

HIGH COURT OF AUSTRALIA

BRENNAN CJ,
TOOHEY, GAUDRON, McHUGH, GUMMOW AND KIRBY JJ

COMMONWEALTH OF AUSTRALIA

APPELLANT

AND

WMC RESOURCES LTD (formerly
WESTERN MINING CORPORATION LTD)

RESPONDENT

Commonwealth of Australia v WMC Resources Ltd [1998] HCA 8
2 February 1998
M58/1996

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Full Court of the Federal Court and in lieu thereof, order that:*
 - (a) *the appeal to that Court be allowed with costs;*
 - (b) *paragraphs 1 and 2 of the orders of Ryan J be set aside and in lieu thereof, order that the application be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation:

J J Spigelman QC with H C Burmester and S J Gageler for the appellant
(instructed by Australian Government Solicitor)

G A A Nettle QC with P J Hanks for the respondent (instructed by Arthur
Robinson & Hedderwicks)

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Reports.

CATCHWORDS

Commonwealth of Australia v WMC Resources Ltd (formerly Western Mining Corporation Ltd)

Constitutional law – Acquisition of property – Application of s 51 (xxxi) to areas geographically external to Australia – Statutory permit to explore for petroleum granted in area of disputed sovereignty – Law reducing area covered by permit – Whether permit property capable of acquisition – Whether rights under permit could be extinguished without just terms compensation – Constitutional guarantee of just terms.

The Constitution, ss 51 (xxix), (xxxi).

Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990 (Cth).

Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Act 1990 (Cth).

Petroleum (Submerged Lands) Act 1967 (Cth).

Seas and Submerged Lands Act 1973 (Cth).

BRENNAN CJ.

The context in which the question for determination arises

1 On 25 June 1977, an exploration permit No WA-74-P was issued to a permittee pursuant to the provisions of Div 2 of Pt III of the *Petroleum (Submerged Lands) Act* 1967 (Cth) ("the PSL Act"). Section 28 of that Act provides:

" A permit, while it remains in force, authorizes the permittee, subject to this Act and the regulations and in accordance with the conditions to which the permit is subject, to explore for petroleum, and to carry on such operations and execute such works as are necessary for that purpose, in the permit area."

The permit area covered by permit No WA-74-P consisted of 253 "blocks" which lay within an "adjacent area", those terms being defined in and for the purposes of the PSL Act. To explore for petroleum in an "adjacent area" without a permit is prohibited: s 19. "Blocks" are portions of the surface of the earth bounded by meridians which are separated from each other by 5 minutes of longitude and parallels of latitude that are separated from each other by 5 minutes of latitude and which lie wholly or partly within an adjacent area¹. An adjacent area means an adjacent area in respect of a State or Territory ascertained in accordance with s 5A, the relevant sub-section of which reads as follows:

- " (1) For the purposes of this Act, but subject to sub-section (2), the adjacent area in respect of a State or the Northern Territory is so much of the area described in Schedule 2 under the heading that refers to that State or Territory as comprises waters of the sea that -
- (a) are not within the outer limits of the territorial sea of Australia (including the territorial sea adjacent to any island forming part of Australia); and
- (b) are within the outer limits of the continental shelf."

Although "adjacent area" is defined as comprising "waters of the sea", s 6 provides that for the purposes of the Act "the space above or below an adjacent area shall be deemed to be in that area".

1 ss 5 and 17.

2 The permit entitled the permittee to explore for petroleum within the 253 blocks of the permit area for a period of 6 years² but was capable of renewal³ although, on renewal, the number of blocks to be included in the permit area had to be reduced: s 31⁴. A permit which is varied under the Act has effect in accordance with its terms as varied: s 5(8).

3 At the time when the permit was issued, Australia and the Republic of Indonesia each claimed sovereign rights to explore and to exploit the natural resources of a portion of the continental shelf which overlapped the permit area. But, for the purposes of determining these proceedings by the municipal law of Australia, Australia must be taken to have possessed those sovereign rights at the time when the permit was issued. The *Seas and Submerged Lands Act* 1973 (Cth) declared and enacted⁵ that -

"the sovereign rights of Australia as a coastal State in respect of the continental shelf of Australia, for the purpose of exploring it and exploiting its natural resources, are vested in and exercisable by the Crown in right of the Commonwealth."

Accordingly, these proceedings must be determined on the footing that Australia had those sovereign rights over that part of the continental shelf which became the permit area.

2 s 29(a).

3 ss 29 and 30.

4 Section 31(1) reads as follows:

" Subject to sub-section (2A), the number of blocks in respect of which an application for the renewal of a permit may be made shall not exceed the number calculated as follows:

(a) where the number of blocks in respect of which the permit is in force is a number that is divisible by 2 without remainder - one-half of that number; or

(b) where the number of blocks in respect of which the permit is in force is a number that is one less or one more than a number that is divisible by 4 without remainder - one-half of that last-mentioned number."

5 s 11, the validity of which was established by *New South Wales v The Commonwealth* ("*the Seas and Submerged Lands Case*") (1975) 135 CLR 337.

3.

4 However, the competing claims to sovereign rights engendered a reluctance by the permittee⁶ to risk further expenditure in exploring the permit area. For that reason, the permittee sought and obtained suspensions of the permit under s 103A of the PSL Act. The suspensions had the effect of extending the term of the permit by periods corresponding with the periods of suspension. In consequence of those extensions, the obligation⁷ of the permittee to relinquish not less than half of the permit area on the renewal of the permit was deferred.

5 By a Treaty between Australia and the Republic of Indonesia done on 11 December 1989 the respective Contracting States created a Zone of Cooperation between the Indonesian Province of East Timor and Northern Australia. The Zone of Cooperation was divided into Areas designated as A, B and C⁸. Clause 2 of Art 2 of that Treaty provides, *inter alia*, as follows:

"2. Within the Zone of Cooperation activities in relation to the exploration for and exploitation of petroleum resources shall be conducted on the following basis:

- (a) In Area A, there shall be joint control by the Contracting States of the exploration for and exploitation of petroleum resources, aimed at achieving optimum commercial utilization thereof and equal sharing between the two Contracting States of the benefits of the exploitation of petroleum resources, as provided for in this Treaty;
- (b) In Area B, Australia shall make certain notifications and share with the Republic of Indonesia Resource Rent Tax collections arising from petroleum production on the basis of Article 4 of this Treaty; and
- (c) In Area C, the Republic of Indonesia shall make certain notifications and share with Australia Contractors' Income Tax collections arising from petroleum production on the basis of Article 4 of this Treaty."

The Treaty does not purport to settle the competing claims of Australia and the Republic of Indonesia to sovereign rights to explore and exploit the resources of

6 There were in fact several corporations interested in the permit, but it is convenient to speak of them collectively as "the permittee".

7 Section 31 of the PSL Act.

8 Art 1.

4.

the continental shelf within the Zone of Cooperation. Clause 3 of Art 2 of the Treaty expressly provides:

"Nothing contained in this Treaty and no acts or activities taking place while this Treaty is in force shall be interpreted as prejudicing the position of either Contracting State on a permanent continental shelf delimitation in the Zone of Cooperation nor shall anything contained in it be considered as affecting the respective sovereign rights claimed by each Contracting State in the Zone of Cooperation."

- 6 Consequent upon the making of the Zone of Cooperation Treaty, the Parliament enacted the *Petroleum (Australia-Indonesia Zone of Cooperation) Act* 1990 (Cth) ("the Zone of Cooperation Act"), the object of which "is to enable Australia to fulfil its obligations under the Treaty"⁹. The provisions of the Treaty were set out in a Schedule to that Act. A Joint Authority between Australia and Indonesia responsible to a Ministerial Council consisting of Ministers of both Contracting States was established pursuant to the Treaty¹⁰ and the Zone of Cooperation Act declared¹¹ that:

"The Ministerial Council and the Joint Authority exercise the rights and responsibilities of Australia, in relation to the exploration for and exploitation of petroleum resources in Area A of the Zone of Cooperation, in accordance with the Treaty."

Section 7 of the Zone of Cooperation Act provided that "a person must not prospect for petroleum in Area A of the Zone of Cooperation except with the approval of the Joint Authority". That prohibition effectively abrogated the right conferred upon the permittee by s 28 of the PSL Act in respect of those blocks in the permit area which lay within Area A.

- 7 Contemporaneously with the commencement of the Zone of Cooperation Act, the *Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Act* 1990 (Cth) ("the Consequential Provisions Act") commenced¹². The latter Act amended a number of Acts including the PSL Act¹³. Section 5A of

9 s 3.

10 Arts 5 and 7.

11 s 4.

12 Consequential Provisions Act, s 2.

13 See Pt 8 of the Consequential Provisions Act.

5.

the PSL Act was amended¹⁴ in substance to excise Area A from any "adjacent area". A consequential amendment was needed to exclude from a permit area those blocks which lay within Area A. That was effected by the insertion¹⁵ in the PSL Act of s 30A which reads as follows:

" (1) This section applies to any permit that was, immediately before the commencement of this section, in force in respect of blocks all or a number of which were blocks constituted by graticular sections wholly or partly in Area A of the Zone of Cooperation.

(2) Where, as a result of the amendments of section 5A made by the *Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Act 1990* (which removed Area A from the adjacent areas) and of the operation of subsection 17(2):

- (a) a block specified in the permit has ceased to exist; or
- (b) the boundaries of a block specified in the permit have changed;

the permit is taken not to specify any block referred to in paragraph (a), to specify each block referred to in paragraph (b) as that block exists immediately after the commencement of the amendments, and to specify each block unaffected by the amendments.

(3) Where:

- (a) before the commencement of this section, an application had been made under section 30 for the renewal of a permit; and
- (b) at that commencement, no decision has been taken to renew, or to refuse to renew, the permit;

the application is taken to specify the blocks which, as a result of the operation of subsection (2), constitute the permit area.

(4) Where, immediately before the commencement of this section, there was in force under section 103A an instrument of suspension in respect of a permit, then, on the commencement of this section:

- (a) the instrument is by force of this section revoked; and

14 By s 22 of the Consequential Provisions Act.

15 By s 23 of the Consequential Provisions Act.

6.

- (b) the permittee is taken to have made an application under section 30 for the renewal by the Joint Authority of the permit in respect of the blocks which, as a result of the operation of subsection (2), constitute the permit area.
- (5) Section 31 does not apply to or in relation to an application:
 - (a) that is referred to in subsection (3); or
 - (b) that a permittee is taken to have made under subsection (4)."

The effect of sub-ss (4) and (5) on Permit No WA-74-P was, first, to terminate the suspension of that permit and, secondly, to deem the permittee to have made an application for renewal of that permit in respect of so much of the permit area as lay outside Area A. These provisions overrode the requirement otherwise imposed by s 31 of the PSL Act to relinquish one-half of the blocks in a permit area when applying for renewal of a permit.

The question for determination

- 8 At the time when the Zone of Cooperation Act and the Consequential Provisions Act commenced, the respondent WMC Resources Ltd ("WMC")¹⁶ held a 16.25% interest in Permit No WA-74-P. Considerable expenditure had been outlaid in exploring the permit area and there were prospects of discovering petroleum deposits capable of exploitation. If a permittee discovers a deposit of petroleum in its permit area, the PSL Act prescribes steps and conditions which, if taken and satisfied, lead to the granting of a licence to a permittee to recover petroleum in a licence area¹⁷ within the permit area. Without a licence, the

16 WMC was formerly known as Western Mining Corporation Ltd. It changed its name on 31 May 1996.

17 Section 52 of the PSL Act provides:

- " A licence, while it remains in force, authorizes the licensee, subject to this Act and the regulations and in accordance with the conditions to which the licence is subject –
- (a) to recover petroleum in the licence area and to recover petroleum from the licence area in another area to which he has lawful access for that purpose;
 - (b) to explore for petroleum in the licence area; and
 - (c) to carry on such operations and execute such works in the licence areas as are necessary for those purposes."

carrying on of operations for the recovery of petroleum in an "adjacent area" is prohibited¹⁸.

9 A permittee's right to explore for petroleum in an adjacent area and, if a deposit of petroleum is discovered within the permit area, the right to apply for and, subject to compliance with the Act and conditions imposed under the Act, to be granted a licence to carry on operations to recover the petroleum within a licence area are valuable rights. More precisely, they are valuable when the permit area might contain deposits of petroleum which are recoverable in operations that are or might become commercially viable. The rights conferred by permit No WA-74-P, and WMC's interest in the permit, are said by WMC to have been valuable. Those rights were susceptible of exercise during the currency of the permit. As a permit may be transferred¹⁹ and interests in a permit may be created or assigned²⁰ subject to approval, the interests of the permittee and the interests of WMC were susceptible of realisation by sale and assignment. These qualities of the permit and WMC's interest in it are indicative of the proprietary character of the rights possessed respectively by the permittee and WMC²¹.

10 WMC sued the Commonwealth in the Federal Court of Australia seeking a declaration that the excision from the permit area of those blocks or parts of blocks which lay within Area A effected by the amendments made by the Consequential Provisions Act would be an acquisition of property otherwise than on just terms if it were not for s 24 of the Consequential Provisions Act. That section reads as follows:

" (1) In this section, '**acquisition of property**' and '**just terms**' have the same meaning as in paragraph 51(xxxi) of the Constitution.

(2) Where, but for this section, the operation of the amendments made by this Part would result in the acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay compensation of a reasonable amount to the person in respect of the acquisition.

(3) Where the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in the

18 PSL Act, s 39.

19 PSL Act, s 78.

20 PSL Act, s 81.

21 *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342-343; *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 241.

Federal Court for the recovery from the Commonwealth of such reasonable amount of compensation as the Federal Court determines."

WMC seeks compensation pursuant to s 24(3). At first instance, Ryan J made the declaration sought by WMC²² and an appeal to the Full Court was dismissed by majority²³ (Black CJ and Beaumont J; Cooper J dissenting).

- 11 The question for determination on this appeal by the Commonwealth against the judgment of the Full Court is whether the amendments which effected the excision from the permit area of the blocks or parts of blocks that lie within Area A are a law for the "acquisition of property" within the meaning of that term in s 51(xxxi) of the Constitution.

Acquisition of property: s 51(xxxi)

- 12 In *Mutual Pools & Staff Pty Ltd v The Commonwealth*²⁴ I said:

" Section 51(xxxi) of the Constitution has a dual effect. First, it confers power to acquire property from any State or person for any purpose for which the Parliament has power to make laws and it conditions the exercise of that power on the provision of just terms. Second, by an implication required to make the condition of just terms effective, it abstracts the power to support a law for the compulsory acquisition of property from any other legislative power²⁵".

It follows that, when the validity of a law is challenged on the ground that it offends the constitutional guarantee of just terms, it is necessary to determine whether the law is a law for the acquisition of property for the purposes of the Commonwealth.

- 13 Axiomatically, a law is not a law for the acquisition of property unless it effects an acquisition of property. A law does not fall within s 51(xxxi) by reason

22 *Western Mining Corporation Ltd v Commonwealth of Australia* (1994) 50 FCR 305 at 344.

23 *Commonwealth of Australia v Western Mining Corporation Ltd* (1996) 67 FCR 153.

24 (1994) 179 CLR 155 at 177.

25 *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth* (1943) 67 CLR 314 at 318, 325; *W H Blakeley & Co Pty Ltd v The Commonwealth* (1953) 87 CLR 501 at 521; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 445.

only that it has an adverse effect on property not amounting to acquisition. As I pointed out in *The Commonwealth v Tasmania. The Tasmanian Dam Case*²⁶:

" Where neither the Commonwealth nor any other person acquires proprietary rights under a law of the Commonwealth, there is no acquisition upon which par (xxxi) may fasten."

But where a law of the Commonwealth purports to extinguish the proprietary rights of a person or a State, the law may or may not effect an acquisition. Dawson and Toohey JJ pointed out in *Australian Tape Manufacturers Association Ltd v The Commonwealth*²⁷ that "[t]he mere extinction or diminution of a proprietary right residing in one person does not necessarily result in the acquisition of a proprietary right by another". However, s 51(xxix) would be a "hollow facade"²⁸ if a law of the Commonwealth which extinguished proprietary rights in relief of the burden or liability which those rights imposed on the Commonwealth or a third party were not held to effect an acquisition of property by the Commonwealth or the third party²⁹. In *Mutual Pools & Staff Pty Ltd v The Commonwealth*³⁰, I observed that "[i]f rights against the Commonwealth are extinguished by statute and the rights are proprietary in nature, there is an acquisition of property by the Commonwealth". Thus the purported statutory extinguishment of a plaintiff's cause of action against the Commonwealth was held to be an acquisition of property in *Georgiadis v Australian and Overseas Telecommunications Corporation*³¹ and in *The Commonwealth v Mewett*³².

- 14 In the present case, the permit and WMC's interest can be classified as proprietary rights. But those rights were the creatures of statute, namely, the PSL Act, and their continued existence depends upon the continued existence of

26 (1983) 158 CLR 1 at 247.

27 (1993) 176 CLR 480 at 528; see also *The Tasmanian Dam Case* (1983) 158 CLR 1 at 145, 247, 283; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 165.

28 *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 510.

29 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 223.

30 (1994) 179 CLR 155 at 176.

31 (1994) 179 CLR 297.

32 (1997) 71 ALJR 1102; 146 ALR 299.

their statutory support. If the statute is amended so that the rights are diminished, does the diminution amount to an acquisition of property?

- 15 In *Georgiadis v Australian and Overseas Telecommunications Corporation*³³, Mason CJ, Deane and Gaudron JJ said:

"[A]cquisition' in s 51(xxxi) extends to the extinguishment of a vested cause of action, at least where the extinguishment results in a direct benefit or financial gain (which, of course, includes liability being brought to an end without payment or other satisfaction) and the cause of action is one that arises under the general law. The position may be different in a case involving the extinguishment or modification of a right that has no existence apart from statute. *That is because, prima facie at least and in 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 Constitution*³⁴". (Emphasis added.)

- 16 In this passage, their Honours treat "acquisition of property" as a single concept. I agree that, where a purely statutory right is by nature susceptible of modification or extinguishment, its modification or extinguishment works no acquisition of property. But, in my respectful opinion, it does not follow that a law of the Commonwealth which extinguishes purely statutory rights having no basis in the general law can never effect an "acquisition of property" within s 51 (xxxi). If statutory rights were conferred on A and a reciprocal liability were imposed on B and the rights were proprietary in nature, a law extinguishing A's rights could effect an acquisition of property by B. In the present case, where the rights of the permittee and of WMC, though created by statute, are properly to be regarded as proprietary in nature, a Commonwealth law which purported to effect a compulsory transfer of those rights to a third party would be a law for the acquisition of property. But the Consequential Provisions Act does not have that effect. The present case does not turn on the proprietary nature of the rights of the permittee or of WMC; it turns on a different issue, namely, whether the modification of the rights of the permittee and of WMC amounts to an acquisition

33 (1994) 179 CLR 297 at 305-306.

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

by the Commonwealth of the rights which the permittee and WMC respectively possessed before the Consequential Provisions Act commenced.

- 17 Where a law of the Commonwealth creates or authorises the creation of a right, a statutory modification or extinguishment of the right effects its acquisition if, but only if, it modifies or extinguishes a reciprocal liability to which the party acquiring the right was subject. Thus in *Newcrest Mining (WA) Ltd v The Commonwealth*³⁵, the law which sterilised Newcrest's right under its mining lease to carry on "operations for the recovery of minerals" on land vested in the Commonwealth was, in my opinion, a law for the acquisition of property because it extinguished the liability of the Commonwealth to have those minerals extracted from its land and thereby enhanced the property of the Commonwealth³⁶. But where a law of the Commonwealth creates or authorises the creation of a right that does not impose on the Commonwealth a reciprocal liability, the mere extinguishment of the right effects no acquisition of the right by the Commonwealth. The Commonwealth's position remains unchanged by the extinguishment.
- 18 Of course, a statute or the common law may confer on a person a right enforceable by a public law remedy to compel the Commonwealth or its officers to perform a public law duty so that the right and the duty are truly reciprocal. If, by repeal or amendment of the statute, the right and the reciprocal duty are modified or extinguished, one of the indicia of acquisition would appear. But not an indicium of an acquisition of property. That is because a right so to compel the performance of a public law duty is not itself property, and the modification or extinguishment of such a right and duty is not an acquisition of property. *Health Insurance Commission v Peverill*³⁷ was such a case.
- 19 In the present case, although the rights vested in the permittee and in WMC pursuant to the PSL Act at the time immediately prior to the commencement of the Consequential Provisions Act may properly be classified as property, the relevant question is whether those rights were acquired by the Commonwealth or were simply extinguished without acquisition. As Deane and Gaudron JJ said in *Mutual Pools*³⁸:

35 (1997) 71 ALJR 1346; 147 ALR 42.

36 See (1997) 71 ALJR 1346 at 1350-1351; 147 ALR 42 at 47-48.

37 (1994) 179 CLR 226 at 243-244.

38 (1994) 179 CLR 155 at 185.

"[T]he fact remains that s 51(xxxi) is directed to 'acquisition' as distinct from deprivation. The extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property³⁹."

The source of the rights of the permittee and WMC

20 It is erroneous to regard the PSL Act as the off-shore equivalent of those provisions which, in Australia, authorise the Crown to alienate interests in the waste lands of the Crown (provisions which I shall call "Land Acts"). If it were the equivalent of Land Acts, it would be arguable that the extinguishing of a permittee's proprietary rights relieves the Commonwealth of a reciprocal burden on its title to land within the permit area and thus constitutes an acquisition of property. The Land Acts assume the existence of the Crown's radical title to land lying above the low water mark, a title which is sufficient to support the alienation of interests in that land and to found the Crown's full beneficial title to that land when there are no other interests or when other interests have been extinguished or are exhausted. In *Mabo v Queensland [No 2]*⁴⁰ I examined the nature of that radical title and it is unnecessary now to repeat it. It is sufficient to note that the extinguishing of an interest in land above the low water mark necessarily results in the enhancement of the title which was subject to the interest extinguished. The position in relation to interests in or over the continental shelf is quite different.

21 In *New South Wales v The Commonwealth* ("the Seas and Submerged Lands Case")⁴¹, Barwick CJ said:

"The colonists inherited the common law: but it operated only in the realm which ended at low-water mark. This was decided in *Reg v Keyn*⁴², a decision with which I respectfully agree. ... Thus, property in and power over the territorial seas could not have come by the common law."

39 See *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 270-271 per Dixon J; *The Tasmanian Dam Case* (1983) 158 CLR 1 at 145-146 per Mason J; at 181-182 per Murphy J; at 247-248 per Brennan J; at 283 per Deane J; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 528 per Dawson and Toohey JJ: "It is relevant to note that the Privy Council has also, in the context of interpreting the Malaysian Constitution, drawn a distinction between deprivations and acquisitions: *Government of Malaysia v Selangor Pilot Association* [1978] AC 337 at 347-348." See also *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 43-54.

40 (1992) 175 CLR 1 at 43-54.

41 (1975) 135 CLR 337 at 368-369; see also *R v Bull* (1974) 131 CLR 203 at 219.

42 (1876) 2 Ex D 63.

Stephen J observed⁴³:

" It may well be that sovereignty over its territorial waters is an attribute of an internationally recognized nation state. If so the Commonwealth possesses that attribute, it has sovereignty in the relevant international law sense, just as, in that same sense, it has sovereignty over the land mass of the Australian continent. In neither case does its lack of full legislative competence *or its lack of radical title* affect its status as a nation state." (Emphasis added.)

Mason J drew a clear distinction between a proprietary interest in the territorial sea and its seabed and legislative power and jurisdiction over them. Of course, his Honour was considering the claim of the States to territory and ownership of the bed of the territorial sea, and, in rejecting that claim, he denied the States' title to the continental shelf⁴⁴. He said⁴⁵:

" The opinion which I have already expressed as to the authority of *Keyn's Case* before 1900 answers the submission that the territorial sea and its solum could, in the absence of some addition to the territories of the colonies, or of legislative action, constitute territory of the colonies situated outside the colonial boundaries. The plaintiffs argued that the solum of the territorial sea was waste land of the colonies. However, the power given to the colonies to alienate waste lands of the Crown was limited to waste lands 'within the said Colony' - see *Constitution Act*, 1855 (NSW) (18 & 19 Vict c 54), s 43; *Constitution Act*, 1855 (Vict) (18 & 19 Vict c 55), s 54; *Constitution Act*, 1867 (Q), s 30; *Wastelands Act*, 1855 (Imp) (18 & 19 Vict c 56), ss 5, 7."

But his Honour accepted⁴⁶ that "[t]he power to make laws for the peace, order and good government of a colony was wide enough to enact laws applying to territorial waters and beyond".

- 22 The PSL Act is a law passed in exercise of the legislative powers of the Commonwealth and a person who seeks and obtains the grant of a permit or licence under that Act cannot deny the authority of the Commonwealth to make the grant, but that is not to say that the Commonwealth has any proprietary interest in the continental shelf or the seas above it. The principle expressed by Mason J with respect to the Crown's grant of off-shore interests is applicable to describe the

43 (1975) 135 CLR 337 at 445.

44 (1975) 135 CLR 337 at 472.

45 (1975) 135 CLR 337 at 467; see also at 367.

46 (1975) 135 CLR 337 at 468-469.

relationship between the grantee of a permit or licence under the PSL Act and the Commonwealth. His Honour said⁴⁷:

" As between the Crown and a subject, instances may be found of the grant by the Crown without legislative authority of proprietary interests in the foreshore or seabed. *As against the Crown the subject could not dispute the Crown's title.* But this constitutes no ground for concluding that *Keyn's Case* is incorrect in relation to the Australian colonies. And the decisions of the United States Supreme Court and the Supreme Court of Canada denying the territorial waters and the seabed formed part of the territory of the States of the Union and the Provinces of the Dominion *confirm the absence of any proprietary interest in the Australian Colonies (Reference re Ownership of Off-Shore Mineral Rights*⁴⁸; *United States v California*⁴⁹). (Emphasis added.)

23 Although, by our municipal law the Commonwealth has the power to legislate in respect of the exploration of and the exploitation of the resources of the continental shelf, it has no property in the continental shelf at common law. It is not necessary to consider what the effect might be of a law of the Commonwealth (if the Commonwealth were ever to enact such a law) that purported to declare its property in the continental shelf. The PSL Act does not purport to do so.

24 The statutory modification or extinguishment of a permit or an interest in a permit is not an acquisition of property by the Commonwealth, for the Commonwealth was under no liability reciprocal to the permit or interest and acquires no benefit by the modification or extinguishment. It follows that the Consequential Provisions Act is not a law for the acquisition of property and is therefore not a law falling within s 51(xxxi).

25 Therefore I would allow the appeal, set aside the order of the Full Court and in lieu thereof allow the appeal to that Court, set aside pars 1 and 2 of the orders made by Ryan J and dismiss WMC's application. Costs should follow each event.

47 (1975) 135 CLR 337 at 469. See also *Bonser v La Macchia* (1969) 122 CLR 177 at 184-185.

48 [1967] SCR 792; (1967) 65 DLR (2d) 353.

49 332 US 19 (1947).

26 TOOHEY J. Although the facts relevant to this appeal appear in other judgments, it is hard to avoid some repetition. An appreciation of the circumstances giving rise to these proceedings is critical to a determination of the issues between the parties.

27 The central question is whether the partial extinguishment of mining rights by the Parliament, in an area of disputed national rights, amounted to an acquisition of property within s 51(xxxi) of the Constitution.

The facts

28 The island of Timor lies 300 miles north-west of Australia. The western part of the island became part of the Indonesian Republic after World War 2. The eastern part of the island was incorporated into the Indonesian Republic in 1975, notwithstanding a claim by Portugal to sovereignty over East Timor. The Timor Trough is a geomorphological feature which lies in the Timor Sea between 40 and 70 miles from Timor and over 200 miles from the Australian coastline. Australia asserts that its sovereign rights extend up to the Timor Trough. Indonesia asserts sovereign rights at least to the median line between Timor and Australia. As a result there is an "area of overlapping claims, which is wholly outside Australian and Indonesian territorial waters"⁵⁰. Lumb⁵¹ describes the process by which the Timor Gap arose:

" An Agreement ... was entered into in 1972 between Australia and Indonesia in relation to seabed boundaries to the north and south of the area adjacent to East Timor ... [Between the boundaries drawn] there is a gap (the 'Timor Gap') in the area of the seabed opposite East Timor ... which extends across the north-eastern portion of the Trough."

29 The respondent WMC Resources Ltd ("WMC")⁵² held a permit ("the Permit") authorising exploration for petroleum by it in an area which lay within the Timor Gap. The Permit was issued on 25 June 1977 under the *Petroleum (Submerged Lands) Act* 1967 (Cth) ("the P(SL) Act")⁵³. At the time it

50 *Horta v The Commonwealth* (1994) 181 CLR 183 at 190.

51 "The Delimitation of Maritime Boundaries in the Timor Sea", (1981) 7 *Australian Year Book of International Law* 72 at 73.

52 Formerly Western Mining Corporation Ltd.

53 The permit was originally granted to Pelsart Oil NL. On 4 October 1983 WMC acquired the interest of Mesa Petroleum Co which had earlier acquired 16.25% of Pelsart's interest in the permit.

was publicly known that the Timor Gap was an area of disputed sovereign rights between Australia and the Republic of Indonesia.

30 Pursuant to s 28 of the P(SL) Act, a permit authorises the permittee to "explore for petroleum, and to carry on such operations and execute such works as are necessary for that purpose, in the permit area"⁵⁴. A permit remains in force for an initial period of 6 years but may be renewed for further periods of 5 years⁵⁵. Any petroleum recovered in the permit area by a permittee becomes the property of the permittee⁵⁶. Exploration is prohibited except under and in accordance with a permit. A breach is an offence⁵⁷. As Cooper J noted in the Full Court of the Federal Court, the "regime established ... is to provide for a general prohibition of specified conduct in defined areas ... without a relevant authorisation and to enforce the prohibition with a criminal sanction"⁵⁸.

31 Exploration permits are defined in the P(SL) Act by areas known as "blocks"⁵⁹. These are areas beyond the territorial sea of Australia but within the limits of the continental shelf. The total area is defined as the "adjacent area"⁶⁰. The Permit comprised blocks in the adjacent area most proximate to Western Australia. The conditions attached to the Permit are detailed in the judgment of Beaumont J⁶¹. I shall do no more than draw attention to those conditions of most relevance to the appeal. Condition 1 required the permittee to expend minimum amounts in each year of the term of the permit. Condition 2 prohibited the recovery of any petroleum from the present area except as a result of production testing of a well. Condition 4 required the permittee to pay a royalty

54 References to the P(SL) Act are to the Act as it appears in Reprint No 2, reprinted as at 31 August 1986. The Reprint was accepted by the parties as the state of the legislation for the purposes of the appeal.

55 s 29.

56 s 127.

57 s 19, unless otherwise permitted by Pt III of the Act.

58 *Commonwealth v Western Mining Corp* (1996) 67 FCR 153 at 200; 136 ALR 353 at 395.

59 ss 5, 17, 149.

60 The definition of "adjacent area" in s 5A brought the Permit within the s 19 prohibition.

61 *Commonwealth v Western Mining Corp* (1996) 67 FCR 153 at 171; 136 ALR 353 at 368.

in respect of petroleum recovered in the permit area. By Condition 5 the permittee must take adequate measures for the protection of the environment.

32 There was a difficulty for permittees in that the area covered by permits was the subject of a sovereignty dispute between Australia and Indonesia. Articles 1 and 2 of the 1958 *Convention on the Continental Shelf* ("the 1958 Convention") had the effect that the area within the Permit was within the sovereign rights of Australia. The *Seas and Submerged Lands Act* 1973 (Cth), s 11 provided that "the sovereign rights of Australia as a coastal State in respect of the continental shelf of Australia, for the purpose of exploring it and exploiting its natural resources, are vested in and exercisable by the Crown in right of the Commonwealth". However, Indonesia is not a party to the 1958 Convention and disputes Australia's assertions of sovereign rights. Indonesia's claims are not based on its continental shelf (having not signed the 1958 Convention). But, as mentioned, Indonesia claims sovereign rights at least to the median line between Timor and Australia. A resolution of the dispute or permanent "continental shelf delimitation" is still pending. The *Treaty between Australia and the Republic of Indonesia on the Zone of Co-operation in an Area between the Indonesian Province of East Timor and Northern Australia* ("the Treaty") was intended as an interim measure pending final resolution⁶².

33 The position of the permittees under the Permit is described by the primary judge, Ryan J⁶³. They were required to expend \$11,640,000 over 6 years in an area where, because of the sovereign rights disputes, their own rights were uncertain. Further, under the renewal procedures in the P(SL) Act a permittee was required to relinquish not less than 50% of the permit area before renewal⁶⁴. The permittees were reluctant to make such a selection and the Commonwealth was of the view that renewal over a smaller area might damage Australia's sovereignty claims. As a result, a request by the permittees to suspend the Permit and extend its period was granted by the Joint Authority on 22 May 1983. The suspensions

62 On 14 March 1997 Australia and Indonesia signed *The Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries*. This treaty has not yet been ratified. The measures provided in the interim treaty are expressly preserved. For a discussion of the treaty of 14 March 1997, see Piotrowicz, "Australia and Indonesia tie the maritime knot", (1997) 71 *Australian Law Journal* 916.

63 *Western Mining Corp v Commonwealth* (1994) 50 FCR 305 at 319-320; 121 ALR 661 at 673-674.

64 s 31(1).

were possible under s 103A of the P(SL) Act⁶⁵. Although the Permit was suspended, the right to "carry on and execute marine geophysical surveys in the area" was preserved⁶⁶.

34 On 18 February 1991 the *Petroleum (Australia-Indonesia Zone of Cooperation) Act* 1990 (Cth) ("the Cooperation Act") came into operation⁶⁷. Its object was to enable Australia to fulfil its obligations under the Treaty: s 3. The Treaty is annexed as a schedule to the Cooperation Act. That Act gives a "Ministerial Council" and a "Joint Authority" authority to exercise the rights and responsibilities of Australia under the treaty⁶⁸. Both the Ministerial Council and Joint Authority are defined as having the meaning provided in the Treaty⁶⁹.

35 The Treaty created a regime for the exploration of minerals in the disputed area which would not prejudice the claims of either Australia or Indonesia to sovereignty or sovereign rights⁷⁰. The disputed "Timor Gap" area was divided into three areas: Areas A, B and C. Responsibility for administering the exploration and exploitation of minerals in Area A was given to the Ministerial Council and the Joint Authority. The Ministerial Council was defined as a body of "Ministers" of equal numbers from the Contracting States with overall responsibility for matters of exploration of and exploitation of the petroleum resources in Area A⁷¹. The Joint Authority was responsible for management of such activities and was

65 This had been inserted in 1980, with effect from 14 February 1983. In 1985 this provision was again amended to allow for suspension of leases as well as permits: see s 38 and the Schedule to the *Petroleum (Submerged Lands) Amendment Act* 1985 (Cth).

66 *Western Mining Corp v Commonwealth* (1994) 50 FCR 305 at 320; 121 ALR 661 at 674.

67 The validity of this Act was upheld by the High Court in *Horta v The Commonwealth* (1994) 181 CLR 183.

68 s 4.

69 s 5(1).

70 Art 2(3).

71 Arts 5, 6.

subject to directions from the Ministerial Council⁷². Australia was given the primary regulatory power for Area B, Indonesia for Area C⁷³.

36 The Permit consists of 253 blocks in the Timor Gap. Its area falls wholly within Australia's continental shelf and Australia asserts sovereign rights over the area as a result. On the other hand, Indonesia refers to the fact that part of the Permit extends past the median line between Australia and Timor. As already noted, Indonesia asserts sovereignty at least up to the median line. The Treaty was established to allow exploitation of petroleum resources pending a permanent agreement delimiting the continental shelf boundary between Australia and Timor. In relation to the Permit, some blocks fell within Area A, some within Area B, some within both and some wholly outside the Zone of Cooperation (Areas A, B and C). It was agreed, by exchange of letters, at the time of the Treaty, that when considering applications for exploration or exploitation, holders of Australian permits wholly or partly within Area A were to be given a right to match the best bid for contract areas which fell significantly within the area of the existing permits.

37 At the same time as the commencement of the Cooperation Act, the *Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Act* 1990 (Cth) ("the Consequential Provisions Act") came into operation⁷⁴. Section 22 of the Consequential Provisions Act amended s 5A of the P(SL) Act so that permits did not extend to any areas which fell within Area A. Section 7 of the Cooperation Act forbade prospecting in Area A unless "with the approval of the Joint Authority", with a penalty of imprisonment for 5 years. As a result, s 23 of the Consequential Provisions Act inserted s 30A into the P(SL) Act. This new section was deemed to apply to all "blocks ... wholly or partly in Area A of the Zone of Cooperation"⁷⁵. The section provides that where, by reason of the amendments made to s 5A, a block specified in a permit has ceased to exist, or the boundaries of such a block have changed, the permit is taken to specify only that part of the block outside Area A⁷⁶. Section 30A(4) covers the precise situation of the Permit, which as mentioned, had been suspended. It reads:

72 Arts 7, 8.

73 Art 4.

74 s 2.

75 s 30A(1)

76 s 30A(2).

"Where, immediately before the commencement of this section, there was in force under section 103A an instrument of suspension in respect of a permit, then, on the commencement of this section:

- (a) the instrument is by force of this section revoked; and
- (b) the permittee is taken to have made an application under section 30 for the renewal by the Joint Authority of the permit in respect of the blocks which, as a result of the operation of subsection (2), constitute the permit area."

38 It should be noted that the reference to "Joint Authority" is a different "Joint Authority" to that established under the Treaty and the Cooperation Act. In 1980, Pt IA had been inserted into the P(SL) Act providing for a Joint Authority in respect of areas covered by the Permit. The Joint Authority in this case consists of a Minister of the Commonwealth and a Minister of the State of Western Australia⁷⁷.

39 As a result of s 30A, the Permit no longer extended to Area A and an application was deemed to have been made to the Joint Authority for renewal of the remaining area of the Permit.

The proceedings

40 In the Federal Court WMC sought a declaration that the reduction in size of the Permit constituted an acquisition by the Commonwealth of its property, otherwise than on just terms. WMC also claimed compensation pursuant to s 24 of the Consequential Provisions Act which reads:

- "(1) In this section, '**acquisition of property**' and '**just terms**' have the same meaning as in paragraph 51(xxxi) of the Constitution.
- (2) Where, but for this section, the operation of the amendments made by this Part would result in an acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay compensation of a reasonable amount to the person in respect of the acquisition.
- (3) Where the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in the Federal Court for recovery from the Commonwealth of such reasonable amount of compensation as the Federal Court determines."

77 s 8A.

41 The entitlement to declaratory relief was ordered be heard prior to any other issue in the action⁷⁸. Ryan J granted a declaration that, but for s 24 of the Consequential Provisions Act, the reduction in the size of the area covered by the Permit was an acquisition of the property of WMC otherwise than on just terms. This had the effect of imposing on the Commonwealth a liability to pay compensation.

42 The Commonwealth argued before Ryan J and before the Full Federal Court that the rights attaching to the Permit were not "property"; that the rights were not acquired; and that even if there had been an acquisition of property it was on "just terms". Ryan J and the majority of the Full Court (Black CJ and Beaumont J, Cooper J dissenting) rejected these arguments. Before this Court the Commonwealth did not persist with its submission that the rights attaching to the Permit did not constitute property.

The issues

43 The Commonwealth's attack on the declaration made by Ryan J and upheld by the Full Court was made on several fronts.

1. While no longer contending that the rights attaching to the Permit were not property, the Commonwealth argued that there was no acquisition of property. It will be necessary to look at the argument more closely but, in effect, the submission was that the rights were inherently susceptible to modification or extinguishment and that the rights were not acquired by the Commonwealth but simply ceased to exist.
2. Further, it was said, the relevant law should not be characterised as a law with respect to the acquisition of property because
 - (i) s 51(xxxi) does not apply to areas geographically external to Australia;
 - (ii) what happened was the adjustment of competing rights and obligations on the part of Australia and Indonesia;
 - (iii) any acquisition was merely incidental to the primary purpose of implementing the Treaty in domestic law.
3. Finally, if there was an acquisition of property within s 51(xxxi), the acquisition was on just terms.

78 O 29 r 2 of the Federal Court Rules.

Section 51(xxxi)

44 To set s 51(xxxi) in context, I repeat a passage from my judgment in *Health Insurance Commission v Peverill*⁷⁹:

" Section 51(xxxi), it has been said, serves a double purpose⁸⁰:

' 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.'

It follows that if a law of the Parliament constitutes an acquisition of property, par (xxxi) will invalidate the law unless it provides just terms.

Inevitably the focus of inquiry has been whether there has been an acquisition of property. The purpose of the paragraph was seen in this way by Dixon J in *Grace Bros Pty Ltd v The Commonwealth*⁸¹:

' The power conferred by s 51(xxxi) is express, and it was introduced as a specific power, not, like the Fifth Amendment, for the purpose of protecting the subject or citizen, but primarily to make certain that the Commonwealth possessed a power compulsorily to acquire property, particularly from the States. The condition "on just terms" was included to prevent arbitrary exercises of the power at the expense of a State or the subject.'

The passage does serve to demonstrate the need to identify an acquisition of property and to avoid erecting par (xxxi) into a wider guarantee than the Constitution warrants."

79 (1994) 179 CLR 226 at 254-255.

80 *Bank of NSW v The Commonwealth* ("the *Bank Nationalization Case*") (1948) 76 CLR 1 at 349 per Dixon J.

81 (1946) 72 CLR 269 at 290-291.

Was there an acquisition of property?

45 As mentioned earlier, the Commonwealth did not argue before this Court that the rights attaching to the Permit were not "property". Senior counsel for the Commonwealth expressly disavowed that submission. What was submitted was that the nature of the rights is such that they cannot be acquired, hence that they are not property within par (xxxi). Put much the same way, although the rights attaching to the Permit constitute property, they are not rights capable of acquisition and therefore there is no acquisition of property upon which the constitutional guarantee can operate.

46 In the Full Court Black CJ concluded that the rights attaching to the Permit were clearly identifiable, assignable, stable, potentially of very substantial value and were not, because of their statutory foundation, inherently defeasible⁸². Beaumont J held that the rights were substantial, liable to cancellation only for sufficient cause, did not require continual adjustment and amounted to a statutory but assignable title⁸³. Cooper J, who was in dissent as to the outcome of the appeal, approached the matter on the footing that the Permit created rights to engage in particular activity in defined areas and a right to apply for a lease or production licence in the permit area. His Honour held that the Permit and the rights attaching to it were capable of ownership and assignment and should be regarded as incorporeal property⁸⁴. It was in refusing to take the next step, namely that there was an acquisition, that he departed from Black CJ and Beaumont J.

47 Whether there was an acquisition of property from WMC depends upon the operation of the Cooperation Act (including the amendments it effected to the P(SL) Act) which prohibited petroleum prospecting or operations in Area A of the Zone of Cooperation except with the approval of the Joint Authority and which, as amended, had the effect of reducing the area covered by WMC's exploration permit. Was there in consequence an acquisition of rights attaching to the Permit held by WMC?

48 It is helpful to see why Cooper J was not prepared to take the step which Black CJ and Beaumont J were willing to take. His Honour explained that the Cooperation Act was one of general application "to control, amongst other things, the conduct of persons in Area A of the Zone of Cooperation in relation to petroleum exploration and exploitation"⁸⁵. It did not purport to acquire any property but rather purported to give effect to the Treaty for the purposes of

82 (1996) 67 FCR 153 at 161-165; 136 ALR 353 at 359-363.

83 (1996) 67 FCR 153 at 187-188; 136 ALR 353 at 383-384.

84 (1996) 67 FCR 153 at 202; 136 ALR 353 at 397.

85 (1996) 67 FCR 153 at 206; 136 ALR 353 at 400.

municipal law. It did not purport to have a particular operation in respect of WMC nor did it purport to acquire the Permit held by WMC or any of the rights attaching to the Permit.

49 The Commonwealth argued that the approach taken by Cooper J finds support in the decision of this Court in *Health Insurance Commission v Peverill*⁸⁶ and also in passages in the judgments in *Georgiadis v Australian and Overseas Telecommunications Corporation*⁸⁷. Cooper J referred to the joint judgment of Mason CJ, Deane and Gaudron JJ in *Georgiadis* which emphasised that not every compulsory divesting of property is an acquisition within s 51(xxxi) and which further emphasised the difference between a "taking" which directs attention to whether there has been a divesting and an "acquisition" which directs attention to whether something is or will be received⁸⁸. At the same time, it is not necessary that what is acquired correspond precisely with what was taken⁸⁹. It is enough if it be shown that the Commonwealth acquired an interest in the property of WMC, even though the interest acquired be slight or insubstantial⁹⁰.

50 In passing, it must be remembered that the Commonwealth had a further argument, namely, that the Cooperation Act was an Act with respect to external affairs, not an Act with respect to the acquisition of property. Although the arguments tended to blend at times, I shall keep them separate for the present analysis.

51 In *Peverill* there was a retrospective reduction in the amount of benefits assigned by patients to a medical practitioner for pathology tests and payable pursuant to the *Health Insurance Act 1973* (Cth). The Court determined that there had been no acquisition of property by the Commonwealth. However there were differences in the approach taken by the members of the Court. Mason CJ, Deane and Gaudron JJ held that the extinguishment of the right to receive payment of a larger amount was effected not only as a genuine adjustment of competing claims made by patients, pathologists, the Health Commission and taxpayers, but also as an element in a scheme for the provision of welfare benefits from public funds. Brennan J and Dawson J each held that, while the value of the right acquired from patients was reduced, there was no debt and the Commonwealth did not acquire

86 (1994) 179 CLR 226.

87 (1994) 179 CLR 297.

88 *Georgiadis* (1994) 179 CLR 297 at 304-305.

89 *Georgiadis* (1994) 179 CLR 297 at 305.

90 *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 145. See also *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 499-500.

any property. I held that it was impossible to identify any property or interest in property acquired by the Commission and further that the operation of the relevant legislation lay outside the scope of par (xxxi). McHugh J held that the practitioner's entitlement to payment was conferred subject to the condition that it could be altered or revoked at any time by the Parliament.

- 52 It is time now to return to the Permit and the context in which it operated, in order to determine whether there was property capable of acquisition and, if so, whether there was in truth an acquisition by the Commonwealth of an interest in that property.

Rights attaching to the Permit

- 53 It is clear that such rights as WMC possessed under the Permit existed because of the P(SL) Act. They had no existence except pursuant to a law of the Commonwealth. But it does not necessarily follow that the rights were subject to modification or diminution by legislation without attracting the operation of s 51(xxix). Intellectual property rights which are the creature of statute, may lie within the scope of par (xxxi)⁹¹. On the other hand, analysis of particular rights created by statute may show that the rights were transient, defeasible and did not give rise to the possibility of acquisition.

- 54 The rights attaching to the Permit were transient, only in the sense that they lasted as long as the Permit lasted. But the Permit was for a finite term and capable of renewal for finite terms. The fact that the Commonwealth was not obliged to renew the Permit has a bearing upon its value. But it does not carry the consequence that, during any period of its operation, the Permit did not confer rights capable of acquisition. The holder of an exploration permit has the right to make application for a production licence⁹². A royalty is payable on petroleum recovered. As Black CJ observed⁹³:

"These activities [of exploration and production] are, of their nature, most likely to involve substantial commercial risks and very large outlays ... [T]he time frame for the exercise of consecutive rights under the P(SL) Act can be a very long one."

- 55 The Commonwealth sought to attach importance to the provision in s 5(8) of the P(SL) Act that a reference in the Act to a permit is a reference to a permit "as varied for the time being under this Act" and also to s 28 which provides that

91 *Tape Manufacturers* (1993) 176 CLR 480 at 527.

92 s 39A of the P(SL) Act.

93 (1996) 67 FCR 153 at 161-162; 136 ALR 353 at 359.

a permit authorises the permittee "subject to this Act". The latter expression, it was said, means the Act as amended from time to time. The provisions in question do little more than state the obvious. There can be no doubt that the P(SL) Act was intended "to attract the interest [and] the kind of money which is necessary to explore and develop" the resources of the area and provide security where "the titles of those who were willing to enter ... into this field were uncertain"⁹⁴.

56 In *Mutual Pools and Staff Pty Ltd v The Commonwealth*⁹⁵ Dawson J and I held that the extinguishment of a right to proceed against the Commonwealth was not an acquisition of property because "when a chose in action is extinguished, the debtor receives merely a financial advantage, not a proprietary interest in the chose in action"⁹⁶. However, that was a minority view and, in light of *Georgiadis v Australian and Overseas Telecommunications Corporation*⁹⁷ and *Commonwealth v Mewett*⁹⁸, it must be accepted that where a distinct financial benefit is conferred upon the Commonwealth, the extinguishment of a cause of action will amount to an acquisition of property⁹⁹. What is clear is that acquisition involves obtaining "some identifiable benefit or advantage relating to the ownership or use of property"¹⁰⁰.

57 Can it be said that the Consequential Provisions Act had the effect of conferring on the Commonwealth some identifiable benefit or advantage relating to the ownership or use of property? WMC answers the question "yes" on the footing that by reducing the scope of the Permit and abolishing its operation in Area A, the sovereign right to explore resources within the excised area was reverted in the Commonwealth. In turn this freed the Commonwealth to deal with this right. It also enabled the Commonwealth to enter into treaty arrangements to its financial benefit and towards the resolution of the ongoing dispute with Indonesia as to sovereign rights in the Timor Gap.

94 House of Representatives, *Parliamentary Debates* (Hansard), 26 October 1967 at 2376, NH Bowen QC introducing the P(SL) Bill.

95 (1994) 179 CLR 155.

96 (1994) 179 CLR 155 at 195.

97 (1994) 179 CLR 297.

98 (1997) 71 ALJR 1102; 146 ALR 299.

99 (1997) 71 ALJR 1102 at 1111, 1127-1128, 1142; 146 ALR 299 at 310, 317, 332-333, 353.

100 *Mutual Pools* (1994) 179 CLR 155 at 185.

58 It might be argued that the Consequential Provisions Act did no more than reduce the scope of the immunity from prosecution conferred by the Permit. But in that regard there is no analogy with *Tape Manufacturers*¹⁰¹ where the conferral of immunity upon infringers of copyright was held not to amount to a proprietary right. There the immunity acquired could not be seen as sufficiently proprietary in nature as it lacked a permanent character, assignability or exclusivity¹⁰². In the present case an immunity, granted on certain conditions, was removed. As earlier stated, the immunity lost here was identifiable, assignable, exclusive and valuable. Indeed in *Tape Manufacturers* a "royalty" payable by those selling or distributing blank tapes was sufficiently proprietary. In relation to this the majority said¹⁰³:

" If it were not a tax, that compulsory transfer of property would constitute an 'acquisition of property' by the transferee from the transferor. Notwithstanding a submission of the Commonwealth to the contrary, the Act would not, if that were so, provide 'just terms'".

59 From what has been said so far in these reasons, I would conclude that there was an acquisition of property from WMC within s 51(xxxi) of the Constitution.

Characterisation

60 The alternative argument of the Commonwealth was that the relevant law cannot be characterised as a law with respect to the acquisition of property. Rather, it was said, the law was one with respect to external affairs.

61 It is true that there are certain heads of power within s 51 that have been held not to attract the operation of par (xxxix). Obvious illustrations are laws with respect to taxation¹⁰⁴, the seizure of enemy property under the aliens power¹⁰⁵ the

101 (1993) 176 CLR 480.

102 (1993) 176 CLR 480 at 499-500, 528.

103 (1993) 176 CLR 480 at 511.

104 *Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 263; *The Tasmanian Dam Case* (1983) 158 CLR 1 at 282; *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 638-639.

105 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 373.

sequestration of the property of a bankrupt¹⁰⁶ and the exaction of fines and penalties in the case of prohibited imports¹⁰⁷ or unlawful activity¹⁰⁸.

- 62 However, there is nothing in the nature of par (xxix) that is inconsistent with the operation of par (xxxi). While the term "State" in par (xxxi) must refer to a State within Australia, "person" is not so limited. Because the Cooperation Act operates outside Australia, it does not cease to be a law for the acquisition of property. In any event as Gaudron J observed in *Newcrest Mining v Commonwealth*¹⁰⁹ in relation to other legislation:

" A purpose of the Conservation Act is the performance of Australia's international obligations; that is a purpose in respect of which the parliament has power to make laws under s 51(xxix); para (xxxi) operates to fetter the implementation of that purpose by means of a law with respect to the acquisition of property.¹¹⁰ The Commonwealth cannot enact laws for a purpose which falls within s 51 without the condition which attaches by para (xxxi)".

- 63 Equally, the operation of par (xxi) cannot be dismissed on the ground that what is involved is merely "the adjustment of ... competing rights, claims or obligations". This is the language of the majority in *Nintendo Co Ltd v Centronics Systems Pty Ltd*¹¹¹. But that language was used in a context where intellectual property rights are conferred on persons other than the owner and must inevitably impact on existing proprietary rights. Here there was no adjustment of competing claims in the *Nintendo* sense. Rights of property were directly extinguished by the amending legislation which was clearly directed towards the acquisition of property.

- 64 Likewise, it is unreal to dismiss the Cooperation Act as merely incidental to a primary purpose of implementing the Treaty in domestic law. A law having such a purpose does not destroy its character as a law for the acquisition of property.

106 *Mutual Pools* (1994) 179 CLR 155 at 170.

107 *Burton v Honan* (1952) 86 CLR 169 at 180; *R v Smithers; Ex parte McMillan* (1982) 152 CLR 477 at 488.

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

109 (1997) 71 ALJR 1346 at 1372-1373; 147 ALR 42 at 78.

110 *Mutual Pools* (1994) 179 CLR 155 at 188-189.

111 (1994) 181 CLR 134 at 161.

Just terms

65 The final argument advanced by the Commonwealth was that in any event any acquisition was on just terms.

66 The argument was put on the basis that the Permit was always subject to alternative claims under Indonesian law and further that WMC was given an entitlement to renewal of the whole of the unexcised portion of the Permit without the normal requirement of relinquishing 50% of the existing Permit area¹¹² and that WMC was given preferential treatment in the allocation of new exploration areas in the Zone of Cooperation¹¹³.

67 The Commonwealth emphasised that "just terms" imposes a requirement of fairness rather than equivalence¹¹⁴. However, where terms depart from equivalence this may be a strong indication that they are not fair, not just. On its face, what WMC received was less valuable than what it had before the Cooperation Act was amended. These are matters relevant to the assessment of compensation under s 24(3) of the Consequential Provisions Act.

68 I would dismiss the appeal.

112 P(SL) Act, s 30A(5).

113 According preferential treatment was pursuant to an exchange of letters. This cannot aid in determining whether the law challenged by WMC was a law for the acquisition of property on just terms.

114 *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290; *Nelungaloo Pty Ltd v The Commonwealth* (1952) 85 CLR 545 at 600; *The Tasmanian Dam Case* (1983) 158 CLR 1 at 291.

69 GAUDRON J. The respondent, WMC Resources Ltd ("WMC"), was at all relevant times a member of a joint venture consortium which held a petroleum exploration permit granted to Pelsart Oil NL ("the Permit"). The Permit was granted over 253 blocks or graticular sections bounded by opposing meridians of longitude and parallels of latitude separated, respectively, by 5 minutes of longitude and 5 minutes of latitude¹¹⁵ in that part of the Timor Sea known as the Timor Gap. Australia and the Republic of Indonesia each claim sovereign rights over the Timor Gap, as they did when the Permit was granted.

70 The Permit was granted in 1977 pursuant to s 22 of the *Petroleum (Submerged Lands) Act* 1967 (Cth) ("the P(SL) Act"). It was initially granted for a period of six years but was suspended and extended for five years in 1983 and, again, in 1988. It was, thus, still in force on 9 February 1991 when the "Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an area between the Indonesian province of East Timor and Northern Australia" ("the Treaty") came into force. The Treaty was carried into effect by the *Petroleum (Australia-Indonesia Zone of Cooperation) Act* 1990 (Cth) ("the Cooperation Act")¹¹⁶ and the *Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Act* 1990 (Cth) ("the Consequential Provisions Act").

71 In general terms, the Treaty designated the Timor Gap area over which Australia and Indonesia each claim sovereign rights as a "Zone of Cooperation" and divided it into three areas, namely, Areas A, B and C, with Australia and Indonesia exercising joint control over petroleum exploration and exploitation in Area A, Australia exercising control in Area B and Indonesia in Area C¹¹⁷. The Treaty also established a Ministerial Council and a Joint Authority to exercise control in Area A¹¹⁸.

72 Some of the blocks included in the Permit were either wholly or partly in Area A. However, the Cooperation Act, which came into force on 18 February 1991, established a new regime for Area A, providing that petroleum exploration and exploitation could only be carried out in that Area with the approval of the Joint Authority established by and under the Treaty¹¹⁹. And the Consequential Provisions Act, which also came into force on 18 February 1991, amended various provisions of the P(SL) Act relating to exploration permits. In

115 Section 17 of the *Petroleum (Submerged Lands) Act* 1967 (Cth).

116 The Treaty is set out in the Schedule to the Cooperation Act.

117 Articles 2, 3 and 4.

118 Articles 3, 5, 6, 7, 8 and 9.

119 Sections 7 and 8.

particular, it amended s 5A of the P(SL) Act so that blocks wholly within Area A ceased to exist as blocks and the boundaries of those partly within that Area were changed and their areas reduced¹²⁰. It also inserted s 30A into the P(SL) Act, sub-s (2) of which had the effect of excising from the Permit that part of its area within Area A¹²¹.

- 73 In the view I take, it is not necessary to refer to the other amendments which the Consequential Provisions Act made to the P(SL) Act. It is, however, necessary to refer to s 24(2) of the Consequential Provisions Act. That sub-section provides:

" Where, but for this section, the operation of the amendments [to the P(SL) Act] would result in the acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay compensation of a reasonable amount to the person in respect of the acquisition."

Section 24(1) defines "acquisition of property" and "just terms" as having the same meaning as in s 51(xxxi) of the Constitution.

- 74 The question in this appeal is whether, but for s 24, the amendments to the P(SL) Act would infringe s 51(xxxi) of the Constitution by effecting an acquisition of property other than on just terms. That question was answered in favour of WMC by Ryan J in proceedings commenced by WMC against the Commonwealth in the Federal Court of Australia¹²². An appeal to the Full Federal Court was dismissed by majority (Black CJ and Beaumont J, Cooper J dissenting)¹²³. The Commonwealth now appeals to this Court.

- 75 Section 51(xxxi) of the Constitution confers power on the Commonwealth to legislate 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". Clearly, s 51(xxxi) is primarily a grant of legislative power¹²⁴. However and because it is a specific grant of power subject to a qualification or condition,

120 Section 22 of the Consequential Provisions Act. See also s 17(2) of the P(SL) Act.

121 Section 23 of the Consequential Provisions Act.

122 *Western Mining Corporation Ltd v Commonwealth of Australia* (1994) 50 FCR 305; 121 ALR 661.

123 *Commonwealth of Australia v Western Mining Corporation Ltd* (1996) 67 FCR 153; 136 ALR 353.

124 See *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290-291 per Dixon J. See also *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 168-169 per Mason CJ; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 284-285 per Deane and Gaudron JJ.

other grants of legislative power are construed as not extending to the acquisition of property¹²⁵. At least that is so unless a contrary intention is manifest, as in the case of the taxation power¹²⁶, or the acquisition is of a kind that does not permit of just terms - for example, a penalty by way of forfeiture¹²⁷. Because it operates in the manner described, s 51(xxxi) is, within its area of operation, a guarantee of just terms.

76 The Commonwealth's first argument is that, although the Consequential Provisions Act operated to extinguish rights conferred by the Permit and the P(SL) Act over blocks wholly within Area A and, in the case of blocks partly within Area A, to confine those rights to a reduced area, the Act operates in an area which is outside the guarantee effected by s 51(xxxi). It puts that argument in two ways: first it is said that the Consequential Provisions Act does not effect any acquisition of property; secondly it is put that, if it does, it is, nonetheless, not properly characterised as a law with respect to the acquisition of property. The Commonwealth's alternative argument is that the Consequential Provisions Act does not infringe the guarantee effected by s 51(xxxi) because it operates in such a way that just terms have been provided. In the view I take, it is unnecessary to consider that alternative argument.

77 Because s 51(xxxi) is, in effect, a guarantee of just terms, it is construed liberally¹²⁸. In particular, the expression "acquisition of property" is not construed

125 See *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 370-372 per Dixon CJ. See also *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth* (1943) 67 CLR 314 at 317-318 per Latham CJ; *WH Blakeley & Co Pty Ltd v The Commonwealth* (1953) 87 CLR 501 at 520-521; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 445-448 per Aickin J.

126 See *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 169-171 per Mason CJ, 185-188 per Deane and Gaudron JJ; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 283-284 per Deane and Gaudron JJ; *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1388; 147 ALR 42 at 99-100 per Gummow J.

127 See *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285 per Deane and Gaudron JJ; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 306 per Mason CJ, Deane and Gaudron JJ; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1388; 147 ALR 42 at 99 per Gummow J.

128 See *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303 per Mason CJ, Deane and Gaudron JJ, referring to *Bank of NSW* (Footnote continues on next page)

as requiring a precise correspondence between what is taken and what is received¹²⁹. Even so, for there to be an acquisition there must be a taking and a receipt of some kind. As was pointed out in *The Tasmanian Dam Case*, "it is not enough that [the] legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be."¹³⁰

78 In *Georgiadis v Australian and Overseas Telecommunications Corporation*, Mason CJ, Deane J and I pointed out that, prima facie at least, a statutory right is inherently susceptible of statutory modification or extinguishment and no acquisition of property is effected by a law which simply modifies or extinguishes a statutory right that has no basis in the general law¹³¹. That is because, ordinarily at least, a law of that kind does not confer an interest in property or any other benefit on the Commonwealth or any person; and, ordinarily at least, it does not constitute a law that is properly characterised as a law with respect to the acquisition of property. Thus, when s 51(xxxi) is invoked, it may be helpful to ask whether the law in question does no more than modify or extinguish a statutory right which has no basis in the general law and which is inherently susceptible to modification or extinguishment. However, the questions which, ultimately, have to be answered are whether the law effects an acquisition of property and, if so, whether it is properly characterised as law with respect to the acquisition of property.

79 If a law modifies or extinguishes a statutory right which has no basis in the general law in circumstances in which some person obtains some consequential advantage or benefit in relation to property, that law may and, ordinarily, will effect an acquisition. And there may and, ordinarily, will be an acquisition if a law

v The Commonwealth ("the Bank Nationalization Case") (1948) 76 CLR 1 at 349-350; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 370-371; *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201-202; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509.

129 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 304-305 per Mason CJ, Deane and Gaudron JJ; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1410; 147 ALR 42 at 129 per Gummow J.

130 *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 145 per Mason J. See also at 246-248 per Brennan J, 282-283 per Deane J; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 184-185 per Deane and Gaudron JJ.

131 (1994) 179 CLR 297 at 305-306. See also *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 237 per Mason CJ, Deane and Gaudron JJ.

operates to transfer a right to some other person, even though the right has no basis in the general law and is inherently susceptible of modification or extinguishment. So, too, there may and, ordinarily, will be an acquisition if a law extinguishes a right of that kind (particularly a monopoly right) and vests a similar right or a right with respect to the same subject-matter in some other person. In cases of that kind, there is something more than the mere modification or extinguishment of a right that is inherently susceptible to that course; the law also operates to confer a benefit.

- 80 It is necessary, at this stage, to say something of the rights conferred by an exploration permit and the P(SL) Act. An exploration permit confers a licence which, for practical purposes, is an exclusive licence¹³² "to explore for petroleum, and to carry on such operations and execute such works as are necessary for that purpose, in the permit area."¹³³ In the event that petroleum is discovered, the holder of a permit may nominate a block or blocks for declaration as "a location"¹³⁴ and may then apply for a retention lease¹³⁵ or production

132 Note that s 112 of the P(SL) Act provides that an "access authority" may be granted to, for example, a permittee, lessee or licensee, to conduct limited operations within a block the subject of a permit held by another person where it is necessary or desirable "for the more effective exercise of the rights, or for the proper performance of the duties", of the permittee, lessee or licensee.

133 Section 28 of the P(SL) Act.

134 Sections 36 and 37 of the P(SL) Act.

135 Section 38A of the P(SL) Act.

licence¹³⁶ in respect of that location¹³⁷. A lease¹³⁸ or production licence¹³⁹ must be granted to the applicant if specified conditions are met.

81 It may well be that if, after the discovery of petroleum, an exploration permit were extinguished or modified with the consequence that the right to apply for a lease or production licence was destroyed or otherwise negated, that would constitute an acquisition for the purposes of s 51(xxxi) of the Constitution. In that situation, some benefit with respect to that petroleum would accrue to the Commonwealth or, perhaps, to the authority charged with the grant of leases and production licences. And that would also be the case if an exploration permit were modified or extinguished with the consequence that the holder of a permit were denied a lease or production licence to which it was otherwise entitled. But none of those considerations apply in this case.

82 Clearly, the Consequential Provisions Act operated to deprive the consortium of which WMC was a member of the right to explore for petroleum in that part of Area A previously included in the Permit. But that is not determinative of the matter. It is necessary, also, to ask whether anyone else thereby obtained anything, including, for example, relief from a burden on land, as in *Newcrest Mining (WA) Ltd v The Commonwealth*¹⁴⁰, or from liability with respect to an accrued cause of action, as in *Georgiadis*¹⁴¹.

83 WMC argues that the Commonwealth obtained a benefit as a result of the modification of the area covered by the Permit, contending that "[b]ecause [WMC's] interests constituted an encumbrance on the underlying estate asserted by the Commonwealth in the area ... located within Area A, the extinguishment enhanced that estate." Additionally, WMC puts two other arguments. Its second argument is that the extinguishment of the right to explore within Area A conferred a benefit on the Commonwealth by enabling it to implement the Treaty. The third is that that extinguishment conferred a direct benefit on the Commonwealth and the Ministerial Council and the Joint Authority established under the Treaty.

136 Sections 39A, 40 and 41 of the P(SL) Act.

137 Provision is made for the holder of a lease to apply for a production licence: see ss 40A and 40B of the P(SL) Act.

138 Section 38B of the P(SL) Act.

139 Sections 43 and 44 of the P(SL) Act.

140 (1997) 71 ALJR 1346; 147 ALR 42.

141 (1994) 179 CLR 297. See also *The Commonwealth v Mewett* (1997) 71 ALJR 1102; 146 ALR 299.

84 WMC's first argument expressly assumes and, perhaps, its third argument impliedly assumes that there is an underlying proprietary estate or interest in the continental shelf or, at least, that part within Area A which was excised from the Permit. I do not doubt that, in the exercise of sovereign rights as a coastal nation, the Commonwealth may make laws creating proprietary estates or interests in its territorial seas, the lands under those seas and the resources of those seas and lands. And if it were also to enact a law modifying or extinguishing a statutory right with the consequence that some estate or interest in the sea, the underlying land, or its or their resources were enhanced, that would, in my view, effect an acquisition of property. However, the Commonwealth did not at any stage create any estate or interest within that part of Area A excised from the Permit. It simply conferred a right to explore for petroleum, buttressing that right by making it an offence for anyone else to do so¹⁴². There was, thus, no estate or interest which was or, even, could be enhanced by modification of the Permit.

85 The other contentions made by WMC are that the Consequential Provisions Act conferred a benefit on the Commonwealth by enabling it to implement the Treaty and, that it conferred a benefit on the Ministerial Council and the Joint Authority established under the Treaty by enabling them to exercise authority and control with respect to petroleum exploration and exploitation in the Timor Gap. Those arguments are flawed. The Commonwealth's entry into the Treaty was an exercise of its sovereign rights, rights which were in no way diminished by the grant of the Permit and in no way enhanced by its modification. To the extent that the Treaty was implemented by statute, that was an exercise by the Commonwealth of its constitutional power to legislate with respect to external affairs, again a power that was in no way diminished by the grant of the Permit and in no way enhanced by its modification. And so far as Australian law is concerned, the ability of the Ministerial Council and the Joint Authority to exercise authority and control in Area A derives from the exercise by the Commonwealth of that legislative power. It certainly does not in any way derive from modification of the Permit.

86 In my view, the Consequential Provisions Act simply modified a statutory right which had no basis in the general law and which was inherently susceptible to that course and, thus, did not effect an acquisition of property. Accordingly, it is not strictly necessary to consider the Commonwealth's further argument that the Consequential Provisions Act is not properly characterised as a law with respect to the acquisition of property. Its primary argument in that regard is, in essence, that the Consequential Provisions Act is a law for the adjustment of competing rights and interests of a kind that falls outside s 51(xxxi) of the Constitution. There was a subsidiary argument that s 51(xxxi) does not apply to areas external to Australia.

142 Section 19 of the P(SL) Act.

87 The argument that s 51(xxxi) does not apply to areas external to Australia is not supported by the terms of that paragraph or, indeed, those of any other provision of the Constitution. The argument that the Consequential Provisions Act is, in essence, a law for the adjustment of competing rights and interests overlooks the fact that a law may have more than one character¹⁴³. In my view, a law which effects an acquisition of property will only escape characterisation as a law with respect to the acquisition of property if it adjusts competing claims or interests as part of the general regulation of some subject-matter or area of the law¹⁴⁴ or if it is "an incident of, or a means for enforcing, some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest."¹⁴⁵ The Consequential Provisions Act is highly specific in its operation and is in no sense a law effecting the general regulation of a subject-matter or area of the law or incidental to the general regulation of conduct, rights or obligations.

88 The appeal should be allowed and orders made as proposed by the Chief Justice.

143 See, for example, *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 192-194 per Stephen J; *Re F; Ex parte F* (1986) 161 CLR 376 at 387-388 per Mason and Deane JJ; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 188-189 per Deane and Gaudron JJ.

144 See, for example, *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 236-237 per Mason CJ, Deane and Gaudron JJ; *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 161 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

145 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 189-190 per Deane and Gaudron JJ. See also *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 306-307 per Mason CJ, Deane and Gaudron JJ.

89 McHUGH J. The question in this appeal is whether the Constitution confers power on the Commonwealth to enact the *Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Act* 1990 (Cth) ("the Consequential Provisions Act") which effectively extinguished the rights previously conferred on the respondent, WMC Resources Ltd ("WMC"), by the issue of an exploration permit under the *Petroleum (Submerged Lands) Act* 1967 (Cth) ("the PSLA"). WMC contends that, but for the operation of s 24 of the Act, the Commonwealth has acquired property of WMC other than on just terms in breach of s 51(xxxi) of the Constitution. The Commonwealth responds, inter alia, that the Consequential Provisions Act is authorised by s 51(xxix) of the Constitution (the external affairs power) and that s 51(xxxi) has no relevant operation.

90 Section 24 of the Consequential Provisions Act is entitled "Compensation" and provides:

"(1) In this section, 'acquisition of property' and 'just terms' have the same meaning as in paragraph 51(xxxi) of the Constitution.

(2) Where, but for this section, the operation of the amendments made by this Part would result in the acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay compensation of a reasonable amount to the person in respect of the acquisition.

(3) Where the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in the Federal Court for the recovery from the Commonwealth of such reasonable amount of compensation as the Federal Court determines."

91 Section 51(xxxi) provides that, subject to the Constitution, the Parliament of the Commonwealth has power to make laws with respect to:

"The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws".

Section 51(xxix) empowers the Parliament, subject to the Constitution, to make laws with respect to:

"External affairs".

92 The appeal is brought by the Commonwealth of Australia against an order of the Full Court of the Federal Court, (Black CJ and Beaumont J, Cooper J dissenting)¹⁴⁶ which dismissed an appeal from an order made by Ryan J in the

146 *Commonwealth of Australia v Western Mining Corporation Ltd* (1996) 67 FCR 153; 136 ALR 353.

Federal Court of Australia¹⁴⁷. Ryan J held that the extinguishment of WMC's statutory exploration permit would, but for s 24 of the Consequential Provisions Act, constitute an acquisition of property other than on just terms. In my opinion, s 51(xxix) of the Constitution authorised the relevant provisions of the Consequential Provisions Act which extinguished the permit. Section s 51(xxxi) did not withdraw from that head of power the power to enact those parts of the Consequential Provisions Act extinguishing the permit. Accordingly, the appeal from the order of the Full Court of the Federal Court should be allowed.

The background to the litigation

93 At all material times, WMC held an interest in a petroleum exploration permit issued under the PSLA. Subject to the PSLA, the regulations and any imposed conditions, the permit authorised WMC to explore for petroleum in an area of approximately 130 nautical miles opposite the coast of East Timor, known as the Timor Gap.

(i) Inconsistent assertions of sovereignty over the Timor Gap

94 Both Australia and the Republic of Indonesia assert exclusive sovereign rights over the Timor Gap¹⁴⁸. Australia claims that the continental shelf adjacent to Australia comes to an end at the Timor Trough, a trench in the seabed at distances varying from 30 to 60 nautical miles from the coast of Timor. By contrast, Indonesia claims that the area over which Australia can assert authority under international law does not extend nearly so far. Indonesia claims that there is a continuous continental shelf between Australia and Timor with the result that, under the Convention on the Continental Shelf ("the Geneva Convention")¹⁴⁹, Australia's sovereign rights extend only to the median line between the Australian and Timorese coasts. On this view, Indonesia has sovereign rights from the Timorese coast to the median line.

95 In exercise of its claimed sovereign rights, Australia has granted petroleum exploration permits in the Timor Gap since 1964¹⁵⁰. Before the annexation of East Timor by Indonesia in July 1976, Portugal also purported to exercise sovereign

147 *Western Mining Corporation Ltd v Commonwealth of Australia* (1994) 50 FCR 305; 121 ALR 661.

148 See Lumb, "The Delimitation of Maritime Boundaries in the Timor Sea", (1981) 7 *Australian Year Book of International Law* 72.

149 Signed at Geneva on 29 April 1958; see especially Arts 1, 2 and 6. The Convention is reproduced as Sched 2 of the *Seas and Submerged Lands Act* 1973 (Cth). Australia is, but Indonesia is not, a party to the Convention.

150 *Western Mining Corporation Ltd* (1994) 50 FCR 305 at 323; 121 ALR 661 at 677.

rights in the Timor Gap by granting oil exploration permits. One permit, granted to an American corporation in 1974, extended to the median line between Timor and Australia.

(ii) The Petroleum (Submerged Lands) Act 1967 (Cth) ("the PSLA")

96 In exercise of its claimed sovereign rights over the continental shelf adjacent to it, Australia enacted the PSLA. Section 8A(1) establishes "in respect of the adjacent area in respect of each [Australian] State a Joint Authority consisting of the Commonwealth Minister and the State Minister." Section 8A(3) establishes a similar Joint Authority for the adjacent area in respect of the Northern Territory. Section 5(1) defines "adjacent area" to mean "an adjacent area in respect of a State or Territory ascertained in accordance with section 5A". Section 5A(1) provides:

"For the purposes of this Act, but subject to sub-section (2), the adjacent area in respect of a State or the Northern Territory is so much of the area described in Schedule 2 under the heading that refers to that State or Territory as comprises waters of the sea that -

- (a) are not within the outer limits of the territorial sea of Australia (including the territorial sea adjacent to any island forming part of Australia); and
- (b) are within the outer limits of the continental shelf."

Section 6 also provides:

"For the purposes of this Act and the regulations -

- (a) the space above or below an adjacent area shall be deemed to be in that area; and
- (b) the space above or below an area that is part of an adjacent area shall be deemed to be in that part."

Section 5(1) defines "the continental shelf" to mean:

"the continental shelf, within the meaning of the Convention, adjacent to the coast of Australia (including the coast of any island forming part of a State or Territory) or of a Territory".

Section 5(1) defines "the Convention" to mean the Geneva Convention "a copy of which in the English language is set out in Schedule 1".

97 Part III of the PSLA is entitled "Mining for Petroleum". Section 17 deems the surface of the Earth to be divided into graticular sections by reference to

meridians of longitude and parallels of latitude. Section 17(2) provides that for the purposes of the Act a graticular section that is wholly within an adjacent area constitutes a block and that if a part or parts of a graticular section are within an adjacent area, the area of that part constitutes a block.

98 Division 2 of Pt III of the Act deals with "Exploration Permits for Petroleum". Section 19 prohibits a person from exploring for petroleum in an adjacent area except under, and in accordance with, a permit or as otherwise permitted by Pt III of the Act. The section provides for a penalty of \$50,000 or imprisonment for five years or both. Section 20 empowers a Designated Authority¹⁵¹ to invite applications for the grant by the Joint Authority of a permit in respect of a block or blocks specified in the instrument published in the *Government Gazette*. An application under s 20 must be:

- in the approved form;
- in respect of not more than 400 blocks;
- accompanied by particulars of the applicant's proposals for work and expenditure in respect of the specified blocks; and
- accompanied by a fee of \$3,000¹⁵².

99 Section 22 empowers the Joint Authority to grant or refuse an application for a permit. Under s 22(1)(a)(ii), the Joint Authority may require the applicant "to lodge a security for compliance with the conditions to which the permit, if granted, will from time to time be subject and with the provisions of this Part and of the regulations". Once the applicant has lodged the security (if required) with the Designated Authority, the Joint Authority "shall grant to him an exploration permit for petroleum" in respect of the specified block or blocks¹⁵³.

100 Section 28 is entitled "Rights conferred by permit" and provides:

"A permit, while it remains in force, authorizes the permittee, subject to this Act and the regulations and in accordance with the conditions to which the permit is subject, to explore for petroleum, and to carry on such

¹⁵¹ Section 14 provides that the Designated Authority in respect of the adjacent area is the State or Northern Territory Minister.

¹⁵² s 21.

¹⁵³ s 22(4).

operations and execute such works as are necessary for that purpose, in the permit area."

101 A permit granted otherwise than by way of renewal remains in force for six years and in the case of the renewal of a permit for five years¹⁵⁴. However, s 31 provides that an application for the renewal of a permit shall not exceed an application for a number of blocks in accordance with formulas set out in the section which have the effect that a person cannot obtain a renewal for more than approximately half of the original blocks.

102 Section 34 provides that, if petroleum is discovered in a permit area, the permittee must inform the Designated Authority of the discovery. Section 35 empowers the Designated Authority to give directions to the permittee regarding the discovery.

103 Section 36 provides that where a permit is in force in respect of a discovery block (a block in which petroleum has been discovered), the permittee may or shall, if required to do so by the Joint Authority, nominate a block in respect of which the permit is in force for the purpose of making a declaration under s 37. Section 37 then requires the Designated Authority, by instrument published in the Gazette, to declare that block to be a location for the purposes of Pt III together with such blocks immediately adjoining that block in respect of which the permit is in force and are not included in a location.

104 Division 3 of Pt III of the Act deals with "Production Licences for Petroleum". Section 39 prohibits a person from carrying on operations for the recovery of petroleum in an adjacent area except under and in accordance with a licence or as otherwise permitted by Pt III. The section provides for a penalty of \$50,000 or imprisonment for five years or both.

105 Sections 39A-41 regulate the manner in which a permittee can apply for a production licence in respect of blocks within a location. Section 43 provides that where an application for the grant of a licence has been made the Joint Authority shall inform the applicant that it is prepared to grant to it a licence in respect of the blocks specified in the application and may inform the applicant that it will be required to lodge a security for compliance with any conditions to which the licence, if granted, will "from time to time be subject and with the provisions of this Part and of the regulations." Section 44 allows the applicant three months in which to request the Joint Authority to grant the licence and to lodge any security required.

106 Division 5 of Pt III provides for the registration of instruments. Section 76 requires the Designated Authority to keep a register of titles. Section 78 provides

154 s 29.

43.

that a transfer of title is ineffective until it has been approved by the Joint Authority and an instrument of transfer is registered in accordance with that section. The register is open to inspection by any person upon payment of a fee¹⁵⁵. The register is to be received by all courts as evidence of the matters required or authorised by the Division to be entered in the register¹⁵⁶.

107 Section 101 empowers the Designated Authority to give directions to the registered holder of a permit or licence. Section 103A is entitled "Suspension of rights conferred by permit or lease" and provides:

"(1) Where the Joint Authority is satisfied that it is necessary to do so in the national interest, it shall, by instrument in writing served on the permittee or lessee, suspend, either for a specified period or indefinitely, all or any of the rights conferred by the permit or lease.

...

(5) If an instrument under this section results in the acquisition of property from a person, being an acquisition of property within the meaning of paragraph 51(xxxi) of the Constitution, the Commonwealth is liable to pay to that person such compensation as is determined by agreement between the Commonwealth and that person or, in the absence of agreement, by action brought by that person against the Commonwealth in the High Court or the Supreme Court of, or having jurisdiction in, the State or Territory in relation to which the Joint Authority concerned is established."

108 Section 105 provides for the cancellation of permits and licences where the holder of that instrument has not:

- . complied with a condition or a provision of Pt III or of the regulations;
- . complied with a direction given by the Designated Authority or the Joint Authority; or
- . paid an amount payable under the Act.

(iii) The issuing of Exploration Permit WA-74-P

155 s 86.

156 s 87.

109 On 24 March 1977 the Designated Authority gave to WMC's predecessor in title, Pelsart Oil NL ("Pelsart"), notice of his intention to grant to Pelsart Exploration Permit WA-74-P in respect of 253 blocks in the Timor Gap. The permit was granted on 25 June 1977 for a term of six years and subject to conditions stipulated in the permit. In October 1979, Pelsart entered into a joint venture agreement in relation to the permit with Mesa Petroleum Company ("Mesa"). Under cl 16 of the Heads of Agreement, Mesa acknowledged that it was aware that the northern boundary of the permit area was "not precisely defined and secure because of the incompleteness of international negotiations between Australia and Indonesia." By Deed of Assignment dated 17 April 1984 Mesa assigned to WMC its 16.25 per cent interest in the permit with effect from 4 October 1983.

110 Between November 1977 and January 1982, Pelsart and Mesa sought variations of the conditions of the permit because of the uncertainty caused by the continuing boundary dispute between Australia and Indonesia. By May 1983 the permittees had spent about \$1 million in exploring the permit area. They were optimistic that commercial quantities of petroleum could be recovered in the northern part of the permit area, but were reluctant to expend further capital in exploring areas the title to which was uncertain. Consequently, the permittees requested that their permit be suspended under s 103A of the PSLA for a period of five years and that the term of the permit be extended for the same period. The Joint Authority granted the request on 22 March 1983. Because the border dispute was still unresolved at the expiration of the five year suspension period, the permit was again suspended and extended for five years with effect from 25 June 1988.

(iv) Australia and Indonesia sign the Zone of Cooperation Treaty

111 After the annexation of Timor by Indonesia in July 1976, Australia and Indonesia negotiated on the delimitation of the seabed boundary in the Timor Gap. In September 1988 the two countries agreed in principle to create a joint development area for the exploitation of the disputed area, without prejudice to either country's claim to sovereignty. On 11 December 1989, Australia and Indonesia signed the "Treaty between Australia and the Republic of Indonesia on the Zone of Co-operation in an area between the Indonesian Province of Eastern Timor and Northern Australia". The Treaty came into force on 9 February 1991.

112 Article 2 of the Treaty established a Zone of Cooperation in respect of the Timor Gap divided into "Areas A, B and C". Area B lay closest to the Australian coast, while Area C lay closest to the Timorese coast. Area A lay between Areas B and C. Article 4 gave Australia general control over Area B and Indonesia general control over Area C. Article 3 dealt with Area A and provided:

"1. In relation to the exploration for and exploitation of petroleum resources in Area A, the rights and responsibilities of the two Contracting States shall be exercised by the Ministerial Council and the Joint Authority in accordance

45.

with this Treaty. Petroleum operations in Area A shall be carried out through production sharing contracts.

2. The Joint Authority shall enter into each production sharing contract with limited liability corporations specifically established for the sole purpose of the contract. This provision shall also apply to the successors or assignees of such corporations."

113 The Joint Authority referred to in Art 3 is a different body to the Joint Authority established under the PSLA. Article 7 of the Treaty established the Joint Authority and Art 8 specified its functions. The Joint Authority is responsible to the Ministerial Council established by Art 5. The Ministerial Council consists of an equal number of designated Ministers from Australia and Indonesia.

114 The Treaty makes no reference to the interest of persons holding Australian exploration permits. However, through an exchange of letters, Australia and Indonesia agreed that existing permittees would receive "favourable consideration" upon tendering for production sharing contracts in Area A. The result of the understanding was that the holder of an existing Australian permit would be given a "right to match" the best bid for a specified contract area where a significant proportion of the area falls within the area covered by the Australian permit.

115 Permit WA-74-P, the subject of the present proceedings, was one of six exploration permits issued under the PSLA which covered areas wholly or partly within Area A of the Zone of Cooperation. In fact, the permit fell partly within Area A and partly within Area B.

- (v) The Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990 (Cth) and the Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Act 1990 (Cth)

116 To implement the Treaty, the Commonwealth Parliament enacted the *Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990 (Cth)* ("the Zone of Cooperation Act") and the Consequential Provisions Act. Both Acts commenced operation on 18 February 1991.

117 Section 3 of the Zone of Cooperation Act states that the object of the Act is to enable Australia to fulfil its obligations under the Treaty. Section 4 provides that the Ministerial Council and Joint Authority, established by the Treaty, will exercise the rights and responsibilities of Australia in relation to the exploration and exploitation in Area A. Section 7 prohibits a person from prospecting for petroleum in Area A except with the approval of the Joint Authority. Section 8 prohibits a person from undertaking petroleum operations in Area A except in accordance with a production sharing contract or with the approval of the Joint Authority. The penalty for contravening ss 7 or 8 is imprisonment for five years.

118 Section 22 of the Consequential Provisions Act amended the definition of adjacent area in s 5A of the PSLA so as to exclude from it Area A of the Zone of Cooperation. Section 23 of the Consequential Provisions Act also inserted into the PSLA s 30A which applied to permits that were in force immediately before the commencement of the section in respect of blocks wholly or partly in Area A. Section 24, which I have already set out, requires the Commonwealth to pay compensation for acquisitions of property coming within s 51(xxxi) of the Constitution. Section 30A(2) provided that where a permit covered a block that, as a result of the amendments, was no longer in an adjacent area or had its boundaries changed, the permit was in substance to be amended to take account of that fact. Section 30A(4) revoked all suspensions of permits in force under s 103A and deemed each respective permittee to have applied under s 30 for the renewal by the Joint Authority of the permit in respect of the blocks which, as a result of the amendments, now constitute the permit area.

The litigation

119 WMC brought proceedings against the Commonwealth in the Federal Court of Australia seeking a declaration that the reduction in size of its exploration permit, by statutory amendment, effected an acquisition of property other than on just terms in contravention of s 51(xxxi) of the Constitution. WMC also sought compensation under s 24 of the Consequential Provisions Act, but the Federal Court deferred this claim pending the determination of WMC's entitlement to declaratory relief.

120 At first instance, Ryan J granted the declaration sought¹⁵⁷. His Honour held that the rights conferred on WMC by the permit constituted property within the meaning of s 51(xxxi). By removing fetters on the Commonwealth's power to deal with the subject matter to which WMC's rights had previously attached, the statutory extinguishment of the permit rights effected an acquisition of property within s 51(xxxi). But for the liability imposed on the Commonwealth by s 24 of the Consequential Provisions Act, the acquisition would have been other than on just terms.

121 By majority, the Full Court of the Federal Court (Black CJ and Beaumont J, Cooper J dissenting) dismissed an appeal from the order of Ryan J¹⁵⁸. All members of the Court agreed that WMC's interest in the permit constituted property within the meaning of s 51(xxxi). However, only Black CJ and Beaumont J held that its extinguishment effected an acquisition within s 51(xxxi) which was, but for s 24 of the Consequential Provisions Act, other than on just terms.

The Commonwealth contends that the impugned legislation is valid

122 The Commonwealth contends that WMC is not entitled to declaratory relief on four grounds. First, the Commonwealth contends that WMC's interest in Exploration Permit WA-74-P was not "property" susceptible of acquisition within the meaning of s 51(xxxi). The Commonwealth says that WMC's interest was, by its nature, always liable to modification or extinguishment because of (i) its entirely statutory character independent of the general law or, alternatively, (ii) its specific character as detailed by the particular legislation at issue and the surrounding circumstances, including the international negotiations over disputed boundaries. Second, the Commonwealth contends that the impugned legislation effected merely an extinguishment, rather than an "acquisition", of any property of WMC within the meaning of s 51(xxxi). Third, the Commonwealth contends that, as a matter of characterisation, the impugned legislation is not a law for the acquisition of property within s 51(xxxi) so that the requirement of "just terms" does not apply. Fourth, the Commonwealth contends that, in any event, "just terms" were provided for the alleged acquisition. If the Commonwealth makes out any one of these grounds, WMC's claim must fail and the appeal must be allowed.

123 Before proceeding to deal with the Commonwealth's contentions, it is convenient to examine the scope of s 51(xxxi).

157 *Western Mining Corporation Ltd* (1994) 50 FCR 305; 121 ALR 661.

158 *Western Mining Corporation Ltd* (1996) 67 FCR 153; 136 ALR 353.

Section 51(xxxi)

- 124 Section 51(xxxi) confers power on the Commonwealth Parliament, subject to the Constitution, 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."

- 125 Section 51(xxxi) has traditionally been interpreted, absent a contrary constitutional intention, as abstracting the power of acquisition from the other heads of power in s 51. In *Attorney-General (Cth) v Schmidt*¹⁵⁹ Dixon CJ explained the process of construction as follows:

"[W]hen 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 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."

- 126 Section 51(xxxi) is a source of Commonwealth power to acquire property and in most cases the exclusive source of that power. Because s 51(xxxi) requires that any acquisition of property be on just terms, it has often been said (including by me)¹⁶⁰ that it is a "constitutional guarantee"¹⁶¹. But that description is misleading. Indeed, I think that much of the difficulty that has been felt in applying s 51(xxxi) to a property right which is created by and depends for its enforcement

159 (1961) 105 CLR 361 at 371-372.

160 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 213, 223.

161 See *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 282; *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201-202; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509; *Mutual Pools* (1994) 179 CLR 155 at 168, 180, 184, 185; *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 241; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 277, 283, 285; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303, 312, 320; *Gambotto v Resolute Samantha Ltd* (1995) 69 ALJR 752 at 754; 131 ALR 263 at 267; *The Commonwealth v Mewett* (1997) 71 ALJR 1102 at 1129, 1138, 1139, 1142; 146 ALR 299 at 335, 336, 348, 349, 352, 353; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1357, 1368, 1371, 1382, 1384, 1388, 1391, 1392, 1393, 1395, 1397, 1398, 1399, 1401, 1421, 1422; 147 ALR 42 at 56, 71, 72, 75, 90, 94, 98, 103, 104, 106, 108, 111, 112, 113, 117, 144, 145.

on federal law arises from describing s 51(xxxi) as a guarantee. Section 51(xxxi) is really a power hedged with a qualification. If the Commonwealth wishes to acquire property, its power to do so is ordinarily conditioned on the requirement that it pay just terms. In cases where the existence of the property in issue depends on the general law and not a federal enactment, it may do no great harm to speak of s 51(xxxi) as a constitutional guarantee. But it is not usual to speak of conditions governing the exercise of a constitutional power as a guarantee. You would not ordinarily speak of s 51(xiii) as containing a guarantee concerning State banking. It is more natural to say that the Commonwealth simply has no power to make laws with respect to State banking except when State banking extends beyond the limits of the State concerned.

127 Where property in the form of a federal statutory right is concerned, describing s 51(xxxi) as a constitutional guarantee is likely to invite error. Section 51(xxxi) does not have the same effect as if that paragraph read: "No person shall be deprived of his or her property except on just terms." If that was the correct approach to the construction of s 51(xxxi), arguably every withdrawal or extinguishment of a federal statutory right would require the Commonwealth to pay compensation under that paragraph.

128 Section 51(xxxi) has been liberally interpreted as concerned with matters of substance rather than form¹⁶². If a federal law extinguishes a property right under the general law and as a result the Commonwealth obtains a corresponding benefit (no matter how small), the Commonwealth will ordinarily be taken to have acquired that property¹⁶³. If s 51(xxxi) is read as meaning: "No person shall be deprived of his or her property except on just terms", pension or welfare rights under a federal statute would probably be incapable of reduction or extinguishment. It would be surprising, however, if the Constitution required that Parliament, once it granted a pension or other gratuity, could not reduce or revoke the entitlement without paying compensation.

129 The ease with which the Commonwealth can avoid "contravening" s 51(xxxi) when acquiring a property right created by federal law further illustrates that it is a misnomer to describe s 51(xxxi) as a constitutional guarantee. To avoid "contravening" s 51(xxxi) it would seem that the Parliament need ensure only that the legislation creating the property right contains words to the following effect:

"any property interest created by this Act endures only until varied or extinguished by subsequent federal legislation."

162 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349-350; *Clunies-Ross* (1984) 155 CLR 193 at 201-202.

163 *Georgiadis* (1994) 179 CLR 297.

There would be no need for any express reference to s 51(xxxi) or to the non-applicability of "acquisition", "just terms" or "compensation" for the variation or extinguishment. The short formula quoted above, perhaps inserted in the miscellaneous provisions part of the statute, would protect the Commonwealth from any "contravention" of s 51(xxxi).

130 Yet all the formula does is effectively to recite the traditional doctrine that one Parliament cannot bind a future Parliament¹⁶⁴. It would appear to be a very peculiar result, to say the least, if what is said to be a constitutional guarantee can so easily be avoided by the Parliament.

131 Where a law of the Parliament of the Commonwealth affects a property right, the critical question in relation to s 51(xxxi) is not whether the law infringes any guaranteed right of the property owner. It is not even whether there has been an acquisition of property, although that is always an important question. The critical question is whether s 51(xxxi) has withdrawn from every other head of federal power the authority to enact the law that affects the property in question. To speak in terms of whether the legislation at issue "breaches" or "contravenes" s 51(xxxi) misses the point. If s 51(xxxi) has withdrawn from every other head of federal power the capacity to acquire the property in question, it is the only source of power that can support the acquisition. If the legislation acquiring the property can be supported by another head of federal power that has not relevantly been curtailed by the presence of s 51(xxxi), s 51(xxxi) cannot invalidate the legislation. If the legislation cannot be so supported, it fails for want of power to enact legislation in that form - not because it "contravenes" s 51(xxxi).

132 Commonwealth laws may often affect property interests without being invalid for failing to pay just compensation. Even when the Commonwealth acquires property from a person or State, the Commonwealth may not be required to pay compensation¹⁶⁵. Laws of the Commonwealth may affect a person's property rights in many ways notwithstanding s 51(xxxi) of the Constitution. First, where a Commonwealth law merely varies or extinguishes a property interest, without any corresponding gain or benefit (no matter how slight or insubstantial) to the Commonwealth or some other person, s 51(xxxi) does not affect the content of the power authorising the law. Second, s 51(xxxi) does not withdraw power where the law can fairly be characterised as a law with respect to another s 51 head

164 *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 at 617-618; *South Australia v The Commonwealth* (1942) 65 CLR 373 at 416; *R v Public Vehicles Licensing Appeal Tribunal (Tas)*; *Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 226; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 74-75. See also *Austereo Ltd v Trade Practices Commission* (1993) 41 FCR 1 at 13; 115 ALR 14 at 25.

165 *Burton v Honan* (1952) 86 CLR 169; *Ex parte Lawler* (1994) 179 CLR 270.

of power, rather than a law with respect to the acquisition of property within s 51(xxxi). This will be the case where, for example, the taking of property is an inevitable consequence of the exercise of another s 51 head of power or is a reasonably proportionate consequence of a breach of a law passed under that other head of power¹⁶⁶. Thus, laws providing for acquisitions in the form of the compulsory extraction of provisional income tax under s 51(ii) (the taxation power)¹⁶⁷, the forfeiture of prohibited imports under s 51(i) (the trade or commerce power)¹⁶⁸, and the forfeiture of an unlicensed fishing boat under s 51(x) (the fisheries power)¹⁶⁹ have all properly been construed as falling outside the scope of s 51(xxxi).

- 133 In my view, s 51(xxxi) has an effect on a head of federal power which has created a property interest that is quite different from the effect that s 51(xxxi) has on a head of federal power that, in the absence of s 51(xxxi), would authorise the acquisition of property held under the general law. Cases where the acquisition of property is an inevitable consequence of the exercise of another s 51 power or is a reasonably proportionate consequence of breach of a law passed under a s 51 power are in a special class of their own. Putting them aside, the presence of s 51(xxxi) in the Constitution precludes resort to any other head of s 51 power to acquire property held under the general law or held under a federal law that substituted¹⁷⁰ a statutory right of property for property previously held under a State enactment or the general law. But if a head of s 51 power otherwise authorises the Parliament to confer a statutory right that constitutes property, in circumstances where no specific property right previously existed under a State enactment or the general law, why should s 51(xxxi) be read as withdrawing from that head of power the authority to vary or extinguish the statutory right created under it? It is one thing to say that "it is in accordance with the soundest principles of interpretation"¹⁷¹ to construe a general power in s 51 as not authorising an acquisition of property without just terms when s 51(xxxi) gives an express power

166 *Mutual Pools* (1994) 179 CLR 155 at 219.

167 *Federal Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 263, 270.

168 *Burton* (1952) 86 CLR 169 at 180-181.

169 *Ex parte Lawler* (1994) 179 CLR 270.

170 The rule of construction to which Dixon CJ referred in *Schmidt* ((1961) 105 CLR 361 at 371-372) clearly prevents the Parliament from relying on its general powers to acquire forms of property which the Parliament has created in substitution for property held under the general law. Otherwise, by a two step process of substitution and then extinguishment, the Parliament could avoid the effect of the rule of construction that s 51(xxxi) brings into operation.

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

to acquire property only on just terms. It is another matter altogether to conclude that the presence of s 51(xxxi) prevents another s 51 power from varying or revoking a right that it has created, merely because that right can be characterised as property and the Commonwealth or some other person obtains a benefit from the variation or revocation.

134 The power to make laws with respect to a subject described in s 51 carries with it the power to amend or repeal a law made on that subject. A property interest that is created by federal legislation, where no property interest previously existed, is necessarily of an inherently determinable character and is always liable to modification or extinguishment by a subsequent federal enactment. Section 51(xxxi) therefore does not ordinarily withdraw from the Parliament the authority to use another s 51 power to revoke or amend legislation that has been passed under that power, even when the legislation has created a property right. The fact that the Commonwealth or some other person might be viewed as benefiting from that alteration or revocation is irrelevant.

135 In *Allpike v The Commonwealth*¹⁷², this Court held that s 51(xxxi) did not apply where, under the authority of a Commonwealth legislative provision, a Commonwealth officer directed that the undrawn and deferred pay of a dead soldier and the accumulated interest should be divided in a way that conflicted with his will. Dixon J said¹⁷³:

"The provision applies prospectively from the passing of the Act in 1942 to persons who die after the date of the statute. So far as they are concerned, the provision deals with the devolution on death of money which will become payable under statute. Whether there will or will not be a right vested in them to the pay or deferred pay or allowances while they are serving as soldiers, the provision attaches to their title to the money a condition affecting its devolution on death. To do this is within the defence power. I think there is no basis for the argument that s 51(xxxi) of the Constitution must be invoked in order to support a legislative direction of the course of devolution on death of property when such a thing falls within the purposes of the Commonwealth. Such a direction involves no acquisition of property and raises no question of just terms. The whole matter of the disposition on death of the pay, deferred pay and allowances of a soldier appears to me to be within Federal legislative power."

136 *Allpike* is authority for the proposition that the Commonwealth can regulate a federal statutory entitlement to a payment even after the beneficiary of the payment has fulfilled the conditions entitling that person to the payment provided

¹⁷² (1948) 77 CLR 62.

¹⁷³ (1948) 77 CLR 62 at 76-77.

that the entitlement was given subject to the condition that it could be regulated. Section 51(xxxi) has no application in such circumstances.

- 137 The decision in *Allpike* accords with a long line of authority in the United States concerning statutory gratuities and the Takings Clause in the US Constitution¹⁷⁴. In *Lynch v United States*¹⁷⁵ Brandeis J, in delivering the judgment of the Supreme Court, stated the governing principle as being:

"Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress."

- 138 As a result, for more than a century the Supreme Court and federal courts in the United States have held that welfare and pension rights are not vested property rights and that Congress may cancel them at any time¹⁷⁶. As I pointed out in *Health Insurance Commission v Peverill*¹⁷⁷ eighteen years before the enactment of the *Commonwealth of Australia Constitution Act* 1900, the Supreme Court of the United States had declared¹⁷⁸:

"No pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion."

- 139 The reasoning of members of this Court in *Georgiadis v Australian and Overseas Telecommunications Corporation*¹⁷⁹ accords with this interpretation of the effect of s 51(xxxi) on other heads of s 51 power. In *Georgiadis*, the Court held that s 51(xxxi) prevented the Parliament of the Commonwealth from abolishing a vested cause of action in tort for damages against the

174 The Fifth Amendment to the US Constitution relevantly provides: "[N]or shall private property be taken for public use, without just compensation."

175 (1934) 292 US 571 at 577.

176 *United States v Teller* 107 US 64 at 68 (1882); *Lynch* 292 US 571 at 576-577 (1934); *US Railroad Retirement Board v Fritz* 449 US 166 at 174 (1980); *Bowen v Gilliard* 483 US 587 at 604, 607 (1987); *Hoffman v City of Warwick* 909 F 2d 608 at 616-617 (1990). See also *New York Central Railroad Co v White* 243 US 188 at 198 (1917); *Atkins v Parker* 472 US 115 at 129-130 (1985).

177 (1994) 179 CLR 226 at 262.

178 *Teller* 107 US 64 at 68 (1882).

179 (1994) 179 CLR 297.

Commonwealth¹⁸⁰. I dissented from the decision in that case because I regarded this property interest as dependent for its existence solely on federal legislation, namely the *Judiciary Act* 1903 (Cth)¹⁸¹. I held that s 51(xxxi) did not apply to prevent the Commonwealth from modifying or revoking that property interest. I said¹⁸²:

"It is true that, as a result of that Act [ie the Comcare Act] the plaintiff has been deprived of a chose in action, and a chose in action is property for the purposes of s 51(xxxi) of the Constitution. Furthermore, the defendant has gained a corresponding benefit of commensurate value. However, the Commonwealth authority has not acquired the property of the plaintiff. This is because the right of the plaintiff to bring his action was dependent upon federal law and was always liable to be revoked by federal law. A right which can be extinguished by a federal law enacted under a power other than s 51(xxxi) is not a law which falls within the terms of that paragraph of the Constitution." (footnote omitted)

140 Contrary to my view, the majority of the Court held that the cause of action against the Commonwealth arose from the common law, not the Judiciary Act. However, comments by Mason CJ, Deane and Gaudron JJ, who were part of the majority, indicate that they accepted that a federal law revoking or extinguishing a property right created by federal law stands in a different category from a federal law revoking or extinguishing a property right arising under the general law. Their Honours said¹⁸³:

"'acquisition' in s 51(xxxi) extends to the extinguishment of a vested cause of action, at least where the extinguishment results in a direct benefit or financial gain ... and the cause of action is one that arises under the general law. The position may be different in a case involving the extinguishment or modification of a right that has no existence apart from statute. That is because, prima facie at least and in 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."

¹⁸⁰ Specifically, a cause of action that arose before the commencement of s 44(1) of what is now called the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) ("the Comcare Act").

¹⁸¹ (1994) 179 CLR 297 at 326.

¹⁸² (1994) 179 CLR 297 at 325. See also *Mutual Pools* (1994) 179 CLR 155 at 223; *Mewett* (1997) 71 ALJR 1102 at 1127; 146 ALR 299 at 333.

¹⁸³ (1994) 179 CLR 297 at 305-306.

Their Honours then firmly declared¹⁸⁴:

"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 Constitution".

- 141 This Court's decision in *Peeverill*¹⁸⁵ also supports the proposition that the Parliament of the Commonwealth can modify or revoke a property interest that is created by federal law even though the modification or revocation is not made on just terms. In *Peeverill*, a law of the Commonwealth Parliament had given pathologists a statutory right to receive payment out of public funds for medical services rendered. Subsequently, the Commonwealth Parliament legislated to reduce retrospectively the amount of money payable for the services already provided¹⁸⁶. The Court held that the legislation was valid. Mason CJ, Deane and Gaudron JJ said¹⁸⁷:

"It is significant that the rights that have been terminated or diminished are statutory entitlements to receive payments from consolidated revenue which were not based on antecedent proprietary rights recognized by the general law. Rights of that kind are rights which, as a general rule, are inherently susceptible of variation. That is particularly so in the case of both the nature and quantum of welfare benefits, such as the provision of medicare benefits in respect of medical services ... Where [change] is effected by a law which operates retrospectively to adjust competing claims or to overcome distortion, anomaly or unintended consequences in the working of the particular scheme, variations in outstanding entitlements to receive payments under the scheme may result. In such a case, what is involved is a variation of a right which is inherently susceptible of variation and the mere fact that a particular variation involves a reduction in entitlement and is retrospective does not convert it into an acquisition of property. More importantly, any incidental diminution in an individual's entitlement to payment in such a case does not suffice to invest the law adjusting entitlements under the relevant statutory scheme with the distinct character

¹⁸⁴ (1994) 179 CLR 297 at 306.

¹⁸⁵ (1994) 179 CLR 226.

¹⁸⁶ See the *Health Insurance (Pathology Services) Amendment Act 1991* (Cth) amending the *Health Insurance Act 1973* (Cth).

¹⁸⁷ (1994) 179 CLR 226 at 237.

of a law with respect to the acquisition of property for the purposes of s 51(xxxi) of the Constitution".

- 142 *Peeverill* is a clear authority for the proposition that, where the Parliament has created a vested right of property under a head of power such as s 51(xxiiiA)¹⁸⁸ of the Constitution, it retains the power to amend, revoke or extinguish that right¹⁸⁹.

The power to enact the Consequential Provisions Act

- 143 The Parliament of the Commonwealth enacted the PSLA, which created the exploration rights owned by WMC, under the power conferred by s 51(xxix) to make laws with respect to: "External affairs"¹⁹⁰. These exploration rights did not exist, whether under a State enactment or the common law, before the Commonwealth enacted the PSLA. The question then is whether the power conferred by s 51(xxix) is sufficient also to authorise the enactment of Consequential Provisions Act so as to extinguish the rights previously conferred on WMC under that power. Or does the presence of s 51(xxxi) in the Constitution withdraw from the content of s 51(xxix) the necessary legislative power to enact the Consequential Provisions Act?

- 144 The Commonwealth contends that the defeasible nature of the rights¹⁹¹ granted to WMC under the statutory permit effectively defeats WMC's claim for

188 Section 51(xxiiiA) provides that, subject to the Constitution, the Parliament of the Commonwealth has power to make laws with respect to:

"The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances".

- 189** In this Court's recent decision in *Newcrest Mining* (1997) 71 ALJR 1346; 147 ALR 42, given the manner in which the parties' arguments were developed, it was unnecessary to consider the proposition that a property right created by federal legislation can be extinguished or varied by subsequent legislation without s 51(xxxi) applying. Nor was the proposition addressed by any members of the Court in *Australian Tape Manufacturers* (1993) 176 CLR 480.

- 190** cf *Horta v The Commonwealth* (1994) 181 CLR 183.

- 191** In my view these rights were property for the purpose of s 51(xxxi). Intangible property rights and "innominate and anomalous interests" qualify as property for the purpose of s 51(xxxi) (*Bank of NSW* (1948) 76 CLR 1 at 349). Under the PSLA, WMC's permit was capable of being assigned (s 78) (subject to approval by the Joint Authority) or the subject of other dealings (s 81) and of being recorded in a public register so as to be clearly identifiable to third parties (s 76). The permit was a right
(Footnote continues on next page)

declaratory relief. There is both a broad and a narrow basis for this contention. Under the broad basis, the Commonwealth contends that a right or interest that is entirely statutory is, by its nature, inherently susceptible to modification or extinguishment and outside the ambit of s 51(xxxi). Under the narrow basis, the Commonwealth contends that, as a matter of interpretation of the particular legislation creating the interest in question (ie the PSLA), it is clear that the interest was inherently subject to modification by amendments to the PSLA from time to time. The Commonwealth says that the factual background to the grant of the permit, in particular the uncertainty regarding the seabed boundary in the Timor Gap, reinforces this interpretation.

145 The Commonwealth's submissions were shaped largely by the notion that s 51(xxxi) is a true guarantee of property rights. This notion is, as I have said, misleading. However, the substance of the Commonwealth's contentions is undoubtedly correct. The rights of WMC were created by the PSLA, a federal statute enacted under the power conferred by s 51(xxix) of the Constitution. That being so, the rights were always liable to be amended, revoked or extinguished by legislation enacted under that same power. In the case of property rights created by federal law under a head of s 51 power, in circumstances where no specific property right previously existed under a State enactment or the general law, the Parliament retains the authority under that head of power to extinguish the right even if a consequence of that extinguishment is to vest some benefit in the Commonwealth or some other person. Section 51(xxxi) does not withdraw from the Parliament the power to repeal or amend laws that it has created in those circumstances. Accordingly, the Commonwealth succeeds in its broad submission on defeasibility.

146 In my view, the Commonwealth also succeeds in its narrow submission on defeasibility. Independently of the Parliament's traditional right to repeal or amend statutory rights that it has created, exploration permits granted under the PSLA were by the terms of that legislation inherently subject to variation by subsequent amendment. This is evident from the combined force of ss 5(8) and 28 of the Act¹⁹². Section 5(8) states that a reference in the Act to a permit is "a reference to the permit ... as varied for the time being under this Act." Section 28 refers to the rights conferred by a permit "while it remains in force" and as being "subject to this Act". Parliament intended that the scheme it created under the PSLA should

that the law would protect by means of the prerogative writs and injunctive relief. The defeasible character of the permit, if established, is relevant only to the question whether s 51(xxxi) withdraws from the content of s 51(xxix) the power to enact the Consequential Provisions Act, not whether the permit constituted "property".

192 Evidence of the continuing uncertainty regarding the seabed boundaries in the Timor Gap is relevant only as part of the background and context in which the PSLA was enacted.

retain sufficient flexibility so that it could be readily altered, by statutory amendment, in response to changing circumstances or policy¹⁹³. Because at the time of their creation, permit rights under the PSLA were inherently subject to variation or extinguishment, subsequent legislation which does exactly that which has been contemplated is not invalid for want of power. In such circumstances, s 51(xxxi) does not withdraw from Parliament the power to enact the amending legislation under s 51(xxix).

147 WMC contends that the limited and specific powers of cancellation and suspension in the PSLA are inconsistent with the view that the permit rights were inherently defeasible. Black CJ adopted this approach in the Full Court¹⁹⁴. However, the limited powers of cancellation and suspension are conferred on the Joint Authority, not the Parliament. There is nothing to prevent the Commonwealth Parliament from creating a flexible scheme under which a statutory authority is established and given certain supervisory powers within defined limits while at the same time the Parliament retains an overall capacity to alter or revoke rights granted under the legislation. This is what Parliament has done here.

148 WMC further contends that the PSLA should not be construed as envisaging inherent defeasibility of permit rights because such a conclusion:

"would lead to the untenable result that a production licence or a pipeline licence could be acquired at any time without compensation, rendering useless the massive and long-term investment and equipment associated with such licenses."

149 Black CJ also adopted this argument in the Full Court¹⁹⁵. But whether or not the presence of s 51(xxxi) in the Constitution prevents the Parliament using another head of power to acquire property without paying just terms cannot depend on the harshness of the result that the acquisition occasions. The question is one of constitutional power, not political morality. If s 51(xxxi) of the Australian Constitution was a guarantee of property rights in the way that the Fifth Amendment¹⁹⁶ to the United States Constitution is a guarantee of property rights, the result of this case might well be different. The rights taken from WMC by the

193 cf *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 165; 119 ALR 108 at 121.

194 *Western Mining Corporation Ltd* (1996) 67 FCR 153 at 162; 136 ALR 353 at 360.

195 *Western Mining Corporation Ltd* (1996) 67 FCR 153 at 165; 136 ALR 353 at 362-363. See also *Newcrest Mining* (1997) 71 ALJR 1346 at 1413; 147 ALR 42 at 133-134 per Kirby J.

196 "[N]or shall private property be taken for public use, without just compensation."

Consequential Provisions Act are private rights and they have been taken without compensation. But while the presence of s 51(xxxi) limits the power of the Parliament of the Commonwealth to acquire property without paying just terms, it does not have the same effect as a true guarantee of property such as is found in the Fifth Amendment¹⁹⁷. As a result, property owners in Australia sometimes have no protection from federal laws that take their property. In those cases, they are in the same position as the owners of property in the various States who have no such constitutional protection from acquisitions under State law, whether or not the relevant property arises under statute or the general law. In the past, for example, States have compulsorily acquired valuable mining interests without any constitutional requirement to pay just compensation¹⁹⁸.

- 150 It follows that s 51(xxxi) of the Constitution did not withdraw from the Commonwealth Parliament the power under s 51(xxix) to enact legislation that extinguished the property rights of WMC.

Order

- 151 The appeal should be allowed. I agree with the order proposed by Brennan CJ.

197 One notable distinction is that, unlike in the United States, the taking of property for public use is not sufficient to require the Parliament to pay just compensation. There must be an acquisition by the Commonwealth or some other person.

198 cf *Coal Acquisition Act* 1981 (NSW) which vested in the Crown all coal in New South Wales which, but for the passing of the Act, would be vested in any other person. The Crown obtained the coal free from all trusts, leases, licenses, obligations, estates, interests and contracts.

152 GUMMOW J. The Commonwealth appeals against the orders of the Full Court of the Federal Court (Black CJ and Beaumont J; Cooper J dissenting)¹⁹⁹ dismissing with costs its appeal, by leave, against declaratory relief granted by a judge of that Court (Ryan J)²⁰⁰. The primary judge granted this relief in an action commenced against the appellant by the respondent ("WMC") and upon determination of a question which had been ordered pursuant to O 29 r 2 of the Federal Court Rules for decision before the hearing of any other question in that action.

153 The action was instituted by WMC under s 24 of the *Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Act* 1990 (Cth) ("the Consequential Provisions Act"). The declaration made by Ryan J²⁰¹ and upheld in the Full Court dealt with the reduction brought about by the Consequential Provisions Act in the size of the area covered by Exploration Permit No WA-74-P ("the Permit") issued under Div 2 of Pt III of the *Petroleum (Submerged Lands) Act* 1967 (Cth) ("the PSL Act")²⁰². The substance of the declaration was that, but for s 24 of the Consequential Provisions Act, the reduction brought about by that Act would have been an acquisition of property from WMC otherwise than on just terms.

154 Part 8 (ss 20-24) of the Consequential Provisions Act makes various amendments to the PSL Act consequent upon the commencement of the *Petroleum (Australia-Indonesia Zone of Cooperation) Act* 1990 (Cth) ("the Cooperation Act"). Section 24 of the Consequential Provisions Act states:

"(1) In this section, '**acquisition of property**' and '**just terms**' have the same meaning as in paragraph 51(xxxi) of the Constitution.

(2) Where, but for this section, the operation of the amendments made by this Part would result in the acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay

199 *Commonwealth of Australia v Western Mining Corporation Ltd* (1996) 67 FCR 153; 136 ALR 353.

200 *Western Mining Corporation Ltd v Commonwealth of Australia* (1994) 50 FCR 305; 121 ALR 661.

201 *Western Mining Corporation Ltd v Commonwealth of Australia* (1994) 50 FCR 305 at 307-308, 344; 121 ALR 661 at 662-663, 696.

202 Division 3 of Pt III of the PSL Act provides for the grant of production licences for the recovery of petroleum in an adjacent area. This litigation does not concern any production licence.

compensation of a reasonable amount to the person in respect of the acquisition.

(3) Where the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in the Federal Court for the recovery from the Commonwealth of such reasonable amount of compensation as the Federal Court determines."

The Permit

155 The Permit had been issued to Pelsart Oil NL ("Pelsart") on 25 June 1977 for a period of six years. On 21 December 1979, Mesa Petroleum Co ("Mesa") exercised its option under an agreement with Pelsart to acquire what was identified as an undivided interest of 16.25 per cent in the Permit. By deed of assignment dated 17 April 1984, Mesa assigned to WMC its entitlement with effect from 4 October 1983. This was after the expiration of six years from 25 June 1977, the term of the Permit. The steps by which the Permit had been kept on foot are discussed later in these reasons. Following other transactions, entitlements in the remaining percentage interest in the Permit were vested as to 55.6 per cent in Petroz NL, as to 20 per cent in Pontoon NL and as to 8.15 per cent in Laist Pty Ltd. None of these other corporations is a party to the present action.

156 The PSL Act provided for the issue of exploration permits in respect of areas constituted by "blocks". Each block comprises a graticular section of the surface of the earth within an "adjacent area" and measured in accordance with s 17. The "adjacent area" in respect of a particular State or the Northern Territory was an area within the outer limits of the continental shelf but not within the outer limits of the territorial sea of Australia (s 5A). The Permit comprised blocks in the adjacent area in respect of Western Australia. The Permit was issued following application by Pelsart in response to a notice inviting applications and issued under s 20 of the PSL Act by the Designated Authority for the State of Western Australia. After the issue of the Permit, Pt IA (ss 8A-8G) was inserted in the PSL Act by s 10 of the *Petroleum (Submerged Lands) Amendment Act 1980* (Cth) ("the 1980 Act"). Part IA was headed "THE JOINT AUTHORITIES" and it established in respect of areas including that covered by the Permit a Joint Authority which consisted of a Minister of the Commonwealth and a Minister of the State of Western Australia (s 8A).

The continental shelf

157 Australia, but not the Republic of Indonesia ("Indonesia"), is a party to the Convention on the Continental Shelf which was done at Geneva on 29 April 1958 ("the Convention"). The text of the Convention is set out in Sched 1 to the PSL Act and also in Sched 2 to the *Seas and Submerged Lands Act 1973* (Cth) ("the Seas and Submerged Lands Act"). Articles 1 and 2 of the Convention state:

"Article 1

For the purpose of these articles, the term 'continental shelf' is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Article 2

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

4. The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil."

158 The area covered by the Permit was, within the meaning of Arts 1 and 2, within the continental shelf (but outside the area of the territorial sea) in respect of which Australia was the coastal State exercising sovereign rights for the purpose of exploring the continental shelf and exploiting its natural resources, including the mineral and other non-living resources of the seabed and subsoil.

159 By s 11 of the Seas and Submerged Lands Act, it was declared and enacted that "the sovereign rights of Australia as a coastal State in respect of the continental shelf of Australia, for the purpose of exploring it and exploiting its natural resources, are vested in and exercisable by the Crown in right of the Commonwealth". The validity of s 11, and of the statute as a whole, was upheld in *New South Wales v The Commonwealth*²⁰³.

203 (1975) 135 CLR 337.

160 Section 6 of the Seas and Submerged Lands Act declared and enacted that "the sovereignty in respect of the territorial sea, and in respect of the airspace over it and in respect of its bed and subsoil, is vested in and exercisable by the Crown in right of the Commonwealth". Section 15B(1) of the *Acts Interpretation Act* 1901 (Cth) ("the Acts Interpretation Act") provides, subject to the appearance of the contrary intention, that, with respect to legislation passed before or after the enactment of s 15B²⁰⁴, the provisions thereof shall be taken to have effect in relation to the "coastal sea" of Australia as if it were part of Australia and references to Australia or to the Commonwealth included the "coastal sea" of Australia. The term "coastal sea" is defined in s 15B(4) so as to include the seabed and subsoil beneath the territorial sea of Australia and the airspace over it but is not defined so as to include the continental shelf beyond the territorial sea. Section 15B reflects the assertion of sovereignty in s 6 of the Seas and Submerged Lands Act. In *New South Wales v The Commonwealth*, Jacobs J said of the word "sovereignty" that it "expresses a concept notoriously difficult of definition"²⁰⁵. However, it is apparent that the sovereignty spoken of in s 6 with respect to the territorial sea is to be distinguished from and is a stronger term than the term "sovereign rights" used in s 11 with respect to the continental shelf.

161 An analogy is provided by the distinction drawn by Jacobs J in *New South Wales v The Commonwealth* between the vesting in the Crown as part of England of the foreshore between high and low water and the beds of all waters *intra fauces terrae* over which tidal waters flowed²⁰⁶, and the rights asserted by the English Crown over the open seas. "The breadth or width of [this] assertion from time to time depended on high politics and ... on considerations of power and of expediency."²⁰⁷ In the former case, but not the latter, the foreshore and associated areas were vested in the Crown under the common law and were subject thereto and could be held under rights springing from the common law²⁰⁸. In describing those areas in *New South Wales v The Commonwealth*, Jacobs J said²⁰⁹:

"They could be parts of manors or honours, and could therefore be the subject of tenures and estates under the English law of real property. Rights in respect of them could rise by prescription as well as by proved grant. Those

204 Section 15B was added by s 4 of the *Acts Interpretation Amendment Act* 1976 (Cth), which commenced on 6 December 1976.

205 (1975) 135 CLR 337 at 479.

206 (1975) 135 CLR 337 at 486-490.

207 (1975) 135 CLR 337 at 489.

208 *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 486-487.

209 (1975) 135 CLR 337 at 486-487.

rights could exist in individuals or corporations or in communities of free inhabitants."

It is important for the present case to bear in mind that the subject of the Permit was the conduct of activities within the continental shelf but outside the area of the territorial sea. It was in the bed and subsoil of the territorial sea that sovereignty was vested in the Commonwealth by s 6 of the Seas and Submerged Lands Act.

The Timor Gap

162 The Permit comprised more than 200 blocks situated in the locality of a geomorphological area known as the Timor Gap. This was and remains a subject of disputed sovereign rights between Australia and Indonesia. Australia claims that it is entitled at international law to exercise sovereign rights in relation to the continental shelf of Australia extending to the Timor Trough. This is a deep trench in the seabed between 30 and 60 nautical miles from the coast of the island of Timor. On this view, Australian sovereignty extends significantly past the median line between Timor and Australia. Indonesia claims that it is entitled to exercise sovereign rights at least to the median line.

163 On 11 December 1989, there was concluded the "Treaty between Australia and the Republic of Indonesia on the Zone of Co-operation in an Area between the Indonesian Province of East Timor and Northern Australia" ("the Treaty"). The Treaty came into force on 9 February 1991. The events leading up to the conclusion of the Treaty were described as follows in *Horta v The Commonwealth*²¹⁰:

"In December 1975, [Indonesia] occupied the territory of East Timor. Since that occupation, Indonesia has remained in effective occupation of that territory and, since 1976, has claimed sovereignty over it under international law. Since 1979, the Commonwealth of Australia ('Australia') has accepted that claim and recognized Indonesia's sovereignty over East Timor.

Australia and Indonesia each claim sovereign rights under international law over respective areas of the continental shelf between the coast of East Timor and the coast of mainland Australia. The area claimed by Australia and the area claimed by Indonesia partly overlap. That area of overlapping claims, which is wholly outside Australian and Indonesian territorial waters, is hereinafter referred to as 'the area of the Timor Gap'. Between 1979 and 1989, Australia and Indonesia negotiated an agreement to designate the area of the Timor Gap as a 'Zone of Cooperation' and to make provision permitting and regulating the exploration for, and the exploitation of, petroleum

210 (1994) 181 CLR 183 at 190.

resources therein, pending a permanent continental shelf delimitation between the two countries in relation to the area."

Suspension of the Permit

164 The dispute between Australia and Indonesia was a matter of public notice at the time the Permit was issued in 1977. The primary judge found that concern that an unfavourable resolution of the dispute between Australia and Indonesia might render futile expenditure undertaken pursuant to the Permit led Pelsart and then Mesa to request from the Designated Authority administering the PSL Act various variations to the work commitments stipulated in the Permit²¹¹.

165 Section 31 of the PSL Act dealt with applications for renewal of the Permit. The effect of s 31 was, put shortly, to require a reduction by 50 per cent in the area covered by the Permit in any application for its renewal beyond the initial six year term. However, s 103A was inserted in the PSL Act²¹² with effect from 14 February 1983 and it empowered the Joint Authority to suspend, either for a specified period or indefinitely, all or any of the rights conferred by the Permit. After amendment in 1985²¹³ to include suspension of leases as well as permits, sub-ss (1)-(4) of s 103A stated:

"(1) Where the Joint Authority is satisfied that it is necessary to do so in the national interest, it shall, by instrument in writing served on the permittee or lessee, suspend, either for a specified period or indefinitely, all or any of the rights conferred by the permit or lease.

(2) Where any rights are suspended in accordance with sub-section (1), any conditions required to be complied with in the exercise of those rights are also suspended.

(3) The Joint Authority may, by instrument in writing served on the permittee or lessee, terminate a suspension of rights under sub-section (1).

(4) Where rights conferred by a permit or lease are suspended in accordance with sub-section (1), the Joint Authority may, by the instrument of suspension or by a later instrument in writing served on the permittee or

211 (1994) 50 FCR 305 at 317-319; 121 ALR 661 at 671-673.

212 By s 41 of the 1980 Act.

213 Section 103A was amended by s 38 and the Schedule to the *Petroleum (Submerged Lands) Amendment Act 1985* (Cth).

lessee, extend the term of the permit or lease by a period not exceeding the period of the suspension."

166 The text of the conditions attached to the Permit were set out in the judgment of the primary judge²¹⁴. They included a requirement (condition 1) that in the first and second years respectively the permittee expends not less than \$70,000 on data study and \$420,000 on seismic survey. In the third year, not less than \$4.595 million was to be expended on one well and, in the sixth and final year, not less than \$6.12 million was to be expended on another well. The permittee was not to recover any petroleum from the permit area except as a result of production testing of a well (condition 3). Section 127 of the PSL Act provided that, "upon recovery" of any petroleum by a permittee in the permit area, the petroleum would become the property of the permittee²¹⁵.

167 As I have indicated, WMC took its assignment on 17 April 1984 with effect from 4 October 1983 and after the lapse of six years from the issue of the Permit. The primary judge described steps taken between 1983 and 1988 as follows²¹⁶:

"By May 1983 the permittees had expended almost \$1m in exploration of the permit area and were, on their evidence, optimistic that commercial quantities of petroleum could be recovered in the northern part of the permit area. However, because of the seabed border dispute, the permittees were concededly reluctant to expend risk capital in exploring areas the title to which was uncertain. The permittees also felt themselves constrained by the policy of the Designated Authority that there should be no drilling which might affect the negotiations between Australia and Indonesia.

Under the renewal procedures by the [PSL Act], a renewing permittee is required to relinquish not less than 50 per cent of the permit area. That necessitates the selection of that half of the area which has to be relinquished. Reluctant to make such a selection, the permittees requested that their permit be suspended pursuant to s 103A of the [PSL Act] for a period of five years and that the term of the permit be extended for the same period. That request was acceded to and an interim suspension was made by the Joint Authority on 22 March 1983. The suspension notice suspended for a period of five

214 (1994) 50 FCR 305 at 315; 121 ALR 661 at 669-670.

215 cf *Gowan v Christie* (1873) LR 2 Sc & Div 273 at 284; *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 192; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1399-1400; 147 ALR 42 at 115.

216 (1994) 50 FCR 305 at 319-320; 121 ALR 661 at 673-674.

years all of the rights conferred by the permit with the exception of the right to carry on and execute marine geophysical surveys in the area.

The Commonwealth endorsed the decision to suspend the permit because it formed the view that renewal over a reduced area might weaken Australia's claim to sovereignty in the disputed area.

As the border dispute remained unresolved, the permit was again suspended and extended for five years by instrument dated 22 June 1988 with effect from 25 June 1988."

The Treaty

168 The Treaty was concluded some 18 months after the suspension and extension of the Permit. The text of the Treaty, including the annexed maps which delineate the "Zone of Cooperation" referred to therein, is the Schedule to the Cooperation Act. The object of that statute is to enable Australia to fulfil its obligations under the Treaty (s 3). The Cooperation Act commenced on 18 February 1991. The validity of the Cooperation Act and the Consequential Provisions Act was upheld in *Horta v The Commonwealth*²¹⁷.

169 The Treaty creates a joint development area known as the "Zone of Cooperation" for the purpose of permitting the immediate exploitation of the disputed area without prejudice to the claim of each country to sovereign rights (Art 2(3), (4)). The Zone of Cooperation comprises three areas. In Area A the exploration for and exploitation of petroleum resources is subject to joint control by Australia and Indonesia. Responsibility for the regulation of Area A is vested by the Treaty in two bodies established thereunder and known as the Ministerial Council (Pt III) and the Joint Authority (Pt IV). In Areas B and C, the exploration for and exploitation of petroleum resources is regulated by Australia and Indonesia respectively, but subject to notification and tax-sharing arrangements. The Permit fell partly in Area A and partly in Area B. Some 120 blocks fell wholly in Area A, and 90 in Area B. Some blocks fell partly within Area A and others partly within Area B. A small portion in the south-west area of the Permit fell wholly outside the Zone of Cooperation.

170 At the time the Treaty was signed, the Governments of Australia and Indonesia exchanged letters which recorded an understanding as to the treatment by the Ministerial Council with respect to Area A. It was agreed that the Ministerial Council would give favourable consideration to applications made by the holders of the Australian permits. The Permit was one of six exploration permits under the PSL Act which were wholly or partly within Area A. The "favourable consideration" was to be expressed by giving to the holders of the

217 (1994) 181 CLR 183.

Australian permits a right to match the best bid for specified contract areas, a significant proportion of which fell within the area of the former Australian permits.

- 171 Section 6 of the Cooperation Act provides that the Joint Authority established by the Treaty is an international organisation to which there applies the *International Organisations (Privileges and Immunities) Act 1963* (Cth). Section 7 states:

"A person must not prospect for petroleum in Area A of the Zone of Cooperation except with the approval of the Joint Authority.

Penalty: Imprisonment for 5 years."

Section 5 of the Consequential Provisions Act inserted in the *Crimes at Sea Act 1979* (Cth) ("the Crimes at Sea Act") a new s 9A. This provides that "the criminal laws in force in the Northern Territory apply to any act done in Area A of the Zone of Cooperation that touches, concerns, is connected with or arises out of the exploration for, or exploitation of, petroleum resources as if the act had been done in the Northern Territory". However, s 9A does not apply, among other things, to "an act done by a national of Indonesia who is not also a national of Australia" or "an act done by a permanent resident of Indonesia who is not a national of Australia".

Consequential legislation

- 172 It is convenient now to consider the changes made to the PSL Act consequent upon the adoption of the Treaty by the Cooperation Act. It is necessary first to refer to certain provisions of the PSL Act as they stood before those changes were made.

- 173 Section 8 of the PSL Act stated:

"This Act applies to all natural persons, whether Australian citizens or not, and whether resident in the Commonwealth or a Territory or not, and to all corporations, whether incorporated or carrying on business in the Commonwealth or a Territory or not."

Section 19 stated:

"A person shall not explore for petroleum in an adjacent area except -

- (a) under and in accordance with a permit; or
- (b) as otherwise permitted by this Part.

Penalty: \$50,000 or imprisonment for 5 years, or both."

In this way and with respect to petroleum exploration, the Commonwealth exercised over the continental shelf the "sovereign rights" identified in Art 2 of the Convention. Contrary to the submissions of WMC, there was no application here of, or analogy to, the principles, flowing from the acquisition of radical title, whereby land may be subject to tenures and estates under the law of real property²¹⁸.

174 The phrase "adjacent area", employed in s 19, was defined in s 5A²¹⁹ in such a fashion as to include the whole of the area covered by the Permit, including that which later fell within Area A of the Zone of Cooperation. Had no further legislative step been taken, the consequence of the broad reach of s 8 of the PSL Act would have been that the prohibition in s 19 of the PSL Act would have applied in Area A of the Zone of Cooperation concurrently with the new offence provisions in s 7 of the Cooperation Act and s 9A of the Crimes at Sea Act. This situation was avoided by contracting the territorial scope of the operation of s 19 of the PSL Act. This was done by s 22 of the Consequential Provisions Act. That section amended s 5A of the PSL Act so as to exclude areas which, whilst within the outer limits of the continental shelf, were within Area A of the Zone of Cooperation.

175 The result for WMC and the others with interests in the Permit was that, with respect to those blocks in the Permit, or portions of such blocks, which now fell within Area A, they were no longer subjected to the prohibition on exploration for petroleum imposed by s 19 of the PSL Act. Rather, with respect to those blocks or portions of blocks in Area A, prospecting for petroleum now was forbidden by s 7 of the Cooperation Act unless it was conducted with the approval of the Joint Authority established by Art 7 of the Treaty. Section 19 had forbidden exploration for petroleum in what was now part of Area A except under and in accordance with the Permit which had been issued under the PSL Act. The continued existence of the Permit with respect to so much of the area thereof as was now within Area A would be no answer to the operation of the sanction now imposed by s 7 of the Cooperation Act.

176 Accordingly, special provision was made by s 23 of the Consequential Provisions Act. This inserted s 30A in the PSL Act. Section 30A applied to any permit that was immediately before the commencement of the Cooperation Act on 18 February 1991 in force in respect of blocks all or a number of which were blocks constituted by graticular sections wholly or partly in Area A of the Zone of

218 cf *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1399; 147 ALR 42 at 114.

219 Section 5A had been inserted by s 7 of the 1980 Act.

Cooperation (s 30A(1)). Where, as a result of the amendments to s 5A of the PSL Act made by the Cooperation Act, a block specified in a permit had ceased to exist or its boundaries had changed, the permit was to be taken to specify only the blocks which were unaffected by the amendment to s 5A and the blocks as changed thereby as they existed after the amendments (s 30A(2)).

177 I have referred earlier in these reasons to the significance of s 31 of the PSL Act and to the instrument of suspension under s 103A dated 22 June 1988 and with effect for five years from 25 June 1988. It was to this situation that sub-ss (4) and (5) of s 30A were now directed. They provide:

"(4) Where, immediately before the commencement of this section, there was in force under section 103A an instrument of suspension in respect of a permit, then, on the commencement of this section:

- (a) the instrument is by force of this section revoked; and
- (b) the permittee is taken to have made an application under section 30 for the renewal by the Joint Authority of the permit in respect of the blocks which, as a result of the operation of subsection (2), constitute the permit area.

(5) Section 31 does not apply to or in relation to an application:

...

(b) that a permittee is taken to have made under subsection (4)."

The result was there was a deemed application for renewal in respect of the permit, but in respect of the whole of the remaining area after the excision of that part which fell within Area A, and without the 50 per cent reduction in that remaining area which otherwise would be required by s 31. The text of s 24 of the Consequential Provisions Act, dealing with compensation, is set out earlier in these reasons.

Acquisition of property?

178 It was in these circumstances that the primary judge made the declaration which the Commonwealth in this Court seeks to have set aside. The declaration is in these terms:

"A declaration that:

- (a) the removal of blocks constituted by graticular section within Area A of the Zone of Cooperation from [the Permit]; and

- (b) the changes to the boundaries of other blocks constituted by graticular areas within Area A of the Zone of Cooperation so as to partly remove such blocks from [the Permit];

effected by the [Consequential Provisions Act] would be, but for s 24 of that Act, an acquisition of property from [WMC] otherwise than on just terms."

179 The phrase in s 51(xxxi) of the Constitution "acquisition of property on just terms" must be read as a whole²²⁰, and the declaration may have been inaptly expressed. However, on any view, the declaration should not have been made and the appeal to the Full Court should have been allowed. This is because, whilst dealings between the permittees and others, consistently with the PSL Act, might have given rise to rights which were proprietary in nature, the operation of s 51(xxxi) of the Constitution is not attracted unless there is a law with respect to the acquisition of property. Such property rights as were involved were not, given their nature, susceptible of such acquisition. In particular, and contrary to the submissions for WMC, the PSL Act, under which the Permit was granted and continued in suspended existence, had not created any statutory rights which were susceptible of acquisition as a consequence of the changes made by the Cooperation Act.

180 There may be some scope in jurisprudential analysis for the proposition that, if a claim is to be truly a "right", it must not depend for its existence or enforceability upon the sufferance of the party against whom it is asserted. A corollary would be that, where the claim was created by or derived from statute, it could not be a "right" because its continued existence depended upon the sufferance of the legislature in not moving to qualify or abrogate the claim. However, the history of governmental immunity considered in *The Commonwealth v Mewett*²²¹ suggests caution in accepting such a broad proposition. The common law accepted that contracts had been made and broken and wrongs committed but the rights of the plaintiff were rendered imperfect by the further provision by the common law to the Crown of an immunity from action, and the requirement of legislative appropriation of funds to meet judgments. Further, in *National Trustees Executors and Agency Co of Australasia Ltd v Federal Commissioner of Taxation*²²², Kitto J analysed and rejected the

²²⁰ *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285.

²²¹ (1997) 71 ALJR 1102 at 1104, 1107-1108, 1116, 1126-1127, 1128, 1133-1139; 146 ALR 299 at 301, 305-306, 317-318, 332, 333, 341-349.

²²² (1954) 91 CLR 540 at 584-587. See also at 557-558 per Dixon CJ, 570-572 per Fullagar J and *Burns Philp Trustee Co Ltd v Viney* [1981] 2 NSWLR 216 at 222-225.

proposition that personal property included only rights enforceable by action in the courts.

181 It has been said of the decisions of the United States Supreme Court upon the "takings clause"²²³ that they do not suggest that statutory proprietary rights can be created only by statutes that are "unrepealable"; nor, conversely, has it been proposed that a statute "becomes unrepealable" if it does create such rights²²⁴. In the present case, it will be unnecessary to determine, with respect to the operation of s 51(xxxi) of the Constitution, whether the consequence of the enactment of a statute, which creates property to which the constitutional guarantee applies, necessarily and in all cases is the denial to the Parliament of the competence (without the provision of just terms) to repeal that law. That is because the law here was in its original form expressed in terms indicative of subsequent amendment. The authority given under the Permit was, by reason of the terms of s 28 of the PSL Act, "subject to this Act" and the effect of s 5(8) thereof was that a reference to a permit was to a permit "as varied for the time being" under the PSL Act. Before further consideration of that aspect of the matter, reference should be made to a submission by the Commonwealth.

182 The Commonwealth submitted that any right which has no existence apart from a law of the Commonwealth "is inherently subject to modification or diminution by later Commonwealth statute". It was said to follow that the contingency of subsequent legislative abrogation or extinguishment denied the protection of s 51(xxxi) to any right created solely by a law of the Commonwealth. Such propositions are too broad. This may be illustrated by reference to laws made under s 51(xviii) of the Constitution²²⁵, such as the *Copyright Act* 1968 (Cth) ("the Copyright Act") and the *Patents Act* 1990 (Cth) ("the Patents Act").

183 Copyright which subsists under the Copyright Act is identified therein in terms of exclusive rights (ss 31, 85-88) and is classified by s 196 as "personal property" which is "transmissible by assignment, by will and by devolution by operation of law". Likewise the exclusive rights given by the Patents Act to a patentee are classified by s 13(2) as "personal property" and as "capable of

223 The takings clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation".

224 Grais, "Statutory Entitlement and the Concept of Property", (1977) 86 *Yale Law Journal* 695 at 706.

225 This gives power to make laws with respect to "[c]opyrights, patents of inventions and designs, and trade marks".

assignment and of devolution by law". In *In re Usines de Melle's Patent*, Fullagar J said²²⁶:

"Such 'property' exists by virtue of a grant from the Crown in right of the Commonwealth, and it is locally situate in Australia, but cannot be regarded as locally situate in any State or Territory of the Commonwealth."

184 The exercise of those intellectual property rights may limit and detract from the proprietary rights of third parties which otherwise would exist unaffected in infringing articles. However, "[t]o the extent that such laws involve an acquisition of property from those adversely affected by the intellectual property rights which they create and confer, the grant of legislative power contained in s 51(xviii) manifests a contrary intention which precludes the operation of s 51(xxxi)"²²⁷. Nevertheless, the position with respect to those intellectual property rights themselves is quite different. As a result of the decision in *Australian Tape Manufacturers Association Ltd v The Commonwealth*²²⁸, it is settled that these species of exclusive right constitute property to which s 51(xxxi) of the Constitution may apply.

185 On the other hand, a law which reduces the content of the exclusive rights created by these statutes, for example, by providing that certain acts henceforth will not infringe those rights, will not attract s 51(xxxi). Thus, as *Tape Manufacturers* decided²²⁹, the immunity which the law in question conferred upon those who otherwise would have been infringers could not be described as proprietary in nature. For s 51(xxxi) to apply, it would be necessary to identify an acquisition, whether by the Commonwealth or a third party, of something proprietary in nature²³⁰.

186 In *Tape Manufacturers*, this Court was concerned with the validity of Pt VC of the Copyright Act which was inserted by the *Copyright Amendment Act* 1989 (Cth). The Court was particularly concerned with two provisions of that Part. Section 135ZZP imposed a "royalty" upon the first vendor of blank tape. Had it not been classified as a tax, the "royalty" would have constituted an "acquisition

²²⁶ (1954) 91 CLR 42 at 49.

²²⁷ *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160-161.

²²⁸ (1993) 176 CLR 480 at 499-500, 527.

²²⁹ (1993) 176 CLR 480 at 499-500, 527-528.

²³⁰ *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 172-173, 185.

of property" to which s 51(xxxi) applied²³¹. That provision is not of present concern. What is of present relevance is s 135ZZM. This provided that copyright in a published sound recording, or in any work included in such a recording, was not infringed by certain copies made on blank tapes for private and domestic use. Section 135ZZM was held not to be a law with respect to the acquisition of the property in the respective copyrights²³².

187 The present appeal does not involve reduction of the content of subsisting statutory exclusive rights, such as those of copyright owners which were at stake in *Tape Manufacturers*, by the conferral upon third parties of immunity from infringement of those rights. The position of WMC is even weaker than that of the copyright owners and so is further removed from the application of s 51(xxxi).

188 In *Banks v Transport Regulation Board (Vic)*²³³, Barwick CJ referred to "the repeated notion", stemming from a passage in the judgment of Vaughan CJ in *Thomas v Sorrell*²³⁴, that a mere licence does not create any estate or interest in the property to which it relates and that "it only makes an act lawful which without it would be unlawful"²³⁵.

189 Before the enactment of the Consequential Provisions Act, the Permit had conferred upon WMC (and the other interested parties) an immunity from the operation of the criminal law in respect of the conduct of petroleum exploration in a specified area. The Consequential Provisions Act operated first to reduce that specified area. This rendered *pro tanto* otiose the immunity in respect of all but the retained portion of the specified area. The Consequential Provisions Act then adjusted accordingly the scope of the Permit and the operation of the immunity. This reduction in the operation of the immunity did not result in any acquisition, within the meaning of the authorities, of something proprietary in nature.

190 It is true that the PSL Act (ss 75-92) established a registration system in respect of exploration permits for petroleum granted under that statute²³⁶. The register was to be maintained by the Designated Authority (s 76). Provision was

231 (1993) 176 CLR 480 at 495, 511.

232 (1993) 176 CLR 480 at 499, 528.

233 (1968) 119 CLR 222 at 230.

234 (1673) Vaugh 330 at 351 [124 ER 1098 at 1109].

235 See also *Federal Commissioner of Taxation v United Aircraft Corporation* (1943) 68 CLR 525 at 533; *R v Toohey*; *Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 352.

236 See the definitions of "title" in s 75 and of "permit" in s 5(1).

also made for registration of permits devolved by operation of law (s 79) and for registration, with the approval of the Joint Authority, of transfers of permits (s 78) and of dealings therein (s 81). Section 82 required the parties to such transfers and dealings to provide the Designated Authority with a statement of the true consideration for the transfer or dealing and s 88 provided for rectification of the register by judicial order upon the application of "a person aggrieved". The steps by which WMC itself became a permittee illustrate the operation of these provisions.

191 On the other hand, if petroleum had been discovered in the Permit area the permittees would have been obliged by s 34(1) of the PSL Act forthwith to inform the Designated Authority, and the conduct of operations for the recovery of petroleum would have required the grant of a production licence under Div 3 of Pt III of the PSL Act (ss 39-59). Without this further grant, the conduct of recovery operations would have contravened the prohibition imposed by s 39.

192 Remarks by Holmes J in his dissenting judgment in *Truax v Corrigan*²³⁷ are in point. His Honour said:

"Delusive exactness is a source of fallacy throughout the law. By calling a business 'property' you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed."

193 It may be accepted that the PSL Act recognised that permits and dealings therein could carry a commercial value and might be the objects of rights and obligations created *inter partes* which were supported by the law of contract and by the legal and equitable doctrines and remedies by which effect is given to that general law. The Consequential Provisions Act may have operated to diminish the commercial value of the permits to which it applied by reason of the separate treatment now given to blocks and parts of blocks within Area A of the Zone of Cooperation. Further, the Executive Government of the Commonwealth was advantaged in the sense that the international law obligations assumed to Indonesia in the Treaty were rendered more likely of fulfilment.

194 However, these circumstances do not indicate that the Consequential Provisions Act involved any acquisition of property which attracted the constitutional guarantee. The necessary legal analysis must proceed from consideration of the nature and function of such permits, the structure of the PSL Act and the immunity the permits conferred. Such analysis, as indicated earlier, discloses that there could not have been an acquisition in the requisite sense.

237 257 US 312 at 342 (1921).

195 Further, any proprietary rights which were enjoyed by WMC by reason of the interest it acquired in the Permit in 1984 were inherently unstable. By reason of this nature of the property concerned there could be no acquisition within the meaning of s 51(xxxi).

196 To accept this proposition is not to assert that the defeasible character of the statutory rights in question denies them the attribute of "property" in the "traditional" sense of the general law. For example, the vested interest of a beneficiary under a settlement in which the settlor reserved a power of revocation would, pending such revocation, be proprietary in nature. A revocable trust is enforceable in equity whilst it subsists and the revocation would be without prejudice to prior distribution of income or capital²³⁸. The point of present significance is that in some circumstances, of which the statutory rights in this case are an instance, the nature of the property may be such that its defeasance or abrogation does not occasion any acquisition in the constitutional sense.

197 The present case has an affinity to, but is not on all fours with, those cases involving gratuitous payments, whether as pensions or otherwise, made by the Executive Government under statutory authority. It has been said that the "rights" to receive such payments are the creation of the legislature and are always liable to alteration or abolition by later legislation²³⁹.

198 Rather, the flexible statutory schemes considered in *Minister for Primary Industry and Energy v Davey*²⁴⁰ and *Bienke v Minister for Primary Industries and Energy*²⁴¹ are more directly in point²⁴². In the present case, it was apparent from the terms of the legislation as it stood when the Permit was granted in 1977 that

238 See *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* (1956) 95 CLR 43 at 67-68; Underhill and Hayton, *Law Relating to Trusts and Trustees*, 15th ed (1995) at 128-129.

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

240 (1993) 47 FCR 151 at 163-165; 119 ALR 108 at 120-121.

241 (1996) 63 FCR 567 at 585-587; 135 ALR 128 at 144-146.

242 See also *Dames & Moore v Regan* 453 US 654 at 669-673, 674 fn 6, 688-689 (1981); Tribe, *American Constitutional Law*, 2nd ed (1988), §9-7.

the Permit was inherently susceptible to variation in accordance with amendments which might be made to the statute from time to time.

199 Reference has already been made to s 5(8) and s 28 of the PSL Act. At all material times, s 5(8) stated:

"In this Act, a reference to a permit, lease, licence, pipeline licence or access authority is a reference to the permit, lease, licence, pipeline licence or access authority *as varied for the time being under this Act.*" (emphasis added)

Section 28 at all material times stated:

"A permit, while it remains in force, authorizes the permittee, *subject to this Act* and the regulations and in accordance with the conditions to which the permit is subject, to explore for petroleum, and to carry on such operations and execute such works as are necessary for that purpose, in the permit area." (emphasis added)

200 In *Ocean Road Motel Pty Ltd v Pacific Acceptance Corporation Ltd*²⁴³, this Court considered an amendment to the *Money Lenders Act* 1958 (Vic). Taylor J said²⁴⁴:

"Considerable argument was addressed to us on the meaning of the expression 'this Act' which appears twice in what I regard as the first limb of this sub-section. But, in my view, it is not open to question that where by amendment a new provision is inserted into a principal Act and that provision speaks of 'this Act' it speaks of the whole Act of which from the time of amendment it forms part and, of course, of the Act in the form which it may from time to time thereafter assume."

In the judgment of the whole Court in *Air Caledonie International v The Commonwealth*, the Court referred to²⁴⁵:

"considerations relating to the nature of an amending Act which is ordinarily to be construed as part of the principal Act (see, eg, *Acts Interpretation Act* 1901 (Cth), s 15) and is commonly treated as 'exhausted' upon

²⁴³ (1963) 109 CLR 276.

²⁴⁴ (1963) 109 CLR 276 at 280. See also at 282-283 per Menzies J, 284 per Owen J.

²⁴⁵ (1988) 165 CLR 462 at 471.

commencement and incorporation of the amendments which it effects in the principal Act".

201 Section 15 of the Acts Interpretation Act provides that every Act amending another Act shall, unless the contrary intention appears, "be construed with such other Act and as part thereof". These principles apply to the expressions in s 5(8) and s 28 of the PSL Act respectively "as varied for the time being under this Act" and "subject to this Act" and to the amendments made by the insertions of s 5A and s 30A which give rise to the present litigation.

202 Indeed, were the true position to the contrary, the Permit would have expired long before the commencement of the Consequential Provisions Act. It will be recalled that the Permit was granted in 1967 for a term of six years. However, before what would have been its expiry, the permittees (who then did not include WMC) obtained a suspension and extension pursuant to s 103A. There was a further suspension and extension of five years with effect from 25 June 1988. Section 103A had not been enacted at the time of the grant of the Permit. It only became available for utilisation by the permittees upon the commencement of s 41 of the 1980 Act on 14 February 1983.

203 The result was that, from the moment of its grant in 1977, the Permit suffered from the "congenital infirmity"²⁴⁶ that its scope and incidents were subject to the PSL Act in the form it might from time to time thereafter assume. Any proprietary rights which were created in respect of the Permit were liable to defeasance. By reason of their nature, upon such defeasance of those rights there would be no acquisition of property to which s 51(xxxi) applied.

204 That conclusion makes it unnecessary in this case to determine whether, as the Commonwealth submits, s 51(xxxi) has no reach in respect of property situated outside the geographical area of Australia and that, for this purpose, the Timor Gap is such an area. However, it may be observed that the purposes "in respect of which the Parliament has power to make laws", within the meaning of s 51(xxxi), include purposes external to that geographical area. Further, persons physically present in that area and so directly amenable to the authority of the Commonwealth legislative, executive and judicial power may hold property, particularly intangible or moveable property, situated elsewhere.

Conclusion

205 The appeal should be allowed and orders made in the terms proposed by the Chief Justice.

²⁴⁶ cf *Norman v Baltimore & Ohio Railroad Co* 294 US 240 at 308 (1935).

206 KIRBY J. In this appeal the Court must revisit the constitutional requirement that the acquisition of property under federal law must provide for just terms²⁴⁷.

207 In the Federal Court of Australia, the primary judge²⁴⁸, and a majority of the Full Court²⁴⁹, found against the Commonwealth. Over-ruling its objections, the judges found that the interests in question were "property", that the property was "acquired" and that, but for a special saving provision enacted against that possibility, the acquisition would not be on just terms. By special leave, the Commonwealth appeals to this Court. However, it has shifted its ground. It adheres to the contentions that there was no "acquisition" and that the law provided "just terms". But it no longer maintains that the interests in issue were not "property". Instead, it argues that the law in question, properly characterised, was not one for the acquisition of property. Not being so characterised, there was no need that the law provide "just terms".

208 Each of the arguments of the Commonwealth fails. The Commonwealth has endeavoured to acquire property without affording just terms. Its attempts must be rejected.

The basic facts

209 The fundamental facts can be stated in three sentences. WMC Resources Ltd, formerly Western Mining Corporation Ltd (the respondent) was the holder of an interest in an exploration permit ("the Permit") issued under federal legislation to permit and encourage exploration for petroleum in defined areas of the Australian continental shelf. Subsequently, the Commonwealth agreed with the Republic of Indonesia to establish a Zone of Cooperation ("the Zone") in an area of the disputed seabed boundary between the Island of Timor and Australia known as the "Timor Gap"²⁵⁰. Some of the areas of exploration provided by the Permit fell within the Zone and by subsequent federal law were extinguished in order that new permits might be granted within the Zone by a joint authority constituted by Australia and Indonesia.

210 The Commonwealth says that the federal law effecting such changes is valid without any obligation to provide just terms to the respondent. The respondent is

²⁴⁷ Constitution, s 51(xxxi).

²⁴⁸ *Western Mining Corporation Ltd v Commonwealth of Australia* (1994) 50 FCR 305; 121 ALR 661 per Ryan J.

²⁴⁹ *Commonwealth of Australia v Western Mining Corporation Ltd* (1996) 67 FCR 153; 136 ALR 353 per Black CJ and Beaumont J; Cooper J dissenting.

²⁵⁰ Lumb, "The Delimitation of Maritime Boundaries in the Timor Sea" in Greig (ed), *The Australian Year Book of International Law*, vol 7 (1981) 72.

part of a consortium of co-venturers. That consortium has expended a substantial sum of money pursuant to the Permit. It was committed to expend much more. It disputes the Commonwealth's contention. It says that, if the Commonwealth wishes to extinguish the interests of its members, so as to be in a position, with Indonesia, to provide new permits for petroleum exploration in place of the Permit, the law doing so must provide for the payment of just terms. If it does not, it is unconstitutional.

- 211 So stated, I think that it would be surprising to most readers of s 51(xxxi), to learn that federal law could modify a party's conceded property rights, so as to permit the re-grant of exploration permits in an identical area, without compensating that party thereby deprived of such a valuable asset. The reader would be specially surprised if, perchance, he or she had read the recent decisions of this Court in *Georgiadis v Australian and Overseas Telecommunications Corporation*²⁵¹, *The Commonwealth v Mewett*²⁵² and *Newcrest Mining (WA) Ltd v The Commonwealth*²⁵³, with their strong affirmations of the scope of the protection afforded by the constitutional guarantee. However, curious things sometimes happen when constitutional doctrine is applied to new facts. It is therefore necessary to descend from generalities, derived from the presumed purposes of s 51(xxxi), and to apply to the special facts of this case the jurisprudence which has grown around each important word of the paragraph.

Issue of a permit to explore for offshore petroleum

- 212 In 1967, the Australian Parliament enacted the *Petroleum (Submerged Lands) Act 1967* (Cth) ("PSLA"). That Act was designed to provide for the exploration for, and exploitation of, petroleum and other resources of the continental shelf of the Commonwealth of Australia and its territories²⁵⁴. In 1973, by the *Seas and Submerged Lands Act 1973* (Cth) ("SSLA"), the Parliament declared that "the sovereign rights of Australia as a coastal state in respect of the continental shelf of Australia, for the purpose of exploring it and exploiting its natural resources, are vested in and exercisable by the Crown in right of the Commonwealth"²⁵⁵. In the latter Act, there was a similar declaration in respect of the territorial sea. However, in that case "sovereignty" was mentioned, as distinct

251 (1994) 179 CLR 297.

252 (1997) 71 ALJR 1102; 146 ALR 299.

253 (1997) 71 ALJR 1346; 147 ALR 42.

254 See the long title to the PSLA.

255 SSLA, s 11.

from the "sovereign rights" asserted in relation to the continental shelf²⁵⁶. Scheduled to SSLA were the Convention on the Territorial Sea and the Contiguous Zone²⁵⁷ and the Convention on the Continental Shelf²⁵⁸, to both of which Australia is a party and in each of which²⁵⁹, reflecting international law, the distinction between sovereignty and sovereign rights is made.

213 In October 1976, pursuant to PSLA, a company (Pelsart Ltd) ("Pelsart") applied for an exploration permit in respect of an area of the Australian continental shelf in the Timor Sea between the adjacent northern coast of Western Australia and the island of Timor. At the time of the application, it was generally known that a dispute existed between Australia, on the one hand, and Indonesia and Portugal on the other, concerning the delineation of the seabed boundary between the land mass of Timor (formerly administered as to part by Indonesia and Portugal respectively) and Australia. In December 1975, Indonesian troops had invaded and occupied East Timor. In July 1976 Indonesia purportedly annexed East Timor and incorporated it into the Republic of Indonesia. After Pelsart, under PSLA, was granted the Permit, it sought advice from the Government of the Commonwealth as to the status of the boundary negotiations consequent on these developments. Obviously, its purpose was to enquire whether the political events in Timor might affect the Permit²⁶⁰. In January 1978, the Government assured Pelsart that the exploration area granted by the Permit was within an area over which Australia excised sovereign rights, both by international law and under SSLA. Armed with this assurance, Pelsart pressed on with its exploration. Over the next few years, its expenditure in relation to the Permit reached nearly one million dollars²⁶¹. Its financial commitment pursuant to the Permit was considerably greater.

214 In June 1979, Pelsart requested the deferment of drilling commitments which were otherwise required, by the conditions of the Permit in the third year of the Permit's duration. This application was approved in accordance with PSLA in December 1979. In 1982 a further variation in the work programme under the

256 SSLA, ss 6, 11.

257 Sched 1.

258 Sched 2.

259 *Convention on the Territorial Sea and the Contiguous Zone*, Article 1.1; *Convention on the Continental Shelf*, Article 2.1.

260 For a discussion of these developments, see Kavanagh, "Oil in Troubled Waters: The International Court of Justice and East Timor: *Case Concerning East Timor (Australia v Portugal)*" (1996) 18 *Sydney Law Review* 87 at 88-89.

261 *Western Mining Corporation Ltd v Commonwealth of Australia* (1994) 50 FCR 305 at 319; 121 ALR 661 at 673.

Permit was agreed to. It was agreed that no wells had to be drilled by Pelsart unless the seabed boundary dispute between Australia and Indonesia was resolved. Since February 1979 the Commonwealth had been actively engaged in negotiations to that end. Meanwhile, Pelsart had agreed with another company that the latter should acquire a proportion of its interest in the Permit. That agreement was approved in September 1980 by the Designated Authority created by PSLA.

215 In June 1983 the Designated Authority, acting pursuant to PSLA, suspended the obligations of the permittees under the Permit for a period of five years. It also extended the duration of the Permit for that interval²⁶². It was soon after this that the respondent acquired its interest in the Permit. It did so by a deed of assignment which was duly registered by the Designated Authority in July 1984. Other co-venturers had also become involved in the Permit. It is not necessary to chart this course. Pelsart, for its part, subsequently dropped out of the consortium. It transferred its interest to the co-venturers, including the respondent. All of these changes were duly made in accordance with PSLA.

216 In March 1988 the permittees sought a further extension of, and suspension of the obligations under, the Permit. In June 1988, that request was also granted by the Designated Authority. Once again it suspended obligations for five years and extended the term of the Permit for that time.

Legislation enacts a Zone of Cooperation affecting permit areas

217 Such was the position when, on 5 September 1988, the Government of the Commonwealth, on behalf of Australia, announced that it had reached an agreement in principle with the Indonesian Government relating to the seabed boundary in the Timor Gap. Meetings ensued and correspondence was exchanged concerning the implications of this agreement for the permit holders including the respondent. However, on 11 December 1989, the Government of the Commonwealth, on behalf of Australia, signed the Zone of Cooperation Treaty ("the Treaty") with the Republic of Indonesia. At the same time it exchanged side letters mentioning the treatment which should to be considered in relation to existing Australian permit holders, such as the respondent. The Treaty entered into force on 9 February 1991. It was followed by the commencement of two measures, the *Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990 (Cth)* ("ZCA") and the *Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Act 1990 (Cth)* ("CPA"). It is the operation of the provisions of CPA upon the respondent's interest as a permittee under the Permit which presents for decision the constitutional question now before this Court.

218 After the enactment of ZCA and CPA, the permittees, including the respondent, protested about the treatment which they had received from the

262 Pursuant to PSLA, s 103A.

Commonwealth. They made claims for compensation to cover their lost rights. A formal request was made to the Designated Authority for the renewal of the Permit. However, because part of the area of exploration covered by the Permit related to an area, the exclusive control of which, by the Treaty and ZCA, had been surrendered by the Commonwealth, the renewal offered by the Designated Authority related solely to the area of the Permit which was still within Australia's exclusive control. In respect of the area covered by the Permit which was lost to the permittees, they were invited to nominate a production sharing contract area in which they might exercise a "right to match" for the areas which they had lost. This offer did not satisfy the respondent. In June 1991 it made a formal claim for compensation under CPA²⁶³. The Commonwealth contested this claim on the footing that the obligation to pay compensation arose only if it were constitutionally obligatory. The Commonwealth denied any such obligation. It is in this way that the contest between the parties came before the Federal Court.

Statutory provisions affecting the Permit

219 Although it is somewhat tedious to describe in detail the provisions of the foregoing Acts, it is necessary to some extent to do so. The relevant provisions are mentioned in the reasons of other members of the Court. They are also extracted in the reasons of the courts below²⁶⁴. Suffice it to note the following key provisions.

220 In PSLA, Pt 3 provides for the exploration for, and mining of, petroleum. It is addressed to what is to happen in that regard in an "adjacent area"²⁶⁵. An "adjacent area" is defined to comprise waters of the sea within the Australian continental shelf²⁶⁶ but outside the three nautical mile limit²⁶⁷. The space above or below an "adjacent area" is deemed to be in that area²⁶⁸. Provision is made to extend the law, written and unwritten, in force in the State of Australia adjacent to

263 s 24(3).

264 See especially the reasons of Beaumont J in the Full Court: *Commonwealth of Australia v Western Mining Corporation Ltd* (1996) 67 FCR 153 at 173-182; 136 ALR 353 at 371-378.

265 Ascertained in accordance with PSLA, s 5A.

266 By SSLA, s3(1) (as it stood at the relevant time), the continental shelf had the same meaning as in the Convention on the Continental Shelf. The Commonwealth Government may proclaim the limits of all or part of the shelf (SSLA, s 12), but has not done so.

267 PSLA, s 5A(2).

268 PSLA, s 6(a).

the area "as if that area were part of that State and of the Commonwealth"²⁶⁹. It is enacted that the Earth is to be deemed to be divided into sections by reference to the meridians of longitude and latitude (called "graticular sections"²⁷⁰). Each section within the "adjacent area", and thus within the Australian continental shelf constitutes a "block"²⁷¹. The permits provided by PSLA relate to the blocks assigned for exploration to the permittees.

221 To enforce the requirement to comply with PSLA in respect of exploration permits, the Act²⁷² forbade exploration for petroleum in an adjacent area except under, and in accordance with, a permit or as otherwise permitted by Pt 3. This provision was supported by criminal sanctions: a substantial fine, or imprisonment, or both. The Part provides for the advertisement of blocks available for exploration and for application for permits in relation to such blocks²⁷³. A Joint Authority, comprising the Australian Federal Minister and a State or Territory Minister, is empowered²⁷⁴ to grant or refuse to grant a permit. If granted, the permit must contain any applicable conditions. Rights so conferred authorise the permittee, subject to the Act and regulations and in accordance with the stated conditions, "to explore for petroleum, and to carry on such operations and execute such works as are necessary for that purpose, in the permit area"²⁷⁵. The term of a permit, initially, is six years and, upon renewal, a further five years²⁷⁶. Additional renewals are contemplated.

222 Other instruments conferring valuable rights are provided for in PSLA. One is a petroleum lease permitting exploration for petroleum and the carrying on of operations and execution of works necessary for that purpose in the lease area²⁷⁷. Upon the discovery of petroleum, the lessee is obliged to notify the Designated

269 PSLA, s 9(1).

270 PSLA, ss 5(1), 17.

271 PSLA, ss 5(1), 17, 149.

272 PSLA, s 19.

273 PSLA, ss 20, 21.

274 PSLA, s 22.

275 PSLA, s 28.

276 PSLA, s 29.

277 PSLA, s 38C. There are other interests such as a "pipeline licence" and "access authority". But these do not need to be considered.

Authority²⁷⁸. The other instrument is a production licence without which no person may carry on operations for the recovery of petroleum in an adjacent area²⁷⁹. The scheme of the Act envisages that an applicant, which has held a permit to explore for petroleum, may secure a petroleum lease and, upon discovery of petroleum, a production license. So long as the statutory conditions are fulfilled, this is a matter of entitlement, not of administrative discretion²⁸⁰. The need for enforceable entitlements is obvious enough. Few corporations engaged in the chancy business of petroleum exploration at sea would invest the large amounts of capital required (and submit to the binding conditions of the permits, leases and licenses) if, upon the discovery of petroleum, the governmental grantors could simply thank the venturers for their efforts and either retain the benefits for themselves or assign those benefits to others. The *quid pro quo* for the investment and obligations envisaged by PSLA and inherent in exploration for petroleum on the Australian continental shelf, was the enforceable legal assurance that the rights of the venturers would be protected and could be enforced under the law of Australia. Thus, production licences are for a period of twenty-one years and may be renewed²⁸¹.

- 223 Provision is made by PSLA for the registration of "title", meaning the rights afforded by a permit, lease, license or other instrument issued under the Act²⁸². Recognition of the valuable, durable and transferable character of such "title" is provided by a statutory system whereby the holder of the title may apply to the Joint Authority created by PSLA for registration of an instrument of transfer. Provision is made for the imposition of conditions and for the deposit of security²⁸³. However, where such conditions are fulfilled, and the security lodged, the Joint Authority is "deemed to have approved the transfer"²⁸⁴. The system of

278 PSLA, s 38J. See also PSLA, s 34.

279 PSLA, s 39.

280 See eg PSLA, ss 32(3) ("shall not refuse") and 44(2) ("shall grant").

281 PSLA, s 53.

282 PSLA, ss 75, 76.

283 PSLA, s 78(6)(b).

284 PSLA, s 78(8).

registration of title bears similarities to the system of title to land by registration²⁸⁵. The true consideration must be shown for any transfer or dealing²⁸⁶.

224 Provision is also made by PSLA for a variation or suspension of conditions attached to a permit, lease or licence²⁸⁷. Exceptional provision is made for the suspension of rights conferred by any such instrument²⁸⁸. The Joint Authority under PSLA is empowered to suspend such rights either for a specified period or indefinitely where it is satisfied that "it is necessary to do so in the national interest"²⁸⁹. Power is given to the Joint Authority, by an instrument in writing, to terminate such a suspension of rights²⁹⁰. With proper caution the Parliament enacted that, if an instrument under the foregoing provisions resulted in an "acquisition of property from a person" as provided by the Constitution, the Commonwealth was liable to pay compensation, in effect, to bring the suspension of legal rights within the constitutional requirements²⁹¹. That provision was not enlivened in the present case. Its only relevance is that it shows a parliamentary recognition that suspension or termination of such valuable rights might result in an acquisition of property requiring compliance of the law with s 51(xxxi) of the Constitution.

225 Further provision is made for the cancellation of the rights, relevantly of a permittee²⁹². However, cancellation is not at large. It is limited to specified cases where the permittee has not complied with a condition, direction, statutory provision or obligation to pay a sum payable under the Act²⁹³. No action may be taken to cancel a permit without notice to the permittee affected and consideration of any action which the permittee has taken to repair the default²⁹⁴.

285 See PSLA, s 78(13).

286 PSLA, s 82.

287 PSLA, s 103(1).

288 PSLA, s 103A.

289 PSLA, s 103A(1).

290 PSLA, s 103A(3).

291 PSLA, s 103A(5).

292 PSLA, s 105.

293 PSLA, s 105(1)(a) - (d).

294 PSLA, s 105(2).

226 The foregoing description of PSLA reveals a legislative scheme conforming to what one would expect in national legislation of a country freshly claiming sovereign rights over its continental shelf and seeking to induce risk capital to explore for and exploit petroleum reserves as yet unknown. Introducing the Bill which became PSLA, the Attorney-General, the Hon N H Bowen QC, told the Parliament²⁹⁵:

"Today the exploitation of Australia's offshore petroleum resources is a reality, or very soon it will be a substantial reality. For governments this has meant the devising of appropriate new legislative machinery."

He acknowledged expressly the need for assurances to investors if they were to be attracted to the nationally important task of petroleum exploration within the Australian continental shelf²⁹⁶:

"[B]ehind this was the uneasiness of free enterprise ventures coming into the area. We were not going to attract the interest or the kind of money which is necessary to explore and develop these resources while the titles of those who were willing to enter going into this field were uncertain."

Answering criticisms that the legislative scheme involved the Commonwealth in parting with powers belonging to it alone over the continental shelf, the Attorney-General went on²⁹⁷:

"On the contrary, the Commonwealth continues to maintain that the resources are a national asset and the Commonwealth has a definite interest in what eventually happens to them. The Designated Authority nominated under the Common Mining Code is the repository of Commonwealth and State *proprietary interests* and he is in a true sense the agent of the Commonwealth as well as of the State. It is a use of a national asset, not a parting with it, and it is used in a way which will be effective to produce the best results for Australia."

295 House of Representatives, *Parliamentary Debates* (Hansard), 26 October 1967 at 2375.

296 House of Representatives, *Parliamentary Debates* (Hansard), 26 October 1967 at 2376.

297 House of Representatives, *Parliamentary Debates* (Hansard), 26 October 1967 at 2378 (emphasis added).

The Minister expressly acknowledged that, where Australian territory was opposite, or adjacent to, the territory of a neighbouring country²⁹⁸:

"[R]egard has been had, and will be had, to the relevant principles relating to delimitation of a country's continental shelf. This would apply as between Australia and Portuguese Timor and Australia and Indonesia."

Statutory provisions enacting the Zone of Cooperation

227 There is no doubt that, following the Treaty, the two laws enacted by the Parliament (ZCA and CPA) introduced a distinctively different regime for the area affected, described in each as the Australia-Indonesia Zone of Cooperation. The Zone, having a trapezoidal shape, occupied a portion of the Timor Sea between the Australian mainland and the island of Timor. It does not purport to close the Timor Gap in an agreed boundary between Australia and the Republic of Indonesia²⁹⁹. Each nation has adhered to its respective claims to sovereign rights in that regard. But the purpose of the Zone is to avoid the uncertainties which would otherwise arise from such competing national claims.

228 The method adopted by the Treaty to achieve this end was to designate the Zone and to divide it into three areas. These are specified as "A", being an area of joint control and development; "B", being an area in respect of which Australia is obliged to make certain notification and sharing arrangements with Indonesia but has sole control; and "C", where Indonesia has reciprocal obligations to Australia but sole control.

FIGURE

ZONE OF COOPERATION³⁰⁰

298 House of Representatives, *Parliamentary Debates* (Hansard), 26 October 1967 at 2379.

299 Accord had been reached in relation to the seabed boundary other than in the area of the Timor Gap by agreements signed on 18 May 1971 and 9 October 1972: *Western Mining Corporation Ltd v Commonwealth of Australia* (1994) 50 FCR 305 at 308; 121 ALR 661 at 663.

300 The above Chart showing the Zone of Cooperation appears as part of Annex A ("Designation and Description including Maps and Coordinates of the Areas comprising the Zone of Cooperation") to the Treaty: see ZCA, Sched 1.

229 The misfortune of the respondent is that these arrangements affected the blocks in which it and its co-venturers were interested. Such blocks fell, in part, in Area "A". They also fell, in part in Area "B", and, in part, outside the Zone but within Australia's continental shelf. The respondent contends that the blocks which fell within Area A are those which early survey results suggested were promising from the point of view of the discovery of petroleum deposits. The other blocks within the Permit, outside the Zone, were regarded as much less promising and therefore much less valuable.

230 The Treaty is annexed to ZCA as the schedule to the Act. In conformity with the Treaty, ZCA provides, under sanction of a penal penalty, that a person must not prospect for petroleum in Area "A" of the Zone of Cooperation "except with the approval of the Joint Authority"³⁰¹. The "Joint Authority" there referred to is not the Joint Authority previously mentioned and created by PSLA. It is a new joint body created by Art 7 of the Treaty. It has its head office in Indonesia and an office in Australia. It works under a Ministerial Council created by Art 5 of the Treaty. The latter comprises designated Ministers from each of the States parties to the Treaty. The object of ZCA is "to enable Australia to fulfil its obligations under the Treaty"³⁰². The result of these provisions is that, by Australian law, the entitlements of the respondent (and others similarly affected) to explore for, and exploit, petroleum within Area A of the Zone was completely changed. From having legally permitted and enforceable rights under Australian law, the entitlements of the permittee were altered. If it attempted to enforce the Permit in Area A, without a new approval of the new Joint Authority, it would be committing a criminal offence against Australian law. What had formerly been a protected transferable property right, potentially of great economic worth, was changed to conduct attracting a serious penal sanction.

231 This is not all. CPA, designed to facilitate the change from the régime in PSLA to the Treaty régime enacted by ZCA, introduced machinery provisions of crucial importance to these proceedings.

232 First, CPA amended the relevant definition of the "adjacent area" here in question which formerly comprised "waters of the sea ... not within the outer limits of the territorial sea ... and ... within the outer limits of the continental shelf"³⁰³.

301 ZCA, s 7. See also ZCA, s 8 by which it is provided that a person shall not undertake petroleum operations in area A of the Zone except under a production sharing contract or with specified approval.

302 ZCA, s 3.

303 PSLA, s 5A(1).

Instead, it provided that such "adjacent area" comprised only that area which was within the aforesaid limits and "not within Area A of the Zone of Cooperation"³⁰⁴.

- 233 Secondly, CPA added a new s 30A to PSLA³⁰⁵ - the provision about which the respondent makes its constitutional complaint. That section provides that it applies to any permit which was in force before the new régime commenced and which contained blocks wholly or partly in Area A of the Zone. It thus applies to the permit in which the respondent is interested. The section proceeds:

"30A(2) Where, as a result of the amendments of section 5A made by the *Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Act 1990* (which removed Area A from the adjacent areas) and of the operation of subsection 17(2):

- (a) a block specified in the permit has ceased to exist; or
- (b) the boundaries of a block specified in the permit have changed;

the permit is taken not to specify any block referred to in paragraph (a), to specify each block referred to in paragraph (b) as that block exists immediately after the commencement of the amendments, and to specify each block unaffected by the amendments."

- 234 Thirdly, CPA enacted the Commonwealth's contingency plan against the possibility that the course adopted in the foregoing section might be held to involve an acquisition of property. The section provides:

"24(1) In this section '**acquisition of property**' and '**just terms**' have the same meaning as in paragraph 51(xxxi) of the Constitution.

- (2) Where, but for this section, the operation of the amendments made by this Part would result in the acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay compensation of a reasonable amount to the person in respect of the acquisition."

- 235 The Commonwealth submits that CPA is not a law for the acquisition of property and thus that s 24(2) has no effective operation. The respondent submits that, but for s 24, the acquisition provisions of CPA would be invalid and accordingly demands compensation in accordance with its terms. In the courts

304 CPA, s 22(c), amending PSLA, s 5A(1).

305 By CPA, s 23.

below, the respondent obtained a declaration upholding its submissions. It is that order which the Commonwealth challenges before this Court.

Common ground

236 There was a measure of common ground between the parties which it is appropriate to record:

1. In determining the appellant's claim, this Court is not concerned to enquire about, or to declare, international law except in so far as it has been incorporated as part of Australia's municipal law³⁰⁶. It was common ground that this Court should neither question nor determine the limits of the sovereign rights asserted by the Commonwealth in international law. Its only concern is to determine the meaning and effect of federal legislation and to measure that legislation against the requirements of s 51(xxxi) of the Constitution. No issue was raised, otherwise, to suggest that the subject matter of the Treaty, and the applicable legislation, were outside the legislative powers of the Parliament. As will be seen, the Commonwealth urged differentiation between the rights in the continental shelf which accrued to it as "sovereign rights" enjoyed by the nation (*imperium*) and the radical title to the ownership of land which was enjoyed by the Crown as a result of its acquisition of sovereignty over Australia (*dominium*)³⁰⁷.
2. So far as the sovereign rights of Australia in the subjacent soil and the superjacent water within Area A of the Zone were concerned, there was no issue but that, by Australian law, they are vested in and exerciseable by the Crown in right of the Commonwealth³⁰⁸. In accordance with the Convention on the Continental Shelf³⁰⁹, such vesting was for a limited purpose, namely "exploring it and exploiting its natural resources". However, that was precisely the purpose for which PSLA provided the Permit.

306 See *Horta v The Commonwealth* (1994) 181 CLR 183, in which the validity of ZCA and CPA were upheld under the external affairs power. See also *Fisheries Case (United Kingdom v Norway)* [1951] ICJR 116 at 132-133; *New South Wales v The Commonwealth ("Seas and Submerged Lands Case")* (1975) 135 CLR 337 at 364, 475.

307 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 46-54, 68; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 89-93, 127-129, 177-178, 206-207, 221, 233-235.

308 It is so provided by SSLA, s 11. In relation to fishing in Australian coastal waters, see also *Fisheries Management Act* 1991 (Cth).

309 Art 2.1 (see SSLA, Sched 2, as it stood prior to the 1994 amendments).

3. The disputes about the claims of Australia, Portugal and Indonesia to the portion of the continental shelf now included in the Zone were public knowledge at the time the Permit was granted to Pelsart under PSLA and when the respondent acquired its interest in the Permit. However, nothing turns on this knowledge or the uncertainties inherent in the dispute. Both in fact and in law the Permit was granted under PSLA. The respondent, by transfer duly registered, acquired its interest as a permittee³¹⁰. It was agreed that the successive suspensions of the Permit for fixed terms was immaterial. It was never suggested for the respondent that it had suffered an acquisition by reason of the suspensions, the latter being approved on the application of the permittees themselves³¹¹. It was not suggested that the supervening Treaty and federal legislation created conditions for the cancellation of the Permit under PSLA or that this was what had occurred³¹². The respondent relied upon the cancellation provision in PSLA to make the point that the Parliament had foreshadowed circumstances of the involuntary cancellation of permits. This was not one of them.
4. Whereas at trial and on appeal in the Federal Court there was a real issue as to whether the rights conferred by the Permit were "property" for the purposes of s 51(xxxi) of the Constitution, in this Court that point was abandoned. Every judge of the Federal Court had determined it against the Commonwealth³¹³. In light of the characteristics of the rights under the Permit and the broad concept of "property" accepted by this Court³¹⁴, the Commonwealth's belated concession is scarcely surprising. However, it is important, in my view, to record that the Commonwealth conceded that the asset which the respondent held under the Permit was a valuable entitlement which, as between citizen and citizen, had the features of a right to property. Thus, it was "definable, identifiable by third parties, capable in its nature of assumption by third parties, and [had] some degree of permanence or

310 *Commonwealth of Australia v Western Mining Corporation Ltd* (1996) 67 FCR 153 at 190; 136 ALR 353 at 386 per Beaumont J.

311 *Commonwealth of Australia v Western Mining Corporation Ltd* (1996) 67 FCR 153 at 190; 136 ALR 353 at 386.

312 *Commonwealth of Australia v Western Mining Corporation Ltd* (1996) 67 FCR 153 at 186; 136 ALR 353 at 382-383. See PSLA, ss 103A, 105.

313 *Western Mining Corporation Ltd v Commonwealth of Australia* (1994) 50 FCR 305 at 328-335; 121 ALR 661 at 681-688 per Ryan J; *Commonwealth of Australia v Western Mining Corporation Ltd* (1996) 67 FCR 153 at 158-161 per Black CJ, 182 per Beaumont J, 200-202 per Cooper J; 136 ALR 353 at 355-359, 378-379, 395-397.

314 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349; *Australian Tape Manufacturers Association v The Commonwealth* (1993) 176 CLR 480 at 527-528.

stability"³¹⁵. Yet according to the Commonwealth, as between the citizen and the Commonwealth, rights under the same Permit lacked any character of property independent of the statute which gave rise to the Permit³¹⁶. It was accepted by the respondent that its interest derived from federal legislation. That interest had no separate existence as a common law right. Moreover, it was conceded that when, pursuant to CPA, the respondent lost its rights as a permittee in Area A of the Zone, the Commonwealth did not acquire exactly the same rights as had been enjoyed by the respondent. What the Commonwealth received, according to the respondent, was the extinction of the inconvenient, but until then valuable, rights of property within the Zone which it had earlier provided might be granted and transferred, as they had been. This was done by the Parliament to permit a new legal régime by which new property rights in the form of permits issued by the new Joint Authority, might be granted to new persons without the impediment which the earlier permits, otherwise still operating by Australian law within the Zone, were thought to present.

5. Valuation evidence was called before the primary judge. It was tendered to prove the commercially valuable character of the respondent's right in the Permit. It would also be relevant to the question of compensation, if that were constitutionally required³¹⁷. None of that evidence was placed before this Court. Presumably, the parties were content that the Court should deal with the disputed matters on the basis of the findings of fact made by the primary judge. The judge did not expressly hold that there had been an acquisition otherwise than on just terms³¹⁸. However, this is clearly inherent in the declaration which he made. No argument was advanced that, if the "compensation" contemplated by CPA were required to be paid, this would not satisfy both the constitutional and statutory obligations³¹⁹. A dispute arose as to whether the argument about the proper characterisation of the

315 *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342-343 approving *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1248 per Lord Wilberforce.

316 See *Commonwealth of Australia v Western Mining Corporation Ltd* (1996) 67 FCR 153 at 209; 136 ALR 353 at 403 per Cooper J.

317 CPA, s 24.

318 *Western Mining Corporation Ltd v Commonwealth of Australia* (1994) 50 FCR 305 at 343-344; 121 ALR 661 at 695-696.

319 Constitution, s 51(xxxi) and CPA, s 24. See *Western Mining Corporation Ltd v Commonwealth of Australia* (1994) 50 FCR 305 at 327-328; 121 ALR 661 at 681 per Ryan J.

challenged law was advanced at the trial in the Federal Court³²⁰. However, that argument is no more than a legal one. No relevant procedural unfairness arises from the Commonwealth's change of argument. But it invites the comment that, if CPA lacked the character of a law for the acquisition of property and was to be characterised exclusively as something else, it might have been expected that this insight would have struck the Commonwealth's advisers at least by the time of the trial before the primary judge.

6. Finally, no issue arose in this case as to the source of the Commonwealth's liability as a juridical entity³²¹. Doubtless this was because of the terms of CPA³²² and because of the larger issues which the Commonwealth sought to debate.

Approach

237 Before dealing with the three basic arguments presented by the Commonwealth in the appeal, it is desirable to note several points about the approach which is to be taken to the meaning of s 51(xxxi) of the Constitution:

1. The provision has been repeatedly described as a constitutional guarantee³²³. Its meaning and requirements are to be derived with this basic purpose in

320 Ryan J appears to have considered that it was not: see *Western Mining Corporation Ltd v Commonwealth of Australia* (1994) 50 FCR 305 at 327, 333; 121 ALR 661 at 681, 686; cf *Commonwealth of Australia v Western Mining Corporation Ltd* (1996) 67 FCR 153 at 169 per Black CJ, 184 per Beaumont J, 197 per Cooper J; 136 ALR 353 at 366, 380-381, 393.

321 *The Commonwealth v Mewett* (1997) 71 ALJR 1102 at 1133; 146 ALR 299 at 340-341; cf Aitken, "The Commonwealth's entrenched liability - further refinements" (1994) 68 *Australian Law Journal* 690; Kneebone, "Claims Against the Commonwealth and States and their Instrumentalities in Federal Jurisdiction: Section 64 of the Judiciary Act" (1996) 24 *Federal Law Review* 93 at 94-95.

322 CPA, s 24(2).

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

mind. This requires that the Court should avoid pedantic³²⁴ or rigid³²⁵ approaches which would defeat the operation of a guarantee. To ensure that such purpose is fulfilled, the Commonwealth may not do indirectly what s 51(xxxi) would forbid if done directly³²⁶.

2. Some dicta have suggested that the Court will have regard only to the law's "direct legal operation and effect"³²⁷. However, in harmony with the foregoing injunctions as to the general approach to be taken, these remarks should now be seen as having given way to a broader approach, apt to the operation of constitutional prohibitions and guarantees³²⁸. The Court will look at the practical operation of a law said to offend the guarantee as well as at its legal form. Where necessary, it will look beyond its direct legal operation to examine the effect of what the law does. This liberal construction of s 51(xxxi)³²⁹ is evidenced most clearly in the broad approach taken by the Court to the meaning of the word "property"³³⁰, ultimately conceded by the Commonwealth as established in this case. But, of necessity, the same broad approach applies to every other word of the paragraph and to its operation as a whole.
3. Each word of s 51(xxxi) is important and has been scrutinised by this Court. But it is essential to view the paragraph as a whole. In particular, the

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

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

326 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349-350; *Wragg v State of New South Wales* (1953) 88 CLR 353 at 387-388; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371; *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 78; *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516 at 522-523.

327 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 433 per Mason J.

328 cf Hanks, "Adjusting Medicare Benefits: Acquisition of Property?" (1992) 14 *Sydney Law Review* 495 at 495-496.

329 *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509; cf *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349-350; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372; *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 202.

330 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 290 per Starke J.

acquisition of property is a compound conception³³¹. There is a danger in dissecting the words that the achievement of the purposes of the paragraph as a guarantee may be lost.

4. Section 51(xxxi) is at once a power to make laws for the acquisition of property and the imposition of a limitation on such power³³². Its language is unusual in two respects. It depends on there being a "purpose" in respect of which the Parliament already has the power to make laws. The acquisition thus posited can only take place in conjunction with the proper exercise of another lawmaking power³³³. It thus grants a power to the Parliament which would otherwise have been incidental to its power to make such other laws. This suggests that the intention of the Constitution is that s 51(xxxi) should be the only power for the enactment of a law "with respect to ... [t]he acquisition of property" as such³³⁴. As a textual matter, this conclusion is reinforced by the fact that the other general legislative powers conferred on the Parliament³³⁵ are expressed to be "subject to this Constitution". They are thus, relevantly, subject to s 51(xxxi). Were any other view of the operation of s 51(xxxi) taken, its express guarantee would be completely ineffectual³³⁶. Thus, the mere fact that a federal law is otherwise validly made pursuant to the external affairs power cannot of itself exempt it from the requirements of s 51(xxxi) if the law, in its relevant provisions, is also one with respect to

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

332 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 169.

333 *WSGAL Pty Ltd v Trade Practices Commission* (1994) 51 FCR 115 at 120; 122 ALR 673 at 677-678 per Lockhart J.

334 This does not mean that it is the "exclusive and exhaustive statement of the Parliament's powers to deal with or provide for the involuntary disposition of or transfer of title to an interest in property": *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 169.

335 Both by ss 51 and 52 of the Constitution.

336 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1422; 147 ALR 42 at 145; cf *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372 applied in *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 198.

"[t]he acquisition of property". The recent decision in *Newcrest*³³⁷ is an illustration of just such a case.

5. Although some dicta might be read as indicating that a right which has no existence apart from statute is one which, of its nature, is always susceptible to modification or extinguishment by later legislation without an entitlement to "just terms"³³⁸, a rule so stated would be much too broad. *Newcrest*³³⁹, and many other cases³⁴⁰, illustrate that it is necessary, in every case, to examine the legislation in question so as to determine whether the nature of the interests involved are inherently defeasible or, however "innominate and anomalous"³⁴¹ so partake of the quality of "property" that the guarantee in s 51(xxxi) is attracted.
6. Finally, it is important to remember that s 51(xxxi) relates to acquisition "from any State or person". The paragraph focuses on the subject of the acquisition, not upon what happens to the property once it is "acquired". It has been held repeatedly that it is not necessary that the acquisition should be effected by the Commonwealth or even by its instrumentalities³⁴² so long as it is done for a purpose in respect of which the Parliament has the power to make laws. Given the variety of such purposes, and their ever-expanding ambit, it would be a mistake to conceive of the "property" referred to in the paragraph as limited in such a way that it must be used after acquisition in the same way as it was before. Not infrequently, the property rights may be

³³⁷ (1997) 71 ALJR 1346; 147 ALR 42; cf Walker, "Case Note - *Horta v The Commonwealth*" (1994) 19 *Melbourne University Law Review* 1114 at 1121-1122.

³³⁸ See eg *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 263; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 304-306.

³³⁹ (1997) 71 ALJR 1346; 147 ALR 42. It was there accepted that the statutory rights were "property".

³⁴⁰ For example *The Commonwealth v Mewett* (1997) 71 ALJR 1102 at 1139; 146 ALR 299 at 349.

³⁴¹ *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349.

³⁴² See eg *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1387-1388; 147 ALR 42 at 98.

acquired for the precise object of extinguishing them, that being the very purpose of the acquisition³⁴³.

The alteration of the permittee's rights was an acquisition

238 The Commonwealth's first argument was that the variation or extinction of the statutory rights of the respondent as a holder of the Permit was not an "acquisition" of property within the meaning of s 51(xxxi)³⁴⁴. This argument was advanced in several ways. Essentially, it was submitted that the rights conferred on a permittee by PSLA were inherently susceptible to modification or extinguishment by later enactment. When the respondent secured the benefit of those rights, it had "no more than a statutory privilege under a licensing system"³⁴⁵. It received no rights recognised by the general law "but rather a new species of statutory entitlement, the nature and extent of which depends entirely on the terms of the legislation"³⁴⁶. Alternatively, it was submitted, the effect of CPA on a permit granted under PSLA was no more than an extinguishment or diminution of the property rights of the permittees³⁴⁷. It did not involve an "acquisition" of their property by the Commonwealth or anyone else because the rights in respect of Area A of the Zone simply disappeared. Neither the Commonwealth nor anyone else "acquired" them.

239 These arguments are supported neither by the analysis of the applicable legal principles nor by an understanding of the facts of this case.

240 This area of discourse usually takes as its starting point the fact that the Australian Constitution is expressed in terms of "acquisition" of property, unlike

343 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 290; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1; cf *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1410; 147 ALR 42 at 129.

344 And thus CPA, s 24.

345 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1410; 147 ALR 42 at 130 per Gummow J.

346 *Bienke v Minister for Primary Industries and Energy* (1996) 63 FCR 567 at 585; 135 ALR 128 at 144; see also *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 163-165; 119 ALR 108 at 120-121.

347 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 270-271; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 328; cf *Government of Malaysia v Selangor Pilot Association* [1978] AC 337 at 347.

the United States provision³⁴⁸ which is addressed to the deprivation of property³⁴⁹. Acquisition connotes the gaining, receiving or coming into possession of something. Therefore, it is argued, if all that has been done is to restrict what an owner may do with its property, that may not amount to an "acquisition"³⁵⁰. According to the Commonwealth, these basic features of s 51(xxxi) necessitate focus both on the nature of the accepted property interests which the respondent held in the Permit, the effect of the challenged law upon those interests, whether the interests were merely modified in a way inherent in their statutory nature and whether they were extinguished but without the acquisition necessary to attract the constitutional guarantee.

241 Much authority of this Court stands against the proposition that the mere fact that property rights are created by federal legislation necessarily implies that they may be extinguished or varied by later legislation without the provision of just terms³⁵¹. As the analysis of the provisions of PSLA demonstrate, far from stating, or implying, that the rights of permittees under that Act were defeasible, the clear object of the Act was to afford permittees the kind of stable "title" to property rights which the Minister, introducing the Bill, acknowledged would be necessary if investors were to be attracted to risk substantial venture capital. Unlike other cases where defeasibility of rights is expressly stated or implied³⁵², this was

348 Constitution of the United States, Amendment V ["... nor shall private property be taken for public use, without just compensation."]. See *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 168-169 referring to *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290-291.

349 *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 145 per Mason J, at 181 per Murphy J; cf *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290-291. In the cases under the Fifth Amendment to the United States Constitution, the Supreme Court has looked to the economic impact of the government's action and the extent to which it has interfered with investment-backed expectations. *Connolly v Pension Benefit Guaranty Corp* 475 US 211 at 225-227 (1986); Hanks, "Adjusting Medicare Benefits: Acquisition of Property?" (1992) 14 *Sydney Law Review* 495 at 496.

350 *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 283 per Deane J; *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 248-249.

351 See eg *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 184; *The Commonwealth v Mewett* (1997) 71 ALJR 1102 at 1139; 146 ALR 299 at 349; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346; 147 ALR 42.

352 *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151; 119 ALR 108; *Bienke v Minister for Primary Industries and Energy* (1996) 63 FCR 567; 135 (Footnote continues on next page)

legislation which went to a great deal of trouble to assure permit holders that their property rights would be guaranteed against arbitrary or discretionary loss. The rights of permittees in the permit area are virtually exclusive. The term is substantial. There is provision for renewal. An exploration permit is the logical first step to the exercise of rights under PSLA to secure a production licence upon the discovery of petroleum reserves. Were a risk of arbitrary or discretionary loss stated or implied in the Act, it is unthinkable that permittees would assume the extremely heavy obligations, involving long-term investment and commitment, associated with such permits³⁵³. The fact that here the respondent acquired its interest in the permit late and, by the suspension of obligations under PSLA, was relieved from the immediate burdens of the Permit is completely irrelevant. What must be ascertained are the characteristics and obligations of the Permit as contemplated by the legislative scheme. A moment's reflection on that scheme confirms that any suggestion that these were defeasible rights which could be granted and cancelled at will, without the provision of just terms, is completely incompatible with the nature of those rights and the valuable investments depending upon them.

242 Another way in which the Commonwealth urged that the rights conferred by the Permit were inherently susceptible to modification or extinguishment was by reference to the fact that they lacked the character which title to land within Australia (and arguably within its territorial sea) afforded. Such rights are granted out of the radical title of the Crown derived from the Crown's sovereignty over Australia. There being no sovereignty over the continental shelf beyond the territorial sea, no traditional right of the Crown in such areas and no radical title there to support the interests of permittees, their property rights rested on a flimsy foundation³⁵⁴. Such rights were no stronger than the legislation enacting them. What one Parliament had provided, another could take away.

243 This argument took the Court into an interesting exploration of international law and legal history surrounding the assertion by the English Crown of its

ALR 128; cf *R v Toohey*; *Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342; *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 261-262.

353 cf *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1413; 147 ALR 42 at 133-134.

354 In *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 337, Mason J pointed out that the *Seas and Submerged Lands Case* did not decide whether the Commonwealth acquired property rights in the seabed. See also *New South Wales v The Commonwealth* ("*Seas and Submerged Lands Case*") (1975) 135 CLR 337 at 457 per Stephen J: "[the] subject matter is not proprietorship ... nor is it even sovereignty, but sovereign rights for specific purposes, the exploration and exploitation of natural resources."

dominion over areas of the high seas, such as the English Channel, the North Sea and the seas around Ireland (and "more vaguely ... the Bay of Biscay and the ocean to the north of Scotland")³⁵⁵. The Commonwealth relied on the very gradual way by which international law had moved to recognise the "sovereign rights" of littoral States to explore for and exploit the natural resources of their continuous continental shelf³⁵⁶. Because of this slow evolution, which coincided with the grant of the Permit, it was inherent in PSLA, and in the grant of a permit under that Act, that everything done was subject to the effect of the process of delimitation of the seabed boundary between the island of Timor and Australia or connected practical arrangements. Until the finalisation of the Treaty, the boundary could never have been known. This meant that, although a permittee acquired a kind of property right, it was one inherently susceptible to later legislative modification or extinguishment.

244 This argument is without merit. By international law relevant "sovereign rights" devolved upon Australia. By valid municipal law, the Parliament provided for the exercise of such sovereign rights for the purpose for which they were given, namely exploration and exploitation of the resources of the sea and seabed³⁵⁷. Also by valid municipal law, the Parliament enacted that the sovereign rights were vested in and exercisable by the Crown in right of the Commonwealth³⁵⁸. It was out of that vested right that the permits were granted, of which the Permit was one. The vesting of such rights was sufficient to sustain the validity of the permits without the need to posit a fiction of feudal land law or to expand the Crown's radical title beyond the territorial sea into the continental shelf³⁵⁹. The absence of this fiction does not weaken the property rights acquired by a permittee. Those rights derived their character from the terms in which they were expressed in the Act creating them. By those terms, they were far from inherently susceptible to modification or extinguishment. On the contrary, their nature and incidents suggested that they would not be modified or extinguished, at least without the

355 Hall, *A Treatise on International Law*, 8th ed (1924) at 179. But see *New South Wales v The Commonwealth* ("*Seas and Submerged Lands Case*") (1975) 135 CLR 337 at 485-488 per Jacobs J.

356 Churchill and Lowe, *The Law of the Sea*, New rev ed (1988) at 121-123; O'Connell, *The International Law of the Sea* (1982), vol 1 at 476-488; Jennings and Watts (eds), *Oppenheim's International Law*, 9th ed (1992), vol 1 at 773; Nandan and Rosenne, *United Nations Convention on the law of the sea 1982: A Commentary* (1982), vol 2 at 825-836.

357 By PSLA.

358 SSLA, s 11.

359 cf *Wik Peoples v Queensland* (1996) 187 CLR 1 at 234-235.

provision of just terms to those who would thereby stand to lose substantial investments and, potentially, substantial profits.

245 That conclusion leaves the alternative basis upon which the Commonwealth argued that there was no "acquisition" of property. This was that all that CPA had effected was an extinguishment of rights but not the acquisition of those rights by someone else.

246 It is important to appreciate that nothing in s 51(xxxi) requires that what is received as a result of an "acquisition" must bear an exact correspondence with the rights of the property owner which are lost in the transaction³⁶⁰. If this were a requirement of the paragraph, it would afford an easy means of evading its protective purpose. It would allow the Commonwealth, by statutory modification or change of rights, to do by circuitous means what it could not successfully do directly. All that s 51(xxxi) requires, in terms, is that the acquisition should be "for any purpose in respect of which the Parliament has power to make laws". It necessitates no more than that the acquirer should obtain some "identifiable benefit or advantage"³⁶¹. Here, the purpose nominated was the power of the Parliament to make laws with respect to external affairs. The interest of permittees in blocks falling within Area A of the Zone clearly constituted an encumbrance on the "sovereign rights" vested in the Crown in right of the Commonwealth which the Parliament determined to remove so as to enhance the Commonwealth's rights. Such enhancement allowed the Commonwealth, in concert with Indonesia and acting through the organs established by the Treaty and ZCA, to grant new permits to different persons in respect of the same area of the earth's graticular surface as was already the subject of permits issued under PSLA. Within that area, the interest of a permittee such as the respondent was an impediment to the implementation of the Treaty and to the operation of the new Joint Authority. It is self-evident that clearing the slate of the vexing interests of a permittee such as the respondent was done for a purpose of the Commonwealth. It afforded the Commonwealth an "identifiable benefit or advantage". But it could only be done if the Commonwealth acquired the relevant permittees' interests from them.

360 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 223.

361 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 185. See also *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 283; *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 161, 163; 119 ALR 108 at 118-119; *Bienke v Minister for Primary Industries and Energy* (1996) 63 FCR 567 at 585-587; 135 ALR 128 at 144-146. In *Newcrest*, Gummow J observed that the question was whether the appellants were deprived of the "reality of proprietorship" (*Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349). That question was answered by deciding whether the Commonwealth acquired a measurable and identifiable advantage relating to the ownership or use of the property: (1997) 71 ALJR 1346 at 1410; 147 ALR 42 at 129.

Because those interests were proprietary in nature, their extinguishment by statute to the benefit of the Commonwealth's interests amounted to an acquisition. Only if it acted as it did would the Commonwealth secure both the external affairs benefit which the Zone was seen to present in the relationships between Australia and Indonesia and the taxation benefits which the Treaty arrangements secured to the revenue of the Commonwealth³⁶². What was extinguished in the property interests of the permittees (including the respondent) corresponded sufficiently to the benefit thereby gained by the Ministerial Council and Joint Authority created by the Treaty and given effect by ZCA. That benefit was the right to grant new permits, recognised by Australian law, to explore for and, if discovered, exploit petroleum in the identical blocks of the earth's surface within the Australian continental shelf.

247 Moreover, by extinguishing the permits in Area A of the Zone the Commonwealth effectively recouped any petroleum or other natural resources in the seabed which might otherwise have become the property of the permittees. Whether or not the Commonwealth had rights of ownership in the seabed is irrelevant. The permittee had, under PSIA, exclusive rights to explore for and exploit any petroleum which it found in an area covered by its permit rights in Area A of the Zone. On the tests which this Court has recognised for differentiating mere extinguishment from acquisition³⁶³, this was a case of acquisition.

Supervening legislation is characterised as an acquisitions law

248 The Commonwealth's second argument was that CPA should not be characterised as a law "with respect to ... [t]he acquisition of property" within s 51(xxxi) of the Constitution. The Commonwealth advanced three basic reasons in support of this proposition.

249 The first, in point of logic, was that s 51(xxxi) could have no application to areas geographically external to Australia. Some support for this theory was found in the reasoning of McHugh J in his dissenting opinion in *Newcrest*³⁶⁴. The argument rested upon the juxtaposition in par (xxxi) of the subjects of the acquisition, namely "any State or person". As a State is, by definition, part of and within Australia so, it was submitted, the "person" contemplated by the paragraph could not be at large. By its association with the word "State" and its place in the

362 See ZCA, Pt 3.

363 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 172-173, 185, 223; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305, 311; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1351, 1410; 147 ALR 42 at 48, 129.

364 (1997) 71 ALJR 1346 at 1381; 147 ALR 42 at 89-90.

federal chapters of the Constitution, it was confined to an "acquisition within a State".

250 There is no substance in this submission. In the context in *Newcrest*, McHugh J was dealing with the proposition that the paragraph extended to federal territories. He was not addressing the ambit of its operation to protect the property of a State or of a person which happened to be outside Australia. The notion that such property could be vulnerable to compulsory acquisition under federal law without just terms is self-evidently unacceptable. Even at federation, but still more today, property interests may be held by Australian connected persons and even by States which have their locus outside Australia. Given that "property" extends to intangible, innominate and anomalous interests³⁶⁵, the property rights of a State or person referred to would clearly extend to interests in foreign capital markets which may have no necessary physical manifestation in Australia save perhaps for electronic messages. The notion that such property interests in the global capital market are outside the protection of s 51(xxxi), and could be acquired by federal legislation, valid without the provision of just terms, is as alarming as it is absurd. Whatever the limits of s 51(xxxi)³⁶⁶, it is confined neither by its language nor by its purpose to property physically within the territory of Australia. But if s 51(xxxi) applies to property in foreign countries, it clearly extends to property in interests related to off-shore areas brought under the jurisdiction and control of the Commonwealth by federal law. The continental shelf is such an area. It is so by international law. But more relevantly, it is so by Australia's municipal law³⁶⁷.

251 The Commonwealth's second basis for this argument was that CPA, properly characterised, was not a law with respect to the acquisition of property but a law providing for the adjustment of competing rights, claims and obligations of a larger order, namely those asserted in the international sphere respectively by the Republic of Indonesia and the Commonwealth of Australia. In this regard, the Commonwealth relied on the following passage in the reasons of the majority in *Nintendo Co Ltd v Centronics Systems Pty Ltd*³⁶⁸:

365 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 197-198.

366 In the United States of America, the protection has been applied to the property wherever situated in favour of United States citizens. See *Reid v Covert* 354 US 1 (1957). Citizenship is an unexpressed and doubtful limitation in the context of s 51(xxxi) of the Australian Constitution.

367 PSLA and SSLA. See also *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1392; 147 ALR 42 at 104 per Gummow J.

368 (1994) 181 CLR 134 at 161. See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 166, 198.

"[A] law which is not directed towards the acquisition of property as such but which is concerned with the adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity is unlikely to be susceptible of legitimate characterisation as a law with respect to the acquisition of property for the purposes of s 51 of the Constitution."

252 In *Nintendo*, the character of the Act in question³⁶⁹ was determined to be beyond the reach of the constitutional guarantee of just terms. There have been other, similar cases³⁷⁰. The difficulty has been to draw a satisfactory line between such cases and others where valuable rights are affected by legislation in a way adverse to the interests of the property owner. No formula of universal application can be expressed. This is because the task of characterisation which is invoked obliges the Court to evaluate all of the features of the law in question in order to classify it as falling within, or outside, the operation of the guarantee in s 51(xxxi).

253 Some interests, of their nature, are much more likely to be catalogued as protected by the guarantee than others. If the interests are ephemeral, prone to ready variation or dependant upon benefits paid out of the consolidated revenue, they will much more readily be classified as falling outside the constitutional protection than where they are exclusive, transferable, require substantial investment, impose significant obligations and partake, by analogy, of the familiar features of stable and valuable property interests long recognised by the common law. The creation of new property interests by federal legislation can scarcely be a consideration which, of itself, puts such interests beyond the protection of s 51(xxxi). After all, the Commonwealth can ordinarily create property interests only by legislation. Several interests created by federal legislation have been held to attract the protection of s 51(xxxi). *Newcrest* is but the latest case to deny the proposition that all legislative rights are inherently provisional and of their nature liable to repeal without the provision of just terms.

254 When the rights conferred by the permit in question here are considered, they can, on no account, be described as defeasible according to their nature. Nor can CPA properly be characterised as a law merely "adjusting" competing rights, claims and obligations of the kind that was inherent in the statutory scheme under which those rights were granted in the first place. On the contrary, a supervening legislative scheme, with entirely new and different rights, was introduced to provide for quite different entitlements for a completely different purpose of the Commonwealth. The acknowledged property interests of permittees such as the

369 *Circuit Layouts Act* 1989 (Cth).

370 *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 510; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 171-173, 177-178, 188-189; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285-286.

respondent were then *pro tanto* diminished in Area A of the Zone. The sterilisation which was imposed on the exercise of the respondent's rights in that area was indistinguishable from that attempted in *Newcrest*³⁷¹. This was not statutory "adjustment" of the kind spoken of in *Nintendo*³⁷². It was an acquisition of clear and stable property rights for the purposes for which the Parliament undoubtedly had power to make laws under the external affairs power. However, it could only acquire such property rights, seen as an impediment to the pursuit of its new purpose, on condition that the law doing so provided just terms to the property owner.

Acquisition not wholly incidental to another head of power

255 The Commonwealth's third argument was that this was a case, like earlier ones³⁷³, where any acquisition of property was to be regarded as necessarily incidental to, consequential upon and inherently involved in a legislative purpose different from that contemplated by s 51(xxxi). That purpose was identified as the purpose of implementing the Treaty in domestic law for which both ZCA and CPA were valid and necessary exercises of the external affairs power under the Constitution.

256 It must be accepted that a long line of cases in this Court recognises that some compulsory and involuntary acquisitions of property are of such a nature that they fall outside the guarantee of s 51(xxxi). They have been treated as inherent in a specific constitutional grant of legislative power which must be given full effect. Such grant would be defeated if it were necessary to provide compensation to the property owner. Examples include the sequestration of the property of a bankrupt³⁷⁴, the levying of taxation³⁷⁵, the imposition of fines or the confiscation

371 (1997) 71 ALJR 1346 at 1350-1351, 1410-1411, 1412-1413; 147 ALR 42 at 48, 130, 133.

372 (1994) 181 CLR 134 at 161.

373 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 was instanced and the *Trading with the Enemy Act 1939* (Cth) was cited.

374 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 170.

375 *Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 263; *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 638-639.

of prohibited imports³⁷⁶ and the seizure of enemy property in time of war³⁷⁷. By analogy, it was argued, the legislation in question here was to be characterised as falling wholly within par (xxxix) of s 51 and unaffected by par (xxxi).

257 This argument is also unconvincing. It has never been necessary for a law which has the effect of authorising the acquisition of property to be characterised as wholly or exclusively concerned with that purpose³⁷⁸. The question is whether Pt 8 of CPA, which affects the respondent's rights under the Permit in respect of exploration blocks in Area A of the Zone, can be characterised as a law with respect to the acquisition of property or not³⁷⁹. In my view it can. The effect on the permittees' property interests could not possibly be said to be so subservient to the other purpose of the law as to have "no recognisable independent character"³⁸⁰. On the contrary, the removal of the impediment which the pre-existing permits were thought to present was the dominant purpose of Pt 8 of CPA³⁸¹. It is true that the overall purpose of ZCA and CPA can be described as being to give effect to a treaty between Australia and Indonesia. However, that alone would not relieve the Parliament of its duty to ensure that any acquisition effected by such a law conformed to the constitutional requirement³⁸². The external affairs power covers potentially so many subject matters of legislation that to treat a law, made under s 51(xxix) of the Constitution or giving effect to a treaty pursuant to that power, as inherently outside the requirements of s 51(xxxi) would be to authorise a most serious diminution of the effectiveness of the constitutional guarantee. There is nothing necessarily antithetical to the pursuit of Australia's external affairs interests in the operation of s 51(xxxi). On the contrary, the express language of

376 *Burton v Honan* (1952) 86 CLR 169 at 180; *R v Smithers; Ex parte McMillan* (1982) 152 CLR 477 at 488-489; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285.

377 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 373.

378 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1352; 147 ALR 42 at 50 per Brennan CJ.

379 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 188; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 307-308.

380 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 171 per Mason CJ.

381 *Commonwealth of Australia v Western Mining Corporation Ltd* (1996) 67 FCR 153 at 168-169; 136 ALR 353 at 365-366.

382 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1351-1352, 1368, 1372, 1399, 1426; 147 ALR 42 at 49, 71, 77, 114, 151.

the Constitution subjects laws made with respect to external affairs under s 51(xxix) to the other provisions of the Constitution. These include s 51(xxxi).

258 The Commonwealth doubtless hoped that it could abolish the respondent's relevant property rights, without providing just terms. It could perhaps view its endeavour in that regard as a pursuit of a larger national interest which the Treaty and supporting legislation were designed to achieve. However, such hope was misplaced. The larger object was indeed attainable under the Constitution. But only on the condition of providing just terms to a property owner whose rights were acquired. The position is indistinguishable from *Newcrest*. There, a corporation enjoying established property rights created under legislation was expected, in effect, to foot the bill of providing an enlargement of a national park of great benefit to the public. The Commonwealth did not seek to acquire the mining tenements there in order to prospect for minerals itself any more than here it acquired the property of the permittees in Area A of the Zone in order itself to prospect for petroleum. In *Newcrest* it simply sought to pursue another purpose, also under the external affairs power, namely to expand the Kakadu National Park. Here, the permittees (including the respondent) were expected to forfeit part of their property interests to clear the path for a practical settlement of a seabed boundary dispute with a neighbouring country. In neither case was such uncompensated self-sacrifice of property rights lawful. If the Australian community, through its Parliament, wishes to pursue such objectives, it cannot expect to do so at someone else's economic cost³⁸³.

259 One of the institutional strengths of the Australian economy is the constitutional guarantee of just terms where the property interests of investors are acquired under federal law. This Court should not undermine that strength by qualifying the guarantee. Neither the Court's past authority nor economic equity require such a result. If it can happen here it can happen again and investors will draw their inferences.

Just terms were not otherwise provided

260 The Commonwealth's third argument was that, if there were an acquisition of property, it was made on "just terms" within s 51(xxxi) of the Constitution. Accordingly, there was no basis to invoke either the constitutional guarantee or the statutory entitlement³⁸⁴.

383 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 213, 219; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1421-1422; 147 ALR 42 at 145.

384 CPA, s 24.

261 It was pointed out that the Permit was always subject to alternative claims under Indonesian law and, to that extent, contingent or uncertain. Following the Treaty and ZCA and CPA, the respondent became entitled outside Area A of the Zone to the renewal of the entire unexercised part of the Permit. Such entitlement was freed from the normal requirement, imposed by the PSLA that the permit holder relinquish fifty percent of the existing permit area before renewals³⁸⁵. The offsetting benefit of relief from this provision was enacted by CPA³⁸⁶. Moreover, the respondent, as the holder of a permit extinguished, in effect, by the creation of the Zone, was afforded preferential treatment in the allocation of new exploration areas in the Zone pursuant to what was described as "the formal understanding" between Australia and Indonesia recorded in the exchange of letters which occurred at the time of the entering into the Treaty. The Commonwealth submitted that these three consequences of the Treaty, and of the federal laws enacted to give it effect, viewed in combination, amounted to "just terms" sufficient to meet the constitutional guarantee and so to relieve it of the requirements of s 24 of CPA.

262 In order to meet the requirement of "just terms", it is necessary that provision be made of appropriate "terms" to ensure economic fairness to the party whose property has been acquired. There is little judicial elaboration of what the phrase means. In one case it was suggested that "the pecuniary equivalent of the property acquired"³⁸⁷ must be paid. However, that suggestion seems unduly narrow. Where the law is challenged for a failure to provide "just terms", it is necessary to consider the way in which the law operates and the comparative position of the property owner before and after the acquisition. Because the requirement to provide "just terms" is a condition of the grant of legislative power, it is necessary that provision for just terms should be made by or under that law³⁸⁸. This does not mean that it must be contained in the acquisition law itself so long as it can be derived as necessarily inherent in that law³⁸⁹.

263 It is true, as the Commonwealth pointed out, that drilling commitments under the Permit were in fact deferred after only two and a half years of operation and then at the request of the permittee. It is also true that the dispute over sovereignty in the area covered by the Permit was publicly known at the time the Permit was

385 PSLA, ss 30A(5) and 31.

386 CPA, s 23.

387 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 300 per Starke J; cf *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290; *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 at 546.

388 *PJ Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 at 402.

389 *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 166-167; 119 ALR 108 at 123.

granted. It would have been well known to the respondent at the time it acquired its interest. Moreover, the Permit was suspended in 1983 and 1988 in accordance with PSLA³⁹⁰. Had such suspensions not occurred, the permittees would have been obliged to relinquish half of their allocation on each successive renewal³⁹¹.

264 These considerations are irrelevant to the validity of the law. The factual situation and the knowledge of the dispute over sovereignty cannot alter the constitutionality of the law affecting the rights of the Permit previously granted. Either the law provides for "just terms" or it does not. If it does not, it is invalid and can only be saved by s 24 of CPA.

265 The exchange of letters relied upon by the Commonwealth is not part of the scheme of the law provided by CPA. Nowhere in that law, expressly or by necessary implication, are such letters referred to. In any case, the letters expressed no more than an "understanding" that an application made by the permittees (including the respondent) for a production-sharing contract within Area A of the Zone, and formerly within the Permit area, would be given "favourable consideration" by the Joint Authority created by the Treaty³⁹². The only aspects of the Treaty introduced into Australian domestic law are those dealt with by ZCA and CPA. Neither of those Acts conferred any enforceable rights in Area A of the Zone on permittees under PSLA, including the respondent.

266 The relevant assessment criteria published by the new Joint Authority, pursuant to Article 11 of the Petroleum Mining Code for Area A of the Zone of Cooperation³⁹³ gave a permittee such as the respondent an option of "matching" the best bid for the contract area that corresponded to the area in respect of which its rights under the Permit had been acquired³⁹⁴. However, neither the Petroleum Mining Code nor the assessment criteria have been enacted as part of the law of Australia. They do not therefore confer enforceable rights on the permittees, including the respondent. They are not part of the law which must be demonstrated on its face to include, or provide for, "just terms". Thus a refusal on the part of the new Joint Authority (or Ministerial Council) administering the Zone to afford the permittees, including the respondent, the option of "matching" the best bid received in relation to the comparable area would not appear to be reviewable

390 PSLA, s 103A.

391 Pursuant to the scheme in PSLA, s 31.

392 *Western Mining Corporation Ltd v Commonwealth of Australia* (1994) 50 FCR 305 at 323; 121 ALR 661 at 677.

393 Annex B to the Treaty: see ZCA, Sched 1.

394 *Western Mining Corporation Ltd v Commonwealth of Australia* (1994) 50 FCR 305 at 324-326; 121 ALR 661 at 678-679.

under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth)³⁹⁵. The enforceability of the right to match and of rights consequent thereto is highly problematical.

267 I accept that some of the considerations raised by the Commonwealth under this part of its argument would be relevant to the ascertainment of the compensation to which the respondent is entitled. But that is a task which has not yet been ventured, having regard to the procedural course which the litigation took in the Federal Court. To the extent that CPA failed to enact or provide for just terms for the permittees such as the respondent, it was not a law with respect to the acquisition of property on just terms. But for s 24, the part of CPA providing for acquisition would therefore be unconstitutional.

Orders

268 The result is that each of the three objections by the Commonwealth to the declaration made by the Federal Court of Australia fails. The appeal from that court should therefore be dismissed with costs.

³⁹⁵ See the definition of a "decision to which this Act applies" in s 3(1) of the *Administrative Decisions (Judicial Review) Act*.