to acquire property that it has created in the exercise of another grant of legislative power is confined to s 51(xxxi).

64 That scope for another grant of legislative power to support a law for the creation of property, but not the acquisition of property within the scope of s 51(xxxi), applies to the power granted by s 51(xxxvi) to make laws with respect to parliamentary allowances and ministerial salaries, for which interim provision was made in ss 48 and 66 of the Constitution, as much as it applies to the other grants in s 51 and s 52 of the Constitution. Each is granted as a plenary legislative power but each is expressly granted "subject to this Constitution".

65 Where the Parliament exercises a legislative power to create a statutory right in the nature of property, attention to the particular statutory characteristics of that statutory right is needed in order to determine whether a subsequent legislative alteration of the right meets the threshold condition of a law with respect to the acquisition of property – that the law provide for the taking of property and for the conferral of a corresponding interest in property⁶⁴. The statutory characteristics of a statutory right of property cannot be assumed to mimic the characteristics of a common law right of property⁶⁵. The statutory characteristics of the right must also be taken in their totality. Unless the statute itself allows the person to pick and choose, the person on whom a statutory right is conferred cannot take the benefit of some characteristics of the right and deny the burden of others⁶⁶.

66 One potential characteristic of a statutory right of property created in the exercise of another grant of legislative power is that the right may be created on terms which make that right susceptible to administrative or legislative alteration or extinguishment without acquisition. That is to say, susceptibility to alteration or extinguishment by subsequent administrative or legislative action might be a characteristic of the right that is created – "inherent at the time of its creation and integral to the property itself"⁶⁷. Whether, and if so to what extent, a right of property created in the exercise of another grant of legislative power is inherently susceptible to administrative or legislative alteration or extinguishment necessarily turns on the construction of the legislation creating that right: on its

64 *Eg Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 232 [49].

65 *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 665 [26]-[27]; [2007] HCA 34.

66 *Phonographic Performance Co of Australia Ltd v The Commonwealth* (2012) 246 CLR 561 at 571 [10], 577 [36], 583 [63], 598-599 [129]; [2012] HCA 8.

67 *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 165.

text, read in its total context and in a manner which best achieves its legislative purpose or object.

67 Legislatively created rights in the nature of accrued entitlements to payments from consolidated revenue have been recognised to be rights of property⁶⁸. Their legislative alteration, if to the financial benefit of the Commonwealth or another person, may amount to an acquisition of property⁶⁹. Legislatively created rights of that nature have nevertheless been said to be proprietary rights of a kind "which, as a general rule, are inherently susceptible of variation"⁷⁰. That general rule can be no more than a presumption of legislative intention which informs the construction of statutes by which such rights are created. The strength of the presumption must vary with the context. The presumption is undoubtedly strong in relation to rights to receive pensions, allowances and benefits in the nature of social welfare payments, which can be regarded as having been conferred from the outset on the basis that they might be redistributed or withdrawn at any time⁷¹. The presumption can apply at best weakly in relation to accrued entitlements to receive payments which can properly be regarded as having formed part of a package of remuneration for services rendered.

68 The textual significance of a particular statutory right being conferred "subject to" the whole or some part of the legislation which created that right must also vary with the statutory context. The words are commonly taken to extend to the legislation as originally enacted and as later amended from time to time⁷². But the words do not speak directly to the source of the power to amend, and they do not necessarily connote a lack of permanence in the statutory right created. Appearing in patents legislation⁷³ or copyright

68 *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 235; [1994] HCA 8.

69 *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 236.

70 *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 237.

71 Cf *United States v Teller* 107 US 64 at 68 (1882) and *Lynch v United States* 292 US 571 at 577 (1934), quoted in *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 262.

72 *Ocean Road Motel Pty Ltd v Pacific Acceptance Corporation Ltd* (1963) 109 CLR 276 at 280, 282-283; [1963] HCA 22.

73 Eg *Patents Act* 1990 (Cth), s 13. See *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 664 [24].

legislation⁷⁴, for example, the words are less suggestive of the inherent susceptibility of statutory rights to subsequent legislative alteration than are the same words appearing in workers' compensation legislation⁷⁵ or in legislation creating and extending exclusive rights to explore for petroleum in an area of the continental shelf which at the time of creation and extension of those rights was subject to competing claims of sovereign rights in international law⁷⁶.

69 Even where those words can be read as signifying that a characteristic of a statutory right is that the right is susceptible to some future legislative alteration, they cannot necessarily be read as signifying that the right is susceptible to any and all legislative alteration, no matter how extreme the alteration and irrespective of the purpose of the alteration. In *Attorney-General (NT) v Chaffey*, reliance was placed on workers' compensation entitlements being conferred "subject to" an identified part of workers' compensation legislation to hold that accrued rights "were of a nature which rendered them liable to variation by a provision such as that made" in a particular amendment the purpose and effect of which was limited to restoring entitlements to levels understood before a recent court decision. Yet a note of caution was sounded when it was added that "subsequent legislation might so remove the content of rights to compensation, as to go beyond what was contemplated ... and amount to abolition"⁷⁷.

70 All of this supports the view expressed by Gleeson CJ in *Theophanous v The Commonwealth* that it is for the Parliament in the exercise of power conferred by s 51(xxxvi) to decide the form and incidents of schemes for the provision of allowances (including retirement allowances in the nature of superannuation or pension entitlements) to parliamentarians, that it is open to the Parliament in the exercise of that power to create rights the statutory modification or extinguishment of which could amount to an acquisition of property within the meaning of s 51(xxxi) and that "[w]hether or not s 51(xxxi) has potential application to such modification or extinguishment may depend upon the legislative context in which such modification or extinguishment occurs". His Honour rejected the proposition that "statutory superannuation or pension

74 Eg *Copyright Act 1968* (Cth), ss 32, 89-92. See *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 70 [182]; [1998] HCA 8.

75 Eg *Work Health Act 1986* (NT), s 53. See *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 662 [18], 665-666 [30].

76 Eg *Petroleum (Submerged Lands) Act 1967* (Cth), ss 5(8) and 28. See *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 73-75 [198]-[203].

77 (2007) 231 CLR 651 at 665-666 [30]-[31].

benefits are inherently defeasible and that, on that account alone, their modification or withdrawal could never constitute an acquisition of property"⁷⁸.

71 That view of the operation and interaction of ss 51(xxxvi) and 51(xxxi), although tentatively expressed by Gleeson CJ in *Theophanous*, is one which I accept without qualification. It provides the starting point for consideration of the arguments in this special case.

Special case

72 The plaintiffs are former parliamentarians, and are also former Ministers or former parliamentary office holders or both. They retired from the Parliament between 1990 and 2001. Their complaint is about alterations made by the Parliament after their retirement to entitlements to payments from the Consolidated Revenue Fund for which they qualified at the time of their retirement under legislation enacted under s 51(xxxvi).

73 The plaintiffs argue that an acquisition of their property otherwise than on just terms has resulted from alterations made by the Parliament in 2011 and 2012 to their statutory rights to receive "retiring allowance". Two of the plaintiffs, the Honourable John Moore AO and the Honourable Barry Cohen AM, separately argue that alterations made by the Parliament in 2002 and 2012 to their statutory rights as holders of Life Gold Passes to travel within Australia for non-commercial purposes at Commonwealth expense resulted in acquisitions of their property otherwise than on just terms.

74 For reasons which follow, I reject the argument that property has been acquired by the alterations to the plaintiffs' statutory rights to receive retiring allowance but accept the arguments of Mr Moore and Mr Cohen that property has been acquired by the alterations to their statutory rights as holders of Life Gold Passes.

Retiring allowance

75 The plaintiffs' rights to receive retiring allowance have at all relevant times been conferred by the *Parliamentary Contributory Superannuation Act* 1948 (Cth) ("the Superannuation Act"). The alterations of rights of which they complain were brought about by the *Remuneration and Other Legislation Amendment Act* 2011 (Cth) ("the 2011 Act") and the *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act* 2012 (Cth) ("the 2012 Act"). Evaluation of their arguments that the 2011 Act and the 2012 Act resulted in an acquisition of property requires an examination of precisely what their rights had previously been and precisely how those rights were altered.

78 (2006) 225 CLR 101 at 113-114 [7].

76 Uncluttering the requisite analysis as much as possible, it is enough to look to the rights which all of the plaintiffs had to receive retiring allowance as former parliamentarians immediately before the commencement of the 2011 Act, and to the operation of the 2011 Act in relation to those rights. The plaintiffs also then had rights to receive additional retiring allowance as former Ministers or former holders of parliamentary office or both. The 2012 Act came to operate in relation to those additional rights. The operation of the 2012 Act in relation to additional retiring allowance is no different in principle, however, from the operation of the 2011 Act in relation to retiring allowance. For that reason, additional retiring allowance and the operation of the 2012 Act can both be put to one side.

77 The content of the right of a former parliamentarian to receive retiring allowance under the Superannuation Act immediately before the commencement of the 2011 Act needs to be understood against the background of rights then conferred on current parliamentarians through the combined operation of the *Remuneration Tribunal Act* 1973 (Cth) ("the Remuneration Tribunal Act"), the *Remuneration and Allowances Act* 1990 (Cth) ("the Remuneration and Allowances Act") and the *Parliamentary Entitlements Act* 1990 (Cth) ("the Parliamentary Entitlements Act") as in force at that time.

78 The Remuneration and Allowances Act and the Parliamentary Entitlements Act were enacted shortly after *Brown v West*, where this Court observed⁷⁹:

"Apart from the possible operation of s 48, it may be that our Constitution provides such a separation of powers as would preclude any exercise of the executive power which takes the form of the discretionary conferring of benefits having a pecuniary value on individual members of the Parliament, not being mere facilities for the functioning of Parliament."

The three Acts together operated to ensure that payments from the Consolidated Revenue Fund to or for the benefit of current parliamentarians occurred with specific statutory authority.

79 The centrally relevant provision of the Remuneration Tribunal Act was s 7. Section 7(1) provided that the Remuneration Tribunal "shall, from time to time ... inquire into, and determine, the allowances (including allowances in accordance with section 48 of the Constitution) to be paid out of the public moneys of the Commonwealth to members of the Parliament by reason of their membership of the Parliament". The term "allowance" was defined in s 3(1) to include but not be limited to "an annual allowance and a travelling allowance".

79 (1990) 169 CLR 195 at 202; [1990] HCA 7.

Section 7(4) made additional provision for the Tribunal to inquire into and determine any matter which the Tribunal or the Minister considered to be significantly related to a matter into which the Tribunal inquired under s 7(1). Under s 7(9)(b), notwithstanding the provisions of any other law, an allowance to which a subsisting determination applied was to be paid in accordance with the determination out of the Consolidated Revenue Fund. Section 8(1) provided for determinations under s 7(1) to be made at intervals of not more than one year.

80 The Remuneration and Allowances Act provided, by force of s 6, for a current member to be entitled to receive three principal forms of allowance referred to in Sched 3. The first was an allowance by way of salary referred to in cl 1 of Sched 3. The second was an electorate allowance referred to in cl 2 of Sched 3. The third was another allowance of a kind to which reference was made in cl 3 of Sched 3. Those other allowances relevantly included an overseas study allowance (entitling the member to financial assistance for overseas study travel while remaining a member) as well as an entitlement to receive on retirement a Life Gold Pass.

81 The allowance by way of salary referred to in cl 1 of Sched 3 was specified in that clause to be an annual allowance and to be equal to either the minimum annual rate of a salary payable to a Commonwealth employee holding a designated classification under the *Public Service Act* 1999 (Cth) or a prescribed percentage of a reference salary set by regulation. Immediately before the commencement of the 2011 Act, the allowance by way of salary was in fact set by regulation as a prescribed percentage of a public service reference salary commonly referred to as Reference Salary A⁸⁰.

82 By force of s 3(2) of the Remuneration and Allowances Act, a determination made by the Remuneration Tribunal which was inconsistent with a provision of that Act operated in substitution for that provision. The result in practice was that the Remuneration Tribunal made annual determinations of electorate allowance and other allowances, including overseas study allowance, which substituted for the electorate and other allowances referred to in cll 2 and 3 of Sched 3.

83 However, s 3(2) of the Remuneration and Allowances Act created an exception for cl 1 of Sched 3. Being a later and specific enactment, the exception also operated as an exception to the generality of s 7(9)(b) of the Remuneration Tribunal Act. The result of that exception was that the Remuneration Tribunal had no power to make a determination which had the effect of altering the allowance by way of salary for a member as then set by regulation as a prescribed percentage of Reference Salary A.

80 Remuneration and Allowances Regulations 2005 (Cth).

84 The Parliamentary Entitlements Act supplemented the Remuneration and Allowances Act by providing in s 5(1) for members to be entitled to additional benefits determined by the Remuneration Tribunal under s 7 of the Remuneration Tribunal Act. Those other benefits were confined by s 5(2) to benefits not in the nature of remuneration.

85 Against that background, s 18(1) of the Superannuation Act as then in force provided that "[s]ubject to this Act, a member who ceases to be entitled to a parliamentary allowance shall be entitled to benefits in accordance with this section". Section 18(6) provided for the rate of retiring allowance payable to a former member to be a specified percentage (varying with years of service) of "the rate of parliamentary allowance for the time being payable to a member". Section 14A provided that the Commonwealth was to make payments in respect of benefits provided for by the Act, and s 27 provided that those payments were to be made out of the Consolidated Revenue Fund, which was appropriated accordingly.

86 Importantly, the rate of retiring allowance payable to a former member in accordance with s 18(6) was affected by s 22T of the Superannuation Act. Section 22T was expressed to apply in the event of a decrease in the rate of parliamentary allowance payable to a current member. In that event, the section operated to require the retiring allowance payable to a former member to be calculated on the basis that the rate of parliamentary allowance for the time being payable to a current member was the earlier, higher rate of parliamentary allowance. The section went on to require retiring allowance to continue to be calculated on the basis of that earlier, higher rate until such time as parliamentary allowance payable to a current member increased to at least the earlier rate.

87 Section 22T of the Superannuation Act in that way set a floor on the amount of retiring allowance payable to a former member. The amount of retiring allowance could always go up. But the amount of retiring allowance could never go down, even if the parliamentary allowance for the time being payable to current members went down.

88 The Superannuation Act defined "parliamentary allowance" in s 4(1) relevantly to mean "an allowance by way of salary" under cl 1 of Sched 3 to the Remuneration and Allowances Act⁸¹. The practical effect of that definition was to require the retiring allowance of a former member under s 18(1) to be calculated under s 18(6) as a specified percentage of Reference Salary A. The entitlement of a current member to electorate allowance or to another allowance such as overseas study travel, or to any other benefit not in the nature of remuneration, did not enter into the calculation.

81 Section 4(1), "parliamentary allowance", par (c).

89 The 2011 Act had as its main purpose amending the Remuneration and Allowances Act to implement recommendations of a report of the Committee for the Review of Parliamentary Entitlements in 2010 concerning the allowances of current and former parliamentarians⁸². The principal recommendations of the Committee were relevantly to the effect that the notion of a reference salary should be abandoned, that the Remuneration Tribunal should have power to determine a base salary for parliamentarians on the basis of the Tribunal's assessment of the value of their work as parliamentarians, and that the Tribunal's power should extend to allowing the Tribunal to dispense with electorate allowance and the allowance for overseas study travel and to fold the value of those existing allowances into its determination of parliamentary base salary⁸³. A subsidiary recommendation of the Committee was to the effect that preventative measures should be taken to ensure that folding the value of electorate allowance and overseas study travel into the parliamentary base salary of current members did not have the unintended consequence of increasing the value of the retiring allowance payable to former parliamentarians under the Superannuation Act⁸⁴.

90 The 2011 Act implemented the principal recommendations of the Committee by the simple expedient of repealing cl 1 of Sched 3 to the Remuneration and Allowances Act and amending s 3(2) to delete the exception. Henceforth, a determination of the Remuneration Tribunal was to operate in accordance with its terms in spite of any provision of the Remuneration and Allowances Act.

91 The 2011 Act went on to implement the subsidiary recommendation of the Committee. It did so in part by amending the definition of "parliamentary allowance" in the Superannuation Act to substitute for part of the existing definition a new definition to the effect that "parliamentary allowance means ... parliamentary base salary (within the meaning of the [Remuneration Tribunal Act]), less any portion determined under subsection 7(1A) of [the Remuneration Tribunal Act]"⁸⁵.

82 Committee for the Review of Parliamentary Entitlements, *Review of Parliamentary Entitlements*, (2010).

83 Committee for the Review of Parliamentary Entitlements, *Review of Parliamentary Entitlements*, (2010) at 58-60, 84-85.

84 Committee for the Review of Parliamentary Entitlements, *Review of Parliamentary Entitlements*, (2010) at 60-61.

85 *Parliamentary Contributory Superannuation Act* 1948 (Cth), s 4(1), "parliamentary allowance", par (d) (as in force on 5 August 2011).

92 Complementing that amendment to the definition in the Superannuation Act, the 2011 Act made two relevant amendments to the Remuneration Tribunal Act. One was to insert a definition of "parliamentary base salary", which was to mean so much of the allowances determined under s 7(1) as "represents the annual allowance payable for the purposes of section 48 of the Constitution" and "is identified in the determination as base salary". The other was to insert a new s 7(1A) to provide that "[t]he Tribunal may determine that a portion of parliamentary base salary is not parliamentary allowance for the purposes of the [Superannuation Act]".

93 After the 2011 Act, the amount of retiring allowance to which a former member was entitled under s 18(1) of the Superannuation Act therefore remained that calculated under s 18(6) as a specified percentage of parliamentary allowance as defined in s 4(1). The calculation required by s 18(6) continued to be constrained by s 22T, so that the amount of retiring allowance could always go up if parliamentary allowance went up but could never go down if parliamentary allowance went down.

94 What the 2011 Act changed was how parliamentary allowance was defined for the purpose of the Superannuation Act in s 4(1) of that latter Act. Gone was the old definition which indirectly tied parliamentary allowance to Reference Salary A. In its place was a new definition which tied parliamentary allowance for the purpose of the Superannuation Act to such amount as the Remuneration Tribunal might determine under s 7(1) of the Remuneration Tribunal Act to be the parliamentary base salary payable to a current parliamentarian less such proportion as the Tribunal might under s 7(1A) determine not to be parliamentary allowance for the purposes of the Superannuation Act.

95 Examination of the practical outworking of that change is instructive. Immediately before the commencement of the 2011 Act, the amount of parliamentary allowance, tied to Reference Salary A, was \$140,910. In the first half of 2012, the then current value of Reference Salary A was \$146,380. The Remuneration Tribunal in March 2012⁸⁶ determined parliamentary base salary to be \$185,000 and determined the portion of parliamentary base salary that was not parliamentary allowance for the purposes of the Superannuation Act to be \$38,620, being the difference between the then current value of Reference Salary A and the amount the Tribunal then determined to be parliamentary base salary. The amount of parliamentary allowance for the purpose of the Superannuation Act was accordingly \$146,380. Around the middle of 2012, the value of Reference Salary A rose to \$150,780 and the Tribunal determined parliamentary base salary and the portion that was not parliamentary allowance for the purposes

86 Remuneration Tribunal Determination 2012/02.

of the Superannuation Act in a way that increased parliamentary allowance to \$150,780⁸⁷.

96 In 2013⁸⁸, the Remuneration Tribunal determined parliamentary base salary by increasing the parliamentary base salary it had determined in the middle of 2012 by a specified percentage and determined the portion that was not parliamentary allowance for the purposes of the Superannuation Act in a way that increased parliamentary allowance for the purposes of the Superannuation Act by the same percentage. Subsequent determinations of the Tribunal left the amounts of parliamentary base salary and of parliamentary allowance for the purposes of the Superannuation Act in 2014 and 2015 at the rates which had been determined in 2013⁸⁹.

97 The retiring allowance of former parliamentarians has in that way remained in practice linked to Reference Salary A as it was in 2012, increased in 2013 by the same percentage as parliamentary base salary then increased.

98 Significantly, the plaintiffs do not challenge the amendment to the definition of parliamentary allowance in the Superannuation Act. They seek to benefit from it. They want to take advantage of the inflating aspect of the new definition, which fastens on a determination of parliamentary base salary under s 7(1) of the Remuneration Tribunal Act. At the same time, they deny the validity of the deflating aspect of the new definition, which under s 7(1A) of the Remuneration Tribunal Act excludes a portion of parliamentary base salary from parliamentary allowance for the purpose of the Superannuation Act. Section 7(1A) of the Remuneration Tribunal Act alone, they argue, is invalid as an acquisition of their statutory property other than on just terms.

99 According to the plaintiffs, the Tribunal's determinations in 2012, 2013, 2014 and 2015 validly determined parliamentary base salary in the exercise of the power conferred by s 7(1) of the Remuneration Tribunal Act, but were invalid insofar as they reduced parliamentary allowance in the purported exercise of the power conferred by s 7(1A) of the Remuneration Tribunal Act for the purpose of the Superannuation Act to a level below parliamentary base salary. For example, the plaintiffs say that in 2012 the amount of parliamentary allowance validly determined by the Tribunal for the purpose of the Superannuation Act was not \$146,380 but \$185,000. They say that they were entitled to receive retiring allowance calculated by reference to that higher amount.

87 Remuneration Tribunal Determination 2012/15.

88 Remuneration Tribunal Determination 2013/13.

89 Remuneration Tribunal Determinations 2014/10 and 2015/06.

100 What is apparent is that the plaintiffs have not in fact received an amount of retiring allowance as a result of the 2011 Act which is less than they received before the 2011 Act. The amount of retiring allowance they have received since the 2011 Act has increased.

101 What is also apparent is that the plaintiffs in their argument approbate and reprobate. They seek to take the benefit of the new definition of parliamentary allowance in the Superannuation Act. Yet they seek to shear away a qualification intrinsic to that new definition.

102 The fundamental problem with the plaintiffs' argument is that it is founded on too large and imprecise a conception of just what their statutory rights to retiring allowance had been before the enactment of the 2011 Act. The plaintiffs did not then have rights to be paid a percentage of whatever might be capable of being regarded from time to time as the base salary of a current parliamentarian. Their rights under ss 18(1) and 18(6) of the Superannuation Act were confined to rights to be paid a percentage of parliamentary allowance as then defined in s 4(1). That definition admitted of the rate of parliamentary allowance being varied up or down at any time by regulation made for the purpose of cl 1 of Sched 3 to the Remuneration and Allowances Act. The plaintiffs at the same time had the protection of s 22T of the Superannuation Act preventing the amount they were entitled to from being reduced.

103 The 2011 Act did not reduce the amount of retiring allowance payable to the plaintiffs under ss 18(1) and 18(6) and did not remove the protection of s 22T. The 2011 Act in truth deprived them of nothing.

104 Without needing to form any view about the scope for inherent variation that might be imported by the words "subject to this Act" in s 18(1) of the Superannuation Act, the change to the definition of parliamentary allowance for the purpose of that Act effected by the 2011 Act did not result in an alteration of the plaintiffs' statutory rights capable of being characterised as constituting a taking of their property. Conversely, the alteration did not result in a financial benefit to the Commonwealth capable of being characterised as constituting an acquisition of property.

105 The 2011 Act did not meet the threshold condition of a law with respect to an acquisition of property. For that reason, the 2011 Act did not engage s 51(xxxi) of the Constitution.

Life Gold Passes

106 The special case to which the parties agreed contains an elaborate history which traces the concept of a Life Gold Pass to gold medallions issued by colonial governments to colonial politicians entitling them to free travel on government-owned railways. Quaintly interesting as that history is, nothing for

present purposes is to be drawn from it in light of the doubt expressed in *Brown v West* about the capacity of the Commonwealth executive to confer discretionary benefits on parliamentarians and in light of the issuing of Life Gold Passes to Commonwealth parliamentarians having been put firmly and exclusively on a statutory basis following the enactment of the Remuneration Tribunal Act.

107 Mr Cohen's and Mr Moore's rights as holders of Life Gold Passes are statutory rights which accrued to them in the form of allowances to which they became entitled in their capacities as members of the Parliament and by reason of that membership at the time of their respective retirements in accordance with determinations of the Remuneration Tribunal then subsisting under s 7(1) of the Remuneration Tribunal Act. From the time of accrual of those rights, provisions of the *Acts Interpretation Act* 1901 (Cth) combined to make them enforceable on the basis that the determinations then subsisting continued to subsist notwithstanding subsequent amendment or expiration⁹⁰. Those provisions admitted of the possibility of a contrary legislative intention appearing in the Remuneration Tribunal Act. But there was none.

108 Section 7(9)(b) of the Remuneration Tribunal Act, it will be recalled, made an allowance to which a subsisting determination applied payable in accordance with the determination out of the Consolidated Revenue Fund notwithstanding the provisions of any other law.

109 The Tribunal itself had no power to alter rights attaching to a Life Gold Pass that had been issued to a retiring member in accordance with a subsisting determination by varying or amending that determination. That was because the power of the Tribunal under s 7(1) of the Remuneration Tribunal Act, to which s 7(4) was ancillary, was relevantly limited to determining allowances to be paid from time to time to current members of the Parliament by reason of their membership of the Parliament.

110 The Tribunal publicly stated in the course of explaining a determination which it made in 1993 that "[t]he Tribunal has been given legal advice that its jurisdiction does not extend to retired Members and, therefore, that it cannot make a determination to restrict the use of the gold pass by retired Members"⁹¹. That view, which I consider correct, was the view on which the Tribunal consistently acted in practice.

90 See *Acts Interpretation Act* 1901 (Cth), ss 8(c), 8B and 46(1)(a) as then in force at the relevant times; see now *Acts Interpretation Act* 1901 (Cth), ss 7(2)(c), 7(3)(b) and 46(1)(a)-(b).

91 Remuneration Tribunal, *1993 Review*, (1993) at xxv.

111 Therefore, neither in principle nor in practice was there anything inherently variable about the rights attaching to a Life Gold Pass issued to a retiring member in accordance with a subsisting determination of the Remuneration Tribunal.

112 At the time of Mr Cohen's retirement, on 19 February 1990, the subsisting determination of the Remuneration Tribunal was relevantly in terms that "[a] senator or member, who, on retirement from the Parliament, has completed [a specified qualifying period] shall be issued with a Life Gold Pass entitling the holder to travel at government expense for non-commercial purposes within Australia on scheduled commercial/commuter air services". The determination went on to provide that "[a] Life Gold Pass holder shall be entitled to travel at government expense at the class of travel determined from time to time for a sitting senator or member". At the time of Mr Moore's retirement, on 5 February 2001, the subsisting determination of the Remuneration Tribunal made similar provision, save that it limited travel at government expense to a maximum of 25 return trips each year.

113 The first of the alterations to his accrued statutory right which Mr Cohen argues to have involved an acquisition of his property was made by the *Members of Parliament (Life Gold Pass) Act* 2002 (Cth) ("the 2002 Act"). Section 11(2) of the 2002 Act relevantly provided that "a former member who is the holder of a Life Gold Pass ... is entitled to ... a maximum of 25 domestic return trips per year". The second of the alterations to his accrued statutory right which Mr Cohen argues to have involved an acquisition of his property was brought about by Item 6 of Sched 1 to the 2012 Act, to which effect was given by s 3 of the 2012 Act, amending s 11(2) of the 2002 Act by substituting "10" for "25". The second alteration also affected the accrued right of Mr Moore.

114 Demonstrating legislative concern that there was a risk of contravention of the just terms condition of s 51(xxxi), the 2002 Act and the 2012 Act each contained an "historic shipwrecks" clause⁹², imposing liability on the Commonwealth to pay compensation if its operation in the absence of that provision for compensation would result in an acquisition of property otherwise than on just terms. That concern, in my opinion, was well founded. The determinations of the Remuneration Tribunal subsisting under s 7(1) of the Remuneration Tribunal Act gave rise to accrued statutory rights the diminution of which by the 2002 Act and the 2012 Act, to obvious financial benefit of the

92 *Members of Parliament (Life Gold Pass) Act* 2002 (Cth), s 32; *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act* 2012 (Cth), Sched 1, Item 10. See generally *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 470 [462]-[463]; [2009] HCA 2.

Commonwealth, constituted acquisitions of property within the meaning of s 51(xxxi) of the Constitution.

115 Viewed from the perspective of anyone other than the holder or prospective holder of a Life Gold Pass, the statutory rights in question must be acknowledged to be a particularly unattractive form of property. The Remuneration Tribunal commented in 2011 that "[t]here is possibly no single issue on which there is such a disconnect between parliamentarians and their constituents as the Life Gold Pass" and went on to note that the public view of actual usage of Life Gold Passes seemed to be one of derision⁹³.

116 The protection afforded by the just terms condition of s 51(xxxi) has nothing to do with the popularity of the creation of the property that is protected. Much less can the constitutional protection yield to the popularity of its taking. In the words of Gleeson CJ⁹⁴:

"The guarantee contained in s 51(xxxi) is there to protect private property. It prevents expropriation of the property of individual citizens, without adequate compensation, even where such expropriation may be intended to serve a wider public interest. A government may be satisfied that it can use the assets of some citizens better than they can; but if it wants to acquire those assets in reliance upon the power given by s 51(xxxi) it must pay for them, or in some other way provide just terms of acquisition."

Answers to questions

117 Question One of the questions reserved by the parties for the consideration of the Full Court should be answered to the effect that s 11(2) of the 2002 Act and s 3 of the 2012 Act, insofar as it amended s 11(2) of the 2002 Act by giving effect to Item 6 of Sched 1 to the 2012 Act, constituted acquisitions otherwise than on just terms of property of Mr Cohen and Mr Moore comprised of their statutory rights to travel at government expense in accordance with determinations of the Remuneration Tribunal subsisting at the time of their retirement which entitled them to be issued with Life Gold Passes. Question Two should be answered to the effect that Mr Cohen and Mr Moore are entitled to declarations reflecting the answer to Question One. Question Three should be answered to the effect that the question of costs should be left to the discretion of a single Justice.

93 Remuneration Tribunal, *Review of the Remuneration of Members of Parliament: Initial Report*, (2011) at [8.9].

94 *Smith v ANL Ltd* (2000) 204 CLR 493 at 501 [9].

118 KEANE J. Each of the plaintiffs is a former member of the House of
Representatives of the Commonwealth Parliament. Each of the first, second and
fourth plaintiffs held one or more parliamentary offices during his time in
Parliament. The third and fourth plaintiffs held positions as Ministers of State,
and each of them upon his retirement from Parliament received a Life Gold Pass.

119 The plaintiffs brought proceedings against the Commonwealth⁹⁵
challenging the possible reduction of their superannuation entitlements as former
members of Parliament, parliamentary office holders, or Ministers of State; and
the third and fourth plaintiffs challenged the reduction of their entitlements to the
payment of travel expenses as holders of a Life Gold Pass.

120 The parties agreed upon the terms of a special case, which presented two
issues for determination by the Court. The first issue arises because s 7(1A),
(1B), (1C) and (2A) of the *Remuneration Tribunal Act* 1973 (Cth) ("the
Remuneration Tribunal Act"), associated amendments to the *Parliamentary
Contributory Superannuation Act* 1948 (Cth) ("the Superannuation Act"), and
Determinations made by the Remuneration Tribunal ("the Tribunal") pursuant to
those provisions, may operate to reduce the amount of payments which the
plaintiffs would otherwise receive under the Superannuation Act. The issue is
whether those provisions and decisions are invalid by reason of s 51(xxxi) of the
Constitution.

121 The second issue arises because s 11(2) of the *Members of Parliament
(Life Gold Pass) Act* 2002 (Cth) ("the Life Gold Pass Act"), both as enacted and
as amended by the *Members of Parliament (Life Gold Pass) and Other
Legislation Amendment Act* 2012 (Cth) ("the LGPA Act"), reduced the value of
expense-paid travel to which holders of a Life Gold Pass were entitled. The issue
is whether this reduction was an acquisition of property within the meaning of
s 51(xxxi) of the Constitution so as to give rise to an entitlement to compensation
under s 32 of the Life Gold Pass Act.

122 The plaintiffs' submission was that the Parliament, which created their
entitlements, may not unmake them without paying compensation for the
consequential reduction in their value. The plaintiffs argued that the Parliament
may lawfully reduce their entitlements only if the Parliament observes the
requirement of s 51(xxxi) of the Constitution to provide "just terms" for the
reduction in the value to them of those entitlements.

123 The plaintiffs accepted that the Determinations by the Tribunal which they
challenge do not extinguish their property completely, but argued that the

95 The Remuneration Tribunal was named as the second defendant in the proceedings;
it filed a submitting appearance.

Determinations may operate to reduce the payments which otherwise would be made to them and, at the same time, provide a corresponding advantage to the Commonwealth. This was said to be an acquisition of property within the meaning of s 51(xxxi).

124 The Commonwealth submitted, among other things, that the entitlements of each of the plaintiffs to receive payments of allowance under the Superannuation Act or the cost of travel privileges under the Life Gold Pass Act are not "property" within the meaning of s 51(xxxi)⁹⁶. On behalf of the Commonwealth, it was argued that, although a statutory right may in some cases be characterised as property for the purposes of s 51(xxxi), the rights to payment in question here could not be so characterised. Rather, they were, by reason of the terms in which they were created, susceptible to alteration as the Parliament sees fit before payment is made. For the reasons that follow, this submission should be accepted.

125 It is necessary to begin a consideration of the issues by summarising the provisions of the Constitution which authorise the statutory provisions which regulate the plaintiffs' entitlements. I will then proceed to a discussion of the superannuation issue. The Life Gold Pass issue will then be addressed.

The Constitution

126 Section 48 of the Constitution provides:

"Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of four hundred pounds a year, to be reckoned from the day on which he takes his seat."

127 Section 66 provides:

"There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, until the Parliament otherwise provides, shall not exceed twelve thousand pounds a year."

128 Section 51 relevantly provides:

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

96 cf *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 664 [23]; [2007] HCA 34.

...

(xxxix) 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;

...

(xxxvi) matters in respect of which this Constitution makes provision until the Parliament otherwise provides".

129 Section 51(xxxvi), supported by ss 48 and 66, provides the constitutional basis for legislative provisions for the payment of allowances and salaries to serving and retired parliamentarians and Ministers of State from the public moneys of the Commonwealth. While s 48 does not refer, in terms, to pensions or superannuation payments for retired parliamentarians, it has been accepted that s 48 empowers the Parliament to legislate for the making of such payments⁹⁷. No party sought to contend otherwise in the present case; and no separate issue was raised in relation to salaries provided pursuant to s 66 of the Constitution.

130 It was not suggested by any party that ss 48, 66 and 51(xxxvi) of the Constitution confer powers on the Parliament that are exercisable only to increase the allowance or salary to the benefit of the parliamentarian and at the expense of the taxpayer. Indeed, the contrary view was accepted by Senior Counsel for the plaintiffs. That concession was rightly made. The entitlement of serving parliamentarians to an irreducible level of remuneration is not protected by provisions such as s 3 and s 72(iii) of the Constitution, which apply to the Governor-General and federal judges respectively. It has long been understood that Parliament may exercise these powers to reduce the remuneration of parliamentarians. Thus, in relation to s 48 of the Constitution, Quick and Garran commented⁹⁸:

"[N]either the principle nor the amount of payment are permanent constitutional provisions. Without an amendment of the Constitution, the Federal Parliament may at any time either abolish payment of members or reduce or increase the allowance which each member is to receive, or alter the method of apportioning the allowance".

97 *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 113-114 [7], 121 [37]; [2006] HCA 18.

98 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 499.

131 On this view, the remuneration payable to parliamentarians and Ministers
of State may be reduced at any time before payment is made to them.

132 Similarly, Professor Harrison Moore said of s 48 of the Constitution⁹⁹:

"The payment of members of the Commonwealth Parliament is under no constitutional guarantee: the Parliament may abolish it or alter the amount."

133 Joseph Story wrote that the conferral of power on the United States Congress by the United States Constitution to determine the remuneration of its members, which includes the power to vary that remuneration from time to time, was to ensure that the remuneration became neither too low nor too high. Story said that it was "wisest" to leave the matter "to be decided by Congress from time to time, according to their own sense of justice and a large view of the national resources."¹⁰⁰

134 Given that the allowances paid to the plaintiffs after each of them left office are sustained by the same constitutional powers as supported their entitlement to remuneration while in office, and given further that the Parliament may reduce the remuneration payable to parliamentarians and Ministers of State while they are in office, one is inevitably led to ask what it is about the entitlements in issue here which rendered them invulnerable to statutory reduction pursuant to ss 48, 66 and 51(xxxvi) of the Constitution as Parliament sees fit so that they could be reduced only pursuant to s 51(xxxi). Unless the plaintiffs' entitlements to payment from the public moneys of the Commonwealth in retirement are different in character from their entitlements while in office in that they have been given the character of property, one would resolve the issues presented by the parties simply by applying the approach of Latham CJ in *Allpike v The Commonwealth*¹⁰¹: "[S]uch right as there is is the creation of Commonwealth statute ... That right may be altered by the authority which created it."

135 The plaintiffs sought to demonstrate the proprietary character of their entitlements in retirement by arguing that their entitlements, both to superannuation benefits and to travel expenses, can be seen to be choses in action which have "vested" in them as rights additional to the statutory payments to

⁹⁹ Harrison Moore, *The Constitution of the Commonwealth of Australia*, (1902) at 113.

¹⁰⁰ Story, *Commentaries on the Constitution of the United States*, 5th ed (1891), vol 1 at 627 §858.

¹⁰¹ (1948) 77 CLR 62 at 69; [1948] HCA 19.

them from time to time out of public moneys of the Commonwealth. The plaintiffs submitted that, to the extent that s 7(1A), (1B), (1C) and (2A) of the Remuneration Tribunal Act and the associated amendments in the *Remuneration and Other Legislation Amendment Act 2011* (Cth) ("the 2011 Amendment Act") and the LGPA Act permit a Determination by the Tribunal which might reduce payments to them, or on their behalf, by severing the link with parliamentary allowance, these provisions effect an acquisition of those choses in action otherwise than on just terms.

136 I turn now to consider this argument in the particular context of the superannuation issue.

The superannuation issue

137 Prior to 5 August 2011, s 18 of the Superannuation Act provided for the payment of retiring allowance by reference to a fixed percentage of the parliamentary allowance for the time being payable to members of Parliament. The parliamentary allowance was an annual allowance, called "salary", and was determined under cl 1 of Sched 3 to the *Remuneration and Allowances Act 1990* (Cth) ("the 1990 Allowances Act") and reg 5 of the Remuneration and Allowances Regulations 2005 (Cth).

The challenged amendments

138 On 5 August 2011, the 2011 Amendment Act repealed cl 1 of Sched 3 to the 1990 Allowances Act, and empowered the Tribunal to determine the "parliamentary base salary" of members of Parliament. A definition of "parliamentary base salary" was inserted into s 3(1) of the Remuneration Tribunal Act¹⁰². The new provisions allowed a differentiation between the annual allowance payable to serving parliamentarians, and the amount of that allowance which is relevant for the purposes of determining the quantum of retiring allowance payable under the Superannuation Act. These amendments permitted the amount of parliamentary allowance to serving members to be altered without automatically altering the quantum of retiring allowance payable to retired members.

¹⁰² *Remuneration and Other Legislation Amendment Act 2011* (Cth), Sched 2, item 16A.

139 The 2011 Amendment Act added s 7(1A) to the Remuneration Tribunal Act¹⁰³; sub-ss (1B), (1C) and (2A) were added by the LGPA Act¹⁰⁴. They are in the following terms¹⁰⁵:

"(1A) The Tribunal may determine that a portion of parliamentary base salary is not **parliamentary allowance** for the purposes of the *Parliamentary Contributory Superannuation Act 1948*.

(1B) The Tribunal may determine that a portion of additional Parliamentary office holder salary is not **allowance by way of salary** for the purposes of the *Parliamentary Contributory Superannuation Act 1948*.

(1C) Without limiting subsection (1B), the Tribunal may determine under that subsection that, in the circumstances specified in the determination, a different portion (which may be a portion equal to 100%) of additional Parliamentary office holder salary is not **allowance by way of salary** for the purposes of that Act in those circumstances.

...

(2A) The Tribunal may determine that a portion of a salary referred to in subsection 6(1) is not **salary** for the purposes of the *Parliamentary Contributory Superannuation Act 1948*."

140 The 2011 Amendment Act also amended the definition of "parliamentary allowance" in the Superannuation Act to allow the exclusion of a portion of parliamentary base salary determined under the Remuneration Tribunal Act from the parliamentary allowance for the purpose of calculating the retiring allowance¹⁰⁶.

141 The result of the changes made by the 2011 Amendment Act was that the amount of the retiring allowance payable to retired members of Parliament was no longer linked by statutory provision to the amount of the allowance payable to

103 *Remuneration and Other Legislation Amendment Act 2011* (Cth), Sched 2, item 17A.

104 Sched 2, items 5, 6.

105 Section 3(1) of the Remuneration Tribunal Act contains definitions relevant to these provisions but it is not necessary to notice their detail.

106 *Remuneration and Other Legislation Amendment Act 2011* (Cth), Sched 2, item 1.

serving members of Parliament; it became some potentially lesser amount depending upon the Determinations of the Tribunal. There was thus created the potential for the reduction of retiring allowance independently of any reduction in the parliamentary allowance. It is this alteration of the basis on which retiring allowance is to be paid to the plaintiffs which is at the heart of the superannuation issue.

142 On 6 March 2012, the LGPA Act made amendments in relation to the additional retiring allowance payable to former Ministers of State and parliamentary office holders in line with those made by the 2011 Amendment Act in relation to parliamentarians¹⁰⁷. Prior to those amendments, the additional retiring allowance was, by reason of s 18(9) of the Superannuation Act, a fixed percentage of the salary payable for the time being to a Minister of State or of the allowance payable for the time being to the parliamentary office holder.

The Tribunal's Determinations

143 Tribunal Determinations made under the challenged provisions have not resulted in any actual reduction of the amount of retiring allowance received by the plaintiffs. In this regard, immediately before the coming into force of the first Determination following the 2011 Amendment Act (Determination 2012/02), the amount of "parliamentary allowance" for the purposes of the Superannuation Act was \$140,910. By Determination 2012/02, the parliamentary base salary was set at \$185,000, and the parliamentary allowance for the purposes of the Superannuation Act was set at \$146,380 on the basis that the portion of the parliamentary base salary that was determined not to be parliamentary allowance for the purposes of that Act was \$38,620.

144 Under the latest Determination in evidence before the Court, Determination 2015/06, the amount of "parliamentary allowance" fixed for the purposes of the Superannuation Act is \$154,400 and the portion of parliamentary base salary that is not parliamentary allowance for those purposes is \$40,730.

The plaintiffs' arguments

145 Recognising that pension entitlements have been described in the authorities as "gratuities", which, generally speaking, may be withdrawn at any time by the payer¹⁰⁸, the plaintiffs submitted that payments under the

107 *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act* 2012 (Cth), Sched 2, items 1, 2, 5 and 6.

108 *Lynch v United States* 292 US 571 at 577 (1934); *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 261-262; [1994] HCA 8.

Superannuation Act are not mere gratuities¹⁰⁹; rather, they are made pursuant to a right to a retiring allowance linked to the parliamentary allowance which vested in them, either under the terms of the Superannuation Act, or having been earned by each plaintiff as the quid pro quo either for the services rendered by each of them as a member of Parliament or for the contributions paid by them under the Superannuation Act while they were members of Parliament.

146 In their written submissions, the plaintiffs argued that their right was a chose in action which vested in each of them at the time they entered Parliament. This was said to be so, at least once each of them had satisfied the minimum qualifying period of service necessary to entitle him to receive a retiring allowance. In oral argument, however, it was said that the chose in action vested in each of them when he ceased to be a member of Parliament.

147 The plaintiffs put at the forefront of their argument the following observations of Gleeson CJ in *Theophanous v The Commonwealth*¹¹⁰:

"If Parliament legislated to modify or take away accrued entitlements simply for the purpose of saving money, or because it was decided as a matter of policy that they were too generous, then the case may fall within s 51(xxxi). It is unnecessary to decide that question. As at present advised, I would not accept that statutory superannuation or pension benefits are inherently defeasible and that, on that account alone, their modification or withdrawal could never constitute an acquisition of property."

148 It should be said immediately that the other members of the Court did not support his Honour's observations. Further, these observations by Gleeson CJ were tentatively expressed remarks unnecessary for his Honour's determination of the case. It may also be said that Gleeson CJ did not enter upon a close consideration of the nature of the right created by s 18(1) of the Superannuation Act, whether in the context of the other provisions of that Act, or against the background of ss 48, 66 and 51(xxxvi) of the Constitution. A consideration of these matters does not support a conclusion that the Superannuation Act purported to vest in the plaintiffs a chose in action of the kind for which they argued.

149 Before turning to a closer consideration of the terms of the statute on which the plaintiffs relied, it may be said that it is difficult to describe the

¹⁰⁹ cf *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 260-262; *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 52-53 [137]-[138], see also at 73 [197]; [1998] HCA 8.

¹¹⁰ (2006) 225 CLR 101 at 113-114 [7].

creation of a *potential* for a diminution in the plaintiffs' entitlements to payment of retiring allowance as an acquisition of property apt to engage s 51(xxxi) of the Constitution. Further, the notion of an entitlement to be paid superannuation payments calculated on a particular basis, ie, by reference to the remuneration paid from time to time to serving parliamentarians, is such an abstract conception that it is difficult to accept that it can be said to be "property" in even a broad sense of the term.

150 In addition, an adjustment downwards of the amount of allowance or salary payable to a serving parliamentarian or Minister of State would not be described in ordinary parlance as an acquisition of his or her property: it is naturally described simply as a reduction in remuneration. Similarly, as a matter of the ordinary use of language, the alteration of the entitlement to payment of retiring allowance from the public moneys of the Commonwealth before payment is made might be said to defeat an expectation of payment; but it is distinctly awkward to speak of that alteration as an acquisition of the property of the (unpaid) former parliamentarian.

151 Finally, as noted above, the plaintiffs, in the course of their submissions, articulated several possibilities as to how and when this vesting might have occurred. The variety of the possible circumstances of the "vesting" which the plaintiffs propounded is itself suggestive of a level of conceptual uncertainty inconsistent with a meaningful idea of property.

152 As will now be seen, the plaintiffs' argument does not gain strength from an examination of the language of the Superannuation Act or from a consideration of the context in which it operates.

The statutory entitlement

153 The right asserted by the plaintiffs does not partake of the proprietary character of a statutory right to compensation payments conferred under federal compulsory acquisition schemes¹¹¹. It does not exhibit the "familiar features of stable and valuable property interests long recognised by the common law."¹¹² It has no existence apart from statute.

111 *National Trustees Executors and Agency Co of Australasia Ltd v Federal Commissioner of Taxation* (1954) 91 CLR 540 at 557-558, 571-572, 580-587; [1954] HCA 71; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305; [1994] HCA 6; *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 73 [197].

112 *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 99 [253]; *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 669 [43].

154 In *Attorney-General (NT) v Chaffey*¹¹³, Gleeson CJ, Gummow, Hayne and Crennan JJ said that the term "property" is used in various settings to describe a wide range of legal and equitable interests, and that:

"its use in s 51(xxxi) ... readily accommodates concepts of the general law. Where the asserted 'property' has no existence apart from statute further analysis is imperative."

155 When that further analysis is undertaken in this case, it becomes apparent that the right created by s 18(1) of the Superannuation Act is in no way analogous to statutory rights such as copyright or patent rights¹¹⁴. Such rights may be exploited by their owner for gain but they exist independently of the receipts which exploitation generates. The right created by s 18(1) is simply to the payment of moneys from time to time from the public funds of the Commonwealth. That right is of the same character as the right of serving parliamentarians to remuneration while in office.

156 Serving members of Parliament are entitled to an annual allowance by way of remuneration. Holders of certain parliamentary offices are entitled to an additional allowance. Salaries are payable to Ministers of State. These entitlements are conferred by the *Parliamentary Allowances Act* 1952 (Cth), the Remuneration Tribunal Act, the 1990 Allowances Act and the *Ministers of State Act* 1952 (Cth).

157 Section 7(1) of the Remuneration Tribunal Act provides:

"The Tribunal shall, from time to time as provided by this Part, inquire into, and determine, the allowances (including allowances in accordance with section 48 of the Constitution) to be paid out of the public moneys of the Commonwealth to members of the Parliament by reason of their membership of the Parliament or by reason of their holding particular offices, or performing particular functions, in, or in relation to, the Parliament or either House of the Parliament."

158 Section 7(2) similarly empowers the Tribunal to make Determinations in relation to the allowances payable to Ministers of State out of the public moneys of the Commonwealth.

159 Section 7(4) provides that where the Tribunal inquires into a matter referred to in sub-s (1), it may also inquire into and determine any matter that is considered by it to be significantly related to the first-mentioned matter.

113 (2007) 231 CLR 651 at 664 [23].

114 See *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 70 [182].

160 Section 7(9)(b) provides that parliamentary allowances and salary
determined by the Tribunal shall "be paid in accordance with the determination
out of the Consolidated Revenue Fund."

161 Since 1 December 1948, the Superannuation Act has provided for the
payment of what is called retiring allowance to certain members of Parliament
who have ceased to be entitled to a parliamentary allowance. Since 12 June
1978, the Superannuation Act has also provided for additional amounts of
retiring allowance to certain members who had served as parliamentary office
holders or Ministers of State.

162 Section 13 of the Superannuation Act provides that a person who is
entitled to a parliamentary allowance shall, during his or her period of service,
pay contributions to the Commonwealth at rates fixed by reference to the
person's period of service.

163 Section 18(1), which appears in Pt V of the Superannuation Act, the Part
of the Act concerned with the payment of benefits, provides:

"Subject to this Act, a member who ceases to be entitled to a
parliamentary allowance shall be entitled to benefits in accordance with
this section."

164 Sections 18(1A) and 18(2) state that "the benefit" shall be "a retiring
allowance during his or her life-time" at a rate specified in accordance with the
scale provided by s 18(6). Section 18(6), in turn, provides that "[t]he rate of
retiring allowance payable to a person under this section is such percentage of the
rate of parliamentary allowance for the time being payable to a member as is
applicable in accordance with" a scale. The scale differentiates the percentage of
parliamentary allowance to be paid as retiring allowance by reference to the
person's complete years of service.

165 Section 18(9) provides for the payment of additional retiring allowance to
a person whose period of service includes a period or periods of service as a
Minister of State or parliamentary office holder.

166 It may be noted that s 18(1) does not use the language of vesting. It
simply provides that, "[s]ubject to this Act", upon a member's entitlement to a
parliamentary allowance ceasing to be payable, a retiring allowance becomes
payable to the member. A member's entitlement to payments by way of retiring
allowance comes into play because the member was, but is no longer, entitled to
payments by way of parliamentary allowance. The entitlement in each case is to
receive payments from the public moneys of the Commonwealth. It is important
to recall that it is common ground that the entitlement to payments by way of
parliamentary allowance while serving as a member could be reduced by
legislative amendment without falling foul of s 51(xxxi) of the Constitution. Just

as there was no "vested" entitlement to an irreducible level of payments from the Consolidated Revenue Fund by way of parliamentary allowance while a member was in office, so there was no such entitlement to payments by way of a retiring allowance when the member ceased to hold office. That conclusion is not altered by s 18(2) or (6) of the Superannuation Act: those provisions are concerned with the quantification of the payments to be made, not with the qualifications for the vesting of a right to a life pension separate from an entitlement to continuing payments by way of retiring allowance.

167 The plaintiffs argued that the opening words of s 18(1) of the Superannuation Act, "Subject to this Act", do not disclose an intention that retiring allowance is subject to a condition that it may be withdrawn or reduced in value before payment¹¹⁵. But, in the context of the Superannuation Act, the expressions "Subject to this Act" and "in accordance with this section" in s 18(1) are fairly understood as referring to the terms of the Superannuation Act as they may be from time to time¹¹⁶. Of the provisions of the Superannuation Act to which s 18(1) is subject, s 27 should be noted. It is an indication of the character of the entitlement to payments by way of retiring allowance created by s 18(1). Section 27 provides that "[p]ayments by the Commonwealth for the purposes of this Act shall be made out of the Consolidated Revenue Fund, which is appropriated accordingly." The right to payments created by s 18(1), (2) and (6) is, and was always, necessarily dependent on the ongoing authority of the Parliament for the making of those payments¹¹⁷; and the terms of that authority were dependent upon the terms of the Act from time to time. Section 18(1) is, it may truly be said, expressed in terms which indicate the possibility of subsequent amendment¹¹⁸.

168 The plaintiffs also argued that s 22T of the Superannuation Act supports their construction of s 18 because it exhibits an intention to maintain the level of superannuation payments. Because s 22T provides an elaborate and apparently comprehensive statement of the extent of the protection of retiring allowance

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

116 *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 662 [18], 663 [20], 665-666 [30]; see also *Ocean Road Motel Pty Ltd v Pacific Acceptance Corporation Ltd* (1963) 109 CLR 276 at 280, 282-283; [1963] HCA 22; *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 73-74 [198]-[200].

117 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 23 [8(5)], 36 [53], 55-56 [111]-[113], 72-75 [176], [178], [180], [183]-[184], 100-101 [283], 105 [296], 113 [320], 210 [600], 213 [607]; [2009] HCA 23.

118 cf *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 69-70 [181].

against downward adjustment, it is desirable to set it out at length. Section 22T provides relevantly:

"(1) If:

- (a) after 2 March 1996, the rate of any of the following payments (the *underlying payment*) is decreased:
 - (i) parliamentary allowance payable to a member;
 - (ii) salary payable to a Minister of State in respect of an office;
 - (iii) allowance by way of salary payable to an office holder in respect of that office; and
- (b) at a time after the decrease, retiring allowance is payable to a person, or would have been payable to a person if he or she had not died, who was receiving the underlying payment at a time before the decrease;

this section applies for the purposes of calculating the rate of the retiring allowance after the decrease. The rate of the underlying payment immediately before the decrease is the *preserved rate*.

...

- (2) In calculating the rate of the retiring allowance, the rate of the underlying payment is to be taken to remain at the preserved rate until the actual rate of the payment increases to at least the preserved rate.

...

- (4) If a decrease of a payment is expressed to have effect from a particular time before the taking of the decision to decrease the payment, this section applies as if the payment had actually been decreased at that earlier time.
- (5) To avoid doubt, if:
 - (a) a determination under subsection 7(1A) or (1B) of the *Remuneration Tribunal Act 1973*; and
 - (b) a determination under subsection 7(1) of that Act;

take effect at the same time in relation to the same allowance referred to in subparagraph (1)(a)(i) or (iii) of this section, the net effect of the determinations is taken into account, for the purposes of this section, as a single alteration of the allowance.

(6) To avoid doubt, if:

- (a) a determination is made under subsection 7(2A) of the *Remuneration Tribunal Act 1973*; and
- (b) the determination states that it relates to an alteration in salary referred to in subparagraph (1)(a)(ii) of this section;

the net effect of the determination and the alteration is taken into account, for the purposes of this section, as a single alteration of the salary."

169 In truth, the plaintiffs' argument gains no support from s 22T. This provision expressly limits the effect that reductions in the amount of parliamentary allowance may have on the absolute amount of payments of retiring allowance; but it is distinctly not concerned to maintain the relativity for which the plaintiffs contended. Indeed, it is readily understood as an exhaustive statement of the extent of the protection against legislative change "built in" to the plaintiffs' entitlements under s 18(1) in that it establishes the boundary beyond which the plaintiffs' entitlements may not be reduced. But that operation is predicated upon the inherent susceptibility to alteration from time to time of the right to payments of superannuation from the public moneys of the Commonwealth.

An earned right?

170 The plaintiffs argued that the entitlement they claimed had vested in them was a right earned by them by virtue of their service. This contention is misconceived. Parliamentarians and Ministers of State do not serve as employees of the Commonwealth¹¹⁹.

171 The plaintiffs' right to payment of retiring allowance is not akin to the cause of action which vests in a plaintiff under the general law of the kind enjoyed by an employee against his or her employer for damages for breach of the contract of employment. Such a cause of action has been recognised as a right in the nature of property for the purposes of s 51(xxxi) because it vests by

119 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 233; [1995] HCA 71; *Austin v The Commonwealth* (2003) 215 CLR 185 at 217-218 [25]; [2003] HCA 3.

operation of the general law. Thus, in *Georgiadis v Australian and Overseas Telecommunications Corporation*¹²⁰, Mason CJ, Deane and Gaudron JJ contrasted such a case with:

"a case involving the extinguishment or modification of a right that has no existence apart from statute. ... [I]n the absence of a recognized legal relationship giving rise to some like right, a right which has no existence apart from statute is one that, of its nature, is susceptible of modification or extinguishment. There is no acquisition of property involved in the modification or extinguishment of a right which has no basis in the general law and which, of its nature, is susceptible to that course. A law which effected the modification or extinguishment of a right of that kind would not have the character of a law with respect to the acquisition of property within s 51(xxxi) of the Constitution¹²¹."

172 Their Honours' description of a "right which has no basis in the general law and which, of its nature, is susceptible" of modification or extinguishment is readily applicable to the right created by s 18(1) of the Superannuation Act. That is because payments of retiring allowance are not made pursuant to any contract or agreement between the member and the Commonwealth. They are not, and are not analogous to, contractual rights recognised under the general law.

173 The plaintiffs were not employees of the Commonwealth who could earn an entitlement to a life pension calculated on a basis specified in a contract of employment: they were constituent units¹²² of the legislative and executive apparatus established for the government of the Commonwealth. The service rendered by each of the plaintiffs as a member of Parliament was not a quid pro quo for the payment of retiring allowance, just as such service was not, in any legal sense, a quid pro quo for payment of parliamentary allowance. The plaintiffs were duty-bound to serve as parliamentarians as a result of being elected by the people of the Commonwealth to the Parliament. In *R v Boston*¹²³, Isaacs and Rich JJ adopted the statement by Dr Hearn in his *Government of England*¹²⁴ that it is:

120 (1994) 179 CLR 297 at 305-306.

121 See *Health Insurance Commission v Peverill* (1994) 179 CLR 226 per Mason CJ, Deane and Gaudron JJ.

122 *R v Boston* (1923) 33 CLR 386 at 400-401; [1923] HCA 59.

123 (1923) 33 CLR 386 at 400.

124 2nd ed (1886) at 532.

"a part of our ancient Constitution that every person duly elected to serve in Parliament was bound so to serve. *Service* in Parliament, as indeed the very term implies, was a *duty* cast in certain circumstances upon every person not expressly disqualified. This duty no person was permitted to decline or to evade." (emphasis of Isaacs and Rich JJ)

174 Given these considerations, the plaintiffs' claim to have earned the right they assert by their service must be rejected.

175 The plaintiffs also argued that they earned an entitlement to superannuation payments linked to parliamentary allowance by the making of the contributions required by s 13 of the Superannuation Act. The circumstance that the plaintiffs were obliged to make contributions under s 13 makes no difference to the foregoing analysis.

176 Section 13(1) provides relevantly that "[a] person who is entitled to a parliamentary allowance shall, during his or her period of service, pay contributions to the Commonwealth" at a percentage rate of annual monthly allowance depending on that person's length of service. The payment of contributions by each plaintiff in conformity to the statutory command was not in the nature of a quid pro quo for the entitlement to payment of retiring allowance. Indeed, s 13 does not even appear in the same Part of the Superannuation Act as s 18(1).

177 The plaintiffs also sought to make something of the possible injustice which might result from a reduction in retiring allowance which would effectively forfeit the contributions paid by retired parliamentarians. No such issue arises here as there has been no reduction in the actual amount of retiring allowance payable to the plaintiffs: each plaintiff receives more by way of retiring allowance than the amount of his contributions. In any event, the plaintiffs' position in this regard is protected by s 22T of the Superannuation Act.

178 For these reasons, the superannuation issue must be resolved against the plaintiffs.

Life Gold Pass

179 Prior to 1976, executive arrangements provided for the issue to certain former members of Parliament of travel passes providing travel privileges. By Determination 1976/6 of the Tribunal, persons who satisfied certain eligibility criteria to a Life Gold Pass were allowed "at official expense" to travel on various modes of transport within Australia for non-commercial purposes, including air, rail and coach. The pass was described by the Tribunal as "a special reward for long and faithful service and for holding the highest elected

offices in Australia", and was said to recognise "the residual demands involving time and travel placed on such public figures after they cease to hold office."¹²⁵

180 Over the period to 1 January 1994, the Tribunal made further Determinations altering aspects of the original Determination; but at all times, the holders of a Life Gold Pass were permitted to travel for non-commercial purposes within Australia on the prescribed modes of transport at the expense of the Commonwealth.

181 By Determination 1993/18, the Tribunal determined that an annual maximum of 25 domestic return trips should apply to members to whom a Life Gold Pass was issued on or after 1 January 1994.

182 In 2002, Parliament enacted the Life Gold Pass Act, s 11(2) of which restricted all holders of a Life Gold Pass, other than a former Prime Minister, to a maximum of 25 domestic return trips per year.

183 Section 30(1) of the Life Gold Pass Act provides that "[a] determination of the [Tribunal] has no effect to the extent to which it is inconsistent with this Act." By virtue of this provision, the extent to which the Tribunal might make an allowance for travel expenses was always subject to the provisions of the Life Gold Pass Act.

184 Section 31 of the Life Gold Pass Act provides that "[t]he cost of travel under this Act is to be paid out of the Consolidated Revenue Fund, which is appropriated for the purpose."

185 Section 32 of the Life Gold Pass Act provides that if the Act's operation would result in an acquisition of property other than on just terms, the acquisition is valid and the Commonwealth is liable to pay reasonable compensation to the affected holder.

186 In 2012, the LGPA Act¹²⁶ amended the Life Gold Pass Act to reduce the maximum number of domestic return trips provided by s 11(2) for holders of the Life Gold Pass from 25 to 10.

125 Remuneration Tribunal, *1976 Review: Statement*, Parliamentary Paper No 219/1976 at 29.

126 *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act* 2012 (Cth), Sched 1, item 6.

187 The plaintiffs accepted that, having regard to the presence of s 32 of the Life Gold Pass Act and a similar provision in the LGPA Act¹²⁷, s 11(2) as enacted and as amended is not invalid¹²⁸, but submitted that this Court should declare that there has been an acquisition of the property of the third and fourth plaintiffs for which the Commonwealth is liable to pay a reasonable amount of compensation.

188 When one asks what it is about the entitlements to payments of travel expenses which rendered them invulnerable to statutory reduction pursuant to ss 48, 66 and 51(xxxvi) of the Constitution as Parliament sees fit so that they may be reduced only pursuant to s 51(xxxi), one may say immediately that the question is not answered by s 32 of the Life Gold Pass Act. This provision operates upon the assumption that the operation of the Act may effect an acquisition of property; but is neutral as to whether that assumption is correct.

189 To the extent that the entitlements attached to a Life Gold Pass began pursuant to a direction by an agency of the executive government for payments of travel expenses to be made out of the Consolidated Revenue Fund without statutory authority, the validity of such payments was questionable¹²⁹. That question no longer arises because, under the statutory framework which was put in place, payment of these expenses was regularised. But the statutory framework determined the content of the entitlement which it regularised. It was, and remains, an aspect of that statutory framework, and s 7(1) of the Remuneration Tribunal Act in particular, that the Tribunal's Determinations were necessarily liable to variation "from time to time" as the Tribunal might consider necessary¹³⁰ and were subject to the requirement that those Determinations be consistent with the Life Gold Pass Act.

190 In so far as the Tribunal determined that a member, on retirement from the Parliament, shall be eligible for the issue of a Life Gold Pass entitling the member to travel "at official expense" for non-commercial purposes¹³¹, it may be

127 *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act* 2012 (Cth), Sched 1, item 10.

128 *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 364-365 [104], 389-390 [196]-[197], 428-434 [321]-[339], 469-471 [461]-[466]; [2009] HCA 2.

129 See *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 23 [8(5)], 36 [53], 55-56 [111]-[113], 72-75 [176], [178], [180], [183]-[184], 100-101 [283], 105 [296], 113 [320], 210 [600], 213 [607].

130 *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 69-70 [181], 73-74 [198].

131 cf Remuneration Tribunal Determination 1976/6 at 18 [2.28].

said that, unlike the retiring allowance under the Superannuation Act, there was something akin to a vesting of an entitlement upon retirement by reason of the satisfaction of qualifying conditions. But under the express terms of s 7(1) and (2) of the Remuneration Tribunal Act, the power conferred on the Tribunal is a power to determine allowances to be paid out of the public moneys of the Commonwealth to members of Parliament and Ministers of State. That power is expressly said to be exercisable "from time to time", and was and is, so far as the expenses associated with the Life Gold Pass are concerned, subject to the provisions of the Life Gold Pass Act.

191 Sections 7(1) and 7(2) of the Remuneration Tribunal Act do not authorise the Tribunal to create an entitlement to payment which may not be modified by a subsequent Determination by the Tribunal. That is because any entitlement created by the Tribunal is an allowance and hence subject to the statutory power of modification by the Tribunal. The power so exercisable can be exercised to reduce an allowance payable to serving parliamentarians. The reference to "from time to time" in s 7(1) of the Remuneration Tribunal Act is distinctly inconsistent with the suggestion that the value of allowances created under s 7 may not be diminished by a subsequent Determination by the Tribunal. It is the Determination by the Tribunal from time to time which, subject to express provision by the Parliament, gives content to the authority in s 7(9) to make payments out of the public moneys of the Commonwealth¹³². And because s 30(1) of the Life Gold Pass Act has always required any Determination of the Tribunal to be consistent with that Act, the content of any such Determination could never be more generous to the recipient than the Life Gold Pass Act allows.

192 It must be borne steadily in mind that the entitlement to expense-paid travel created by Determinations made by the Tribunal in respect of the Life Gold Pass, the cost of which is to be paid out of the Consolidated Revenue Fund, is an allowance within the meaning of s 7(1) of the Remuneration Tribunal Act. If that were not so, the Tribunal would have no power at all to create the entitlements which attach from time to time to the Life Gold Pass by its Determination. Further, so far as the Life Gold Pass is concerned, the Tribunal's power is subject to the terms of the Life Gold Pass Act.

193 For these reasons, no occasion arises to observe the requirements of s 51(xxxi) of the Constitution.

194 The concern which prompted the inclusion of s 32 in the Life Gold Pass Act was misplaced. The claim of each of the plaintiffs to the protection of s 51(xxxi) against a reduction of the allowance payable to him can be no stronger

132 *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 245.

than the claim of the estate of the deceased soldier in *Allpike v The Commonwealth*¹³³ to the unpaid payment entitlements which accrued prior to his death on war service.

Conclusion

195 The questions posed for the opinion of the Court were as follows:

"Question One: Do any, and if so which, of the following laws and Determinations of the Remuneration Tribunal constitute or authorise an acquisition of any, and if so what, property of the plaintiffs, or any of them, otherwise than on just terms, within the meaning of s 51(xxxi) of the Constitution:

- a. Remuneration Tribunal Act 1973 (Cth), ss 7(1A), 7(1B), 7(1C) and 7(2A);
- b. Remuneration and Other Legislation Amendment Act 2011 (Cth), s 3 (insofar as it made the amendments or repeals provided for in Sched 2, items 1, 16A, 17A, 19, 20, 21(2));
- c. Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act 2012 (Cth), s 3 (insofar as it made the amendments or repeals provided for in Sched 2, items 1, 2, 3, 5, 6, 7, 8 and 9);
- d. Members of Parliament (Life Gold Pass) Act 2002 (Cth), s 11(2) (as originally enacted);
- e. Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act 2012 (Cth), s 3 (insofar as it made the amendments or repeals provided for in Sched 1, item 6);
- f. Determination 2012/02, Pt 2 (cl 2.2);
- g. Determination 2012/03, Pt 2 (cl 2.3), Pt 3 (cl 3.1);
- h. Determination 2012/15, Pt 1 (cl 1.3 and cl 1.4 (insofar as it relates to cl 1.3));
- i. Determination 2013/13, Pt 2 (cl 2.2), Pt 3 (cl 3.3), Pt 4 (cl 4.1);
- j. Determination 2014/10, Pt 2 (cl 2.2), Pt 3 (cl 3.3), Pt 4 (cl 4.1);

¹³³ (1948) 77 CLR 62 at 68, 76-77.

55.

k. Determination 2015/06, Pt 2 (cl 2.2), Pt 3 (cl 3.3), Pt 4 (cl 4.1)?

Question Two: If the answer to Question One is yes, to what, if any relief are the plaintiffs, or any of them, entitled in the proceedings?

Question Three: Who should pay the costs of the proceedings?"

196

These questions should be answered as follows:

Question One: No.

Question Two: Unnecessary to answer.

Question Three: The plaintiffs.

197 NETTLE J. This special case concerns benefits conferred by legislation on Commonwealth Parliamentarians after their retirement. The four plaintiffs are retired members of the House of Representatives of the Commonwealth Parliament who were, subsequent to their retirement, receiving retirement benefits in the nature of superannuation payments under the *Parliamentary Contributory Superannuation Act* 1948 (Cth) ("the Superannuation Act"). The third and fourth plaintiffs were, subsequent to their retirement, also receiving travel benefits in the nature of travel privileges pursuant to determinations of the Remuneration Tribunal and then under the *Members of Parliament (Life Gold Pass) Act* 2002 (Cth).

198 The two questions for decision are whether s 7(1A), (1B), (1C) and (2A) of the *Remuneration Tribunal Act* 1973 (Cth), and decisions made by the Remuneration Tribunal pursuant to those provisions as to what should count as parliamentary salary for the purposes of the Superannuation Act ("the impugned provisions and determinations"), resulted in an acquisition of property within the meaning of s 51(xxxi) of the Constitution, and whether s 11(2) of the *Members of Parliament (Life Gold Pass) Act* 2002 as enacted and as relevantly amended by the *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act* 2012 (Cth) resulted in an acquisition of property within the meaning of s 51(xxxi). For the reasons which follow, both questions should be answered "no".

Parliamentary superannuation

(i) Constitutional and statutory framework

199 Section 48 of the Constitution provides that:

"Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of four hundred pounds a year, to be reckoned from the day on which he takes his seat."

200 Section 66 of the Constitution provides that:

"There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, until the Parliament otherwise provides, shall not exceed twelve thousand pounds a year."

201 Section 51(xxxvi) of the Constitution provides that, subject to the Constitution, the Parliament has power to make laws for the peace, order, and good government of the Commonwealth with respect to matters in respect of which the Constitution makes provision until the Parliament otherwise provides. Together, ss 48, 66 and 51(xxxvi) provide the constitutional basis for the provision of allowances and salaries to serving and retired Parliamentarians.

202 Since 1948, the *Parliamentary Retiring Allowances Act* 1948 (Cth) (later
renamed the *Parliamentary Contributory Superannuation Act* 1948¹³⁴) has
provided for the payment of retiring allowances to retired members of
Parliament. The form and content of the retiring allowance has changed over
time.

203 As first enacted, s 13 of the Superannuation Act provided that members of
Parliament were required to pay fixed contributions to the Parliamentary Retiring
Allowances Fund ("the Fund"), being a fund established under s 9 for the
purposes of paying pensions and other benefits under the Superannuation Act.
Section 18 provided for a weekly pension of £8 for life to be paid from the Fund
to retired members aged 45 or over who did not retire "voluntarily"¹³⁵ and who
had a period of service of eight years or more, and retired members who retired
"voluntarily" after reaching 45 years of age and who had a period of service of 12
years or more. Section 18(2)(b) also provided for the payment from the Fund to
retired members who did not retire "voluntarily", and had a period of service of
less than eight years, of a refund of contributions and an additional amount,
known as the "Commonwealth supplement"¹³⁶, calculated by reference to the
quantum of contributions made, or deemed to have been made, to the Fund by
the member during his or her period of service. Section 18(3)(b) provided for a
refund of contributions to those members who retired voluntarily after a period of
service of less than 12 years or who retired voluntarily prior to reaching 45 years
of age.

204 On 1 January 1952, the Superannuation Act was amended, relevantly, by
redefining "parliamentary allowance" as an allowance paid under s 3 of the
Parliamentary Allowances Act 1920 (Cth) or under s 4(1) or s 5(1) of the
Parliamentary Allowances Act 1952 (Cth) and amending s 18 to provide for an
additional weekly pension of £2 for persons aged 65 or over who were entitled to
a pension¹³⁷.

205 On 16 June 1955, the Superannuation Act was again amended, relevantly,
to increase further the rates of weekly pension¹³⁸. Then, on 1 March 1959, s 18
of the Superannuation Act was further amended, relevantly, to reduce the pension
age qualification threshold to 40 years, provide a graduated scale of weekly

134 *Parliamentary Contributory Superannuation Amendment Act* 1978 (Cth), s 4.

135 *Parliamentary Retiring Allowances Act* 1948 (Cth), s 17 (as enacted).

136 *Parliamentary Retiring Allowances Act* 1948, s 16 (as enacted).

137 *Parliamentary Retiring Allowances Act* 1952 (Cth), ss 3, 6.

138 *Parliamentary Retiring Allowances Act* 1955 (Cth), s 6.

pension payments for members retiring at 40 to 45 years of age and provide for an additional payment of half of the Commonwealth supplement to retired members previously entitled only to a refund of contributions¹³⁹.

206 On 1 November 1964, the Superannuation Act was amended by the *Parliamentary Retiring Allowances Act 1964* (Cth) with the relevant effect that current and future members were thenceforth required to contribute to the Fund 11.5% of the "parliamentary allowance" that he or she was entitled to receive from time to time¹⁴⁰. At the same time, the rate of pension payable under s 18 was amended in respect of both current and future members of Parliament to a percentage, based on the age of the retired member, of the "parliamentary allowance" to which the retired member was entitled immediately before retirement¹⁴¹. That percentage ranged from a minimum of 30% for a retired member aged 40 to a maximum of 50% for a retired member aged 45 or over. On 8 November 1967, those pensions were subsequently increased by ss 3 and 4 of the *Parliamentary Retiring Allowances (Increases) Act 1967* (Cth) and, on 1 October 1971, by ss 3-7 of the *Parliamentary Retiring Allowances (Increases) Act 1971* (Cth).

207 On 8 June 1973, the Superannuation Act was amended by the *Parliamentary and Judicial Retiring Allowances Act 1973* (Cth). "Pension" was renamed "retiring allowance"¹⁴² and the assets of the Fund were vested in the Commonwealth, with future benefits to be paid directly by the Commonwealth¹⁴³. Section 18 was amended by removing the minimum age requirement for members who did not retire "voluntarily"¹⁴⁴. In the case of members who retired "voluntarily", the minimum age was restored to age 45 or over but only in relation to future members of Parliament¹⁴⁵. The rate of pension was amended to a percentage of the parliamentary allowance for the time being payable¹⁴⁶. That percentage was calculated according to the number of complete

139 *Parliamentary Retiring Allowances Act 1959* (Cth), s 7.

140 *Parliamentary Retiring Allowances Act 1964* (Cth), s 6.

141 *Parliamentary Retiring Allowances Act 1964*, s 10.

142 See, eg, *Parliamentary and Judicial Retiring Allowances Act 1973* (Cth), s 14.

143 *Parliamentary and Judicial Retiring Allowances Act 1973*, ss 9(2), 13.

144 *Parliamentary and Judicial Retiring Allowances Act 1973*, s 15(1)(b).

145 *Parliamentary and Judicial Retiring Allowances Act 1973*, s 15(1)(d), (4).

146 *Parliamentary and Judicial Retiring Allowances Act 1973*, s 15(1)(g).

years a retired member had served and ranged from a minimum of 50% for retired members with eight years' service to 75% for retired members with 20 or more years' service¹⁴⁷.

208 On 12 June 1978, the *Parliamentary Contributory Superannuation Amendment Act 1978* (Cth) made a number of substantive alterations to the scheme, including that, for retired members who had retired before 12 June 1978, a reference to the "parliamentary allowance" should be read as the rate of parliamentary allowance determined for the time being by the Remuneration Tribunal¹⁴⁸; the minimum 45 years or more age qualification for retiring allowance for retired members who had retired voluntarily was abolished¹⁴⁹; s 18(6) was amended in relation to current and future members of Parliament to refer to a percentage rate of parliamentary allowance determined by the Remuneration Tribunal¹⁵⁰; percentage rates were increased for retired members with nine or more years' service¹⁵¹; and s 18(9) was introduced to provide an additional retiring allowance for current and future members who were Ministers or other office holders¹⁵².

209 On 1 July 1980, provisions of the *Parliamentary Contributory Superannuation Amendment Act 1981* (Cth) came into force which had the effect that the rate of the additional retiring allowance for members becoming entitled to a retiring allowance after 30 June 1980 was amended to a percentage of parliamentary office holder salary for the time being payable¹⁵³ and, by virtue of transitional provisions, that any member retiring after 30 June 1980 should not suffer loss by reason of a change of the basis of calculation¹⁵⁴.

147 *Parliamentary and Judicial Retiring Allowances Act 1973*, s 15(1)(g).

148 *Parliamentary Contributory Superannuation Amendment Act 1978*, s 5(2).

149 *Parliamentary Contributory Superannuation Amendment Act 1978*, s 9(1)(e).

150 *Parliamentary Contributory Superannuation Amendment Act 1978*, s 9(1)(e).

151 *Parliamentary Contributory Superannuation Amendment Act 1978*, s 9(1)(e).

152 *Parliamentary Contributory Superannuation Amendment Act 1978*, ss 5(1)(a), 9(1)(e).

153 *Parliamentary Contributory Superannuation Amendment Act 1981* (Cth), ss 2(2), 3, 6.

154 *Parliamentary Contributory Superannuation Amendment Act 1981*, s 15.

210 Sections 4 and 5 of the *Parliamentary Allowances Act* 1952 were subsequently repealed by Sched 1 to the *Statute Law (Miscellaneous Provisions) Act (No 1)* 1983 (Cth) and replaced with the effect that thenceforth there became payable to members of Parliament such allowances as might be determined by the Remuneration Tribunal under s 7 of the *Remuneration Tribunal Act* 1973; and, perforce of ss 2(2), 3(2) and 9(2) of the *Parliamentary Contributory Superannuation Amendment Act* 1983 (Cth), "parliamentary allowance" in the Superannuation Act was amended to include an allowance by way of salary under s 4 of the *Parliamentary Allowances Act* 1952 (other than an additional office holder allowance).

211 On 20 June 1990, the *Remuneration and Allowances Act* 1990 (Cth) was enacted with effect that from 1 July 1990 the allowance payable to senators and members of the House of Representatives provided for in s 48 of the Constitution was to include an allowance by way of "salary"¹⁵⁵.

212 On 2 March 1996, s 22T was inserted into the Superannuation Act¹⁵⁶ to prevent decreases in the rate of parliamentary allowance from reducing the rate of retiring allowance below a certain preserved rate. It provided that:

"(1) If:

- (a) after 2 March 1996, the rate of any of the following payments (the *underlying payment*) is decreased:
 - (i) parliamentary allowance payable to a member;
 - (ii) salary payable to a Minister of State in respect of an office;
 - (iii) allowance by way of salary payable to an office holder in respect of that office; and
- (b) at a time after the decrease, retiring allowance is payable to a person, or would have been payable to a person if he or she had not died, who was receiving the underlying payment at a time before the decrease;

¹⁵⁵ *Remuneration and Allowances Act* 1990 (Cth), Sched 3, cl 1.

¹⁵⁶ *Parliamentary Contributory Superannuation Amendment Act* 1996 (Cth), Sched 1, item 5.

61.

this section applies for the purposes of calculating the rate of the retiring allowance after the decrease. The rate of the underlying payment immediately before the decrease is the *preserved rate*.

...

- (2) In calculating the rate of the retiring allowance, the rate of the underlying payment is to be taken to remain at the preserved rate until the actual rate of the payment increases to at least the preserved rate.
- (3) If the actual rate of the underlying payment is further decreased before increasing to at least the preserved rate, this section does not apply separately in relation to that further decrease.
- (4) If a decrease of a payment is expressed to have effect from a particular time before the taking of the decision to decrease the payment, this section applies as if the payment had actually been decreased at that earlier time."

213 With effect from 5 August 2011, the *Remuneration and Other Legislation Amendment Act 2011* (Cth) ("the 2011 Amendment Act") relevantly modified the definition of "parliamentary allowance" so that such portion of parliamentary base salary as the Remuneration Tribunal should determine will not count as parliamentary allowance for the purposes of the Superannuation Act¹⁵⁷. The purported effect of that was that the retiring allowance payable to the plaintiffs ceased to be the previously specified fixed percentage of parliamentary salary and became a variable (by the Remuneration Tribunal) and potentially lesser fraction of parliamentary salary. And, by reason of the subsequent determinations of the Remuneration Tribunal, it has become in fact a lesser fraction of parliamentary salary, albeit not lesser in amount.

214 On 15 March 2012, Remuneration Tribunal Determination 2012/02 and Remuneration Tribunal Determination 2012/03 came into operation. By those determinations there was excluded from the calculation of retiring allowance approximately 20% of the parliamentary base salary and precisely 20% of additional parliamentary office holder salary.

(ii) The plaintiffs' contentions

215 As ultimately formulated, the plaintiffs' case was that, upon retirement or completion of the relevant qualifying period ("the plaintiff's vesting day"), each plaintiff acquired a vested statutory right or chose in action as against the

¹⁵⁷ *Remuneration and Other Legislation Amendment Act 2011* (Cth), Sched 2, item 1.

Commonwealth to be paid a retiring allowance in accordance with the provisions of the Parliamentary Contributory Superannuation Scheme *in esse* as at the plaintiff's vesting day, or as those terms might later be amended favourably to the plaintiff; but that, if after the plaintiff's vesting day the provisions were amended in a fashion that was unfavourable to the plaintiff, in the sense of extinguishing or qualitatively diminishing the plaintiff's right to be paid a retiring allowance, the amendment would constitute an acquisition of property that engaged s 51(xxxi) of the Constitution.

216 More particularly, it was submitted that, immediately prior to 5 August 2011, each plaintiff was seized of a vested right or chose in action under the Superannuation Act to be paid a retiring allowance comprised of the percentage fixed by s 18(6) of the Superannuation Act of the parliamentary allowance payable from time to time. The insertion by the 2011 Amendment Act of the impugned provisions enabled the Remuneration Tribunal with effect from 5 August 2011 to determine that a portion of "parliamentary base salary" should not count as "parliamentary allowance" for the purposes of the Superannuation Act. That meant that each plaintiff's retiring allowance ceased to be the percentage fixed by s 18(6) of the Superannuation Act of the parliamentary allowance payable from time to time and became instead a fixed percentage of some potentially lesser proportion of the parliamentary allowance payable from time to time – a percentage of a proportion – with consequent corresponding reduction in the Commonwealth's correlative obligation to pay the retiring allowance. And in the plaintiffs' submission, that amounted to an acquisition of property within the meaning of s 51(xxxi) of the Constitution.

(iii) *The Commonwealth's contentions*

217 The Commonwealth contended that the plaintiffs' entitlements to a retiring allowance under the Superannuation Act were subject to legislative amendment from time to time and, as such, were inherently defeasible. So much was apparent, it was said, from the constitutional context. By providing for the allowances to be paid "until the Parliament otherwise provides", ss 48 and 66 bespoke a constitutional intention that the Parliament should have unconstrained flexibility in the design and amendment from time to time of the allowances to be paid¹⁵⁸. According to the Commonwealth, that stands in stark contrast to s 72(iii) of the Constitution, which expressly prohibits a reduction in the allowances payable to a Justice of this Court.

158 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 499; Moore, *The Constitution of the Commonwealth of Australia*, (1902) at 113.

218 In the Commonwealth's submission, the inherently changeable nature of the rights to receive a retiring allowance under the Superannuation Act was also evident in the text of s 18(1) of that Act, in its reference to the creation of benefits "[s]ubject to this Act" and "in accordance with this section". The expression "[s]ubject to this Act" should be taken to mean "[subject to this] Act as amended from time to time"¹⁵⁹ and was therefore indicative of an intention that benefits created under the section should be alterable from time to time, as were the words "in accordance with this section".

219 The Commonwealth also invoked Crennan J's words in *Wurridjal v The Commonwealth*¹⁶⁰ in aid of the view that s 18 of the Superannuation Act is "part of a scheme of statutory entitlements which will inevitably require modification over time" to reflect changes in economic circumstances. It was submitted that that was exemplified by the reduction in allowances and salaries paid to Parliamentarians during the Great Depression and by the retrospective changes which were made to the Superannuation Act in 1981 and 1986. It followed, it was submitted, that the plaintiffs' rights to receive a retiring allowance under the Superannuation Act could not be regarded as property within the meaning of s 51(xxxi).

220 More generally, the Commonwealth contended that the retiring allowance was entirely a creature of statute: a gratuitous benefit provided in the absence of any contract between the Commonwealth and Parliamentarians which in relevant respects was no different from gratuitous social service benefits of the kind considered in *Health Insurance Commission v Peverill*¹⁶¹. The fact that the superannuation scheme was contributory made no difference to that. Even if the retiring allowance were conceived of as part of a Parliamentarian's remuneration, it was, like other aspects of a Parliamentarian's remuneration, subject to statutory amendment from time to time, and any such variation was not an acquisition of property.

221 Alternatively, it was contended that, if the plaintiffs' rights to a retiring allowance were property and the changes effected by the impugned provisions and determinations would have otherwise amounted to an acquisition of property, s 22T of the Superannuation Act had the effect that the amount payable following the changes cannot be less than the amount payable before the changes and meant that there had been no acquisition of property.

159 *Ocean Road Motel Pty Ltd v Pacific Acceptance Corporation Ltd* (1963) 109 CLR 276 at 280 per Taylor J, 282-283 per Menzies J; [1963] HCA 22.

160 (2009) 237 CLR 309 at 440 [364]; [2009] HCA 2.

161 (1994) 179 CLR 226; [1994] HCA 8.

(iv) *Inherent defeasibility*

222 For reasons to be explained, it is sufficient to dispose of the plaintiffs' case to acknowledge (as the Commonwealth contended) that the continued existence and content of each plaintiff's right to be paid a retiring allowance was, by the statutory terms by which it was created, subjected to the will from time to time of the legislature which created it. Before going to that aspect of the matter, however, it is appropriate to say something of the remainder of the Commonwealth's contentions.

(v) *Constitutional context*

223 First, with respect to the Commonwealth's arguments based on the constitutional context of ss 48 and 51(xxxvi), the plaintiffs did not dispute that the retiring allowance is an allowance within the meaning of ss 48 and 51(xxxvi) of the Constitution. It was not suggested that there was any other relevant head of power under which it could be paid. Contrary to the Commonwealth's submissions, however, it is not the case that every allowance created pursuant to ss 48 and 51(xxxvi) of the Constitution is inherently defeasible. Whether or not an allowance is inherently defeasible depends on the kind of allowance it is, and more particularly on the terms of the statute by which it is created¹⁶². Granted, the power conferred by ss 48 and 51(xxxvi) of the Constitution is one to legislate to provide for the allowances payable to Parliamentarians and retired Parliamentarians from time to time; it is up to the Parliament to choose what it will provide for from time to time. It may choose to provide that upon retirement a Parliamentarian shall become entitled to such retiring allowances as may be specified from time to time, or it may choose to provide that upon retirement a Parliamentarian shall become entitled to receive a specified retiring allowance for the duration of his or her retirement.

224 Of course, a choice of the latter kind would not prevent the Parliament from later amending or repealing the enactment to provide for something different. The Parliament could do so, subject to the Constitution, when and as often as it chose. But if, upon its proper construction, an Act provided for the payment of a specified allowance to a retiring Parliamentarian for the duration of his or her retirement, the right thereby created in favour of the retiring Parliamentarian and vested upon his or her retirement would qualify as "property" within the meaning of s 51(xxxi) of the Constitution, with the

¹⁶² *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 29 [53] per Toohey J, 73 [194] per Gummow J, 93-94 [241] per Kirby J; [1998] HCA 8.

consequence that a subsequent extinguishment or adverse statutory alteration of it could amount to an acquisition of property within the meaning of s 51(xxxi)¹⁶³.

(vi) *Past increases in benefits*

225 Secondly, in submissions on behalf of the Commonwealth a good deal was made of the fact that, prior to the 2011 Amendment Act, there were a number of legislative changes which increased the benefits payable under the scheme. It was submitted that, just as the Parliament had so increased the benefits payable under the scheme, it must be recognised that the Parliament has the power to reduce such benefits when and if it so determines. Reference was also made to the fact that in at least one instance a retrospective reduction in parliamentary salary had had the effect of reducing the quantum of retiring allowance payable¹⁶⁴.

226 Insofar as that argument proceeded from previous beneficial increases in the amount of retiring allowance it is unpersuasive. Certainly, the Parliament has the power by legislation to change what it has created by legislation. In this context, that is the result of the broad and flexible power conferred by s 51(xxxvi) of the Constitution taken in conjunction with ss 48 and 66¹⁶⁵. But, as has been observed, if by legislation the Parliament creates a right of fixed proportions, such a right may amount to property within the meaning of s 51(xxxi) of the Constitution and thus, if by later amendment the Parliament purports to extinguish or reduce the right so created, the extinguishment or reduction of it may amount to an acquisition of property within the meaning of s 51(xxxi). It is in no way inconsistent with that being so that the Parliament may by legislation augment such a right in a manner which improves its quality or value without engaging the operation of s 51(xxxi).

227 Insofar as the argument proceeded from reductions in parliamentary salary which may have had the effect of reducing the quantum of retiring allowance, the argument cannot be accepted in the broad terms in which it was stated. The Parliament has power to increase or reduce the amount of parliamentary allowance payable from time to time. Hence, assuming for the sake of argument that the right to a retiring allowance created by s 18(1) of the Superannuation Act were a right to a set proportion of parliamentary allowance from time to time, it

¹⁶³ *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 113-114 [7] per Gleeson CJ; [2006] HCA 18.

¹⁶⁴ See, eg, *Financial Emergency Act* 1931 (Cth), ss 8, 9.

¹⁶⁵ Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 499; Moore, *The Constitution of the Commonwealth of Australia*, (1902) at 113.

would follow that the quantum of retiring allowance would be liable to increase or reduce according to increases or reductions in parliamentary allowance from time to time. But of itself that does not necessarily imply that the right to receive the set percentage of parliamentary allowance from time to time would be subject to change to a lesser percentage of parliamentary allowance from time to time.

(vii) *No existence apart from statute*

228 Thirdly, it was contended on behalf of the Commonwealth that a right which has no existence apart from statute is more readily to be regarded as inherently defeasible and susceptible to extinguishment or modification and hence that, because the rights to a retiring allowance created in favour of the plaintiffs by s 18(1) of the Superannuation Act had no existence apart from statute, it should be concluded that they were inherently defeasible and subject to extinguishment or modification from time to time.

229 That contention was overstated. Although McHugh J several times expressed firm adherence to the proposition that a right which has no existence apart from statute is necessarily inherently defeasible¹⁶⁶, the idea has not found favour with other members of the Court¹⁶⁷. As was earlier noticed, it does not logically follow from the fact that a right has no existence apart from statute that it is inherently subject to extinguishment or variation in the sense which denies it the status of property within the meaning of s 51(xxxi). As Gummow J observed in *The Commonwealth v WMC Resources Ltd*¹⁶⁸, purely statutory rights such as copyright and patent rights are unquestionably proprietary in nature. And, otherwise, as his Honour's observations necessarily imply, the determination of whether purely statutory rights are proprietary must proceed from consideration

166 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 325; [1994] HCA 6; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 223; [1994] HCA 9; *The Commonwealth v Mewett* (1997) 191 CLR 471 at 532; [1997] HCA 29; *WMC Resources* (1998) 194 CLR 1 at 53-55 [139]-[142].

167 *Mewett* (1997) 191 CLR 471 at 552 per Gummow and Kirby JJ; *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 664 [24] per Gleeson CJ, Gummow, Hayne and Crennan JJ; [2007] HCA 34; *Wurridjal* (2009) 237 CLR 309 at 439-440 [363]-[364] per Crennan J; *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 48 [103] per Gummow J; [2012] HCA 43.

168 (1998) 194 CLR 1 at 70 [182]; see also *Chaffey* (2007) 231 CLR 651 at 664 [24] per Gleeson CJ, Gummow, Hayne and Crennan JJ; *JT International* (2012) 250 CLR 1 at 59 [137] per Gummow J.

of the terms of the statute by which they are created, the nature and function of the rights thus created and the benefits thus conferred¹⁶⁹.

(viii) *Gratuitous statutory benefits*

230 Fourthly, it was contended on behalf of the Commonwealth that the retiring allowance created by s 18(2) of the Superannuation Act was not proprietary because it was in the nature of a gratuitous statutory benefit – like a social security pension or a Medicare rebate or more generally a statutory entitlement to receive payment from consolidated revenue which is not based on any antecedent proprietary right recognised by general law – and for that reason it was inherently susceptible of variation¹⁷⁰.

231 That contention was also too broadly stated. It asserts a conclusion about the nature of the rights created by s 18(2) without identifying anything about the terms of their creation or their benefits which requires that they be characterised in that fashion. It would be wrong to suppose that benefits payable under statutory superannuation schemes are automatically to be equated with gratuitous social security benefits like old age and invalid pensions or Medicare rebates. In many cases of statutory superannuation schemes, the benefits are not gratuitous but paid pursuant to arrangements which require members to make fixed contributions; and, contrary to the Commonwealth's submission, that is significant notwithstanding that the amount of contributions paid or payable may be relatively minimal compared to the amount of the benefits.

232 It is true that benefits payable under some statutory superannuation schemes are not based on any antecedent proprietary right recognised by general law. Usually, however, they have similar characteristics to benefits based on proprietary rights which are recognised by general law and, although that is not the same thing¹⁷¹, in the case of superannuation benefits it is important. In essential respects, a significant number of statutory superannuation schemes are contributory or non-contributory defined benefit superannuation schemes of the kind that was once commonplace in the public sector and various sections of

169 *WMC Resources* (1998) 194 CLR 1 at 73 [194] per Gummow J; *Chaffey* (2007) 231 CLR 651 at 664 [22] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

170 *Allpike v The Commonwealth* (1948) 77 CLR 62 at 69 per Latham CJ, 76-77 per Dixon J; [1948] HCA 19; *Peverill* (1994) 179 CLR 226 at 237 per Mason CJ, Deane and Gaudron JJ; *WMC Resources* (1998) 194 CLR 1 at 52 [137] per McHugh J, 73 [196] per Gummow J; *United States v Teller* 107 US 64 at 68 (1882); *Lynch v United States* 292 US 571 at 577 (1934).

171 *Chaffey* (2007) 231 CLR 651 at 665 [26]-[27] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

private industry. The *raison d'être* of them is that a member can and should plan for his or her retirement and, in the case of contributory schemes, make contributions, with assurance that upon retirement he or she will receive a defined benefit for the duration of his or her retirement. It would be antithetical to the nature of such a scheme if the defined benefit for which it provides were extinguishable or reducible at any time during retirement¹⁷². In that respect, the benefits payable under such a scheme stand in marked contrast to gratuitous social security benefits, like the old age pension, which are undoubtedly subject to change from time to time.

(ix) *Assignability*

233 Fifthly, the Commonwealth emphasised the fact that the plaintiffs' rights to receive a retiring allowance were not assignable, as an indicium of their not being property. But "[a]ssignability is not in all circumstances an essential characteristic of a right of property"¹⁷³. It is a consequence, not a test, of property¹⁷⁴ and, in any event, "property" in s 51(xxxi) extends to "every species of valuable right and interest including ... choses in action"¹⁷⁵ and "innominate and anomalous interests"¹⁷⁶. It would require no extension of "property" in

172 *Theophanous* (2006) 225 CLR 101 at 113-114 [7] per Gleeson CJ; see also *Re Manufacturing Grocers' Employees Federation of Australia; Ex parte Australian Chamber of Manufactures* (1986) 160 CLR 341 at 355; [1986] HCA 23; *Re Amalgamated Metal Workers Union; Ex parte Shell Co of Australia Ltd* (1992) 174 CLR 345 at 356 per Mason CJ, Deane, Toohey and Gaudron JJ; [1992] HCA 38.

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

174 *Commissioner of Stamp Duties (NSW) v Yeend* (1929) 43 CLR 235 at 245 per Isaacs J; [1929] HCA 39.

175 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 290 per Starke J; [1944] HCA 4; *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; *Chaffey* (2007) 231 CLR 651 at 663 [21] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

176 *Bank of NSW v The Commonwealth* ("the *Bank Nationalisation Case*") (1948) 76 CLR 1 at 349 per Dixon J; [1948] HCA 7; see also *Australian Tape Manufacturers Association Ltd v The Commonwealth* ("the *Blank Tapes Levy Case*") (1993) 176 CLR 480 at 509 per Mason CJ, Brennan, Deane and Gaudron JJ; [1993] HCA 10.

s 51(xxxi) to comprehend a vested statutory right to be paid retiring allowance for the duration of retirement in accordance with a fixed statutory formula¹⁷⁷.

(x) *No acquisition of property*

234 That leaves the Commonwealth's contention – which should be accepted – that the continued existence and content of each plaintiff's right to be paid a retiring allowance was by the statutory terms by which it was created subjected to the will from time to time of the legislature which created it.

235 Authority makes clear that where a claimant is seized of a right against the Commonwealth that is proprietary in nature and is not inherently defeasible, and the Commonwealth extinguishes or relevantly diminishes that right so as to relieve the Commonwealth of a correlative obligation, the extinguishment or diminishment may amount to an acquisition of property by the Commonwealth within the meaning of s 51(xxxi) constituted of the Commonwealth thereby receiving a benefit precisely corresponding to the obligee's loss of property¹⁷⁸. But equally, where a right is inherently defeasible, the extinguishment or diminishment of the right will not result in any acquisition of property¹⁷⁹.

236 The Commonwealth argued in support of the conclusion that the plaintiffs' rights to retiring allowance were inherently defeasible that the words "[s]ubject to this Act" and "in accordance with this section", which appear in s 18(1) of the Superannuation Act, evinced a legislative intention that the retiring allowance for which s 18(1) provides be subject to variation from time to time at the will of the Parliament. The Solicitor-General of the Commonwealth referred to the decision of this Court in *Attorney-General (NT) v Chaffey*¹⁸⁰ and submitted that the Court had there accepted the proposition that the words "[s]ubject to this Part", "in

177 Cf *Georgiadis* (1994) 179 CLR 297 at 312 per Brennan J.

178 *Georgiadis* (1994) 179 CLR 297 at 306 per Mason CJ, Deane and Gaudron JJ; see also *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 283 per Deane J; [1983] HCA 21; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 530 per Brennan CJ; [1997] HCA 38; *JT International* (2012) 250 CLR 1 at 33-34 [42] per French CJ, 57 [131]-[132] per Gummow J, 68 [169] per Hayne and Bell JJ, 110 [305] per Crennan J, 130 [364]-[365] per Kiefel J.

179 *Peeverill* (1994) 179 CLR 226 at 237 per Mason CJ, Deane and Gaudron JJ; cf *JT International* (2012) 250 CLR 1 at 59 [138] per Gummow J.

180 (2007) 231 CLR 651 at 662 [18], 665 [30] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

accordance with this Part" and "such compensation as is prescribed" rendered the workers' compensation rights in issue in that case inherently variable.

237 Evidently, what was critical in *Chaffey*, however, was that the benefits were referred to as such benefits as might be prescribed¹⁸¹. That was a clear statutory intimation that the rights would be subject to variation from time to time in accordance with the regulations. It cannot be assumed that the words "[s]ubject to this Part" or "in accordance with this Part" would have been sufficient of themselves. Although the expression "subject to this Act" is ordinarily taken to mean subject to this Act as it may be amended from time to time¹⁸², where an Act creates a right in terms which are otherwise indicative of immutability, a preface of "subject to this Act" may not be sufficient to render it subject to amendment from time to time. It will depend on the nature of the provision and the right thereby created, the context and ultimately the apparent purpose of the legislation.

238 Nevertheless, in this case it is apparent that, in the context of s 18(1) of the Superannuation Act, the words "[s]ubject to this Act" and "in accordance with this section" are indicative of a legislative intention that the amounts payable in accordance with Pt V were from inception subject to the Act, and particularly Pt V, as it may be amended from time to time.

239 The long and varied legislative history of the scheme which was earlier referred to and the many structural and quantitative legislative changes made to the benefits payable under the scheme up to the time of the 2011 amendments provide a context indicative of a legislative purpose of rendering all benefits subject to legislative change from time to time. The provision for retirement benefits equal to a specified percentage of parliamentary allowance calculated in accordance with cl 1 of Sched 3 to the *Remuneration and Allowances Act* 1990 is properly to be seen as just the last of many different formulations of retiring allowance which preceded the 2011 amendments.

240 It is also supportive of a legislative purpose of rendering retiring allowance benefits subject to change that, up to the time of the 2011 amendments, the right to a retiring allowance provided for in s 18(1) was defined as a percentage of parliamentary allowance from time to time. As has been observed, the percentage of parliamentary allowance to be paid as retiring allowance was fixed by s 18(6), and that provided the basis of the plaintiffs' submission that that percentage was immutable unless changed favourably to the

181 (2007) 231 CLR 651 at 664 [25] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

182 *Ocean Road Motel* (1963) 109 CLR 276 at 280 per Taylor J, 282-283 per Menzies J.

plaintiffs. But it was not suggested, and could not properly be, that it was not open to the Parliament from time to time to amend the quantum of parliamentary allowance, up or down, or to change the elemental composition of parliamentary allowance, favourably or unfavourably to the plaintiffs. Nor was it disputed that it was open to the Parliament to provide instead for some different type of emolument, such as, for example, an hourly fee for time spent in the House or electorate, in no way corresponding to the definition of "parliamentary allowance" prior to the 2011 amendments. In either of those events, the amount of retiring allowance payable to the plaintiffs could be reduced to a fraction of what it is now, or even perhaps to nothing, without engaging the operation of s 51(xxxi).

241 Admittedly, as counsel for the plaintiffs submitted, it is one thing for the plaintiffs to face the risk of that occurring and quite another to be subjected to what is in effect a reduction of the proportion of parliamentary allowance on which retiring allowance is to be calculated. It is not unduly cynical to suppose that there may be a difference between the chances of sitting members voting to reduce the annual allowance to which they are entitled and of voting to reduce the percentage of annual allowance payable to retired members by way of a retiring allowance to which at least some sitting members may never become entitled. But, even so, the fact that retiring allowance is and always has been subject to radical change (or even perhaps elimination), as a result of changes to annual allowance from time to time, bespeaks such a lack of legislative intent to prevent detrimental alteration in the composition and amount of retiring allowance as to imply that the words "[s]ubject to this Act" and "in accordance with this section" should be read in the manner for which the Commonwealth contended.

Life Gold Pass

242 The Life Gold Pass issue may be dealt with more briefly. Prior to 1976, former members of the Commonwealth Parliament were issued with travel passes that provided certain travel privileges under an administrative scheme. Between 1976 and 1994, determinations were made by the Remuneration Tribunal which permitted the holders of a Life Gold Pass to travel at the expense of the Commonwealth for non-commercial purposes within Australia on scheduled commercial air, rail and motor vehicle services¹⁸³. In 2002, the *Members of Parliament (Life Gold Pass) Act 2002* was enacted and all holders of a Life Gold Pass, other than a former Prime Minister, were restricted to a maximum of 25 domestic return trips per year¹⁸⁴. Subsequently, in 2012, s 11(2)

183 Determinations 1976/6, 1977/9, 1980/8, 1981/13 and 1984/18.

184 *Members of Parliament (Life Gold Pass) Act 2002* (Cth), s 11.

was amended further to reduce that entitlement to 10 domestic return trips per year¹⁸⁵.

243 As noted, to begin with the Life Gold Pass was an executive entitlement. As such, it was necessarily subject to change or elimination from time to time. According to the plaintiffs, that changed when the Life Gold Pass became in effect an allowance determined by the Remuneration Tribunal under s 7(1) or (4) of the *Remuneration Tribunal Act* 1973. It was submitted that thenceforth it became a statutory entitlement which was proprietary in nature and hence could not be reduced or eliminated otherwise than in accordance with s 51(xxxi) of the Constitution.

244 The difficulty with that, however, as French CJ, Kiefel and Bell JJ observe¹⁸⁶, is that the power conferred on the Remuneration Tribunal by s 7(1) is a power to determine allowances from time to time. It necessarily follows that the Life Gold Pass entitlement as determined by the Remuneration Tribunal was from its inception inherently subject to change from time to time. It follows in turn, for the reasons already given in relation to superannuation, that any subsequent reduction in or elimination of Life Gold Pass benefits could not amount to an acquisition of property.

Conclusion

245 In the result, the questions posed by the special case should be answered as French CJ, Kiefel and Bell JJ propose.

185 *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act* 2012 (Cth), Sched 1, item 6.

186 Reasons of French CJ, Kiefel and Bell JJ at [50].

246 GORDON J. Each plaintiff is a former member of the House of Representatives in the Commonwealth Parliament. Each plaintiff receives a "retiring allowance" under the *Parliamentary Contributory Superannuation Act* 1948 (Cth) ("the Superannuation Act").

247 Each of the first, second and fourth plaintiffs was also an "office holder" and receives "additional retiring allowance" for that service. Each of the third and fourth plaintiffs served as a Minister of State ("Minister") and receives "additional retiring allowance" for that service.

248 The plaintiffs and the first defendant, the Commonwealth, stated a special case and questions of law arising for the opinion of the Full Court under r 27.08.1 of the High Court Rules 2004 (Cth). The second defendant, the Remuneration Tribunal, filed a submitting appearance.

249 The plaintiffs contended that s 7(1A), (1B), (1C) and (2A) of the *Remuneration Tribunal Act* 1973 (Cth) ("the RT Act")¹⁸⁷ and determinations made by the Remuneration Tribunal pursuant to those provisions¹⁸⁸ ("the RT Impugned Provisions and Determinations") are invalid because they effect an acquisition of property otherwise than on just terms, contrary to s 51(xxxi) of the Constitution. Under the RT Impugned Provisions and Determinations, retired parliamentarians became entitled to a prescribed percentage of an amount determined by the Remuneration Tribunal from time to time by reference to the allowances and salaries paid to serving parliamentarians, instead of a prescribed percentage of whatever allowance or salary serving parliamentarians received from time to time. The RT Impugned Provisions and Determinations did not result in any reduction in the amount of retiring allowance (including any additional retiring allowance) received by the plaintiffs.

187 Those provisions were inserted, and other related amendments were made to the RT Act and the Superannuation Act, by provisions which the plaintiffs also contended are invalid: s 3 and Items 1, 16A, 17A, 19, 20, 21(2) of Sched 2 to the *Remuneration and Other Legislation Amendment Act* 2011 (Cth) ("the 2011 Amendment Act"); s 3 and Items 1, 2, 3, 5-9 of Sched 2 to the *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act* 2012 (Cth) ("the 2012 LGP Act"). These provisions are also "RT Impugned Provisions and Determinations".

188 Determination 2012/02, Pt 2 (cl 2.2); Determination 2012/03, Pt 2 (cl 2.3), Pt 3 (cl 3.1); Determination 2012/15, Pt 1 (cl 1.3 and cl 1.4 (insofar as it relates to cl 1.3)); Determination 2013/13, Pt 2 (cl 2.2), Pt 3 (cl 3.3), Pt 4 (cl 4.1); Determination 2014/10, Pt 2 (cl 2.2), Pt 3 (cl 3.3), Pt 4 (cl 4.1); Determination 2015/06, Pt 2 (cl 2.2), Pt 3 (cl 3.3), Pt 4 (cl 4.1).

250 Further, the third and fourth plaintiffs contended that s 11(2) of the *Members of Parliament (Life Gold Pass) Act* 2002 (Cth) ("the 2002 LGP Act") both as enacted and as amended by the *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act* 2012 (Cth)¹⁸⁹ ("the 2012 LGP Act") ("the LGP Impugned Provisions") is invalid because it effects an acquisition of property otherwise than on just terms, contrary to s 51(xxxi) of the Constitution. The LGP Impugned Provisions reduced the number of free domestic return trips per year to which holders of a Life Gold Pass ("LGP") were entitled.

251 For the reasons that follow, none of the RT Impugned Provisions and Determinations or the LGP Impugned Provisions constitutes or authorises an acquisition of any property of the plaintiffs within the meaning of s 51(xxxi) of the Constitution.

252 The RT Impugned Provisions and Determinations concerned an entitlement to, and payment of, a retiring allowance. The entitlement is a "right" created by statute that was and remains inherently liable to variation. Not only did the "right" remain inherently liable to variation; its content depended on the will, from time to time, of the legislature that created the "right". It was, at best, a right to receive whatever level of benefit was provided from time to time. That "right" was not property protected from acquisition by s 51(xxxi) and there was no acquisition of property within the meaning of s 51(xxxi). The history, purpose and object of the RT Impugned Provisions and Determinations reveal that those provisions and determinations are not concerned with the acquisition of property; they were not intended to, and did not, confer any benefit on the Commonwealth. As will be seen, they were directed to a different object and purpose.

253 In relation to the LGP Impugned Provisions, the position is no less stark. The statutory provisions, including the administrative and legislative history of the LGP, demonstrate that the "right" to a LGP suffers from a "congenital infirmity"¹⁹⁰. The origin of the LGP was inherently unstable and its continued existence, scope and incidents remain unstable. The LGP legislative scheme was and remains inherently liable to variation and the content of the "right" depends on the will, from time to time, of the legislature that created it. The "right" was not property protected from acquisition by s 51(xxxi) and there was no acquisition of property within the meaning of s 51(xxxi).

189 s 3 and Item 6 of Sched 1 to the 2012 LGP Act.

190 See *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 75 [203]; [1998] HCA 8 citing *Norman v Baltimore & Ohio Railroad Co* 294 US 240 at 308 (1935).

254 These reasons will describe each of the plaintiffs, set out the constitutional framework, and then turn to consider the RT Impugned Provisions and Determinations and the LGP Impugned Provisions, each by reference to four sub-headings – identification of the asserted "property" or "right", the position prior to the impugned provisions, the changes effected by the impugned provisions and whether the impugned provisions are invalid by reason of s 51(xxxi) of the Constitution.

The plaintiffs

Mr Barry Thomas Cunningham

255 The first plaintiff, Mr Cunningham, was first elected to the House of Representatives in October 1980. Mr Cunningham was re-elected in 1983, 1984 and 1987. He was not re-elected in 1990. He was elected again in 1993 but not re-elected in 1996. He held the parliamentary office of Deputy Government Whip from March 1983 to July 1987 and the parliamentary office of Government Whip from July 1987 to February 1990.

256 During these periods, pursuant to s 5(4) and then s 5A(1) of the *Parliamentary Allowances Act* 1952 (Cth) ("the 1952 Allowances Act"), Mr Cunningham received a parliamentary allowance. At times, he also received a parliamentary office holder allowance. The rate of the parliamentary office holder allowance was set by successive determinations of the Remuneration Tribunal under s 7(1) of the RT Act. He paid, and was obliged to pay, a proportion of those allowances pursuant to the Superannuation Act.

Dr Antony Hamilton Lamb OAM

257 The second plaintiff, Dr Lamb, was first elected to the House of Representatives in December 1972. He was re-elected in 1974. He was not re-elected in 1975. Dr Lamb was elected again in 1984 and re-elected in 1987 but not re-elected in 1990. He held the parliamentary office of Chairman of the House of Representatives Standing Committee on Environment and Conservation from September 1975 to November 1975. He then held the parliamentary office of Deputy Government Whip from July 1987 to February 1990.

258 During these periods, pursuant to s 5(4) and then s 5A(1) of the 1952 Allowances Act, Dr Lamb received a parliamentary allowance. At times, he also received a parliamentary office holder allowance. He paid, and was obliged to pay, a proportion of those allowances pursuant to the Superannuation Act.

The Honourable John Colinton Moore AO

259 The third plaintiff, Mr Moore, was first elected to the House of Representatives in December 1975. He was re-elected in 1977, 1980, 1983, 1984, 1987, 1990, 1993, 1996 and 1998. He resigned in February 2001. Mr Moore was a Minister from November 1980 to April 1982 and from March 1996 to January 2001.

260 During these periods, Mr Moore received a parliamentary allowance. He was paid a salary pursuant to s 66 of the Constitution as determined by the Executive from time to time in relation to his service as a Minister. He paid, and was obliged to pay, a proportion of the allowance and the ministerial salary pursuant to the Superannuation Act.

261 Upon his retirement from Parliament in February 2001, Mr Moore became eligible for the issue of a LGP pursuant to Determination 1993/18 of the Remuneration Tribunal.

The Honourable Barry Cohen AM

262 The fourth plaintiff, Mr Cohen, was first elected to the House of Representatives in October 1969. He was re-elected in 1972, 1974, 1975, 1977, 1980, 1983, 1984 and 1987. He was not a candidate in the general election held in March 1990. Mr Cohen held the parliamentary office of Chairman of the House of Representatives Standing Committee on Road Safety from May 1973 to November 1975 and was a Minister from March 1983 to July 1987.

263 During these periods, Mr Cohen received a parliamentary allowance. For part of the period, he also received a parliamentary office holder allowance. He was paid a salary pursuant to s 66 of the Constitution as determined by the Executive from time to time in relation to his service as a Minister. He paid, and was obliged to pay, a proportion of the allowances and the ministerial salary pursuant to the Superannuation Act.

264 Upon his retirement from Parliament in February 1990, Mr Cohen became eligible for the issue of a LGP pursuant to Determination 1976/6 of the Remuneration Tribunal, as modified by Determinations 1977/9, 1980/8 and 1984/18.

The constitutional framework

265 Examination of the issues in this matter must begin with the relevant constitutional provisions. Parliamentary allowances are addressed in s 48 of the Constitution, which has at all times provided:

"Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of four

hundred pounds a year, to be reckoned from the day on which he takes his seat." (emphasis added)

266 Salaries of the Ministers are addressed in s 66 of the Constitution, which has at all times provided:

"There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, *until the Parliament otherwise provides*, shall not exceed twelve thousand pounds a year." (emphasis added)

267 Sections 48 and 66 must be read with s 51(xxxvi), which empowers the Parliament, subject to the Constitution, to make laws for the peace, order, and good government of the Commonwealth with respect to "matters in respect of which this Constitution makes provision until the Parliament otherwise provides".

268 For the purposes of this matter, it is unnecessary to determine the scope of an "allowance" within the meaning of s 48 of the Constitution. It is sufficient to note that s 51(xxxvi), in light of s 48, empowers the Parliament to legislate for the payment of allowances to parliamentarians, including a retiring allowance¹⁹¹. Similarly, s 51(xxxvi), in light of s 66, empowers the Parliament to legislate for the payment of a "salary" to Ministers. Subject to the Constitution, it is for the Parliament to decide the form and incidents of any such scheme, including whether the scheme extends to a retiring allowance and, if so, the form and incidents of that retirement scheme¹⁹².

269 Section 51(xxxi) of the Constitution empowers the Parliament, subject to the Constitution, to make laws for the peace, order, and good government 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 the Parliament has power to make laws".

270 As is well established, s 51(xxxi) serves a double purpose. It provides the Commonwealth with a legislative power to acquire property and, at the same time, by the condition placed upon the exercise of the power, it provides the individual or the State affected by the acquisition with a protection against

191 *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 113 [7], 121 [37]; [2006] HCA 18.

192 See *Theophanous* (2006) 225 CLR 101 at 113 [7].

governmental interferences with proprietary rights without just compensation¹⁹³. It is an express power that is subject to a safeguard, restriction or qualification¹⁹⁴.

271 The nature of the power under s 51(xxxi) has another consequence. To ensure that the condition is effective, s 51(xxxi) "abstracts" or "carves out"¹⁹⁵ the power to support a law for the compulsory acquisition of property from any other legislative power. That proposition is not absolute¹⁹⁶. There are powers which, by their nature, have been held to be unaffected by the guarantee of just terms¹⁹⁷. The Commonwealth submitted that the legislative powers granted by ss 48 and 66, read with s 51(xxxvi), were powers of this kind. As will become apparent, in light of the conclusions reached below, there is no need to consider that question in this case¹⁹⁸.

272 Given the dual purpose of s 51(xxxi), both "property" and "acquisition" in that provision are to be construed liberally¹⁹⁹. Section 51(xxxi) extends to protect against the acquisition, otherwise than on just terms, of "every species of valuable right and interest"²⁰⁰. Accordingly, legislation that modifies statutory

193 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349; [1948] HCA 7; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 370-371; [1961] HCA 21.

194 *Schmidt* (1961) 105 CLR 361 at 371.

195 See *JT International SA v The Commonwealth* (2012) 250 CLR 1 at 67 [167]; [2012] HCA 43; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 445 [107]; [2014] HCA 13.

196 *Schmidt* (1961) 105 CLR 361 at 371-372.

197 See *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 169-170, 177-178, 186-187; [1994] HCA 9.

198 See, in a similar context, *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 199 [141]; [2009] HCA 51.

199 *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201-202; [1984] HCA 65; *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 230 [43]; [2008] HCA 7.

200 *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509; [1993] HCA 10 quoting *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 290; [1944] HCA 4. See also *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 663 [21]; [2007] HCA 34; *Telstra* (2008) 234 CLR 210 at 232 [49].

rights may be characterised as a law with respect to an "acquisition of property" within the meaning of s 51(xxxi), even if those rights have no existence apart from statute²⁰¹.

273 Whether legislation of that kind falls within the scope of s 51(xxxi) depends on the nature of the statutory rights. That analysis "must begin from an understanding of the practical and legal operation of the legislative provisions that are in issue"²⁰².

The plaintiffs' challenge to the RT Impugned Provisions and Determinations

The "property" or "right"

274 First, it is necessary to identify the "property" in issue²⁰³. What was said by the plaintiffs to be the relevant "property" protected from acquisition by s 51(xxxi) did not clearly emerge until the hearing. The plaintiffs submitted that they had a "right" to a retirement allowance that is a certain proportion of the parliamentary allowances or salary from time to time. They accepted that the underlying parliamentary allowances or salary were liable to variation from time to time. However, in the plaintiffs' submission, neither the proportion nor the underlying reference point could be changed without attracting the operation of s 51(xxxi). That is, as identified, the "right" is a right to a retirement allowance calculated in accordance with a particular formula.

275 This asserted right was said to be found in s 18 of the Superannuation Act, prior to its amendment in August 2011 by the *Remuneration and Other Legislation Amendment Act 2011* (Cth) ("the 2011 Amendment Act"). Section 18 set out, subject to the Superannuation Act, the benefits to which "a member who ceases to be entitled to a parliamentary allowance" was entitled²⁰⁴. The plaintiffs challenged the validity of changes to the operation of that provision caused by the RT Impugned Provisions and Determinations. It is necessary to identify the position prior to, and the nature and extent of the changes effected by, the RT Impugned Provisions and Determinations.

201 See *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305-306; [1994] HCA 6; *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 237; [1994] HCA 8.

202 *Telstra* (2008) 234 CLR 210 at 232 [49].

203 *Chaffey* (2007) 231 CLR 651 at 664 [22].

204 s 18(1) of the Superannuation Act.

Position prior to the RT Impugned Provisions and Determinations

276 Immediately prior to 5 August 2011, s 18(6) of the Superannuation Act provided for the payment of a "retiring allowance"²⁰⁵ by reference to a fixed percentage of the rate of parliamentary allowance for the time being payable to members of Parliament. The percentage varied depending on the length of the member's service, with, in most circumstances, a minimum qualifying period of eight years²⁰⁶. Members who did not satisfy the minimum qualifying period were entitled, at a minimum, to a refund of their contributions²⁰⁷.

277 The parliamentary allowance was not determined directly by the Remuneration Tribunal but was an annual allowance, called "salary", determined under cl 1 of Sched 3 to the *Remuneration and Allowances Act* 1990 (Cth) ("the 1990 Allowances Act") and reg 5 of the Remuneration and Allowances Regulations 2005 (Cth). The salary was "Reference Salary A" (being the salary of a specified position in the Public Service) less \$5,470, which was equal to \$140,910.

278 Section 18(9) provided for "additional retiring allowance" for those who became entitled to a retiring allowance after 30 June 1980 and had served as a Minister or as a parliamentary office holder, determined by reference to a certain percentage²⁰⁸ of the amount for the time being payable to a serving Minister or parliamentary office holder.

Changes effected by the RT Impugned Provisions and Determinations

279 The 2011 Amendment Act effected the following key changes. It repealed cl 1 of Sched 3 to the 1990 Allowances Act and conferred a power on the Remuneration Tribunal to determine the "parliamentary base salary" of members

205 "[R]etiring allowance" was defined in s 4(1) of the Superannuation Act, in relation to a person, to mean "the retiring allowance payable to the person under this Act and, in the case of a person who ceased or ceases to be a member after 30 June 1980, includes additional retiring allowance (if any) payable to the person under subsection 18(9)".

206 See s 18(6) of the Superannuation Act. cf s 18(2)(aa) of the Superannuation Act.

207 See s 18(2) and (4) of the Superannuation Act.

208 Determined in accordance with s 18(10) in respect of the period of service in the relevant position.

of Parliament. A definition of "parliamentary base salary" was inserted²⁰⁹ into s 3(1) of the RT Act:

"parliamentary base salary means so much of the allowances determined under subsection 7(1) as:

- (a) represents the annual allowance payable for the purposes of section 48 of the Constitution; and
- (b) is identified in the determination as base salary."

280 The 2011 Amendment Act also inserted²¹⁰ s 7(1A) into the RT Act, which empowered the Remuneration Tribunal to determine that "a portion" of parliamentary base salary is not parliamentary allowance for the purposes of the Superannuation Act. The definition of "parliamentary allowance" in s 4(1) of the Superannuation Act was also amended²¹¹ to exclude any portion of parliamentary base salary determined under s 7(1A) of the RT Act.

281 The result of the amendments was that the retiring allowance payable to retired members of Parliament was no longer a fixed percentage of the annual allowance payable to members of Parliament, but a fixed percentage of some potentially lesser amount as fixed by the Remuneration Tribunal.

282 On 6 March 2012, the 2012 LGP Act made similar amendments in relation to the additional retiring allowance payable to former Ministers and parliamentary office holders. Prior to those amendments, the additional retiring allowance was a fixed percentage of the salary payable for the time being to a Minister or of the allowance payable for the time being to the relevant parliamentary office holder.

283 On 15 March 2012, by Determination 2012/02, the Remuneration Tribunal determined that "parliamentary base salary" should be set at \$185,000. The annual salary payable to members of Parliament immediately prior to that time was \$140,910. The increase was as a result of a work value assessment of parliamentary remuneration. In that determination, the Remuneration Tribunal also determined that the portion of the parliamentary base salary that was not parliamentary allowance for the purposes of the Superannuation Act was \$38,620, or in other words, that the parliamentary allowance for the purposes of the Superannuation Act was \$146,380. By Determination 2012/03,

209 Item 16A of Sched 2 to the 2011 Amendment Act.

210 Item 17A of Sched 2 to the 2011 Amendment Act.

211 Item 1 of Sched 2 to the 2011 Amendment Act.

the Remuneration Tribunal also determined that 20% of ministerial salary and 20% of parliamentary office holder allowance was not to be counted for the purposes of the Superannuation Act.

284 At the date of the commencement of this proceeding, the relevant determination was Determination 2015/06. Under that determination, the parliamentary base salary was \$195,130 and the portion of base salary that was not parliamentary allowance for the purposes of the Superannuation Act was \$40,730, so the parliamentary allowance for the purposes of the Superannuation Act was \$154,400. Again, 20% of ministerial salary and parliamentary office holder allowance was not to be counted for the purposes of the Superannuation Act.

285 As seen above, immediately prior to the changes, retired members were not entitled to any fixed amount but merely to a prescribed percentage of whatever allowance or salary serving members, parliamentary office holders and Ministers (as applicable) received from time to time. After the changes, retired members were entitled to a prescribed percentage of an amount determined by the Remuneration Tribunal from time to time by reference to the allowances and salaries paid to serving parliamentarians.

286 The RT Impugned Provisions and Determinations did not result in any reduction in the amount of retiring allowance received by the plaintiffs. The RT Impugned Provisions and Determinations did not change the method for determining entitlement to the retiring allowance under s 18(6) of the Superannuation Act, namely as a percentage of "parliamentary allowance" based on the number of years served. The RT Impugned Provisions and Determinations did not change the method for determining entitlement to the additional retiring allowance in respect of former parliamentary office holders or Ministers under s 18(9) and (10) of the Superannuation Act.

The RT Impugned Provisions and Determinations invalid by reason of s 51(xxxi)?

287 As seen earlier, subject to the Constitution, it is for the Parliament to decide the form and incidents of any scheme for the payment of allowances to parliamentarians, including whether the scheme extends to retiring allowances and, if so, the form and incidents of that retirement scheme.

288 The issue is: are the RT Impugned Provisions and Determinations, the scheme currently chosen by Parliament, invalid by reason of s 51(xxxi) of the Constitution? The answer is "no".

289 The asserted "property" has no existence apart from statute. The "right" was and remains inherently susceptible to change²¹² and, in fact, has been substantially amended from time to time. Indeed, as will be seen, the "right" was part of a bundle of rights where the content of the bundle, as well as the reference point for calculating the retiring allowance, was variable and has been regularly varied²¹³. That answer is explained by examining the nature of the "right", including the history of the retiring allowance and the additional retiring allowance in s 18 of the Superannuation Act, as well as the legislative context in which such allowances exist.

(a) History of s 18

290 The amendments effected by the 2011 Amendment Act and the 2012 LGP Act were not the first time that the "right" conferred by s 18 was changed.

(i) Retiring allowance for parliamentarians

291 Since 1 December 1948, s 18 of the Superannuation Act²¹⁴ has provided for the payment of a retiring allowance to certain retired parliamentarians. The form and content of the retiring allowance payable under the Superannuation Act has changed as it has been modified by Parliament from time to time.

292 When enacted in 1948, s 18 fixed the rate of retiring allowance as a weekly amount. The *Parliamentary Retiring Allowances Act* 1964 (Cth) amended s 18 so that, from 1 November 1964 to 7 June 1973, the rate of retiring allowance was fixed by reference to a percentage of the parliamentary allowance paid to the relevant retired parliamentarian immediately before they became entitled to a retiring allowance (with the percentage being calculated on the basis of the age of the member at that date)²¹⁵. During that period, s 18 of the Superannuation Act relevantly provided:

"(1) Subject to this Act, a member who ceases to be entitled to a parliamentary allowance shall be entitled to benefits from the Fund in accordance with this section.

212 *Georgiadis* (1994) 179 CLR 297 at 305-306; *Peeverill* (1994) 179 CLR 226 at 237; *Chaffey* (2007) 231 CLR 651 at 664 [25], 665-666 [30].

213 cf *Chaffey* (2007) 231 CLR 651 at 673 [60].

214 Then called the *Parliamentary Retiring Allowances Act* 1948 (Cth).

215 s 10 of the *Parliamentary Retiring Allowances Act* 1964 (Cth).

...

- (6) The rate of pension payable to a person under this section is such percentage of the rate of the parliamentary allowance to which that person was entitled immediately before he became entitled to pension as is ascertained in accordance with the following scale:—

| Age of member on becoming entitled to pension. | Percentage of parliamentary allowance to be paid as pension. |
|--|--|
| 40 years | 30 per centum |
| 41 years | 34 per centum |
| 42 years | 38 per centum |
| 43 years | 42 per centum |
| 44 years | 46 per centum |
| 45 years or over | 50 per centum |

"

293 This was the position when, for example, Mr Cohen entered Parliament in 1969. At that point, Mr Cohen's prospective entitlement to a retiring allowance depended upon what, if any, parliamentary allowance he was entitled to when he retired and then, depending on his age immediately before he retired, a prescribed percentage of that parliamentary allowance (if any) by reference to that age. "[P]arliamentary allowance" was relevantly defined in s 4 of the Superannuation Act as the allowance paid to a member under s 3 of the *Parliamentary Allowances Act* 1920 (Cth) (as amended) or under s 4(1) or s 5(1) of the 1952 Allowances Act. That allowance was the current parliamentary allowance "otherwise provided" by Parliament under s 48 of the Constitution, which was capable of going up or down, as had occurred in the past²¹⁶.

294 Then the *Parliamentary and Judicial Retiring Allowances Act* 1973 (Cth) amended s 18(6) of the Superannuation Act so that the rate of retiring allowance was fixed by reference to a percentage of the parliamentary allowance for the

216 See [308]-[318] below.

time being payable to a serving parliamentarian (with the percentage calculated on the basis of the retired member's period of parliamentary service)²¹⁷. For Mr Cohen, any prospective entitlement to a retiring allowance was no longer linked to what *he* would be receiving on the day he retired but, instead, was linked to what *serving* parliamentarians would receive from time to time. Mr Cohen's prospective "right" not only was variable but had been varied in a manner which may or may not have been more beneficial than the scheme that existed when he entered Parliament.

295 In 1978, another important change occurred. Section 5(2) of the *Parliamentary Contributory Superannuation Amendment Act 1978* (Cth) provided that, for the purpose of ascertaining the rate of retiring allowance payable under the Superannuation Act to a person who was already retired, the reference in s 18(6) of the Superannuation Act to the rate of the parliamentary allowance for the time being payable under s 4(1) or s 5(1) of the 1952 Allowances Act was to be read as a reference to the rate of the parliamentary allowance for the time being determined by the Remuneration Tribunal. In short, there was a new reference point – the rate determined by the Remuneration Tribunal. The rate was no longer linked to a decision of Parliament but to a decision of the Remuneration Tribunal. Accordingly, at that point in time, Mr Cohen, at best, and subject to satisfying length of service conditions, had a prospective "right" to receive a percentage of the parliamentary allowance set from time to time by the Remuneration Tribunal.

296 The extent to which that "right" was then subject to variation is illustrated by reference to the position under the Superannuation Act in February 1990, before Mr Cohen and Dr Lamb left Parliament and Mr Cunningham left Parliament for the first time. At that time, the point of reference for calculating the retiring allowance, namely the parliamentary allowance, was defined by reference to an allowance under s 3 of the *Parliamentary Allowances Act 1920* (Cth) or under former s 4(1) or former s 5(1) of the 1952 Allowances Act or an allowance by way of salary under s 4 of the 1952 Allowances Act as determined by the Remuneration Tribunal. At that time, there were five elements to any "right" to a retiring allowance: s 18 of the Superannuation Act, which provided for a retiring allowance to be a percentage of the parliamentary allowance, such percentage determined by the period of service; the 1952 Allowances Act (for the definition of parliamentary allowance); the RT Act (for the power of the Remuneration Tribunal to make determinations); the determinations of the Remuneration Tribunal (for the amount of any parliamentary allowance); and, finally, whether Parliament had overridden any determinations of the Remuneration Tribunal. That bundle, its elements, its form and the method for calculating the allowance had changed

217 s 15 of the *Parliamentary and Judicial Retiring Allowances Act 1973* (Cth).

substantially since Mr Cohen entered Parliament in 1969. The bundle was inherently subject to variation and had been varied.

297 Three further changes should be noted. First, with retrospective effect from 1 July 1990, the definition of "parliamentary allowance" in the Superannuation Act was "updated" with the result that, for the purpose of the retiring allowance provisions, parliamentary allowance included an allowance by way of salary under cl 1 of Sched 3 to the 1990 Allowances Act²¹⁸. Clause 1 of Sched 3 to the 1990 Allowances Act set the parliamentary allowance (called "salary" in the clause) by reference to a fixed amount with effect from 1 July 1990²¹⁹, followed by a stipulated increase of 6% on 1 January 1991 and then, from 1 July 1991, by reference to "SES Band 1 annual salary", a salary paid to certain members of the public service. In 1994, Parliament amended cl 1 of Sched 3 to the 1990 Allowances Act and linked the parliamentary allowance to "SES Band 2 annual salary"²²⁰. Mr Cunningham retired on 1 March 1996, when he was not re-elected at an election on 2 March 1996.

298 Second, with effect from 2 March 1996, s 22T was inserted into the Superannuation Act to protect retired parliamentarians in receipt of a retiring allowance from the effect that decreases (in real terms) in the rate of parliamentary allowance would have on the rate of the retiring allowance²²¹.

299 Finally, in 1999, cl 1 of Sched 3 to the 1990 Allowances Act was amended to provide two methods for setting parliamentary allowances – SES Band 2 or by a regulation prescribing a "percentage of [a] reference salary"²²². The Remuneration and Allowances Regulations 1999 (Cth) then provided that for a defined period, the annual salary was 95% of the reference salary for Band A of the Principal Executive Office classification set out in Remuneration Tribunal Determination 1999/15 and, thereafter, would be 100% of that reference salary.

218 s 33 of the *Superannuation Laws Amendment Act* 1994 (Cth).

219 Clause 1(4) of Sched 3 to the 1990 Allowances Act provided that, apart from the other scheduled increases, the salary would increase proportionately to any increase in the SES Band 1 salary in the period from 1 July 1990 to 30 June 1991.

220 Item 2 of Sched 2 to the *Industrial Relations Legislation Amendment Act (No 2)* 1994 (Cth).

221 Item 5 of Sched 1 to the *Parliamentary Contributory Superannuation Amendment Act* 1996 (Cth), assented to on 9 July 1996.

222 Item 775 of Sched 1 to the *Public Employment (Consequential and Transitional) Amendment Act* 1999 (Cth).

300 This was the position when Mr Moore retired in 2001. By that time, there were four elements to any "right" to a retiring allowance: s 18 of the Superannuation Act, which provided for a retiring allowance to be a percentage of the parliamentary allowance for the time being payable to a member, such percentage determined by the period of service; cl 1 of Sched 3 to the 1990 Allowances Act; the Remuneration and Allowances Regulations 1999; and the determinations of the Remuneration Tribunal. That bundle, its elements, its form and the method for calculating the allowance had changed substantially since Mr Moore entered Parliament and changed substantially even since the other plaintiffs had retired. The bundle was inherently subject to variation and had been varied.

301 At all times since 1 December 1948, a retiring allowance has not been payable to a retired parliamentarian who has not completed a minimum period of service. In that circumstance, a retired parliamentarian is (and has always been) entitled to a refund of their contributions.

(ii) Additional retiring allowance for parliamentary office holders

302 Since 12 June 1978, s 18 of the Superannuation Act has provided for the payment of additional amounts of retiring allowance (howsoever described from time to time) to certain recipients of retiring allowance who had served as parliamentary office holders. The form and content of the retiring allowance payable to certain retired former parliamentary office holders pursuant to the Superannuation Act has been modified by Parliament from time to time. For example, from 12 June 1978, s 18 of that Act provided for the payment of additional retiring allowance to certain former parliamentary office holders calculated by reference to a formula that took into account amounts of parliamentary office holder allowance that they had received.

303 Then, pursuant to the *Parliamentary Contributory Superannuation Amendment Act* 1981 (Cth), relevantly commencing on 1 July 1980, s 18 of the Superannuation Act was amended to provide for the payment of additional retiring allowance to certain former parliamentary office holders calculated by reference to a percentage of the allowance for the time being payable to the holder of the relevant office. As seen above, commencing on 2 March 1996²²³, s 22T was inserted into the Superannuation Act to protect retired parliamentarians in receipt of additional retiring allowance payable to certain former parliamentary office holders from the effect that decreases (in real terms) in the rate of parliamentary office holder allowance would have on the rate of additional retiring allowance.

223 Item 5 of Sched 1 to the *Parliamentary Contributory Superannuation Amendment Act* 1996 (Cth).

(iii) Ministerial additional retiring allowance

304 Since 12 June 1978, s 18 of the Superannuation Act has provided for the payment of additional retiring allowance (howsoever described from time to time) to certain recipients of retiring allowance who had served as Ministers.

305 The form and content of the retiring allowance payable to certain retired Ministers pursuant to the Superannuation Act has been modified by Parliament from time to time. The modifications listed in respect of additional retiring allowance for parliamentary office holders also extended to ministerial additional retiring allowance.

(b) Section 18 in context

306 As the history reveals, s 18 has undergone several substantial changes since its enactment, including changes to the method of calculation of, and underlying reference point for, retiring allowance.

307 There is, however, a further matter to consider. Section 18 of the Superannuation Act operates as part of an integrated legislative framework. Immediately prior to the RT Impugned Provisions and Determinations, amounts payable under s 18 for the retiring allowance or the additional retiring allowance were all calculated by reference to the allowances from time to time payable to serving parliamentarians, parliamentary office holders and Ministers. As will be seen, those underlying allowances themselves were subject to variation and have been substantially varied. Further, there have been substantial reviews of that integrated legislative framework. It is to that context that these reasons now turn.

(i) Allowances to serving parliamentarians and parliamentary office holders

308 Two allowances to serving parliamentarians are presently relevant. First is the allowance provided to serving members of Parliament ("the parliamentary allowance"). Parliament has "otherwise provided", pursuant to ss 48 and 51(xxxvi), for the payment of the parliamentary allowance since 1907²²⁴. Second is the allowance provided to certain parliamentary office holders ("the parliamentary office holder allowance"). Parliament made provision for the parliamentary office holder allowance at all times while the plaintiffs were members of Parliament. The offices to which the parliamentary office holder allowance has attached have changed over time.

309 The form and content of each allowance "otherwise provided" by Parliament pursuant to ss 48 and 51(xxxvi) have varied from time to time. Indeed, some allowances payable to parliamentarians have been subject to

224 See *Parliamentary Allowances Act 1907* (Cth).

reductions, including on a retrospective basis. Moreover, as the Commonwealth submitted, the formula or the method for establishing the allowances has changed repeatedly and significantly since the Parliament first "otherwise provided" and, more particularly, while each of the plaintiffs was a member of the House of Representatives. At any time, each member would have known that his or her right to allowances, including future retiring allowance, would depend upon decisions about the method of calculation and, if appropriate to the selected method, the exercise of a range of discretions under a selected method.

310 What then were some of the changes to those underlying allowances for which Parliament has "otherwise provided"?

311 Prior to 1952, legislation "otherwise providing" for the payment of allowances to parliamentarians and certain parliamentary office holders included the *Parliamentary Allowances Act* 1907 (Cth), which increased the allowance payable to parliamentarians not otherwise holding ministerial or certain parliamentary offices to 600 pounds per year from its starting point of 400 pounds per year under s 48 of the Constitution. The *Parliamentary Allowances Act* 1920 (Cth) increased that allowance to 1,000 pounds per year.

312 Reductions in the quantum of allowances payable to parliamentarians also occurred. For example, the *Financial Emergency Act* 1931 (Cth) ("the 1931 Emergency Act") reduced the yearly allowance payable to parliamentarians, including allowances payable in respect of certain parliamentary offices, by 20% (for allowances up to 1,000 pounds), by 22.5% (for allowances between 1,000 and 2,000 pounds) and by 25% (for allowances in excess of 2,000 pounds). Then, in 1932, the *Financial Emergency Act* 1932 (Cth) ("the 1932 Emergency Act") amended the 1931 Emergency Act to reduce the yearly allowance payable to parliamentarians, including allowances payable in respect of certain parliamentary offices, by 25%, 27.5% or 30%.

313 From January 1952 to December 1973, Parliament "otherwise provided" for the payment of parliamentary allowances to parliamentarians and certain parliamentary office holders by s 5 of the 1952 Allowances Act. The amount payable under that section was amended on multiple occasions. For example, amendments in 1956²²⁵, 1959²²⁶, 1964²²⁷, 1968²²⁸ and 1973²²⁹ increased the

225 s 4 of the *Parliamentary Allowances Act* 1956 (Cth).

226 s 4 of the *Parliamentary Allowances Act* 1959 (Cth).

227 Sched to the *Parliamentary Allowances Act* 1964 (Cth).

228 Sched to the *Parliamentary Allowances Act* 1968 (Cth).

229 Sched 1 to the *Remuneration and Allowances Act* 1973 (Cth).

parliamentary allowance payable to parliamentarians not otherwise holding certain parliamentary offices.

314 Then, with the establishment of the Remuneration Tribunal from December 1973²³⁰ and continuing to June 1990, Parliament "otherwise provided" for the payment of the parliamentary allowance and the parliamentary office holder allowance pursuant to the 1952 Allowances Act, the RT Act and determinations made by the Remuneration Tribunal under the RT Act.

315 Section 7(1) of the RT Act at all relevant times provided, in a materially identical form, that:

"The Tribunal shall, *from time to time as provided by this Part, inquire into, and determine, the allowances (including allowances in accordance with section 48 of the Constitution)* to be paid out of the public moneys of the Commonwealth to members of the Parliament by reason of their membership of the Parliament or by reason of their holding particular offices, or performing particular functions, in, or in relation to, the Parliament or either House of the Parliament." (emphasis added)

316 The operation of the 1952 Allowances Act, the RT Act and determinations pursuant to the RT Act, in relation to the provision of the parliamentary allowance and the parliamentary office holder allowance, was modified from time to time by legislation²³¹. Indeed, the *Remuneration and Allowances Alteration Act* 1986 (Cth) retrospectively reduced parliamentary basic salary by around 10%.

317 From 1974 to 1990, several determinations by the Remuneration Tribunal made under the RT Act were disapproved by a single House of the Parliament under s 7(8) of the RT Act. For example: 1974 Determinations (including salaries and allowances payable to parliamentarians) were disapproved by the Senate on 25 July 1974; August 1975 Determinations (including salaries and allowances payable to parliamentarians) were disapproved by the Senate on 9 September 1975; Determination 1978/7 (office holder additional allowances

230 s 4 of the RT Act.

231 See Pt II of the *Remuneration and Allowances Act* 1979 (Cth); ss 3-6, 14 of the *Remuneration and Allowances Amendment Act* 1981 (Cth); ss 169-170 of the *Statute Law (Miscellaneous Amendments) Act (No 1)* 1982 (Cth); ss 3, 7(1), 8 of the *Salaries and Wages Pause Act* 1982 (Cth); amendments to the 1952 Allowances Act in Sched 1 to the *Statute Law (Miscellaneous Provisions) Act (No 1)* 1983 (Cth); ss 7-9, 20, 24 of the *Remuneration and Allowances Amendment Act* 1984 (Cth); ss 3-5, 14 of the *Remuneration and Allowances Alteration Act* 1986 (Cth).

and salaries) was disapproved by the House of Representatives on 17 August 1978; and Determinations 1990/13 (basic salary) and 1990/15 (office holder additional allowances and salary) were disapproved by the House of Representatives on 31 May 1990.

318 Then, from 20 June 1990 to 5 February 2001 (the date Mr Moore ceased to be a parliamentarian), Parliament "otherwise provided" for the payment of parliamentary allowances to parliamentarians and certain parliamentary office holders pursuant to cl 1 of Sched 3 to the 1990 Allowances Act²³², s 7 of the RT Act and determinations made by the Remuneration Tribunal under the RT Act. The operation of the 1990 Allowances Act, the RT Act and determinations made pursuant to the RT Act was modified by legislation from time to time, insofar as those Acts pertained to the provision of parliamentary allowances²³³.

(ii) Ministerial salaries

319 Parliament has "otherwise provided", pursuant to ss 66 and 51(xxxvi), for the appropriation of monies for the payment of ministerial salaries since at least the enactment of the *Ministers of State Act* 1915 (Cth).

320 The annual sum appropriated for ministerial salaries was increased by the *Ministers of State Act* 1917 (Cth). It was then reduced twice – by the 1931 Emergency Act and the 1932 Emergency Act – before being returned to close to the 1915 position by the *Ministers of State Act* 1935 (Cth).

321 Since 1952, the Parliament has "otherwise provided" for the annual appropriation for ministerial salaries by the *Ministers of State Act* 1952 (Cth). That Act has been amended on several occasions²³⁴. The Remuneration Tribunal enquires into and reports on ministerial salaries²³⁵, but does not determine the specific amounts payable to each Minister.

232 See [297] above.

233 See, eg, Sched 2 to the *Industrial Relations Legislation Amendment Act* (No 2) 1994 (Cth); [297]-[299] above.

234 See, eg, *Ministers of State Act* 1956 (Cth); *Ministers of State Act* 1959 (Cth); *Ministers of State Act* 1964 (Cth).

235 See s 6(1) of the RT Act. See, eg, Remuneration Tribunal, *Report Number 1 of 2015: Report on Ministers of State – Salaries Additional to the Basic Parliamentary Salary*, (2015).

(iii) Review of parliamentary allowances, retiring allowances and LGP

322 The appropriate nature and amount of parliamentary allowance and retiring allowance and the appropriate nature and extent of the provision of a LGP have been the subject of repeated review and consideration²³⁶. For present purposes, it is sufficient to refer to the Committee for the Review of Parliamentary Entitlements, *Review of Parliamentary Entitlements*, (2010) ("the Belcher Review").

323 The Belcher Review concluded that the then existing arrangements for parliamentary entitlements were an extraordinarily complex mix of primary legislation, regulations, determinations, procedural rules, executive decisions, accepted conventions and administrative practices resulting in inconsistency, ambiguity, duplication, overlap, redundancy and gaps in the framework. The Belcher Review recommended "a simplified, transparent and accountable framework that has regard to contemporary community standards"²³⁷.

324 The Belcher Review recommended, amongst other things, that:

- (1) Parliament restore the power of the Remuneration Tribunal to determine parliamentary base salary and remove the Parliament's ability to disallow determinations made by the Remuneration Tribunal²³⁸;

²³⁶ See, eg, *Report of the Committee of Enquiry into the Salaries and Allowances of Members of the National Parliament*, (1952); *Report of the Committee of Inquiry into the Salaries and Allowances of Members of the Commonwealth Parliament*, (1955); Commonwealth Actuary, *Parliamentary Retiring Allowances Fund*, (1957); *Report of the Committee of Inquiry into the Salaries and Allowances of Members of the Commonwealth Parliament*, (1959); *Report by the Commonwealth Actuary upon the Parliamentary Retiring Allowances Fund*, (1959); *Salaries and Allowances of Members of the Parliament of the Commonwealth: Report of Inquiry by Mr Justice Kerr*, (1971); Remuneration Tribunal, *1976 Review: Statement*, (1976); Remuneration Tribunal, *1988 Review*, (1988); Remuneration Tribunal, *1993 Review*, (1993); Senate Select Committee on Superannuation, *The Parliamentary Contributory Superannuation Scheme & the Judges' Pension Scheme*, (1997); Australian National Audit Office, *Administration of Parliamentarians' Entitlements by the Department of Finance and Deregulation*, (2009).

²³⁷ Belcher Review at 8.

²³⁸ Belcher Review at 12, 50-51, Recommendation 1.

- (2) all salary matters should be determined independently by the Remuneration Tribunal following a work value assessment and that the level of parliamentary remuneration would be more transparent if all allowances providing a personal benefit, such as electorate allowance and overseas study travel entitlement, were considered to be part of the salary²³⁹;
- (3) the LGP scheme be abolished prospectively so that it would not be available to those who entered Parliament at or after the next federal election and, for existing LGP holders, the LGP scheme be reduced from 25 to 10 free domestic return trips per year²⁴⁰.

325 If these recommendations were adopted, then the Belcher Review further recommended that the Parliament "take preventative measures so that the folding in of electorate allowance does not flow to the retirement benefits of members of the parliamentary contributory superannuation scheme" under the Superannuation Act²⁴¹.

326 The changes to the calculation of retiring allowance caused by the 2011 Amendment Act and the 2012 LGP Act (namely, the RT Impugned Provisions and Determinations) were the direct result of those recommendations by the Belcher Review²⁴² and subsequently the Remuneration Tribunal²⁴³.

239 Belcher Review at 13, 59-60, Recommendation 6.

240 Belcher Review at 17, 83, Recommendation 20.

241 Belcher Review at 60-61, Recommendation 7; see also at 13.

242 For the 2011 Amendment Act, see Australia, House of Representatives, Remuneration and Other Legislation Amendment Bill 2011, Explanatory Memorandum at 2, 9; Australia, Senate, Remuneration and Other Legislation Amendment Bill 2011, Supplementary Explanatory Memorandum; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 24 March 2011 at 3156-3158. For the 2012 LGP Act, see Australia, House of Representatives, Members of Parliament (Life Gold Pass) and Other Legislation Amendment Bill 2012, Explanatory Memorandum at 1; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 9 February 2012 at 556.

243 See Australia, House of Representatives, Members of Parliament (Life Gold Pass) and Other Legislation Amendment Bill 2012, Explanatory Memorandum at 1.

No infringement of s 51(xxxi)

327 The plaintiffs' challenge to the RT Impugned Provisions and Determinations concerned the validity of legislative provisions (and associated Remuneration Tribunal determinations) that had the effect of calculating the rate of retiring allowance by reference to an amount potentially less than the amounts payable to serving parliamentarians, parliamentary office holders and Ministers from time to time.

328 But, as the Commonwealth submitted, at the time when they became eligible to receive a retiring allowance, each plaintiff could do no more than say that his "right" was governed by the Superannuation Act as amended from time to time. The content of that "right" depended on the will, from time to time, of the legislature that created the "right"²⁴⁴. The inherent variability of the "right" is reflected in the features of the statutory scheme itself. Any entitlements under s 18 are, and always have been, expressly "[s]ubject to this Act" and any entitlements are only "to benefits in accordance with" s 18²⁴⁵. Similarly, the underlying allowances are determined by the Remuneration Tribunal "from time to time as provided by this Part"²⁴⁶.

329 The method for calculation of the retiring allowance, and each integer used by any method, was not fixed in permanent form at any particular date (whether at the date the plaintiffs entered Parliament, at the date they retired from Parliament or at a later date). Accordingly, even if the bundle of "rights" held by the plaintiffs (whether at the date they entered Parliament, at the date they retired from Parliament or at a later date) was property, as broadly construed²⁴⁷, there was no property protected from acquisition by s 51(xxxi) and no acquisition of property within the meaning of s 51(xxxi)²⁴⁸.

244 *Chaffey* (2007) 231 CLR 651 at 664 [25]. See also Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, 2nd ed (rev) (2015) at 573-574.

245 s 18(1) of the Superannuation Act. See, eg, *Chaffey* (2007) 231 CLR 651 at 662 [18], 665 [30], 670-671 [49].

246 s 7(1) of the RT Act.

247 See *Chaffey* (2007) 231 CLR 651 at 663-664 [21]-[25]; *Telstra* (2008) 234 CLR 210 at 230-231 [43]-[44]. See also *Dalziel* (1944) 68 CLR 261 at 284-285, 290, 295.

248 *Chaffey* (2007) 231 CLR 651 at 665-666 [30]; *WMC Resources* (1998) 194 CLR 1 at 16-17 [15]-[16], 38 [86], 75 [203].

330 That view is reinforced by the history²⁴⁹, purpose and object of the legislation that effected the alleged variation, modification or extinguishment. On the recommendation of the Belcher Review, the RT Impugned Provisions were introduced as preventative measures "so that any folding-in of allowances" for sitting parliamentarians did "not flow to the retirement benefits of members of [Parliament]"²⁵⁰.

331 The preventative measures were necessary because the Parliament adopted the Belcher Review's recommendation²⁵¹ that the entitlements framework for serving parliamentarians be simplified. In particular, the Belcher Review recommended that all salary matters for serving parliamentarians be determined independently by the Remuneration Tribunal following a work value assessment²⁵². The Belcher Review considered that the level of parliamentary remuneration would be more transparent (as was desirable) if allowances providing a personal benefit, such as an electorate allowance and overseas study travel entitlements, were considered to be part of a serving parliamentarian's salary²⁵³.

332 So, what mechanism did the preventative measures adopt? As seen earlier, and as recommended by the Belcher Review²⁵⁴, the RT Impugned Provisions permitted the Remuneration Tribunal to provide that certain amounts *not* form part of the underlying reference used to determine the superannuation benefits of members of the scheme.

333 In that legislative context, the source of the power to enact the RT Impugned Provisions is the same as the RT Act. Parliament may legislate for the remuneration of members of the Senate and the House of Representatives. It is for the Parliament to decide the amount, nature and incidents of that remuneration. When Parliament decided in 2011 to adopt the recommendation of the Belcher Review that, to enhance transparency²⁵⁵, the calculation of the

249 See, eg, *Chaffey* (2007) 231 CLR 651 at 673 [60].

250 See Australia, Senate, Remuneration and Other Legislation Amendment Bill 2011, Supplementary Explanatory Memorandum; see also Belcher Review at 13, 60-61, Recommendation 7.

251 See, eg, Belcher Review at 8.

252 Belcher Review at 13, 58-60.

253 Belcher Review at 59.

254 Belcher Review at 61.

255 Belcher Review at 59.

salary of a parliamentarian would extend to include allowances which, up to that point in time, had not constituted the salary of a parliamentarian, it is not surprising that this required changes to be made to permit the excision of those allowances in the calculation of a retiring allowance. Why? The answer is that, because those allowances had not previously been available to a retired parliamentarian, there was no reason for the retiring allowance to be calculated by reference to them and increased accordingly. The RT Impugned Provisions simply prevented "any folding-in" of those allowances to the retiring benefits of members.

334 There is no suggestion here that Parliament legislated to modify or take away any accrued entitlements, or legislated to modify or take away accrued entitlements simply for the purpose of saving money, or because it was decided as a matter of policy that entitlements were too generous. Cases of that nature may or may not fall within s 51(xxxi)²⁵⁶. That is not this case.

335 The RT Impugned Provisions and Determinations have nothing to do with the acquisition of property on just terms for a purpose in respect of which the Parliament has power to make laws. A law that qualifies retired parliamentarians' rights to the retiring allowance by permitting removal of allowances that would otherwise not be relevant to, and would improperly inflate, the retiring allowance is within the power to grant remuneration, a power given by s 51(xxxvi) read with s 48 or s 66 of the Constitution. It would weaken the effect of the principle of probity and good governance, which the RT Impugned Provisions were intended to provide, to place the laws within s 51(xxxi).

336 The RT Impugned Provisions and Determinations do not effect an "acquisition". The Commonwealth did not acquire anything or have any interest conferred on it by reason of any one of the RT Impugned Provisions and Determinations. The RT Impugned Provisions and Determinations cannot properly be characterised as a law with respect to the acquisition of property for a purpose for which the Parliament has power to make laws²⁵⁷.

256 *Theophanous* (2006) 225 CLR 101 at 113-114 [7]. cf *Peverill* (1994) 179 CLR 226 at 237.

257 *Mutual Pools* (1994) 179 CLR 155 at 188.

The third and fourth plaintiffs' challenge to the LGP Impugned Provisions

The "property" or "right"

337 The third and fourth plaintiffs, Mr Moore and Mr Cohen, submitted that they had a "right" to a LGP that entitled them to a certain number of free domestic return trips per year.

338 Prior to the enactment of the 2002 LGP Act, Mr Moore was entitled to 25 free domestic return trips per year with his LGP²⁵⁸, while Mr Cohen was entitled to unlimited free domestic return trips per year with his LGP²⁵⁹. After the enactment of the 2002 LGP Act, Mr Moore and Mr Cohen were both entitled to 25 free domestic return trips per year with their LGPs pursuant to the table in s 11(2). The 2012 LGP Act reduced the entitlement to 10 free domestic return trips per year²⁶⁰. Certain provision was also made for spouses of LGP holders at each relevant time²⁶¹.

339 Mr Moore and Mr Cohen challenged the validity of the LGP Impugned Provisions. They alleged that the LGP Impugned Provisions resulted in the acquisition of property within the meaning of s 51(xxxi) because they reduced the number of free domestic return trips to which holders of the LGP were entitled per year²⁶².

340 Although it is convenient to refer to the subject matter as the "life gold pass" or "LGP", it is important not to allow those terms to obscure the fact that the "right" alleged to be the relevant item of property acquired otherwise than on just terms is a "right", the content of which has been often changed, to have certain travel fares paid by the Commonwealth. In particular, what forms of travel and what class of travel would be paid for, in what circumstances and how often, has often changed. Accordingly, when Mr Moore and Mr Cohen spoke of the LGP Impugned Provisions effecting an acquisition of their "right" to a LGP,

258 Remuneration Tribunal, Determination 1993/18.

259 Remuneration Tribunal, Determination 1976/6, as modified by Determinations 1977/9, 1980/8 and 1984/18.

260 Item 6 of Sched 1 to the 2012 LGP Act.

261 See, eg, Item 2 of the table in s 11(2) of the 2002 LGP Act.

262 Mr Moore claimed that the 2012 LGP Act resulted in an acquisition of his property otherwise than on just terms and Mr Cohen claimed that both the 2002 LGP Act and the 2012 LGP Act resulted in an acquisition of his property otherwise than on just terms.

the proposition had to be understood as being that an entitlement to have a certain number and kind of travel fares paid for by the Commonwealth had been acquired because the number of allowed fares had been reduced.

341 It is necessary to examine in more detail the position prior to, and then the nature and extent of the changes effected by, the LGP Impugned Provisions.

Position prior to the LGP Impugned Provisions

342 The LGP has had three phases in its life: as an administrative scheme from pre-Federation until 1976, as an allowance by determinations of the Remuneration Tribunal under the RT Act from 1976 to 2002 and then under its own legislative scheme – the 2002 LGP Act.

343 From pre-Federation (in respect of parliamentarians in the separate colonies) until 1976, the scheme was administrative and depended upon the exercise of executive power. The validity of that scheme is not in issue but is at least open to doubt²⁶³. The scheme for the issue of a LGP to certain serving (and, later, retired) parliamentarians has its origins in executive arrangements between the Commonwealth and State governments. Those arrangements involved the issue from time to time of passes, in the form of a gold plated medallion, to various persons, and the associated provision of travel privileges to those persons. The persons to whom such passes were issued, and the associated travel entitlements of persons who held such passes, developed over time and reflected the views current at various points in time.

344 These passes were first issued to retired Commonwealth parliamentarians in 1923, in the form of a gold medallion, called a Gold Life Pass by the issuing authority. From 1955, the term "Life Gold Pass" was frequently used to describe the pass. These passes were also described officially from time to time by other descriptions including "life railway passes", "life passes", "all lines life passes" and "gold life rail passes".

345 From 1976 to 1994, the scheme was the subject of determinations of the Remuneration Tribunal under the RT Act. By a notice in writing dated 4 March 1976, pursuant to s 7(4)(b) of the RT Act, the Minister for Administrative Services requested the Remuneration Tribunal to enquire into and determine certain matters, including "Life Gold Pass". By its Determination 1976/6, the Remuneration Tribunal determined the criteria applicable to the issue and use of a LGP²⁶⁴. By the same Determination, the Remuneration Tribunal suspended the travel privileges associated with the LGPs held by sitting members of

263 See *Brown v West* (1990) 169 CLR 195 at 202; [1990] HCA 7.

264 See cll 2.28-2.33 of Determination 1976/6.

Parliament²⁶⁵. That Determination was not disapproved by either House of Parliament.

346 From the coming into effect of Determination 1976/6 until 1 January 1994, the Remuneration Tribunal issued Determinations that modified the operation of the LGP scheme from time to time²⁶⁶. The effect of those Determinations made by the Remuneration Tribunal was to permit the holders of a LGP to travel at official expense for non-commercial purposes within Australia on scheduled commercial/commuter air services, mainline rail services and other government services, or by motor coach or other vehicles operating as regular carriers.

347 In 1993, the Remuneration Tribunal reviewed the LGP and imposed a cap of 25 free domestic return trips per year on members (who had not been Prime Minister) to whom a LGP was issued on or after 1 January 1994²⁶⁷.

Changes effected by the LGP Impugned Provisions

348 With relevant effect from the commencement of Pt 3 of the 2002 LGP Act on 30 December 2002, Item 1 of the table in s 11(2) of the 2002 LGP Act provided that a former parliamentarian, other than a former Prime Minister, who held a LGP was entitled to a maximum of 25 free domestic return trips per year. Mr Cohen claimed that the 2002 LGP Act resulted in an acquisition of his property otherwise than on just terms. The 2002 LGP Act did not affect Mr Moore.

349 Section 30(2) of the 2002 LGP Act provided that a determination of the Remuneration Tribunal was to make provision for the circumstances in which a member will, on retirement from Parliament, qualify for a LGP. The determination may provide for different circumstances for different kinds of members²⁶⁸. However, s 30(1) of the 2002 LGP Act provided that a determination of the Remuneration Tribunal had no effect to the extent to which it was inconsistent with the 2002 LGP Act. That provision is important. It will be necessary to return to consider it.

350 The 2012 LGP Act then amended Item 1 of the table in s 11(2) of the 2002 LGP Act to provide that a former member who held a LGP, other than a

265 cl 2.34 of Determination 1976/6.

266 See Determinations 1977/9, 1980/8, 1981/13 and 1984/18.

267 Remuneration Tribunal, *1993 Review*, (1993) at xxv and Determination 1993/18.

268 s 30(3) of the 2002 LGP Act.

former Prime Minister, was entitled to a maximum of 10 free domestic return trips per year²⁶⁹. Both Mr Moore and Mr Cohen claimed that the 2012 LGP Act resulted in an acquisition of their property otherwise than on just terms.

351 It was not in issue in this matter that the 2002 LGP Act and the 2012 LGP Act, insofar as they addressed the LGP, were enacted by Parliament under s 48 read with s 51(xxxvi) of the Constitution²⁷⁰. It is therefore not necessary to examine whether the LGP is an allowance of the kind referred to in s 48 of the Constitution.

The LGP Impugned Provisions invalid by reason of s 51(xxxi)?

352 The statutory provisions for a LGP, together with their administrative and recent legislative history, reveal that the "right" to a LGP suffers from a "congenital infirmity"²⁷¹. Not only was the administrative origin of the LGP inherently unstable²⁷², but its continued existence, scope and incidents were, and remain, unstable.

353 The fragility and inherent variability of the prospective "right" to a LGP for serving members is made evident by s 7(1) of the RT Act providing that the Remuneration Tribunal shall "*from time to time* ... determine, the allowances ... to be paid ... to members of the Parliament" (emphasis added). The statutory right that serving members had to the benefits provided by the LGP could be and was varied from time to time. At its highest, the prospective "right" to a LGP for serving members was subject to what Parliament "otherwise provided" and what the Remuneration Tribunal determined from time to time²⁷³.

354 For example, as noted above, in 1993, the Remuneration Tribunal did limit the amount of trips per year for prospective LGP holders. A relevant Remuneration Tribunal determination also may provide for the circumstances in which a member will, on retirement from Parliament, qualify for a LGP. As seen earlier, the determination may provide for different circumstances for different

269 Item 6 of Sched 1 to the 2012 LGP Act.

270 See *Theophanous* (2006) 225 CLR 101 at 113 [7], 121 [37].

271 See *WMC Resources* (1998) 194 CLR 1 at 75 [203] citing *Norman v Baltimore & Ohio Railroad Co* 294 US 240 at 308 (1935).

272 cf *Brown v West* (1990) 169 CLR 195 at 202.

273 See also *Peverill* (1994) 179 CLR 226 at 237; *Georgiadis* (1994) 179 CLR 297 at 305-306; *WMC Resources* (1998) 194 CLR 1 at 75 [203]; *Chaffey* (2007) 231 CLR 651 at 665-666 [30].

kinds of members²⁷⁴. And the Remuneration Tribunal did make changes. It had previously amended the class of travel available to existing LGP holders²⁷⁵. That power of amendment was specifically retained by s 26 of the 2002 LGP Act.

355 Mr Cohen and Mr Moore are not serving members but retired parliamentarians. The "right" which they had to a LGP, at retirement, still depended upon the statutory scheme, if any, as it stood from time to time. The "right" that a retired parliamentarian had to a LGP was and remains as fragile and inherently variable as the right of a serving parliamentarian. The content of the "right", at least from 1976, depended on the will, from time to time, of the legislature that created the "right"²⁷⁶. Not only its origin, but its continued existence, was and remains unstable.

356 The 2002 LGP Act, and then the 2012 LGP Act, provided a new statutory scheme for the LGP for retired parliamentarians. That new statutory scheme arose because the Remuneration Tribunal expressed the view that it was the responsibility of the Government to address the "right" to a LGP for retired parliamentarians²⁷⁷. The Government did address that issue by introducing the 2002 LGP Act, and then the 2012 LGP Act, both of which Parliament enacted.

357 Not only did each of the 2002 LGP Act and the 2012 LGP Act vary the "right" to a LGP for retired parliamentarians but s 30(1) of the 2002 LGP Act at all times expressly provided that a determination of the Remuneration Tribunal had no effect to the extent it was inconsistent with the 2002 LGP Act. The 2002 LGP Act, and then the 2012 LGP Act, made existing determinations of the Remuneration Tribunal under s 7(1) of the RT Act dealing with the "right" to a LGP for retired parliamentarians unenforceable to the extent that they were inconsistent with the 2002 LGP Act. That is not surprising. As seen earlier, the prospective "right" to a LGP for serving members was fragile and inherently variable, as was the "right" that a retired parliamentarian had to a LGP. To describe determinations made by the Remuneration Tribunal under s 7(1) of the RT Act in relation to a LGP as creating accrued statutory rights is inconsistent with the express words of the RT Act, the subsequent enactment and

274 s 30(2) and (3) of the 2002 LGP Act.

275 See cl 6.3-6.4 of Determination 1977/9, superseding cl 2.31-2.32 of Determination 1976/6.

276 *Chaffey* (2007) 231 CLR 651 at 664 [25]. See also Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, 2nd ed (rev) (2015) at 573-574.

277 Remuneration Tribunal, *1993 Review*, (1993) at xxv.

express terms of the 2002 LGP Act and the 2012 LGP Act, and the history of the various iterations of the LGP scheme. Those matters reveal that the "right" to a LGP suffers from a "congenital infirmity"²⁷⁸. Nothing in the *Acts Interpretation Act* 1901 (Cth) (whether s 8(c), s 8B or s 46(1)(a)²⁷⁹ or any other provision) denied those results.

358 There could be no acquisition because the "right" was variable and could be and was amended from time to time. The "right" to the LGP held by Mr Moore and Mr Cohen was not property protected from acquisition by s 51(xxxi) and there was no acquisition of property within the meaning of s 51(xxxi)²⁸⁰.

Conclusions and orders

359 For these reasons, the questions of law which the parties agreed in stating in the form of a special case for the opinion of the Full Court under r 27.08.1 of the High Court Rules should be answered as follows:

Question One: Do any, and if so which, of the following laws and Determinations of the Remuneration Tribunal constitute or authorise an acquisition of any, and if so what, property of the plaintiffs, or any of them, otherwise than on just terms, within the meaning of s 51(xxxi) of the Constitution:

- (a) *Remuneration Tribunal Act* 1973 (Cth), ss 7(1A), 7(1B), 7(1C) and 7(2A);
- (b) *Remuneration and Other Legislation Amendment Act* 2011 (Cth), s 3 (insofar as it made the amendments or repeals provided for in Sched 2, items 1, 16A, 17A, 19, 20, 21(2));
- (c) *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act* 2012 (Cth), s 3 (insofar as it made the amendments or

278 See *WMC Resources* (1998) 194 CLR 1 at 75 [203] citing *Norman v Baltimore & Ohio Railroad Co* 294 US 240 at 308 (1935).

279 As those provisions stood before the amendments made by the *Acts Interpretation Amendment Act* 2011 (Cth).

280 *WMC Resources* (1998) 194 CLR 1 at 16-17 [15]-[16], 38 [86], 75 [203]; *Chaffey* (2007) 231 CLR 651 at 665-666 [30].

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repeals provided for in Sched 2, items 1, 2, 3, 5, 6, 7, 8 and 9);

- (d) *Members of Parliament (Life Gold Pass) Act* 2002 (Cth), s 11(2) (as originally enacted);
- (e) *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act* 2012 (Cth), s 3 (insofar as it made the amendments or repeals provided for in Sched 1, item 6);
- (f) Determination 2012/02, Pt 2 (cl 2.2);
- (g) Determination 2012/03, Pt 2 (cl 2.3), Pt 3 (cl 3.1);
- (h) Determination 2012/15, Pt 1 (cl 1.3 and cl 1.4 (insofar as it relates to cl 1.3));
- (i) Determination 2013/13, Pt 2 (cl 2.2), Pt 3 (cl 3.3), Pt 4 (cl 4.1);
- (j) Determination 2014/10, Pt 2 (cl 2.2), Pt 3 (cl 3.3), Pt 4 (cl 4.1);
- (k) Determination 2015/06, Pt 2 (cl 2.2), Pt 3 (cl 3.3), Pt 4 (cl 4.1)?

Answer: No.

Question Two: If the answer to Question One is yes, to what, if any relief are the plaintiffs, or any of them, entitled in the proceedings?

Answer: Unnecessary to answer.

Question Three: Who should pay the costs of the proceedings?

Answer: The plaintiffs.