HIGH COURT OF AUSTRALIA

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

THE COMMONWEALTH OF AUSTRALIA	PLAINTIFF
AND	
THE STATE OF WESTERN AUSTRALIA	FIRST DEFENDANT
THE WARDENS OF THE SOUTH WEST MINERAL FIELD	SECOND DEFENDANT
MINERAL SAND MINING & DEVELOPMENT PTY LTD	THIRD DEFENDANT
ENMIC PTY LTD	FOURTH DEFENDANT

Commonwealth of Australia v State of Western Australia
(C4-1998) [1999] HCA 5
11 February 1999

ORDER

1. *Demurrer by the State of Western Australia to the Commonwealth's Amended Statement of Claim filed on 22 May 1998 allowed in so far as it relates to that part of the defence practice area outside the land within Melbourne Locations 3988, 3989 and 4004 but otherwise overruled.*

2. *Demurrer by the Commonwealth to the State of Western Australia's Counterclaim filed on 25 May 1998 allowed.*

3. *Matter stood over to be listed before a single Justice to make further or consequential orders.*

4. *Costs of each demurrer, if they be sought, reserved for consideration of a single Justice.*

Representation:

H C Burmester, Acting Solicitor-General for the Commonwealth, with M J Hawkins and M A Perry for the plaintiff (instructed by Australian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia, with J C Pritchard for the first defendant (instructed by Crown Solicitor for the State of Western Australia)

No appearance for the second, third and fourth defendants

Interveners:

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

B M Selway QC, Solicitor-General for the State of South Australia, with J Hughes intervening on behalf of the Attorneys-General for the States of South Australia and New South Wales (instructed by Crown Solicitors for the States of South Australia and New South Wales)

CATCHWORDS

The Commonwealth of Australia v The State of Western Australia & Ors

Statutes – Construction – Whether *Mining Act* 1978 (WA) applies to land owned or leased by the Commonwealth.

Real property – Grants – Freehold grant – Crown lease – Reservations for mining and minerals – Construction of reservations.

Constitutional law – Effect of s 64 of the *Judiciary Act* 1903 (Cth) – Application of *Mining Act* 1978 (WA) to land owned or leased by the Commonwealth.

Constitutional law – Inconsistency of laws – Whether *Lands Acquisition Act* 1989 (Cth) inconsistent with *Mining Act* 1978 (WA).

Constitutional law – Inconsistency of laws – Whether Defence Force Regulations (Cth) inconsistent with *Mining Act* 1978 (WA).

Constitutional law – Acquisition of property – Whether Defence Force Regulations (Cth) effect an "acquisition of property" under s 51 (xxxi) of the Constitution.

Words and phrases – "Crown land" – "operational inconsistency" – "private land".

The Constitution, ss 51(xxxi), 109.
Commonwealth Places (Application of Laws) Act 1970 (Cth), s 4(1).
Judiciary Act 1903 (Cth), s 64.
Lands Acquisition Act 1955 (Cth), ss 8, 51 & 53(2).
Lands Acquisition Act 1989 (Cth), Pt X.
Defence Force Regulations (Cth), Pt XI.
Mining Act 1978 (WA).

1 GLEESON CJ AND GAUDRON J. The Commonwealth uses land at Lancelin in Western Australia as a defence practice area ("the defence practice area"). It owns the fee simple in part of the land known as Melbourne Locations 3989 and 4004 ("the freehold land"). It holds another part of the land, Melbourne Location 3988, as lessee under a Special Lease from the State of Western Australia ("the leasehold land"). The remaining land surrounds the leasehold land ("the perimeter area"). It is owned by the State of Western Australia. The Commonwealth may have some arrangement with the State with respect to its use but, if so, that does not appear from the pleadings.

2 Application has been made by Mineral Sand Mining & Development Pty Ltd and Enmic Pty Ltd, the third and fourth defendants, respectively, for the grant pursuant to the *Mining Act* 1978 (WA) of exploration licences over part of the defence practice area. One application (No 70/1425) is in respect of an area which encompasses part of the leasehold land and part of the perimeter area. Another (No 70/1542) covers part of the freehold and leasehold lands and part of the perimeter area and the other application (No 70/1549) covers part of the freehold and leasehold lands. The applications were lodged on 10 February 1994, 9 November 1994 and 10 January 1995, respectively.

The proceedings

3 Proceedings were commenced in this Court by the Commonwealth against the State of Western Australia, the Wardens of the South West Mineral Field ("the Mining Wardens") and the third and fourth defendants. By its Amended Statement of Claim, the Commonwealth seeks declarations that the Mining Wardens do not have jurisdiction to entertain applications for mining tenements over any part of the defence practice area; that, to the extent that the *Mining Act* purports to apply to any part of that area, it is invalid; and, finally, that the *Mining Act* "does not bind the Crown in the right of the Commonwealth."

4 The State of Western Australia demurred to the Commonwealth's Amended Statement of Claim. Additionally, it counterclaimed to the effect that the legislative provisions upon which the Commonwealth relies are invalid. It will later be necessary to refer to the counterclaim in more detail. For the moment, it is sufficient to note that the Commonwealth has demurred to it.

History of and title to the defence practice area

5 Before turning to the precise issues raised by the demurrers, it is necessary to say something further with respect to the separate areas which together make up the defence practice area.

6 The freehold land was acquired by agreement with the State of Western Australia in two parcels, the first (Melbourne Location 3989) in 1975 and the

second (Melbourne Location 4004) in 1977. The acquisition of both parcels was for a public purpose and was effected pursuant to s 7 of the *Lands Acquisition Act* 1955 (Cth) ("the 1955 Acquisition Act")[1]. Crown Grants were issued by the Governor of Western Australia and the Commonwealth became registered as proprietor in fee simple of both parcels pursuant to the *Transfer of Land Act* 1893 (WA).

7 Each of the Crown Grants contains a reservation of minerals in the following terms:

> "... we do hereby save and reserve to Us, Our heirs and successors, all Mines, of Gold, Silver, Copper, Tin, or other Metals, Ore and Minerals, or other substances containing Metals, and all Gems or Precious Stones and Coal or Mineral Oil and all Phosphatic Substances in and under the said land, with full liberty at all times to search and dig for and carry away the same; and for that purpose to enter upon the said land or any part thereof".

They also contain a reservation of petroleum in these terms:

> "... we do hereby, save and reserve to Us, Our heirs and successors all petroleum (as defined in the Petroleum Act, 1967, and all amendments thereof for the time being in force) on or below the surface of the said land with the right reserved to Us, Our heirs and successors and persons authorised by Us, Our heirs and successors to have access to the said land for the purpose of searching for and for the operations of obtaining petroleum in any part of the said land".

8 There is a distinct difference between the reservation of minerals and the reservation of petroleum. The latter allows that access may be had not only by "Us, Our heirs and successors" but also by "persons authorised ... to have access ... for the purpose of searching for and ... obtaining petroleum". So far as concerns the reservation of minerals, a right of entry is simply reserved "to Us, Our heirs and successors".

9 Whatever the extent of the reservation of petroleum and the associated right of access, it follows from the limited nature of the reservation of minerals that it does not, itself, permit any person to be authorised to search for minerals or to conduct mining activities on his or her own behalf. Thus, contrary to the primary

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1 The 1955 Acquisition Act has since been repealed. At the time of the acquisitions, s 7(1) provided:

> " The Minister may authorize the acquisition of land by the Commonwealth by agreement for a public purpose approved by him."

argument for the State of Western Australia, it is necessary to inquire with respect to the freehold land whether such authority can be conferred pursuant to the *Mining Act*.

10 The leasehold land was demised by the State of Western Australia to the Commonwealth for use as "a Naval Gunfire Support Range Danger Area and Army Training Area"[2]. It was demised pursuant to s 7(4) of the *Land Act* 1933 (WA) for a period of 21 years from 1 July 1978[3]. The leasehold was also acquired by the Commonwealth for a public purpose pursuant to s 7 of the 1955 Acquisition Act and the lease registered pursuant to the *Transfer of Land Act*.

11 The Special Lease provides:

> "it [is] at all times ... lawful for Us, Our Heirs and Successors, or for any person or persons acting in that behalf by Our or Their authority, to resume and enter upon possession of any part of the said lands ... for the purpose of exercising the power to search for minerals and gems hereinafter reserved".

The reservation of minerals and gems is in these terms:

> "... we do hereby save and reserve to Us, Our Heirs and Successors, all mines of gold, silver, copper, tin or other metals, ore, and mineral, or other substances containing metals, and all gems and precious stones, and coal or mineral oil, and all phosphatic substances in and under the said land, with full liberty at all times to search and dig for and carry away the same".

12 The reservation of access for the purpose of exploration is expressed to be "for Us, Our Heirs and Successors, or for any person or persons acting in that behalf by Our or Their authority", whilst in relation to the reservation of minerals and gems a right of entry is reserved "to Us, Our Heirs and Successors". Given the limited nature of the latter reservation, the reservation of access for the purpose

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2 Condition 1 of the Special Lease provides that the land is not to be used for any other purpose "without the prior approval in writing of the Minister for Lands."

3 At the relevant time, s 7(4) provided:

> " The Governor is authorized to agree with the Governor General of the Commonwealth or other appropriate authority of the Commonwealth for the sale or lease of any Crown lands to the Commonwealth and to execute any instruments or assurance for granting, conveying or leasing the land to the Commonwealth."

The *Land Act* has been repealed and replaced by the *Land Administration Act* 1997 (WA).

of exploration must be construed as confined to persons acting as servants or agents of the Crown.

13 It follows that neither the reservation of access for the purpose of exploration nor the reservation of minerals can be construed as extending to persons searching for minerals or conducting mining activities on their own behalf. Thus, and again contrary to the primary argument for Western Australia, it is necessary to inquire with respect to the leasehold land, as with the freehold land, whether persons may be authorised pursuant to the *Mining Act* to engage in exploration or other mining activities on that land on their own behalf.

14 The precise status of the perimeter area does not appear from the pleadings, but the argument proceeded on the basis that it is unalienated Crown land which is included in the defence practice area either as a result of some agreement with the State of Western Australia or simply by force of declarations made pursuant to reg 49(1) of the Defence Force Regulations (Cth) ("the Defence Regulations"), to which detailed reference will later be made.

Use of the defence practice area

15 In February 1944, an area around Lancelin Island was declared to be an air gunnery and bombing area. On 28 October 1975 and 18 July 1978, authorisations were published in the *Gazette* pursuant to s 69(1) of the *Defence Act* 1903 (Cth) for the use of an area for military training. That land included part of what is now the defence practice area.

16 On 5 July 1985, 16 July 1987 and 17 October 1994, the defence practice area was declared a defence practice area pursuant to reg 49(1) of the Defence Regulations[4]. The first such declaration was for use as a naval gunnery, and the second and third for air to surface weapons firing. The relevant parts of the first and third of those declarations were still in force when the applications for exploration licences were made[5].

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4 Regulation 49(1) provides:

> " The Minister may, by notice published in the *Gazette*, declare any area of land, sea or air in or adjacent to Australia to be a defence practice area for carrying out a defence operation or practice of a kind specified in the notice."

5 The declaration of 16 July 1987 was revoked by that of 17 October 1994. The relevant part of the declaration of 5 July 1985 has since been revoked by a declaration of 3 March 1998, published in the *Gazette* of 8 April 1998.

17 It seems that, so far as the perimeter area is concerned, the declarations made under reg 49(1) of the Defence Regulations were made with the consent of the State for no such declaration is to be made with respect to private land unless with the consent of the occupier or unless it is "necessary or expedient in the interests of the safety or defence ... to carry out ... a defence operation or practice"[6]. It is common ground that, for the purposes of reg 49(1), the perimeter area is private land[7].

18 According to the Commonwealth's Amended Statement of Claim, the defence practice area has been used as follows:

> "During 1993 the Army conducted operations in the defence practice area on 203 days, the Navy on 125 days and the Airforce on 36 days.
>
> During 1994 the Army conducted operations in the defence practice area on 171 days, the Navy on 116 days and the Airforce on 36 days.
>
> During 1995 the Army conducted operations in the defence practice area on 190 days, the Navy on 117 days and the Airforce on 36 days.
>
> During 1996 the Army conducted operations in the defence practice area on 200 days, the Navy on 84 days and the Airforce on 36 days.
>
> During 1997 the Army conducted operations in the defence practice area on 207 days, the Navy on 125 days and the Airforce on 7 days.
>
> During 1998 to the 30th April 1998 the Army conducted operations in the defence practice area on 82 days and the Navy on 72 days."

The *Mining Act*: issues with respect to the freehold and leasehold lands

19 So far as concerns the freehold and leasehold lands, the Commonwealth contends that the *Mining Act* does not apply to them, or, as it is put in the Amended

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6 Regulation 49(2) of the Defence Regulations. Note that by reg 50 declarations with respect to private land must be tabled in Parliament and are subject to disallowance.

7 Regulation 48 of the Defence Regulations defines "private land" as "land that is not Commonwealth land" and "Commonwealth land" as "land belonging to, or in the occupation of, the Commonwealth or a public authority under the Commonwealth but does not include land the subject of a lease from the Commonwealth unless that lease is subject to the condition that the land may be used by the Defence Force or an arm of the Defence Force for carrying out a defence operation or practice of a kind specified in a notice under subregulation 49(1)".

Statement of Claim, "does not bind the Crown in the right of the Commonwealth". Further, it was put that the *Mining Act* does not apply to the freehold land because of s 52(i) of the Constitution[8]. It was also put by the Commonwealth that, if the *Mining Act* purports to apply to the freehold and leasehold lands, it is, to that extent, invalid by reason of inconsistency with the Defence Regulations, the 1955 Acquisition Act and the *Lands Acquisition Act* 1989 (Cth) ("the 1989 Acquisition Act").

20 It was also argued for the Commonwealth that the *Mining Act* is invalid to the extent of its application to the freehold and leasehold lands by reason of implied constitutional limitations on State legislative power with respect to the use by the Commonwealth of its property and, also, with respect to Commonwealth property used in connection with defence. It was also put that there is a wider immunity with respect to defence activities. Further reference will be made to that argument in relation to the perimeter area.

The *Mining Act*: issues with respect to the perimeter area

21 So far as concerns the perimeter area, the Commonwealth argued that the *Mining Act* is inconsistent with the Defence Regulations and, to that extent, invalid by force of s 109 of the Constitution[9]. In the alternative, it was put that it was invalid because of an implied constitutional limitation on State legislative power with respect to the Commonwealth's capacity "to carry out defence activities as it determines on land set aside ... for those purposes".

Further issues with respect to the freehold and leasehold lands

22 By its counterclaim, the State of Western Australia contends that, if, by reason of any of the laws upon which the Commonwealth relies, the Commonwealth is entitled to prohibit or regulate exploration and mining on the

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8 Section 52 of the Constitution relevantly provides:

> " The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to-
>
> (i) the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes".

9 Section 109 provides:

> " When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

freehold and leasehold lands or the *Mining Act* is rendered invalid "so that the [State] is unable to utilise the metals and minerals ... reserved to it", the Commonwealth laws which have that result are, to the same extent, invalid as an acquisition of property contrary to s 51(xxxi) of the Constitution[10]. This contention is restricted to "metals and minerals" reserved to the State of Western Australia by the Crown Grants and the Special Lease. Thus, no question is raised as to the acquisition of minerals in the perimeter area.

The *Mining Act*: the freehold and leasehold lands

23 If the *Mining Act* does not apply to the freehold or the leasehold lands, no issue arises as to its validity in relation to those areas. It is, therefore, convenient to begin with the question of its application to those areas. In this regard, it was put for the State of Western Australia that the *Mining Act* applies to the freehold and leasehold lands of its own force. In the alternative, it was argued that it is applied either by s 64 of the *Judiciary Act* 1903 (Cth) or by the *Commonwealth Places (Application of Laws) Act* 1970 (Cth).

24 The *Mining Act* provides as to the circumstances in which persons may engage in exploration or other mining activities on land in Western Australia and regulates the conduct of those persons with respect to those activities. It has no provision expressly binding the government of Western Australia or that of any other polity in the federation. Nor does it have any provision expressly indicating whether it applies to land owned by any other polity in the federation. However, in terms, it applies to "Crown land" and land reserved for public purposes which are defined in such a way that the Act applies to land owned or held by the State of Western Australia, although not in the same manner as for private land.

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10 Section 51(xxxi) of the Constitution confers power to 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".

This section has been construed as a guarantee of just terms. See, for example, *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 284-285 per Rich J; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349-350 per Dixon J; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509 per Mason CJ, Brennan, Deane and Gaudron JJ; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 565 per Gaudron J, 595 per Gummow J, 652-653 per Kirby J; *The Commonwealth v WMC Resources Ltd* (1998) 72 ALJR 280 at 296-297 per Gaudron J, 329 per Kirby J; 152 ALR 1 at 24, 70.

25 So far as concerns Crown land, it is expressly provided in s 18 of the *Mining Act* that all Crown land that is not already the subject of a mining tenement is open for mining. Subject to any contrary intention, "Crown land" is defined in s 8(1) to mean:

> "all land in the State, except -
>
> (a) land that has been reserved for or dedicated to any public purpose other than –
>
> (i) land reserved for mining or commons;
>
> (ii) land reserved and designated for public utility for any purpose under the *Land Administration Act* 1997;
>
> (b) land that has been lawfully granted or contracted to be granted in fee simple by or on behalf of the Crown;
>
> (c) land that is subject to any lease granted by or on behalf of the Crown other than –
>
> (i) a pastoral lease within the meaning of the *Land Administration Act* 1997, or a lease otherwise granted for grazing purposes only;
>
> (ii) a lease for timber purposes; or
>
> (iii) a lease of Crown land for the use and benefit of the Aboriginal inhabitants;
>
> (d) land that is a townsite within the meaning of the *Land Administration Act* 1997"[11].

26 The exception from the definition of "Crown land" of land reserved or designated for a public purpose is of some significance. "Public purpose" is also defined in s 8(1) and, again subject to a contrary intention, means "any of the

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11 Section 8(1) of the *Mining Act* was amended with effect from 30 March 1998 to reflect the repeal of the *Land Act* 1933 and its replacement with the *Land Administration Act* 1997. As nothing turns on these amendments, it is convenient to refer to s 8(1) in its present form.

purposes for which land may be reserved under Part 4 of the *Land Administration Act* 1997, and any purpose declared by the Governor pursuant to that Act"[12].

27 Private land is also open for mining and, by s 27 of the *Mining Act*, it is provided that "a mining tenement may be applied for in respect of any private land ... and such land is open for mining in accordance with this Act."[13] Again subject to a contrary intention, "private land" is relevantly defined in s 8(1) to mean:

> "... any land that has been or may hereafter be alienated from the Crown for any estate of freehold, or is or may hereafter be the subject of any conditional purchase agreement, or of any lease or concession with or without a right of acquiring the fee simple thereof (not being a pastoral lease within the meaning of the *Land Administration Act* 1997 or a lease or concession otherwise granted by or on behalf of the Crown for grazing purposes only or for timber purposes or a lease of Crown land for the use and benefit of the Aboriginal inhabitants) but –
>
> ...
>
> (c) no land that has been reserved for or dedicated to any public purpose shall be taken to be private land by reason only that any lease or concession is granted in relation thereto for any purpose".

28 It is apparent from a comparison of the definitions of "Crown land" and "private land" that land within exception (b) to the definition of "Crown land" (for ease of reference, land granted in fee simple) falls within the definition of "private land" and that land within exception (c) (for ease of reference, Crown leases) also falls within the definition of "private land", apart from pastoral and grazing leases, timber leases and Aboriginal leases which are Crown land. Land within

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12 Under s 41, which is in Pt 4 of the *Land Administration Act*, "the Minister may by order reserve Crown land to the Crown for one or more purposes in the public interest." The *Land Act*, which was in force when the applications for exploration licences were made, contained a similar provision for the reservation of land (s 29). Clause 14(2) of Sched 2 of the *Land Administration Act* provides:

> " Any land reserved under section 29 of the [*Land Act*] and remaining so reserved immediately before the [day that this Act is proclaimed] is to be taken to be land reserved under section 41 of this Act."

13 Note that for the purposes of Div 3 of Pt III of the Act, which includes s 27, private land does not include "private land that is the subject of a mining tenement, other than in relation to mining for gold pursuant to a special prospecting licence or mining lease under section 56A, 70 or 85B".

exceptions (a) and (d) to the definition of "Crown land" (for ease of reference, land reserved for a public purpose and townsites) falls within neither definition. However, townsites and land reserved for a public purpose may be open for mining in accordance with Div 2 of Pt III of the *Mining Act*. It will later be necessary to refer to the provisions of Div 2.

29 It is necessary to note three matters with respect to the definitions of "Crown land" and "private land" in s 8(1) of the *Mining Act*. The first is that, because of the definition of "public purpose", the exception of land that has been reserved for a public purpose from the definition of "Crown land" does not extend to land that has been acquired by the Commonwealth for a public purpose. The second is that, as a matter of ordinary language, the freehold and leasehold lands in the defence practice area fall, respectively, within exceptions (b) and (c) to the definition of "Crown land" (land granted in fee simple and Crown leases) and within the definition of "private land" ("land that has been ... alienated from the Crown for any estate of freehold, or is ... the subject ... of any lease"). Thus, subject to any contrary intention as allowed by s 8(1), the freehold and leasehold lands are "private land" for the purposes of the *Mining Act* and open for mining in accordance with s 27.

30 The third matter to be noted with respect to the definitions of "Crown land" and "private land" in s 8(1) of the *Mining Act* is that some land, namely, land reserved for a public purpose and townsites, falls within neither definition. That is a matter which is relevant to the question whether there is to be discerned a contrary intention so that, notwithstanding the terms of the definitions, land acquired by the Commonwealth for a public purpose is neither "Crown land" nor "private land".

The *Mining Act*: principles of construction and contrary intention

31 It should at once be noted that, subject to express and implied constitutional limitations, the various polities in the federation may enact legislation applying to each other and, also, to their property[14]. The question whether the legislation of one polity applies to another is usually framed as a question whether it "binds the Crown in right of a State" or, in the case of State legislation, "whether it binds the Crown in right of the Commonwealth". In the present case, however, the question is not whether the *Mining Act* "binds the Commonwealth", but whether it applies to lands acquired by the Commonwealth for a public purpose.

32 There is a common law rule or presumption that "no statute binds the Crown unless the Crown is expressly named therein or unless there is a necessary implication that it was intended to be bound"[15]. And it was held in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* that, within Australia, that presumption applies to "the Crown in all its capacities" and not simply "the Crown in right of the community whose legislation is under consideration"[16], to use expressions which were used in that case[17].

33 It would be preferable, in our view, and more consonant with our constitutional arrangements, if the presumption that a statute "does not bind the Crown" were expressed as a presumption that a statute which regulates the conduct or rights of individuals does not apply to members of the executive government of any of the polities in the federation, government instrumentalities and authorities intended to have the same legal status as the executive government, their servants or agents. For ease of reference, we shall refer to that presumption as the

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14 As to a State law applying to the Commonwealth, see *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410. As to a Commonwealth law applying to a State, see *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

15 *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 at 116 per Gibbs ACJ. The presumption is not to be treated as an inflexible rule involving a stringent test of necessary implication. See *Bropho v Western Australia* (1990) 171 CLR 1.

16 (1979) 145 CLR 107 at 122-123 per Gibbs ACJ, 129 per Stephen J, 136 per Mason and Jacobs JJ. See also *Jacobsen v Rogers* (1995) 182 CLR 572 at 585 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 444 per Dawson, Toohey and Gaudron JJ.

17 (1979) 145 CLR 107 at 116 per Gibbs ACJ.

presumption that legislation does not apply to members of the executive government.

34 As already indicated, however, this case is concerned with a slightly different presumption, namely, that a statute does not divest the Crown of its property, rights, interests or prerogatives unless that is clearly stated or necessarily intended[18]. Again, for ease of reference, we shall refer to that presumption as the presumption that legislation does not affect government property.

35 The rationale for the presumption that a statute does not apply to members of the executive government was identified in relation to the United States of America by Story J in *United States v Hoar* in these terms:

> "In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself."[19]

The same reason was given by Gibbs ACJ in *Bradken* for holding that, in Australia, the presumption extends to all governments, not just the government of the enacting polity[20].

36 Speaking of legislation enacted by the Commonwealth Parliament, Gibbs ACJ observed in *Bradken* that legislation "may have a very different effect when applied to the government of a State from that which it has in its application to ordinary citizens."[21] That is also true of State legislation when applied to members of the executive government of the Commonwealth. And it is, perhaps, more obviously so in the case of legislation affecting government property, whether the legislation in question is that of a State or that of the Commonwealth. For that reason, the presumption with respect to government property should be expressed as a presumption with respect to the property of all polities in the

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18 *Attorney-General v Hancock* [1940] 1 KB 427 at 439 per Wrottesley J, referred to in *In re Telephone Apparatus Manufacturers' Application* [1963] 1 WLR 463 at 479 per Upjohn LJ; [1963] 2 All ER 302 at 311. It seems that this presumption was also applied in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107 at 124 per Gibbs ACJ, 129 per Stephen J, 137-138 per Mason and Jacobs JJ.

19 (1821) 2 Mason 311 [26 Fed Cas 329 at 330], referred to in *Roberts v Ahern* (1904) 1 CLR 406 at 418.

20 (1979) 145 CLR 107 at 122.

21 (1979) 145 CLR 107 at 123.

federation, not simply that of the enacting polity. Moreover, it would be anomalous if the presumption were not to operate in the same way as the presumption with respect to members of the executive government.

37 Reference was made earlier to the fact that there is land in Western Australia that falls neither within the definition of "Crown land" in s 8(1) of the *Mining Act* nor within the definition of "private land". Were those definitions exhaustive, in the sense of embracing all land in Western Australia, the conclusion that the *Mining Act* was intended to apply to land acquired by the Commonwealth for public purposes would be inescapable.

38 Given, however, that the definitions of "Crown land" and "private property" are not exhaustive and given, also, the presumption that a statute does not detract from the property rights of a State or of the Commonwealth, it is necessary to ask whether the Act was intended to apply to Commonwealth land. More precisely, it is necessary to ask whether there is to be discerned a contrary intention so that land acquired by the Commonwealth for a public purpose falls neither within the definition of "Crown land" nor that of "private land".

39 It is not unusual for a State statute to be expressed to bind "the Crown in right of" that State, but for the statute to be silent with respect to its application to the Commonwealth. Nor is it unusual, in that situation, for there to be special provision as to the manner in which the statute is to apply to members of the executive government or to the property of the State. In that situation, it may be taken that the Parliament recognised that it would be inappropriate for the statute to apply to government property or personnel in precisely the same way as it does to individuals.

40 Moreover, if it has been recognised by the legislature that it would be inappropriate for legislation to apply to government property or personnel in the same way as it applies to individuals, it may be inferred from its silence with respect to other polities in the federation that it was not intended that it should apply to their property or personnel. That is because, if the legislature has recognised that a statute will or may have a different impact on government property or personnel, it ought not be assumed that it intended to subject the property and personnel of the other polities in the federation to a regime which it recognised was inappropriate in its own case.

41 As earlier indicated and unless a contrary intention appears, the Commonwealth's freehold and leasehold lands fall within the definition of "private land" in s 8(1) of the *Mining Act*. However, the lands owned or held by the State of Western Australia are generally either "Crown land" as defined in the Act or land falling within exception (a) to that definition (land reserved for a public purpose). And special provision is made in the *Mining Act* with respect to Crown land and land reserved for a public purpose. In this regard, the first provision that

should be noted is s 19(1)(a) which enables the Minister to "exempt any land, not being private land or land that is the subject of a mining tenement or of an application therefor", from the operation of the *Mining Act*[22].

42 Further, as already noted, special provision is made in Div 2 of Pt III of the *Mining Act* with respect to land reserved for a public purpose[23]. As explained earlier, that land is not included within the definition of "Crown land". Under Div 2 of Pt III, no mining can be carried out on specified lands, including certain lands which are reserved under Pt 4 of the *Land Administration Act*[24], other than with the consent of the Minister[25]. And in the case of some of those lands[26], the grant of a mining lease is subject to the consent of both Houses of Parliament[27].

The *Mining Act* does not apply of its own force to the freehold and leasehold lands

43 The *Mining Act*'s provisions enabling the exemption of land that is not private land and requiring Ministerial consent for mining on land reserved under Pt 4 of the *Land Administration Act* are to be taken as legislative recognition that it was not appropriate for lands owned or held by the State to be dealt with in precisely the same way as private land. It is not to be assumed that the legislature considered that land acquired by the Commonwealth for a public purpose was to be subject to a regime considered inappropriate for land owned or held by the State of Western Australia.

44 In the circumstances, the different treatment of that land is to be taken as signifying a contrary intention for the purposes of s 8(1) of the *Mining Act*. More precisely, it is to be taken as signifying that land acquired by the Commonwealth

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22 Section 19(1)(a) was amended with effect from 14 October 1995. The words "land, not being private land or" replaced the previous words "Crown land, not being Crown". As nothing turns on these amendments, it is convenient to refer to the section in its present form.

23 As noted earlier, such land does not include land acquired by the Commonwealth for a public purpose and the freehold and leasehold lands in the defence practice area do not otherwise come within Div 2 of Pt III of the Act.

24 Section 24(1)(a), (b) and (c). As noted earlier, the definition of "public purpose" in s 8(1) of the *Mining Act* includes "any of the purposes for which land may be reserved under Part 4 of the *Land Administration Act*".

25 Section 24(3)(a) and (5)(a).

26 Section 24(1)(a) and (b).

27 Section 24(4).

for a public purpose falls neither within the definition of "Crown land" nor "private land". In consequence, the Act does not apply of its own force to the freehold and leasehold lands in the defence practice area.

Section 64 of the *Judiciary Act*

45 Section 64 of the *Judiciary Act* relevantly provides:

> " In any suit to which the Commonwealth ... is a party, the rights of parties shall as nearly as possible be the same ... as in a suit between subject and subject."

46 It was contended for the State of Western Australia that the proceedings in this Court are a "suit" for the purposes of s 64 of the *Judiciary Act* and that the demurrer is to be determined on the basis that s 64 operates to apply the *Mining Act* to the Commonwealth. Were that the issue, the argument would find support in *The Commonwealth v Evans Deakin Industries Ltd*[28]. It was held in that case that a State law which did not purport to apply to the Commonwealth operated to confer a right of action against the Commonwealth once proceedings were commenced against it.

47 The issue in this case, however, is not the operation of s 64 of the *Judiciary Act* in proceedings in this Court. The question is whether mining tenements may be granted pursuant to the *Mining Act* over the freehold and leasehold lands. They can only be granted on application. And as the *Mining Act* does not apply to those lands of its own force, they can only be granted if some other law – for present purposes, s 64 of the *Judiciary Act* - operates to apply that Act to the process of

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28 (1986) 161 CLR 254.

determining whether an application should be granted[29]. In this case, this question is whether s 64 applies the *Mining Act* to the proceedings in the warden's court[30].

48 As a matter of ordinary language and, also, as a matter of context, the word "suit" in s 64 of the *Judiciary Act* refers to proceedings for the determination of existing rights and obligations or other proceedings which involve the exercise of the judicial power of the Commonwealth[31]. An application for the grant of a mining tenement is not an application to determine existing legal rights and obligations. Rather, it is an application for the creation of new rights and obligations. In essence, that is an administrative function to be performed by wardens in accordance with the *Mining Act*.

49 Although it may be that, in the discharge of some functions conferred by the *Mining Act*, wardens exercise what would ordinarily be regarded as judicial power, they do not exercise any part of the judicial power of the Commonwealth. Given that that is so and given, also, the nature of their function with respect to applications for the grant of mining tenements, proceedings in the warden's court

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29 The definition of "mining tenement" in s 8(1) of the *Mining Act* includes prospecting, exploration, retention and miscellaneous licences and mining and general purpose leases. In an application for a prospecting or miscellaneous licence, the mining registrar determines the application, unless there is a notice of objection lodged in which case the warden hears and determines the application (ss 42, 91, 92). In an application for any other mining tenement, the Minister has the power to grant or refuse the lease or licence. If no notice objection is lodged, the mining registrar makes a recommendation to the Minister as to whether to grant or refuse the application. When there is an objection, the warden hears the application and then makes a recommendation to the Minister (ss 59, 70D, 75, 86).

30 Three applications for exploration licences were lodged pursuant to the *Mining Act*. The Commonwealth lodged an objection to each of the applications and so the applications came before the warden in accordance with s 59 of the Act. On 23 June 1996, Mining Warden PG Malone SM held that he had jurisdiction to hear and make recommendations on one of the applications (No 70/1425).

31 Some powers have a "double aspect" so that "they are properly characterised as judicial if conferred on a court and non-judicial if conferred on another body": *Gould v Brown* (1998) 72 ALJR 375 at 398 per Gaudron J; 151 ALR 395 at 424. See also *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 177 per Isaacs J; *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 305 per Kitto J; *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 628 per Mason J; *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 665; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189.

are not a "suit" for the purposes of s 64 of the *Judiciary Act*[32]. It follows that s 64 does not operate to apply the *Mining Act* to the Commonwealth in those proceedings.

Commonwealth Places (Application of Laws) Act

50 It was also put for the State of Western Australia that s 4(1) of the *Commonwealth Places (Application of Laws) Act* applies the *Mining Act* to the freehold and leasehold lands in the defence practice area. Section 4(1) provides:

> " The provisions of the laws of a State as in force at a time (whether before or after the commencement of this Act) apply, or shall be deemed to have applied, in accordance with their tenor, at that time in and in relation to each place in that State that is or was a Commonwealth place at that time."

51 When properly construed, the *Mining Act* does not apply, and does not purport to apply, to land acquired by the Commonwealth for public purposes. Section 4(1) operates to apply State laws "in accordance with their tenor", not to rewrite them. Accordingly, it does not operate to apply the *Mining Act* to the freehold and leasehold lands in the defence practice area.

The State's demurrer: freehold and leasehold lands

52 As the *Mining Act* does not apply of its own force to the freehold and leasehold lands and is not applied to them by s 64 of the *Judiciary Act* or by s 4(1) of the *Commonwealth Places (Application of Laws) Act*, the State's demurrer must be overruled so far as it concerns those lands. That being so, it is unnecessary to consider the Commonwealth's contentions as to the invalidity of the *Mining Act* in relation to the freehold and leasehold lands by reason of inconsistency, s 52(i) of the Constitution or implied constitutional limitations on State legislative power.

The *Mining Act*: the perimeter area

53 As already indicated, the argument in this Court proceeded on the basis that the perimeter area is unalienated Crown land. It was common ground that, on that basis, it falls within the definition of "Crown land" in s 8(1) of the *Mining Act* and

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32 Section 64 only applies in suits in federal jurisdiction. See *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 223 per Stephen J, 234 per Murphy J; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 474 per Gummow J. In relation to proceedings in an administrative tribunal see *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 448 per Dawson, Toohey and Gaudron JJ, 460-461 per McHugh J, 511 per Kirby J.

is open for mining unless, in its application to that land, the *Mining Act* is inconsistent with the Defence Regulations or is otherwise invalid by reason of a constitutional immunity with respect to land set aside for defence purposes.

The *Mining Act*: inconsistency with the Defence Regulations

54 For the purposes of s 109 of the Constitution, the question of inconsistency is ordinarily determined by asking whether the Commonwealth law "covers the field"[33], or, whether the State law would, if valid, "alter, impair or detract from the operation" of the Commonwealth law[34]. On other occasions, the question may simply be whether, for example, the laws cannot be obeyed simultaneously[35] or whether one law takes away what the other confers[36].

55 To say that a Commonwealth law "covers the field" is simply to say that there is to be discerned an intention on the part of the Parliament of the Commonwealth that its legislation should be an exclusive and exhaustive statement of the law on the topic with which it is concerned[37]. In this case, the question is whether the Defence Regulations evince such an intention with respect to private land included in a defence practice area.

56 As already indicated, land which is private land for the purposes of the Defence Regulations may be declared a defence practice area under reg 49(1). By reg 51(1) of the Defence Regulations, a chief of staff may authorise the carrying out of a defence operation or practice in an area that has been declared a defence practice area. And where an authorisation is issued under reg 51(1), "such notice

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33 See, for example, *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 489-490 per Isaacs J; *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 109 per Latham CJ; *Viskauskas v Niland* (1983) 153 CLR 280 at 291.

34 *Victoria v The Commonwealth ("The Kakariki")* (1937) 58 CLR 618 at 630 per Dixon J.

35 See, for example, *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 258-259 per Barwick CJ.

36 See, for example, *Botany Municipal Council v Federal Airports Authority* (1992) 175 CLR 453 at 464.

37 See *Ex parte McLean* (1930) 43 CLR 472 at 483 per Dixon J; *Viskauskas v Niland* (1983) 153 CLR 280 at 291-292; *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 465-466 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

... as is reasonably required for the protection of persons or property" must be given under reg 52(1).

57 By regs 53(1) and (2), it is an offence for a person to be in a defence practice area without reasonable excuse, or, to permit a vehicle, vessel or aircraft to be in a defence practice area (again, without reasonable excuse) "at a time specified in an instrument under subregulation 51(1)", except with the permission of the authorising officer or of a participating officer[38]. If permission is given, it is an offence to disobey a condition attached to that permission[39]. Moreover, by reg 54, persons, vehicles, vessels and aircraft in the defence practice area without permission at the time of a defence operation or practice authorised under reg 51(1) may be removed.

58 One other provision of the Defence Regulations should be noted. Regulation 57(1) relevantly provides:

> "The Commonwealth shall pay reasonable compensation to a person who:
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> ...
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> (b) sustains loss or damage by reason that an area is declared to be a defence practice area under subregulation 49(1);
>
> (c) sustains loss or damage by reason of the use of land for the purposes of a defence operation or practice authorized under regulation 51; or
>
> (d) sustains loss or damage otherwise caused by the operation of this Part."[40]

59 It is clear that the regulations to which reference has been made constitute an exhaustive statement of the Commonwealth's rights and obligations with respect to private land in a defence practice area. However, they make limited provision as to the rights and obligations of other persons. Save to that limited extent, their rights and obligations are left to the general law[41]. Accordingly, it cannot be said

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38 In each case, the penalty is $500 or imprisonment for 3 months or both.

39 Regulation 53(5).

40 Part XI, which comprises regs 48 to 57C inclusive.

41 See with respect to laws which operate against the background of the general law, *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at

(Footnote continues on next page)

that the Defence Regulations manifest an intention to "cover the field" with respect to the rights and obligations of persons other than those acting for or on behalf of the Commonwealth in relation to the perimeter area.

60 Nor, in our view, can it be said that any provision of the *Mining Act* would, if valid, alter, impair or detract from the operation of the Defence Regulations or that the Act is otherwise inconsistent with the Regulations because, for example, the Act and the Regulations cannot be obeyed simultaneously or one takes away what the other confers. That is because the *Mining Act* does not confer rights to enter upon or use land in the perimeter area. Rather, it simply allows that authority may be granted to persons to enter or conduct mining operations on that land.

61 The Defence Regulations do not operate to prevent entry or activity on the perimeter area, except if a defence operation or practice has been authorised by a chief of staff pursuant to reg 51(1). It would seem clear that, were authority to be granted pursuant to the *Mining Act* to enter upon or conduct mining activities on land in the perimeter area at a time or times specified in an authorisation under reg 51(1) for the conduct of a defence operation or practice, there would be direct inconsistency between that authorisation and the authority granted under the *Mining Act*. That inconsistency would result from the inconsistent operation in the particular circumstances of the *Mining Act* and the Defence Regulations – "operational inconsistency", as it is called[42].

62 Section 109 of the Constitution operates to render a State law inoperative only to the extent of its inconsistency with a law of the Commonwealth and only for so long as the inconsistency remains[43]. Although there may be "operational inconsistency" between the *Mining Act* and the Defence Regulations in the event and to the extent that authority is conferred pursuant to the former to enter upon or engage in activities on land in the perimeter area at a time when a defence operation or practice is authorised under reg 51(1) of the Defence Regulations, that situation has not yet arisen. Thus, at the present time, there is no inconsistency between the *Mining Act* and the Defence Regulations.

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246 per Stephen J; *Dobinson v Crabb* (1990) 170 CLR 218 at 231 per Dawson and McHugh JJ; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 433 per Dawson, Toohey and Gaudron JJ.

42 *Victoria v The Commonwealth ("The Kakariki")* (1937) 58 CLR 618; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 599-600 per Gaudron J.

43 *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 465 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

Implied immunity with respect to land "set aside for defence purposes"

63 The argument that there is an implied constitutional immunity from State laws which operate with respect to land "set side for defence purposes" must be rejected. The Commonwealth Parliament has power to legislate with respect to defence[44] and, subject to just terms, to legislate for the acquisition of land or other property for purposes which include defence[45]. Moreover, s 52(i) of the Constitution confers immunity from State law in the sense that it makes Commonwealth legislative power with respect to "places acquired by the Commonwealth for public purposes" exclusive. Clearly s 52(i) includes places acquired for defence purposes.

64 Given the Commonwealth's power to legislate with respect to defence and the acquisition of property and, given also, the terms of s 52(i) of the Constitution, there is no room for an implication of the kind for which the Commonwealth contends.

The State's demurrer with respect to the perimeter area

65 As there is no present inconsistency between the *Mining Act* and the Defence Regulations in their application to the perimeter area and no immunity of the kind for which the Commonwealth contends, the State's demurrer should be upheld so far as it concerns that area.

The State's counterclaim: acquisition other than on just terms

66 As already indicated, the counterclaim is confined to the freehold and leasehold lands. It is in these terms:

"If the operation of:

(a) s 124 of the *Lands Acquisition Act* 1989 and s 53(2) of the *Lands Acquisition Act* 1955 (as applied by section 124(8) of the *Lands Acquisition Act* 1989 (Cth)); or

(b) Part X of the *Lands Acquisition Act* 1989, including sections 51 and 53(2) of the *Lands Acquisition Act* 1955 (as applied by s 124(8) of the *Lands Acquisition Act* 1989); or

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44 Constitution, s 51(vi).

45 Constitution, s 51(xxxi).

(c) Section 8 of the *Lands Acquisition Act* 1955 and section 134 of the *Lands Acquisition Act* 1989; or

(d) Regulations 49-53 of the *Defence Force Regulations*;

have the consequence that:

(e) the [Commonwealth] is entitled to prohibit or to regulate the exploration for, and mining of, all metals and minerals which are situated on or in land the subject of Melbourne Locations 3988, 3989 and 4004; or

(f) the *Mining Act* 1978 is rendered invalid and inoperative so that the [State of Western Australia] is unable to utilise the metals and minerals or its rights associated therewith which are reserved to it;

as the [Commonwealth] contends in its Statement of Claim,

then those provisions effect an acquisition by the [Commonwealth] of property of the [State of Western Australia], otherwise than on just terms, and contrary to s 51(xxxi) of the *Constitution*."

67 Section 124(1) of the 1989 Acquisition Act permits of the making of regulations providing "for or in relation to prohibiting or regulating ...

(a) the exploration for minerals on relevant land;

(b) the mining for, or recovery of, minerals on or from relevant land;

(c) the carrying on of operations, and the execution of works, for a purpose referred to in paragraph (a) or (b)."

Section 51(1) of the 1955 Acquisition Act provides that "[t]he Governor-General may authorize the grant of a lease or licence ... to mine for minerals on land ... vested in the Commonwealth." And s 53(2) of that Act, relevantly allows the Minister to "authorize the grant of easements, or other rights, powers or privileges ... over or in connexion with, land vested in the Commonwealth." Both ss 51 and 53(2) are continued in force by s 124(8) of the 1989 Acquisition Act until regulations are made under s 124(1) of the latter Act.

68 Apart from s 124, no provision of Pt X of the 1989 Acquisition Act bears on the prohibition or regulation of exploration or mining on land vested in the Commonwealth. Further, neither s 8 of the 1955 Acquisition Act nor s 134 of the 1989 Acquisition Act bears on that issue. Each is concerned with the validity of assurances and provides to the effect that, where an instrument or assurance is

executed by the Governor of a State to give effect to an agreement with the Commonwealth for the acquisition of an interest in Crown land, that instrument or assurance is "valid and effectual to vest the interest ... according to the tenor of the instrument or assurance."[46]

69 Assuming that s 124(1) of the 1989 Acquisition Act and ss 51 and 53(2) of the 1955 Acquisition Act apply to minerals which are not owned or vested in the Commonwealth (although, that seems unlikely), it is possible that regulations might be made or steps taken to prohibit or regulate mining on land vested in the Commonwealth, including the freehold and leasehold lands in the defence practice area. In that event, the regulations or steps taken might operate to negate the reservations in the Crown Grants and the Special Lease. And in that event, a question could arise whether there was an acquisition other than on just terms. But until regulations are made pursuant to s 124(1) of the 1989 Acquisition Act or steps taken pursuant to ss 51 or 53(2) of the 1955 Acquisition Act, that question does not arise.

70 Even if regulations can be made under s 124(1) of the 1989 Acquisition Act or steps taken pursuant to ss 51 or 53(2) of the 1955 Acquisition Act to prohibit or regulate mining on the freehold and leasehold lands, no question arises as to inconsistency between those Acts and the *Mining Act*. No question arises because the *Mining Act* does not apply to that land. And for the same reason, no question arises as to inconsistency between the *Mining Act* and regs 49-53 of the Defence Regulations.

71 There remains the question whether regs 49-53 effect an acquisition of the minerals reserved to the State by the Crown Grants and the Special Lease. The regulation central to this question is reg 51(1) which permits authorisations to be issued with the effect that no person, vehicle, vessel or aircraft can be on any part of the defence practice area at the time specified in the authorisations.

72 Neither reg 51(1) nor any of the other regulations in Pt XI of the Defence Regulations has any direct operation which might be thought to amount to an acquisition of property. It may be that authorisations under reg 51(1) have been so numerous that, if valid, the State's present rights of access and, perhaps, its rights to the minerals have been acquired, at least for the period during which those authorisations have been issued. However, that is simply a matter of speculation. The pleadings do not indicate how often authorisations have been given under

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46 Section 134(1) of the 1989 Acquisition Act. Section 8(1) of the 1955 Acquisition Act is to the same effect except that it is concerned with "Crown land", rather than "an interest in Crown land".

reg 51(1), whether with respect to the freehold and leasehold lands or any other part of the defence practice area.

73 Even if it be the case that authorisations under reg 51(1) of the Defence Regulations have issued with such frequency as to raise a question of acquisition other than on just terms, no question would arise as to the validity of the regulation. That is because it would be read down within constitutional limits and, when read down in that way, it would not permit of authorisations effecting an acquisition of property other than on just terms.

74 It follows that none of the provisions specified in the State's counterclaim effect any acquisition of property. Thus the Commonwealth's demurrer must be upheld.

Conclusion

75 So far as concerns the freehold and leasehold lands, the State's demurrer should be overruled; so far as concerns the perimeter area, the State's demurrer should be upheld. The Commonwealth's demurrer to the State's counterclaim should also be upheld.

76 The matter should be stood over to be listed before a single Justice to make orders for the disposition of the action, including a declaration that the *Mining Act* does not apply to the freehold and leasehold lands, and orders dismissing the State's counterclaim and providing as to costs, if they be sought.

77 McHUGH J. Subject to two matters, I agree with the judgment of Hayne J in this matter.

78 The first matter to which I refer is his Honour's discussion of the capacity of the States to bind the Commonwealth. I have expressed my views on that subject in my judgment in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*[47] in terms which do not fully accord with the discussion of Hayne J in this case. No doubt it will some day be necessary to determine whether the views expressed by Dawson, Toohey and Gaudron JJ in *Re Residential Tenancies*[48] to which Hayne J refers have finally settled the question of the States' capacity to bind the Commonwealth. But it is not necessary to do so for the purposes of this case.

79 The second matter is whether the Crown grants created contractual rights in favour of the State. I think that the better view of those instruments is that they created contractual rights in favour of the State. But assuming that is so, those rights cannot bear on whether the *Mining Act* 1978 (WA), on its proper construction, applies to the land held by the Commonwealth. Nevertheless, I think that the arguable existence of these rights should be noted. If they exist, they may be exercised by the State against the Commonwealth. Their scope will depend not only on the terms of the grants but also on any restrictions which arise from valid Commonwealth legislation. If those contractual rights exist and if Commonwealth legislation has the effect of modifying them, the legislation may effectuate an acquisition of property within the terms of s 51(xxxi) of the Constitution. In that event, the modification will be unlawful unless the legislation provides just terms for the modification.

80 However, these matters do not arise for decision in this case. The Commonwealth has not sought to deny that the State has contractual rights under the Crown grants; nor has the Commonwealth sought to argue that there is any legislation which would impact upon these rights. Furthermore, the State has not attempted to enforce any contractual rights that it may have under the grants. That being so, it is not necessary to determine either the scope of the grants or whether, if the State sought to rely upon them, they would or could be affected by Commonwealth legislation.

81 Subject to these matters, I agree with the judgment of Hayne J and the orders which he proposes.

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47 (1997) 190 CLR 410.

48 (1997) 190 CLR 410.

82 GUMMOW J. These cross-demurrers raise issues of law respecting the relationship between Commonwealth and State law which bear upon the exploration for minerals at sites in Western Australia. The Commonwealth (which is the plaintiff in the action) and the State (the first defendant) each assert that the operative legal regime is that established by its own laws. In order to state the issues with more precision, it is convenient to begin with the immediately relevant federal law.

83 Section 124(1) of the *Defence Act* 1903 (Cth) ("the Defence Act") empowers the Governor-General to make regulations, not inconsistent with the statute, which are necessary or convenient to be prescribed for carrying out or giving effect to the statute. Part XI (regs 48-57C) of the Defence Force Regulations ("the Defence Regulations") made under the Defence Act is headed "DEFENCE PRACTICE AREAS". Part XI establishes a regime for the control of activities in defence practice areas. The phrase "defence practice area" means (reg 48) "any area of land, sea or air declared by the Minister under regulation 49". Regulation 49(1) empowers the Minister, by notice published in the *Gazette*, to declare any area of land, sea or air in or adjacent to Australia to be a defence practice area for carrying out a defence operation or practice of a kind specified in the notice.

84 The Lancelin Training Area comprises defence practice areas which were declared for naval gunnery and air to surface weapons firing purposes by notices under reg 49(1) dated respectively 5 July 1985 and 17 October 1994. The Lancelin Training Area is situated on the coast of Western Australia, about 130 kms north of the naval base at HMAS Stirling, Cockburn Sound. Within, but not occupying the whole of, that area at Lancelin ("the Defence Practice Area") lie three parcels of land. In respect of two of these parcels ("Melbourne Location 3989" and "Melbourne Location 4004") the Commonwealth is registered as owner in fee simple under the *Transfer of Land Act* 1893 (WA) ("the Transfer of Land Act"). In respect of the third ("Melbourne Location 3988") the Commonwealth is lessee under a Special Lease from the State of Western Australia ("the Special Lease"). Save where the contrary is indicated, the term "Melbourne Locations" will be used in these reasons to identify the two freehold Melbourne Locations 3989 and 4004.

85 The Special Lease was acquired to provide a "buffer area". It was executed and registered on 3 October 1978. The term is 21 years from 1 July 1978 and there is a yearly rent of $360. The Commonwealth's title to Melbourne Location 3989 was registered on 7 November 1977 and that to Melbourne Location 4004 on 9 January 1978. The areas of the Melbourne Locations and of the Special Lease are respectively 591.7527 ha, 336.8413 ha and 11,853 ha. The grants of the Melbourne Locations were made in consideration of payments by the Commonwealth to the State of $1,480.50 and $842 respectively. The agreed price of $1,480.50 corresponded with a valuation and that of $842 at the time was considered reasonable by a valuer.

86 Section 7(4) of the *Land Act* 1933 (WA) ("the Land Act")[49], at all material times, has been in the following form:

> "The Governor is authorized to agree with the Governor General of the Commonwealth or other appropriate authority of the Commonwealth for the sale or lease of any Crown lands to the Commonwealth and to execute any instruments or assurance for granting, conveying or leasing the land to the Commonwealth."

The title of the Commonwealth to the two Melbourne Locations and under the Special Lease was acquired consensually and respectively as grants and a lease pursuant to s 7(4) of the Land Act. It will be necessary later in these reasons to refer to other provisions of s 7 of the Land Act and to relevant enabling laws of the Commonwealth. It should be noted at this stage that the *Lands Acquisition Act* 1955 (Cth) ("the Acquisition Act") was effective by its own force to vest title in the Commonwealth. Section 8(1) thereof stated:

> "Where an agreement is entered into by the Commonwealth with a State for the acquisition of Crown land, an instrument or assurance executed by the Governor of that State for the purpose of carrying out the agreement is, by force of this Act and notwithstanding anything in the law of the State, valid and effectual to vest the land in the Commonwealth according to the tenor of the instrument or assurance."

The Acquisition Act was repealed by the *Lands Acquisition (Repeal and Consequential Provisions) Act* 1989 (Cth) with effect at the commencement on 9 June 1989 of the *Lands Acquisition Act* 1989 (Cth) ("the 1989 Act").

87 Each of the Crown grants for the Melbourne Locations and the Special Lease contain what are identified therein as savings and reservations in respect of what might shortly be called mines and minerals. The term "reservation" is to be understood to identify not subject-matter newly created out of the grant or demise but that which was excepted or kept back from the grant or demise[50]. The Commonwealth does not contend that it has the property in the minerals so reserved to the State. However, it contends that the law of the State is ineffective to dispose of rights to the surface and over the land embraced in the grants to the Commonwealth.

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49 The Land Act was repealed by s 281 of the *Land Administration Act* 1997 (WA) but with the transitional, savings and validation provisions set out in Sched 2 thereof.

50 *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 194; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 200-201; cf *Wardle v Manitoba Farm Loans Association* [1956] SCR 1 at 11-12.

88 The second defendants ("the Wardens") are the Wardens of South West Mineral Field established under Pt II (ss 10-16) of the *Mining Act* 1978 (WA) ("the Mining Act"). Part IV, Div 2 (ss 56B-70) provides for the grant by the Minister for Mines of exploration licences after the taking of steps which may involve the furnishing of a warden's report (s 59). The Minister is bound to consider such a report but may grant or refuse to grant an exploration licence irrespective of whether the warden has recommended for or against a grant[51]. The third and fourth defendants ("the Applicants") are companies incorporated under the law of the State and each has lodged applications for the grant of exploration licences under the Mining Act. The areas the subject of the applications are wholly within the Defence Practice Area. One application (No 70/1425) is in respect of an area partly within the Special Lease. The others (Nos 70/1542 and 70/1549) are areas partly within one or more of the Melbourne Locations and the Special Lease. In each case, the balance of the areas which fall outside the Melbourne Locations and the Special Lease, as the case may be, still fall within the Defence Practice Area.

89 Section 53(2) of the Acquisition Act stated:

> "The Minister may authorize the grant of easements, or other rights, powers or privileges (other than leases or occupation licences), over or in connexion with, land vested in the Commonwealth."

By instrument dated 29 November 1985 ("the Commonwealth Authority"), which recited the effect of s 53(2), that there was vested in the Commonwealth land within the State of Western Australia, minerals in or under which were owned by the State, and that the State desired empowerment to grant exploration licences with respect thereto, the Minister for Local Government and Administrative Services, on certain conditions, authorised the State to grant such exploration licences "on behalf of the Commonwealth". The State Minister for Mines does not intend to exercise the Commonwealth Authority in dealing with the Applicants. In substance, the case for the State is that it is unnecessary for the State Minister to rely upon any authority in addition to that conferred by State law, in particular by the Mining Act.

90 Exploration licences if granted to the Applicants would confer certain rights upon them. These would include authority to enter and re-enter the land subject to the licence and to perform operations such as the digging of pits and the sinking of bores in or under the land (Mining Act, s 66). The Commonwealth submits that s 66 is ineffective to confer such authority not only with respect to so much of the Defence Practice Area as comprises the freehold and leasehold areas, being the land in the Melbourne Locations and under the Special Lease, but also with respect to the balance of the Defence Practice Area. However, as will appear, the

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51 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 166, 170-175.

declaratory relief to which the Commonwealth is entitled is limited to the lack of State authority with respect to the freehold and leasehold areas.

The issues on the demurrers

91 By its Amended Statement of Claim, the Commonwealth claims declarations that the Mining Act "does not bind the Crown in the right of the Commonwealth", that the Mining Act is invalid in so far as it purports to apply to land comprised within the Defence Practice Area or to the Special Lease or the Melbourne Locations, and that the Wardens do not have jurisdiction to deal with applications with respect to those areas.

92 The State demurs. The grounds for the State's demurrer are that (i) the Mining Act "binds the Crown in the right of the Commonwealth" and applies to the land within the Melbourne Locations and the Special Lease; (ii) contrary to the position taken by the Commonwealth, no relevant provisions of the Mining Act in their application to the Defence Practice Area, the Melbourne Locations and the Special Lease are rendered invalid by s 109 of the Constitution by reason of any inconsistency with the law of the Commonwealth, including Pt XI of the Defence Regulations; (iii) this has two limbs, namely (a) the Melbourne Locations are not "places acquired by the Commonwealth" within the meaning of s 52(i) of the Constitution and, in the alternative, (b) the Mining Act applies to the Melbourne Locations by virtue of the operation of the *Commonwealth Places (Application of Laws) Act* 1970 (Cth) ("the Application of Laws Act"); (iv) the Mining Act, in so far as it applies to land within the Melbourne Locations and the Special Lease, does not interfere with or adversely affect the capacity of the Commonwealth to control and make use of the land nor does it derogate from or adversely affect the interest therein held by the Commonwealth; and (v) in the alternative to (ii), s 64 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") renders the Mining Act binding upon the Commonwealth, at least in the present suit in this Court.

93 If on its face the Application of Laws Act did not apply to the Melbourne Locations, ground (iii)(b) would be determined adversely to the State, even if the outcome of ground (iii)(a) were that the Melbourne Locations are not "places" upon which s 52(i) of the Constitution operates. Ground (iv) does not arise if the Mining Act does not apply to the areas of the Melbourne Locations and the Special Lease. There would then be no occasion to consider the decision in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*[52].

94 By its counterclaim, the State claims a declaration that, in so far as the laws of the Commonwealth relied upon by the Commonwealth to support its claim of inconsistency with the Mining Act result in the acquisition by the Commonwealth of the property of the State, they are invalid. To this the Commonwealth demurs.

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52 (1997) 190 CLR 410.

It does so on the grounds that (i) none of the laws in question "effect an acquisition of property on other than just terms"; (ii) the Commonwealth acquired its interest in each of the Melbourne Locations and the Special Lease "by voluntary agreement, and as such acquired its property on just terms"; and (iii) Pt XI of the Defence Regulations, in reg 57, "allows for the acquisition of property on just terms". If the Commonwealth fails upon its claims of inconsistency, the occasion for the counterclaim by the State, and the demurrer by the Commonwealth to it, will not arise.

The subject-matters of the grants and Special Lease

95 It is necessary to begin by determining the nature and extent of the subject-matter comprised in the grants of the Melbourne Locations and the demise by the Special Lease. These were authorised by s 7(4) of the Land Act which provided for the making and implementation of agreements between the Governor and the Governor-General with respect to "any Crown lands". In s 3(1), "Crown Lands" was defined, with immaterial exceptions, to mean and include "all lands of the Crown vested in Her Majesty".

96 The term "lands" was not defined. However, s 7(2) spoke of "grants and other instruments disposing of any portion of Crown lands in fee simple or for any less estate". This indicates a recognition in the Land Act of the distinction between the identity of the particular estate or interest in land which is the subject of the grant and the quantum of that estate or interest on the one hand and the ordinary meaning of "land" on the other. This ordinary meaning was identified by Knox CJ and Starke J in *The Commonwealth v New South Wales*[53] as some "defined portion of the terrestrial globe".

97 The State referred to the principle that the words of an instrument are to be taken against the party employing them except in the case of the Crown and emphasised that here the grantor and lessor was the Crown. The consequence would be to render applicable the statement by Slade J in *Earl of Lonsdale v Attorney-General*[54]:

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53 (1923) 33 CLR 1 at 23. See also the drawing of this distinction in *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 at 13, 28, 37; *The Commonwealth of Australia v Maddalozzo* (1980) 54 ALJR 289 at 290, 292, 294; 29 ALR 161 at 164-165, 168-169, 172-173; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 629.

54 [1982] 1 WLR 887 at 901; [1982] 3 All ER 579 at 590-591. See also *Hume Steel Ltd v Attorney-General (Vict)* (1927) 39 CLR 455 at 463, 465; *Minister for Mineral Resources v Brantag Pty Ltd*, unreported, New South Wales Court of Appeal, 20 November 1997 at 7 per Mason P.

> "[I]f the wording of a grant by the Crown is clear and unequivocal, the grantee is entitled to rely on it as much as if the grantor had been any other subject of the Crown; if, on the other hand, the wording is obscure or equivocal, the court must lean towards the construction more favourable to the Crown, unless satisfied that another interpretation of the relevant words in their context is the true one."

However, the authorities, as is indicated in the statement by Slade J, have been concerned with cases arising between Crown and subject. Here, the parties to the instruments are two bodies politic. In those circumstances, the better approach is merely to seek the proper construction of the instruments in the light of the surrounding circumstances at the time they were executed[55].

98 In each grant in respect of the Melbourne Locations, the subject-matter, to be held by the Commonwealth in fee simple, was identified as "the natural surface and so much of the land as is below the natural surface to a depth of 12.19 metres" of the tract or parcel of land comprising the specified hectares. The demise the subject of the Special Lease also was identified as the natural surface and so much of the land as is below the natural surface to a depth of 12.19 metres of the piece or parcel of land containing the specified hectares.

99 Each Melbourne Location grant contained reservations expressed relevantly in identical terms[56]. There was (i) a reservation in favour of the Crown in right of

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55 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 347-352; cf *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912-913; [1998] 1 All ER 98 at 114-115.

56 The text of the reservation in respect of Melbourne Location 3989 was as follows:

> "PROVIDED, NEVERTHELESS, that, subject to section 141 of the Land Act, 1933, it shall be lawful for Us, Our heirs and successors, or for any person or persons acting in that behalf by Our or their authority, to resume and enter upon possession of any part of the said land which it may at any time by Us, Our heirs and successors, be deemed necessary to resume for roads, tramways, railways, railway stations, bridges, canals, towing paths, harbour or river improvement works, drainage, or irrigation works, or quarries, and generally for any other works or purposes of public use, utility, or convenience, and for the purpose of exercising the power to search for minerals hereinafter reserved, and such lands so resumed to hold to Us, Our heirs and successors, as of Our or their former estate without making to the said Grantee [the Commonwealth], or any person lawfully claiming under him, any compensation in respect thereof, so nevertheless, that the land so to be resumed shall not exceed one-twentieth part of the whole of the lands aforesaid, and that no such resumption be made of the part of any lands upon which any buildings may have been erected, or which may be in use as gardens, or otherwise, for the more convenient occupation of any such buildings, or on which any other improvements as defined by the Land Act, 1933, have been made, without compensation: AND PROVIDED, ALSO,

(Footnote continues on next page)

the State of all minerals "in and under the said land, with full liberty at all times to search and dig for and carry away the same; and for that purpose to enter upon the said land or any part thereof"; (ii) a power to the Crown, and any person or persons acting on that behalf by authority of the Crown, to resume not more than one-twentieth of the whole of the lands granted for the purpose of exercising the power to search for minerals reserved in (i); and (iii) a separate reservation in favour of the Crown of petroleum, as defined in the *Petroleum Act* 1967 (WA) ("the Petroleum Act"), with the right reserved to the Crown and persons authorised by it to have, subject to and in accordance with the provisions of the Petroleum Act, access to the land for the purpose of searching for and the operations of obtaining petroleum.

100 The power of resumption without compensation conferred by (i) was expressed to be subject to s 141 of the Land Act. The effect of sub-s (1) thereof was to require compensation in respect of resumptions after five years from the date of the grant and to assess the compensation by setting off against the value of the land resumed any increase in value of the land remaining which was due to or arose out of the resumption.

101 It will be noted that (ii) and (iii), but not (i), specify the exercise of rights not only by the Crown but also by persons authorised by it. The Special Lease contained reservations to the effect of (i) and (ii) but not (iii). The reservations to the effect of (i) deal with the minerals themselves and their exploitation but do not provide for the exercise of rights in relation thereto by those acting by authority of the Crown. Nor do they refer to the mining legislation. These reservations should

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> that it shall be lawful at all times for Us, Our heirs and successors, or for any person or persons acting in that behalf, by Our or their authority, to search and dig for and carry away any stones or other materials which may be required for making or keeping in repair any roads, tramways, railways, railway stations, bridges, canals, towing paths, harbour works, breakwaters, river improvements, drainage, or irrigation works, and generally for any other works or purposes of public use, utility, or convenience, without making to the said Grantee, or any person claiming under him, any compensation in respect thereof; and we do hereby save and reserve to Us, Our heirs and successors, all Mines, of Gold, Silver, Copper, Tin, or other Metals, Ore, and Minerals, or other substances containing Metals, and all Gems or Precious Stones and Coal or Mineral Oil and all Phosphate Substances in and under the said land, with full liberty at all times to seat and dig for and carry away the same; and for that purpose to enter upon the said land or any part thereof: and we do hereby, save and reserve to Us, Our heirs and successors all petroleum (as defined in the Petroleum Act, 1967, and all amendments thereof for the time being in force) on or below the surface of the said land with the right reserved to Us, Our heirs and successors and persons authorised by Us, Our heirs and successors to have access to the said land for the purpose of searching for and for the operations of obtaining petroleum in any part of the said land subject to and in accordance with the provisions contained in the Petroleum Act, 1967, and all amendments thereof for the time being in force."

not be read as reserving to the State a power now exercisable by the State of granting rights under the Mining Act where, under that statute, the State otherwise does not have such power.

102 The Special Lease also contained eight conditions. These included a restriction on use of the land for any purpose other than a Naval Gunfire Support Range Danger Area and Army Training Area, without the prior approval in writing of the State Minister for Lands (condition 1) and a requirement that the Commonwealth give to the State Department of Mines at least six weeks' notice of firing dates whenever an exercise was contemplated (condition 8). In addition, the Commonwealth was obliged to permit occupation by authorised bee-keepers, fishermen, prospectors and miners, consistent with the safe and effective use of the area for its leased purposes (condition 3).

103 The effect of condition 3 of the Special Lease and of the reservations, particularly (i) and (ii) in their respective operations in the grants and the Special Lease, was to qualify the enjoyment of the rights of ownership and exclusive possession which otherwise were conferred by the State upon the Commonwealth. For example, action authorised or permitted thereby would be an answer to an allegation of trespass[57].

104 The question then is whether the rights and obligations created or imposed by or pursuant to the Mining Act bear upon the subject-matter, identified as indicated, of the grants and demise to the Commonwealth.

Does the Mining Act "bind the Commonwealth"?

105 The phrase "the Crown" has come to be used in the law in various senses. Perhaps its oldest meaning is to identify the body politic itself. In discussing the structure of government as it has developed in the United Kingdom, Lord Templeman, in *M v Home Office*[58], distinguished between "the monarch and the executive". In the joint judgment in *Bropho v Western Australia*[59], reference was made to the development from "the Crown" as encompassing little more than the Sovereign, the monarch's direct representatives[60] and the basic organs of

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57 cf *The State of South Australia v The State of Victoria* (1911) 12 CLR 667; affd (1914) 18 CLR 115 (PC).

58 [1994] 1 AC 377 at 395.

59 (1990) 171 CLR 1 at 18-19. See also *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 427-428, 444-445, 453.

60 For example, in Australia the provision in s 2 of the Constitution for the appointment by the Sovereign of the Governor-General as the representative of the Sovereign in Australia.

government to the situation in Australia where "the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavour" and statutory instrumentalities operate on the same basis as private enterprise. In *Bropho v Western Australia*, the Court approached from this starting point the meaning now to be given to the presumption that statute does not "bind the Crown" and to the doctrine of the "shield of the Crown". Thus, the phrase "the Crown" is used here to identify the operations of the executive government and its statutory instrumentalities. Where, as in the present case, title to land or other assets is vested in "the Crown", the body politic itself may be identified as owner, and the expression "bind the Crown" will indicate that the enjoyment of the rights otherwise enjoyed as owner is qualified in some way.

106 "The Crown" may identify not a body politic or the executive government thereof but those rights, privileges or immunities identified with the royal prerogative. Speaking of one such prerogative in *The Commonwealth v Cigamatic Pty Ltd (In Liquidation)*, Dixon CJ said[61]:

> "In the first instance the Commonwealth rests its claim on the right at common law of the Crown to priority of payment when in any administration of assets debts of equal degree due to the Crown and due to subjects of the Crown come into competition. This right arose from the sovereignty of the Crown and was accordingly expressed in terms of prerogative but it is today one of the fiscal rights of government and of course it clearly attaches to the Commonwealth."

Here, the term "bind the Crown" refers to the abridgement or abolition of some special right, privilege or immunity setting the executive government apart from citizens generally[62]. More generally, the "prerogative" may identify "the powers accorded to the Crown by the common law"[63] or "the power of the Crown apart from statutory authority"[64]. Here, the question whether a particular statute "binds the Crown" is more likely to turn upon the application, to such activities of the executive government as the making of contracts, of a law of general operation[65].

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61 (1962) 108 CLR 372 at 376-377.

62 cf *In re Silver Brothers Ltd* [1932] AC 514 at 524.

63 *Barton v The Commonwealth* (1974) 131 CLR 477 at 498.

64 *Theodore v Duncan* [1919] AC 696 at 706; (1919) 26 CLR 276 at 282; *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 143.

65 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 424-425, 453.

107 The remarks of Dixon CJ in *Cigamatic* also indicate the difficulties which may attend the concurrent existence of several bodies politic within the one federal structure and the allocation between the respective executive governments in a federation of the prerogative rights enjoyed in a unitary state[66]. Issues of a constitutional and federal character also arise when the legislature of one body politic in the federation attempts to abolish or curtail the prerogatives attached to the executive government of another or to subject that other executive government to the obligations created by its laws. In Australia, the expression "bind the Crown" has been used in this context. *Jacobsen v Rogers*[67] is an example. However, it should be noted that the issue in that case was approached by the majority on the footing that[68]:

> "Once it is seen that the Commonwealth intended by s 10 to bind its own executive government, there is no reason to suppose that it did not intend to bind the executive governments of the States."

108 The State alleges in its Statement of Defence that the Mining Act "binds the Crown in right of the Commonwealth, and applies to the land within [the] Melbourne Locations [and the Special Lease]". The expression "bind" when used with respect to a body politic or the executive branch of government invites, if not requires, identification of the particular activities and interests of government which would be affected if the law in question has the operation it is said to have[69]. This is because, as Brennan CJ put it in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*[70]:

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66 See *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278 at 303-305; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 230-231; Campbell, "Parliament and the Executive" in Zines (ed), *Commentaries on the Australian Constitution*, (1977) 88 at 88-90.

67 (1995) 182 CLR 572.

68 (1995) 182 CLR 572 at 591. Brennan J (at 594) posed the question "does the law 'bind' the State?" McHugh J (at 601) cited the statement by Dixon J (in *In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 529) that in "a dual political system" one does "not expect to find either government legislating for the other" and (at 602) discussed authority indicating a similar approach in Canada and the United States. See also Hogg, *Liability of the Crown*, 2nd ed (1989) at 239-241.

69 *Jacobsen v Rogers* (1995) 182 CLR 572 at 593-594.

70 (1997) 190 CLR 410 at 427.

> "'bound' may have a different significance when the proposition refers to laws of different kinds".

Further, as indicated above, the phrase "bind the Crown" may be somewhat inapt or misleading when employed in articulation of justiciable issues which arise from the mutual legal relations between the Commonwealth and a State under the Constitution.

109 The Constitution, in terms, distinguishes between dealings between or involving the Commonwealth and the Parliament of a State (ss 111, 123, 124) and those between or involving the Commonwealth and the "Executive Government" of a State (s 119). Section 85 provides for the vesting in or acquisition by "the Commonwealth" of property of "a State" and s 51(xxxi) speaks of the acquisition of property "from any State". The constitutional provisions do not operate by reference to distinctions drawn between "the Crown" in one "capacity" and "the Crown" in another "capacity"[71].

110 The present issue between the Commonwealth and the State is better understood as being whether, by reason of the express terms in the Mining Act or by its necessary intendment, the land comprised in the Melbourne Locations and the Special Lease is open for mining in accordance with the Mining Act. There are no such express terms. In particular, there is no statement in the Mining Act that its operation in respect of land and interests in land applies to land held by the Commonwealth or that references therein to the Crown include the Crown in right of the Commonwealth[72]. The issue thus becomes whether on its true construction

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71 *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 282-283.

72 Section 4 of the *Interpretation Act* 1918 (WA), which was in force when the Mining Act was enacted and the grants of the Melbourne Locations and the Special Lease were made, stated that, unless the contrary intention appeared:

> "'His Majesty' or 'Her Majesty,' 'the King' or 'the Queen,' or 'the Crown,' means His Majesty the King, or Her Majesty the Queen, Sovereign for the time being of the United Kingdom of Great Britain and Ireland, and the British Dominions beyond the Seas, and includes the predecessors and the heirs and successors of such King or Queen".

This definition reflects the distinction drawn between the Crown as monarch and the Crown as executive. In Australia, such a definition was more apt to identify the sovereign for the time being by a particular style and title rather than any particular body politic within the federal system or the executive government thereof. The royal style and title used in s 4 was supplanted by that adopted under the *Royal Style and Titles Act* 1953 (Cth), which in turn was replaced by that adopted under the *Royal*

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the Mining Act evinces the necessary intendment. The State submits that there is that intendment. That submission should not be accepted.

111 The State submits that "at least in so far as the Commonwealth is the owner of private land" the Mining Act evinces an intention that ownership and enjoyment of the land may be affected by mining tenements (in this case, exploration licences) granted under the Mining Act. However, upon its proper construction the Mining Act has no such operation. In particular, neither the subject-matter of the grants in respect of the Melbourne Locations nor that demised by the Special Lease falls within any of the Divisions of Pt III of the Mining Act.

112 The Mining Act replaced the *Mining Act* 1904 (WA) ("the 1904 Act"). The scheme of Pt III of the Mining Act (ss 18-39) is to open for mining thereunder Crown land (Div 1 (ss 18-22)), private land (Div 3 (ss 27-39)) and what in the heading to Div 2 (ss 23-26A) are identified as "Public Reserves, etc". A different regulatory regime is prescribed with respect to each Division in Pt III. The closest restrictions are those prescribed by Div 2 with respect to public reserves and the like. However, the effect of ss 21 and 22 is that private land under Div 3 may be taken or resumed so as to acquire the character of Crown land within the operation of Div 1. It will be necessary to refer later in these reasons to this relationship between Div 1 and Div 3.

113 The term "Crown land" upon which Div 1 turns is defined in s 8(1) as meaning "all land in the State" with specified exceptions. One exception is land "lawfully granted or contracted to be granted in fee simple by or on behalf of the Crown" (par (b)). Another is land that, with immaterial exceptions, is "subject to any lease granted by or on behalf of the Crown" (par (c)).

114 The functions of government identified by these references to grants respecting land in the State are, in the absence of express terms or necessary intendment to the contrary, to be taken as activities of the Executive Government of the State[73]. The entire management of the waste lands in Western Australia had been vested by the Imperial Parliament in the Western Australian legislature by s 3 of the *Western Australia Constitution Act* 1890 (Imp)[74]. Thereafter, subject to the operation of the Constitution and laws of the Commonwealth, dealings in Crown land, including mines and minerals thereon and therein, could only be authorised

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Style and Titles Act 1973 (Cth). In any event, the definition in s 4 is of no assistance for the issues in this case.

73 *R v Registrar of Titles (Vict); Ex parte The Commonwealth* (1915) 20 CLR 379 at 391, 397, 405-406; *Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1 at 26-27.

74 53 & 54 Vict c 26.

and supported by the statute law of Western Australia[75]. To adapt what was said by Dixon J in *Essendon Corporation v Criterion Theatres Ltd*[76], there is "no logical ground" for expanding the meaning given in the Mining Act to the Crown "to cover the Commonwealth"; having regard to the history of the disposition of Crown lands, "[t]he presumption is the other way".

115 When the Mining Act was introduced, this state of affairs was recognised and implemented by s 7 of the Land Act. Sub-sections (1)-(3) thereof then stated:

> "(1) The Governor is authorized, in the name and on behalf of Her Majesty, to dispose of the Crown lands within the State, in the manner and upon the conditions prescribed by this Act or by regulations made thereunder.[77]
>
> (2) All grants and other instruments disposing of any portion of Crown lands in fee simple or for any less estate made in accordance with this Act shall be valid and effectual in law to transfer to and vest in possession in the purchasers the land described in such grants or other instruments for the estate or interest therein mentioned.
>
> (3) The Governor is authorized to make such grants and other instruments, upon such terms and conditions as to resumption of the land or otherwise as to him shall seem fit."

Section 7 also recognised, in sub-s (4) set out earlier in these reasons, that, as a consequence of federation, the Commonwealth and States were organisations or

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75 *Nicholas v Western Australia* [1972] WAR 168 at 172. See also *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 424-428, 449-456, 464-465; *The State of South Australia v The State of Victoria* (1914) 18 CLR 115 at 121-122; *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 38-39; *Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1 at 26; *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 439; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 108-110, 139-143, 188-189, 227-229.

76 (1947) 74 CLR 1 at 26; cf *Jacobsen v Rogers* (1995) 182 CLR 572 at 590-591.

77 The words "in the manner ... made thereunder" were deleted and there were substituted the words "in accordance with the provisions of this Act" by s 3 of the *Land Act Amendment Act* 1977 (WA) which came into force on 20 March 1978.

institutions of government, possessing distinct individualities, which might enter into mutual legal relations[78].

116 When references to Crown grants and the definition of "Crown land" in the Mining Act to which I have referred are read with s 7 of the Land Act, it becomes apparent that the grants and lease by which the Commonwealth acquired from the State the Melbourne Locations and the Special Lease took the subject land outside the definition of Crown land in the Mining Act. It follows that the subject lands are not within Div 1. It is not suggested that they fall within Div 2. The question then is whether they fall within Div 3 as "private land" which s 27 thereof provides is "open for mining in accordance with this Act".

117 The classification in Pt III of the Mining Act of "land open for mining" reflects that which developed in the course of Australian colonial administration between (i) the waste lands of the Crown (ie, those not yet appropriated by subjects under any title from the Crown, whether by grant for an estate or by lease for a term of years, or on other statutory tenure); (ii) lands dedicated and set apart for some public use or purpose; and (iii) lands previously within (i) but now the subject of appropriation by subjects as aforesaid. The history of the matter is detailed in *Williams v Attorney-General for New South Wales*[79], particularly by Barton ACJ[80], Isaacs J[81] and Higgins J[82]. The Mining Act replaced the 1904 Act. This had contained definitions of "Crown Land" (s 3) and "Private Land" (s 115), from which the definitions of those terms in s 8(1) of the Mining Act were later developed.

118 With exceptions and qualifications not of immediate importance (save that in par (c) no land which "has been reserved for or dedicated to any public purpose shall be taken to be private land by reason only that any lease or concession is granted in relation thereto for any purpose"), the definition in s 8(1) of "private land" means:

> "any land that has been or may hereafter be alienated from the Crown for any estate of freehold, or is or may hereafter be the subject of any conditional

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78 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 363; *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 282-283.

79 (1913) 16 CLR 404.

80 (1913) 16 CLR 404 at 423-428.

81 (1913) 16 CLR 404 at 440-456.

82 (1913) 16 CLR 404 at 461-465.

purchase agreement, or of any lease or concession with or without a right of acquiring the fee simple thereof ...".

119 It was submitted by the State that the Melbourne Locations had been "alienated from the Crown for [an] estate of freehold" and that the land the subject of the Special Lease was "the subject … of [a] lease" within the meaning of this definition. The result is said to be that the Melbourne Locations are "private land" open for mining in accordance with s 27. However, the background of the matter and the scheme of Pt III suggest that the alienation spoken of in the definition of "private land" is that in favour of a private as distinct from a public alienee and, in particular, not an alienation from one body politic in the federal structure to another. The definition of "private land" in the Mining Act is to be read with the provisions in s 7 of the Land Act, in particular with sub-ss (1)-(3) of s 7. These deal with the disposal of Crown lands by grant and other instruments, whilst sub-s (4) provides for sale or lease by agreement with the Commonwealth. The phrase "alienated from the Crown" in the definition of "private land", upon which Div 3 of Pt III of the Mining Act turns, is more apt to describe the former rather than the latter species of dealing under s 7 of the Land Act.

120 Further, the Mining Act (in ss 21 and 22) provides for the taking or resumption on behalf of the State pursuant to the *Land Acquisition and Public Works Act* 1902 (WA) of any private land, whereupon it is to be taken for the purposes of the Mining Act to be Crown land to which Div 1 rather than Div 3 of Pt III applies. If the legislature of the State had been determined to provide for the taking or resumption of land or interests in land vested in the Commonwealth, then, given the serious constitutional question that would arise, it would be expected that the legislature would have plainly indicated that intention. The failure to do so with respect to the definition of "private land" suggests that Div 3 is concerned with land held by private parties rather than by the federal body politic.

121 In addition, the particular treatment in Pt III of State public purposes is a significant guide to construction. There is excluded from the "Crown land" which is open for mining under Div 1 land which has been reserved for or dedicated to a wide range of public purposes. This follows from the exception in par (a) of the definition of "Crown land" and the definition of "public purpose", both in s 8(1). Reference has been made above to the treatment of land reserved for or dedicated to public purposes by par (c) of the definition of "private land". The result, broadly, is to place outside Div 1 and Div 3 land reserved for or dedicated to State public purposes. Such provision as is made with respect to them is found in the special and limited provisions of Div 2.

122 If the submissions for the State be accepted, land or interests therein which are vested in the Commonwealth would fall within Div 3 as "private land". The differential treatment then apparent between State and Commonwealth public purposes would raise a serious constitutional issue. It should be accepted that a State may not legislate in a way that discriminates against the Commonwealth by

placing upon it a special burden or disability[83]. The phrase "public purposes" of the Commonwealth expresses "a large and general idea"[84]. This comprehends the defence purposes in pursuance of which the Commonwealth acquired the Melbourne Locations and took the Special Lease.

123 If the construction advanced by the State as to the scope of Div 3 of Pt III of the Mining Act were correct, the Part would operate by reference to a distinction which some overriding law, namely the Constitution, decrees to be impermissible[85]. A construction which avoids that result is to be preferred.

124 For these reasons, the submissions by the State on the construction of the Mining Act should not be accepted. The operation of that legislation does not extend to that land or interest in land which constitutes the subject-matter of the title vested in the Commonwealth with respect to the Melbourne Locations and the Special Lease.

125 The Commonwealth, in its action, should have declaratory relief to reflect that situation. With respect to that portion of the Defence Practice Area which is outside the freehold and leasehold areas, the Commonwealth relies primarily upon a submission as to inconsistency between the Mining Act and Pt XI of the Defence Regulations. Consideration will be given to that submission after dealing with the balance of the demurrer by the State.

The consequences of the limited operation of the Mining Act

126 The result of the foregoing is that the State fails on ground (i) for its demurrer, namely that the Mining Act "binds the Crown in the right of the Commonwealth" and applies to the subject-matter of the Melbourne Locations and the Special Lease. Ground (iv) of the demurrer does not arise because it presupposes that the Mining Act does have such an application. By reason of its limited operation, the Mining Act does not derogate from or adversely affect the interest in the Melbourne Locations and the Special Lease, nor does it interfere with or adversely affect the capacity of the Commonwealth to control and make use of the subject-matter of the Melbourne Locations and the Special Lease. However, it will

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83 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 61, 74, 99; *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 214-217; *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 288; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 507-508.

84 *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89 at 125.

85 See the remarks by Gaudron and McHugh JJ in *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478.

be necessary to refer further to the significance which remains in giving effect to the reservations in the relevant instruments and the conditions attached to the Special Lease. These generate rights and obligations arising in contract and under the law of real property with respect to reservations from grants, rather than under the terms of the Mining Act.

127 The limited reach of the Mining Act also has the consequence that the State fails in respect of ground (iii)(b) for its demurrer. This was put on the footing that if, contrary to the submission by the State and in accordance with the submission for the Commonwealth, the Melbourne Locations were "places acquired by the Commonwealth"[86] within the meaning of s 52(i) of the Constitution[87], the result was to engage the Application of Laws Act and apply the Mining Act to the Melbourne Locations.

128 Section 4(1) of the Application of Laws Act states:

> "The provisions of the laws of a State as in force at a time (whether before or after the commencement of this Act) apply, or shall be deemed to have applied, *in accordance with their tenor*, at that time in and in relation to each place in that State that is or was a Commonwealth place at that time." (emphasis added)

129 The first question that arises with respect to the operation of s 4(1) upon the use to which any land may be put is whether, in accordance with its tenor, the State law would restrict that use[88]. The State provisions can apply only "in accordance with their tenor" and thus within their limits, most plainly as to locality. Many State laws have only a local operation so that "the provisions of a municipal by-law in Gundagai should not be applied in the Richmond Air Force Base"[89]. The limited reach of the Mining Act, upon its true construction, differs in degree but not nature

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86 The Commonwealth eschewed any submission that the area of the Special Lease was a Commonwealth place; cf *Bevelon Investments Pty Ltd v Melbourne City Council* (1976) 135 CLR 530; *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 at 660, 675.

87 Section 52(i) states that, subject to the Constitution, the Parliament has exclusive power to legislate with respect to "all places acquired by the Commonwealth for public purposes".

88 *Kangaroo Point East Association Inc v Balkin* [1995] 2 Qd R 135 at 140; (1993) 119 ALR 305 at 309.

89 Rose, "The Commonwealth Places (Application of Laws) Act 1970", (1971) 4 *Federal Law Review* 263 at 269.

from the local law referred to in this example. Further, par (b) of s 4(2) puts it beyond doubt that s 4(1) does not operate:

> "so as to make applicable the provisions of a law of a State in or in relation to a Commonwealth place if that law would not apply, or would not have applied, in or in relation to that place if it were not, or had not been, a Commonwealth place".

130 The issues which remain for consideration concern (i) the rendering of the Mining Act "binding on the Commonwealth" by the force of s 64 of the Judiciary Act; and (ii) the absence (asserted by the State and disputed by the Commonwealth) of any inconsistency between a law of the State and a law of the Commonwealth within the meaning of s 109 of the Constitution.

Section 64 of the Judiciary Act

131 This states:

> "In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject."

132 In *The Commonwealth v Evans Deakin Industries Ltd*[90], five members of this Court[91] rejected the view taken by the New South Wales Court of Appeal in *Australian Postal Commission v Dao*[92] that s 64 did not begin to operate against the Commonwealth until there was otherwise a cause of action which brought the Commonwealth before the court as a party. It was held that, whilst there must be a suit to which the Commonwealth is a party before s 64 commences its operation[93], this does not mean that the cause of action must arise under some other law before s 64 may apply[94]. The commencement of a suit against the Commonwealth, the precondition for the operation of the section, was satisfied by the bringing of an action against the Commonwealth in a court of competent jurisdiction.

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90 (1986) 161 CLR 254 at 267.

91 Gibbs CJ, Mason, Wilson, Deane and Dawson JJ; Brennan J dissented.

92 (1985) 3 NSWLR 565, especially at 582-583 per Kirby P, 604 per McHugh JA. The decision of the Court of Appeal was confirmed on other grounds: (1987) 162 CLR 317.

93 (1986) 161 CLR 254 at 263.

94 (1986) 161 CLR 254 at 264.

133 In the present case, the Commonwealth did not seek leave to re-open *The Commonwealth v Evans Deakin Industries Ltd*. Rather, the Commonwealth emphasised that the application of s 64 must depend upon the subject-matter in respect of which the rights of parties otherwise would differ and the meaning of the phrase "the rights of parties shall *as nearly as possible* be the same"[95].

134 The State submitted that the Mining Act is binding on subjects who own private land to which Div 3 of Pt III of the Mining Act applies and that the effect of s 64 was to render that law of the State binding on the Commonwealth. One difficulty with that proposition is that, as indicated earlier in these reasons, the Commonwealth does not own private land within the meaning of Div 3 of Pt III of the Mining Act. The phrase "as nearly as possible" cannot operate to alter the nature of respective rights in relation to different subject-matter. Further, here the Commonwealth acquired the freehold and leasehold titles for defence purposes and was thus performing a function peculiar to government. The phrase "as nearly as possible" does not embrace such a situation. This conclusion is not foreclosed by *The Commonwealth v Evans Deakin Industries Ltd*[96].

135 There is a further ground which denies the application here of s 64. The proceeding in this Court answers the description in s 64 of a suit to which the Commonwealth is a party. However, the issue is whether s 64 applies in respect of the steps to be taken by the Wardens upon the applications by the Applicants. The nature of the authority exercised by the Wardens is explained earlier in these reasons.

136 The Commonwealth has lodged objections to those applications. Nevertheless, the Wardens are not engaged in the adjudication of a matter in which a State court is exercising federal jurisdiction with which it has been invested by a law made by the Parliament under s 77(iii) of the Constitution[97].

137 Accordingly, s 64 has no relevant application.

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95 Emphasis added. See Finn, "Claims Against the Government Legislation" in Finn (ed), *Essays on Law and Government, Volume 2, The Citizen and the State in the Courts*, (1996) 25 at 40-43, 45-47.

96 See (1986) 161 CLR 254 at 264-265.

97 *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 223-224; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 448, 460-461, 474-475, 511.

Inconsistency and acquisition of property of the State

138 The principles with respect to the application of s 109 of the Constitution which are to be deduced from the decisions of this Court were considered by Mason CJ, Deane, Toohey and Gaudron JJ in *P v P*[98]. Their Honours explained that the terms and operation of the Commonwealth law in question may disclose a legislative intent to cover the relevant field. If so, s 109 will apply to render invalid the State law to the extent that it intrudes within the area validly occupied by the federal law. If the terms and operation of the federal law disclose no such legislative intent, the existence and extent of inconsistency will depend upon the terms and operation of the Commonwealth and the State law. When that is so, commonly the State law will be inconsistent with the Commonwealth law and invalid only to the extent that it would "alter, impair or detract from"[99] the operation of the Commonwealth law.

139 In particular, as was emphasised in *The Kakariki*[100], the federal law may not be an exhaustive statement of rights and liabilities with respect to a particular subject-matter, but may confer upon the executive government a power with respect to a particular subject the exercise of which is intended to be exclusive. Section 109 then operates at the time of the exercise of that power. In *R v Winneke; Ex parte Gallagher*, Mason J referred to *The Kakariki*, saying[101]:

> "In cases of this kind, which arise out of the coexistence of Commonwealth and State powers potentially capable of being exercised with respect to the same property, no inconsistency will arise until the powers are actually exercised."

The terms in s 109 "a law of a State", "a law of the Commonwealth" and "to the extent of the inconsistency" have what Taylor J in *Butler v Attorney-General (Vict)*[102] identified as "a temporal as well as a substantive connotation". The relevant "law of the Commonwealth" may not enliven the operation of s 109 until the executive government has implemented the law by taking the action which it

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98 (1994) 181 CLR 583 at 602-603.

99 *Victoria v The Commonwealth* ("*The Kakariki*") (1937) 58 CLR 618 at 630.

100 (1937) 58 CLR 618 at 631.

101 (1982) 152 CLR 211 at 221. Gibbs CJ (at 217) made the same point. See also the statement to like effect by Mason ACJ, Wilson and Dawson JJ in *Flaherty v Girgis* (1987) 162 CLR 574 at 588.

102 (1961) 106 CLR 268 at 283.

authorises. This notion of "operational inconsistency" is important for the present case.

140 It is convenient to begin with the laws upon which the Commonwealth relies. First, the Commonwealth submits that Pt X of the 1989 Act is an exhaustive code for the disposition of interests in land vested in the Commonwealth and that it excludes the operation of State law such as the Mining Act which might otherwise empower the State to deal with interests in such land. In particular, the contention is that the rights conferred by an exploration licence under the Mining Act, to which reference has been made earlier in these reasons, would involve the disposition of part of the interests vested in the Commonwealth in freehold and leasehold with respect to the Melbourne Locations and the Special Lease. This would be so despite the operation of the reservations in the grants and in the Special Lease and the conditions attached to the Special Lease.

141 These submissions should not be accepted. Part X (ss 117-124) of the 1989 Act is headed "DEALINGS IN LAND VESTED IN ACQUIRING AUTHORITIES". The Commonwealth is an "acquiring authority" (s 6). Section 117 restricts the disposition by an acquiring authority of an interest in land. Section 118 empowers the Minister to direct that an interest in land vested in the Commonwealth be transferred to a particular Commonwealth authority. Sections 119, 120 and 121 are concerned with disposal by an acquiring authority of interests in land and s 123 with the extinguishment of easements where, it appears, the dominant tenement is owned by an acquiring authority. Section 122 authorises the dedication to a public purpose of land vested in the Commonwealth.

142 None of these provisions supports the characterisation of Pt X as the complete and comprehensive code which the Commonwealth contends supplants what otherwise would be rights conferred by exploration licences under the Mining Act or the power to grant such licences. Part X cannot be construed as covering any relevant field which extends beyond the disposition of interests in land vested in the Commonwealth to include the disposition of interests which are not so vested and, indeed, which were reserved and held back from the vesting in the Commonwealth.

143 The Commonwealth placed particular, and distinct, reliance upon s 124, sub-s (8) of which presently preserves the operation of certain provisions of the Acquisition Act. These include s 53(2), the text of which was set out earlier in these reasons in the course of explaining the reliance upon it for the Commonwealth Authority given to the State on 29 November 1985.

144 Section 53(2) provides the conferral of authority to grant easements or other rights, powers or privileges (not being leases or occupation licences) "over or in connexion with, land vested in the Commonwealth". A right, power or privilege may be conferred, for example, pursuant to the Commonwealth Authority, to enter upon the Melbourne Locations and the Special Lease and conduct activities there

involving the digging of pits and the sinking of bores into the 12.19 metres below the natural surface. A party so authorised would, without more, still lack the authority to excavate, extract or remove the minerals or, in the case of the Melbourne Locations, petroleum, which is reserved to the State.

145 Any question of the application of s 109 of the Constitution would involve what has been identified earlier in these reasons as operational inconsistency. No such right, power or privilege has been granted pursuant to authority conferred by the Minister under s 53(2). Much might turn upon the actual terms of such a grant. In the meantime, the better view is that the circumstance that the two legal regimes "make contact the one with the other"[103] in this way does not attract the operation of s 109. Rather, the decisions in cases such as *Airlines of NSW Pty Ltd v New South Wales [No 2]*[104] and *Commercial Radio Coffs Harbour v Fuller*[105] are in point. The pursuit of a particular economic activity with respect to an area, the ownership of which is divided between Commonwealth and State in the particular fashion disclosed in this case, requires compliance with both legal regimes.

146 The Commonwealth also referred to s 8(1) of the Acquisition Act, the text of which is set out earlier in these reasons. However, this provides for a vesting in the Commonwealth "according to the tenor of the instrument or assurance". It thus recognises that which was held back by the State under the reservations. It is not to the point that that which was granted to the Commonwealth takes full effect notwithstanding anything in State law to the contrary. That which takes full effect is that which was vested according to the tenor of the instrument or assurance.

147 There is nothing in these laws of the Commonwealth which is inconsistent with the application of the Mining Act to the subject-matter held back by the State under the reservations. Accordingly, the Commonwealth laws do not effect an acquisition of the property of the State.

The Defence Regulations

148 The Commonwealth placed greatest reliance upon the operation of the Defence Regulations with respect to defence practice areas. This was on the footing that, whilst those portions of the Defence Practice Area which fell outside the Melbourne Locations and the Special Lease were otherwise open to mining under the State law, that law was inconsistent with the Defence Regulations.

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103 *Australian Broadcasting Commission v Industrial Court (SA)* (1977) 138 CLR 399 at 407.

104 (1965) 113 CLR 54 at 121, 144, 168.

105 (1986) 161 CLR 47 at 58-59.

149 The Commonwealth also submitted, as an apparent corollary, that, to the extent that there was no operational inconsistency, the State law was beyond power because it interfered with or adversely affected the Commonwealth "to discharge its constitutional obligations in areas set aside for defence purposes". That submission, which is not without its difficulties, will not fall for consideration in advance of the determination, in a properly constituted action, of the existence of operational inconsistency.

150 As indicated earlier in these reasons, it was pursuant to reg 49 that the Minister established the Lancelin Training Area as the Defence Practice Area. The scheme of Pt XI (regs 48-57C) of the Defence Regulations involves the imposition of prohibitions, contravention of which a penalty is prescribed, by reg 53, upon persons without reasonable excuse being in a defence practice area at a time specified in an instrument issued under reg 51(1). A person whose presence contravenes reg 53 may be removed (reg 54).

151 Regulation 51(1) empowers a chief of staff, in writing, to authorise the carrying out in a defence practice area of defence operations "at a time specified in the instrument". The Commonwealth uses land within the Lancelin Training Area, including land within the Melbourne Locations and the Special Lease, at the times specified in instruments issued under reg 51.

152 Paragraphs (b) and (d) of reg 57(1) state that the Commonwealth shall pay reasonable compensation to a person who sustains loss or damage by reason that an area is declared to be a defence practice area under reg 49(1) or who sustains loss or damage otherwise caused by the operation of Pt XI. Persons aggrieved by a refusal to pay compensation or by the amount thereof may apply to a "reviewing authority" established under reg 57A, from whose decisions there is review under the *Administrative Appeals Tribunal Act* 1975 (Cth) and whence an "appeal" on a question of law lies to the Federal Court under s 44 of that statute.

153 There is a dispute, crystallised in the demurrer by the Commonwealth, as to whether upon its true construction reg 57 and the "appeal" structure described above[106] provide just terms for the acquisition of property within the meaning of s 51(xxxi) of the Constitution. It is unnecessary to resolve various issues of construction of Pt XI of the Defence Regulations and to determine this constitutional question in the present case. The State correctly submits that no exploration licences have been granted by its Minister for Mines under Pt IV, Div 2 of the Mining Act with respect to any portion of the Defence Practice Area and that any inconsistency, the presence of which may activate the constitutional guarantee, would be operational in nature.

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106 See *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 at 562, 566; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 300, 355.

154 Not only have the Applicants yet to receive any grant of exploration licences pursuant to the Mining Act, but, for reasons yet to appear, they may never do so. Again, those bee-keepers, fishermen and others whose occupation the Commonwealth is obliged by condition 3 of the Special Lease to permit may assert that they have sustained loss or damage by the operation of Pt XI but no such claim is made in this action.

155 Further, it is by no means inevitable that the provisions of the Mining Act and of Pt XI of the Defence Regulations would operate inconsistently in the circumstances of this case. Section 57(1) of the Mining Act empowers the Minister to grant a licence on such terms and conditions as the Minister may determine. Although one of the rights conferred upon the grantee of an exploration licence is authority to enter and re-enter the land the subject of the licence (s 66(a)), that right is "subject to [the Mining] Act" and is to be exercised "in accordance with any conditions to which the licence may be subject". Thus, exploration licences may be granted by the Minister for Mines in terms which do not permit the holders to be present on any portion of the Defence Practice Area at the same time as defence operations are conducted. In such a situation, there would be no operational inconsistency because the prohibition upon the presence of non-defence personnel in the Defence Practice Area is limited by reg 53 to the time specified for the conduct of the defence operation.

156 In any event, the State's counterclaim is limited to the alleged acquisition by the Commonwealth of the property of the State, not any third party. The restrictive operation of Pt XI upon the reservation to the State and its exploitation thereof conceivably could deny to the State the "substance" and "reality" of its proprietary interest[107] or "everything that made [it] worth having"[108]. However that may be, the potentiality of that result does not attract s 51(xxxi) to the state of affairs now disclosed on the pleadings. The present case stands in quite a different position to that in *Minister of State for the Army v Dalziel*[109]. There, reg 54 of the National Security (General) Regulations, made under s 5 of the *National Security Act* 1939 (Cth), empowered the Minister of State for the Army in certain circumstances to take possession of any land for a period to end not later than six months after the cessation of war[110]. Possession had been taken of certain land occupied by the respondent as a weekly tenant and litigation then was instituted by the respondent in which he relied upon s 51(xxxi).

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107 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 530, 633-634.

108 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 286.

109 (1944) 68 CLR 261.

110 See the judgment of Starke J: (1944) 68 CLR 261 at 289.

157 As this action is constituted, no law of the State is rendered invalid to the extent of an inconsistency with a law of the Commonwealth. Therefore, there arises no question of the operation of s 51(xxxi) to invalidate any relevant law of the Commonwealth. The relief the State seeks in its counterclaim turns upon such an invalidating operation of s 51(xxxi). It follows that, on its counterclaim, the State is not entitled to relief.

Conclusion

158 The demurrer by the Commonwealth to the counterclaim by the State should be allowed. The declaration sought by the State in its counterclaim should not be made. The demurrer by the State to the Commonwealth's Amended Statement of Claim should be upheld to the extent that Pt XI of the Defence Regulations has not been shown by the Commonwealth to operate so as to deny to those portions of the Defence Practice Area which fall outside the three Melbourne Locations (that is to say, outside the freehold and leasehold areas) the character of land open for mining under the provisions of Pt III of the Mining Act. The result is that the Commonwealth, in its action, will be entitled to limited declaratory relief with respect to the freehold and leasehold areas. The precise terms of that relief will be for the Justice disposing of the action but sufficient relief to the Commonwealth would be a declaration that the land and interests in land within the Melbourne Locations 3988, 3989 and 4004, as identified in the Amended Statement of Claim and vested in the Commonwealth, are not land open for mining under the provisions of Pt III of the Mining Act. Costs of the demurrers, if sought, should be reserved to the disposition of the action.

159 KIRBY J. These proceedings concern the intersection of federal and State law. Before the Court are countervailing claims of inapplicability or invalidity of the laws said to be inconsistent.

The facts, pleadings and issues

160 Most of the facts necessary to my reasons are set out in the opinions of the other members of the Court. The issues for decision also appear there. Those issues arise out of the pleadings of the principal antagonists. These are the Commonwealth of Australia and the State of Western Australia. To the Commonwealth's amended statement of claim seeking certain declarations, Western Australia has pleaded additional facts and has demurred. It contends that, as a matter of law, the facts pleaded in the statement of claim do not entitle the Commonwealth to any of the relief sought. As well, the State has lodged a counterclaim. This asserts, in effect, that, if the Commonwealth is entitled to the legal rights it claims, the provisions of federal law upon which it relies effect an acquisition of the State's property otherwise than on just terms and are thus contrary to the Constitution[111]. Insofar as the federal laws have that effect, Western Australia by its counterclaim seeks a declaration that they are invalid. To this counterclaim, the Commonwealth has, in turn, demurred.

161 The proceedings originally began in this Court on a motion for a writ of prohibition and a declaration against the Wardens of the South West Mineral Field (appointed under the *Mining Act* 1978 (WA)[112]) and two named companies (Mineral Sand Mining & Development Pty Ltd and Enmic Pty Ltd). Those companies have applied to the Wardens under that Act for the grant of mineral exploration licences. One such application came before a Warden for hearing. The Commonwealth took a preliminary objection, asserting that the Warden lacked jurisdiction under the Act to grant a licence. The Warden overruled the objection[113]. The Warden made it clear that, unless stopped, he would proceed to determine the application in accordance with the *Mining Act.* This ruling led first to an application to the Supreme Court of Western Australia where Scott J[114] granted an order nisi for a writ of certiorari to permit review of the Warden's decision. Later, the Commonwealth commenced proceedings in this Court for

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111 s 51(xxxi).

112 s 13.

113 Wardens Court (Perth), 23 June 1996 per Warden P G Malone SM (In the matter of an application for exploration licence 70/1425 and objection 63H/934). Although in terms confined to the application of Mineral Sand Mining & Development Pty Ltd, the reasoning was equally applicable to the application of Enmic Pty Ltd and has been so treated.

114 On 6 November 1996.

constitutional prohibition. McHugh J granted an order nisi. However, after the Commonwealth filed the statement of claim in the present suit, the motion for the writ of prohibition was, by consent of the parties, discontinued[115]. That left the issues to be decided on the present pleadings. The Wardens and the two companies submitted to the orders of this Court. The Commonwealth and Western Australia advanced their conflicting positions. Other States intervened, principally to support Western Australia.

The Defence Practice Area at Lancelin

162 Affidavit material filed in the prohibition proceedings was left before the Court. It gives some background information, much of it in the public record, about the use of the Lancelin Training Area in Western Australia. It is a defence practice area ("DPA") under the Defence Force Regulations (Cth) made pursuant to the *Defence Act* 1903 (Cth)[116]. However, so far as the cross-demurrers are concerned, they confine attention to the facts which the parties have severally pleaded. They each ask whether those facts, if established, would have the legal consequences which the parties separately assert[117]. If the facts pleaded are insufficient, in law, to have the consequences suggested, the claim or counterclaim concerned must be sent for trial in the ordinary way.

163 In elaboration of its demurrer, Western Australia annexed to its pleading a number of original documents, being those connected with two grants of interests in fee simple (Locations 3989 and 4004) and the special lease (Location 3988) all within the DPA. As well, Western Australia annexed the authorities approved under the *Defence Act*[118] and declarations made pursuant to the Defence Force Regulations[119]. The latter define the DPA in question, and the area of sea off the coast which was declared part of the DPA for the purposes of the Regulations.

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115 By order of Gummow J (in chambers): *The Commonwealth of Australia v The State of Western Australia*, Transcript of Proceedings, High Court of Australia, 25 May 1998 at 29-30.

116 s 124.

117 *Bond v The Commonwealth of Australia* (1903) 1 CLR 13; *South Australia v The Commonwealth* (1962) 108 CLR 130 at 142; *Levy v Victoria* (1997) 189 CLR 579 at 649.

118 s 69. This section has since been repealed: *Statute Law (Miscellaneous Provisions) Act (No 1)* 1983 (Cth), Sched 1.

119 reg 49(1).

According to the declarations in force at the relevant time, and still in force, the DPA may be used for naval gunnery and air to surface weapons firing[120].

164 The outer perimeter of the DPA, extending into the sea, defines its boundaries. The inner perimeter defines the interest acquired by the Commonwealth from Western Australia under the special lease (Location 3988). The two areas comprising the fee simple grant are within that area (Locations 3989 and 4004). The other lines on the map portray the perimeters of the land referred to in various mineral exploration licence applications lodged with the Wardens. It is sufficient to note that some of these extend over land held by the Commonwealth in fee simple and under the special lease. Some extend into the area within the outer perimeter where the land is not held by the Commonwealth pursuant to any grant of leasehold or freehold. This is unalienated Crown land of the State of Western Australia. The Commonwealth's interest in the land arises only as that land has been designated part of the DPA. A map shown in the attached Figure makes the position clearer.

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120 Declarations of 5 July 1985 and 17 October 1994. See *Commonwealth of Australia Gazette*, S 289, 25 July 1985 at 6; *Commonwealth of Australia Gazette*, GN 46, 23 November 1994 at 2995.

54.

FIGURE

THE LANCELIN TRAINING AREA

The Commonwealth's claim for relief is not theoretical or premature

165 I agree with Gummow J that, properly construed, the *Mining Act* of Western Australia does not bind the Commonwealth (or the Crown in right of the Commonwealth) and does not apply to the land held by the Commonwealth pursuant to the grants in fee simple or under the special lease. Other considerations arise in relation to the balance of the DPA. I also agree with Gummow J's reasons for holding that the *Mining Act* is not made applicable to the areas of land acquired in fee simple by force of the *Commonwealth Places (Application of Laws) Act* 1970 (Cth), s 4(1). Similarly, I agree that the *Judiciary Act* 1903 (Cth), s 64 cannot apply (even if *The Commonwealth v Evans Deakin Industries Ltd*[121] is correctly decided[122]) to import into the rights of the parties the entitlements and obligations laid down by the *Mining Act* which do not, by their terms, apply to them. On this question, I also agree with the additional reasons given by Hayne J for coming to that opinion. The result, if the matter stopped here, is that the Commonwealth would be entitled to limited declaratory relief with respect to the freehold and leasehold areas. But the matter does not stop here. A more fundamental problem arises requiring broader relief.

166 All of the foregoing conclusions have no greater effect than to demolish the primary foundation of Western Australia's demurrer, relying as it chiefly does upon the State's attempt to apply to the Commonwealth's freehold and leasehold lands the detailed regime of the State *Mining Act* which the Wardens have upheld. However, it seems apparent from the cross-demurrers, the history of the litigation and the relief which the parties severally seek from this Court, that such conclusion by no means resolves the practical dispute now before us. Gummow J and Hayne J have expressed the opinion that the other issues between the Commonwealth and Western Australia are not crystallised at this stage[123], are premature or hypothetical[124]. Attractive as it would be to agree in those propositions, I cannot do so.

167 The issues in suit between the parties are by no means theoretical. Concrete applications for actual exploration licences under the *Mining Act* have been filed in the Warden's Court. They have been filed on behalf of the corporate parties to these proceedings (the third and fourth defendants). Jurisdiction to determine these applications has been upheld by the relevant Warden (the second defendant). His

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121 (1986) 161 CLR 254 at 267.

122 cf *Australian Postal Commission v Dao* (1985) 3 NSWLR 565 at 582-583, 604.

123 *Commonwealth of Australia v State of Western Australia* [1999] HCA 5 at [153] per Gummow J.

124 *Commonwealth of Australia v State of Western Australia* [1999] HCA 5 at [259] per Hayne J.

decision is supported in this Court by Western Australia. The Commonwealth seeks a declaration that the Wardens have no jurisdiction to consider applications for mining tenements in or over any of the land within the DPA. Alternatively, the Commonwealth seeks a declaration that there is no such jurisdiction over any land held by the Commonwealth in fee simple or under its special lease. Its submissions are either right or wrong. Unless this Court determines that question, the Wardens will presumably continue to exercise the jurisdiction which is in contest. In particular, unless this Court resolves the Commonwealth's assertion that the designation of the DPA covering the three categories of land renders the *Mining Act* inapplicable, there will be no legal impediment to the continued exercise of jurisdiction by the Wardens. This will be so despite the fact that the Commonwealth asserts that any such exercise of jurisdiction is inconsistent with federal law[125] and thus, to the extent of the inconsistency, is invalid under the Constitution[126]. Only if this question is decided, will the validity of Western Australia's counterclaim arise for decision.

168 It is true that a Minister in the Government of Western Australia is empowered by the *Mining Act* to grant or refuse an exploration licence in his or her discretion[127]. However, the scheme of that Act, and its proper operation according to its terms, envisages that such discretion will be exercised after receiving a report from the Warden which recommends the grant or refusal of the exploration licence and sets out reasons for such recommendation[128]. Clearly, the Warden is not expected to waste public time or the time of the parties. The hearing by the Warden's Court is the first step on a path towards an exploration licence in a specified area and subject to specified conditions. The Commonwealth contends that the exercise of such jurisdiction is fundamentally misconceived. Its contention goes beyond its assertion that the *Mining Act* does not, of its own terms, or by force of the application of federal law, apply to the three categories of land in which the Commonwealth is interested. The Commonwealth says that, even beyond its particular acquisitions under federal law[129], the designation of the area as a DPA, containing all of the land in question, is fundamentally incompatible with the purported operation in such a DPA of a State legal regime enacted to facilitate, and result in, the grant of licences to explore for minerals and, by inference, eventually to exploit those which are discovered. In my view, this Court is obliged to decide

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125 Either pursuant to the Defence Force Regulations or the *Lands Acquisition Act* 1955 (Cth) or the *Lands Acquisition Act* 1989 (Cth).

126 s 109.

127 *Mining Act*, s 59(6).

128 *Mining Act*, s 59(5)(c).

129 Each of the interests in land were acquired by the Commonwealth pursuant to s 7 of the *Lands Acquisition Act* 1955.

the parties' competing claims. If jurisdiction does not exist in the Warden's Court, this Court must say so.

Inconsistency: the *Mining Act* and Defence Force Regulations

169 The *Mining Act* does not apply to the land held by the Commonwealth in freehold or leasehold. No question of inconsistency between the *Mining Act* and the Defence Force Regulations therefore arises regarding such land. However, different considerations apply to the unalienated Crown land. Subject to questions of inconsistency and acquisition other than on just terms, that land is open to mining under the *Mining Act*.

170 It was not contested that the Defence Force Regulations were made for a purpose in respect of which the Parliament of the Commonwealth has powers to make laws. The most obvious head of power in question is that conferred to make laws with respect to "[t]he naval and military defence of the Commonwealth and of the several States"[130]. Plainly, even in a time of peace, it is essential to the nation's defence that its forces train with, and test, weapons including by the use of naval gunnery and by air to surface weapons firing. For that purpose, it is necessary and expedient to have designated areas of land and sea within which such weapons may be tested without unacceptable risks to human life or limb, property or the environment. The conduct of training, manoeuvres and other military exercises within designated DPAs is an inescapable concomitant of the effective defence of the Commonwealth. So potentially important is that activity to the continued existence of the Commonwealth (and of the States) that incompatible activities purportedly authorised by State law could not be permitted if doing so "would alter, impair or detract from"[131] the fulfilment of the federal law made for the purposes of national defence. Any such State law would then be inconsistent with the federal law in question. The latter would prevail. The former, to the extent of the inconsistency, would be invalid[132].

171 As the Constitution provides, the comparison which is to be made is not, primarily at least, between possible applications of the federal and State laws in the particular case, although this may disclose operational inconsistency between them. It is no answer to a complaint of constitutional inconsistency that conditions *might* be imposed on an exploration licence granted under the *Mining Act* which could have the effect of avoiding conflict with the Defence Force Regulations and their requirements. Or that mining licensees could scurry in and out of the DPA, avoiding the weapons and military exercises and confining their activities to

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130 Constitution, s 51(vi).

131 *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630 per Dixon J.

132 Constitution, s 109.

compatible works, perhaps with a "pick and shovel"[133]. The comparison mandated by the Constitution is between the laws themselves[134]. It is now clearly established that there may be inconsistency within s 109 of the Constitution although it is possible to obey both the State law and the federal law[135]. In *Clyde Engineering Co Ltd v Cowburn*[136], Knox CJ and Gavan Duffy J explained:

> "Two enactments may be inconsistent although obedience to each of them may be possible without disobeying the other. Statutes may do more than impose duties: they may, for instance, confer rights; and one statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying the statute which conferred it."

It is for this reason that a State law may not impair the enjoyment of a right conferred by federal law. If a State law "would vary, detract from, or impair the operation of a law of the Commonwealth"[137] it is inconsistent with that law. It is thus invalid under the Constitution. For example, in *Australian Mutual Provident Society v Goulden*[138], the Court held the provision of the State law to be invalid under s 109 of the Constitution as it "would qualify, impair and, in a significant respect, negate the essential legislative scheme of the *Life Insurance Act*".

172 The *Mining Act*, which the Commonwealth says is invalid to the extent of inconsistency with the Defence Force Regulations confers a broad range of rights which devolve upon a person granted an exploration licence, such as the corporate defendants seek here. Such a licence authorises the holder to enter and re-enter the land the subject of the licence with such agents, employees, vehicles,

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133 *The Commonwealth of Australia v The State of Western Australia*, Transcript of Proceedings, High Court of Australia, 26 May 1998 at 33.

134 *Australian Broadcasting Commission v Industrial Court (SA)* (1977) 138 CLR 399 at 406.

135 *Viskauskas v Niland* (1983) 153 CLR 280 at 291.

136 (1926) 37 CLR 466 at 478. See also at 489-490 per Isaacs J.

137 *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 136 per Dixon J. See also *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630; *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 258-259; *Australian Broadcasting Commission v Industrial Court (SA)* (1977) 138 CLR 399 at 406; *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 642-643; *Dao v Australian Postal Commission* (1987) 162 CLR 317 at 335, 338-339.

138 (1986) 160 CLR 330 at 339.

machinery and equipment as may be necessary to explore for minerals in, on, or under, the land[139]. It authorises the licensee to carry on such operations as are necessary to explore for minerals (including by digging pits, trenches and holes, and sinking bores and tunnels)[140]. It authorises the licensee to excavate earth to the extent specified and to take and divert water[141]. The purpose of the *Mining Act* is obviously to encourage and promote mining and exploration. The grant of an exploration licence is therefore designed to impose on the licensee an obligation actively to exercise the licensee's privileges. The Act attaches various conditions to the grant of an exploration licence[142]. It also creates a number of corresponding offences. These include destroying marks or obstructing any person marking out or surveying any land pursuant to the Act, interfering with the carrying out of works by persons lawfully engaged in connection with a survey that is being made under the Act and, without lawful excuse, obstructing or hindering the holder of a mining tenement in the execution of rights conferred under the tenement[143]. The holder of an exploration licence may also hold a miscellaneous lease which may be granted for prescribed purposes[144]. These may include a road, pipeline, aerodrome or any other approved purpose directly connected with the mining operation[145]. In addition, the Act confers on the holder of an exploration licence the right to secure a mining lease over the land[146]. The latter has been described as a "statutory right"[147], although the Minister enjoys power to terminate or summarily refuse some applications on public interest grounds[148]. Where a mining lease is granted, being the desired objective of a successful outcome of an exploration licence, the holder is entitled under the *Mining Act* to work and mine the land. It is then empowered to do all things that are necessary to carry out mining operations in, on or under the land and to occupy and enjoy the land in

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139 *Mining Act*, s 66(a).

140 *Mining Act*, s 66(b).

141 *Mining Act*, s 66(d).

142 See, for example, *Mining Act*, ss 62, 63, 68.

143 *Mining Act*, ss 106, 115, 157.

144 *Mining Act*, Pt IV, Div 5.

145 Mining Regulations (WA), reg 42B.

146 *Mining Act*, ss 67, 75(7).

147 *Re Warden French; Ex parte Serpentine* (1994) 11 WAR 315 at 326.

148 *Mining Act*, s 111A.

respect of which the mining lease is granted[149]. A general purpose lease may be granted to an exploration licence holder over land outside and subject to the exploration licence[150]. This will entitle the lessee "to the exclusive occupation of the land in respect of which the general purpose lease was granted"[151].

173 The scheme which is thus set in place for the grant of mining tenements under the *Mining Act* (including exploration licences) may be compared with the federal law upon which the Commonwealth relies to oust the *Mining Act* and thus to expel the jurisdiction of the Wardens. Where an area of land is declared to be a DPA[152], the Commonwealth thereby assumes the power to control access to such land. That power is in direct conflict with any purported grants of rights of access, entry and occupation which it would be the purpose of a mining tenement (including an exploration licence) to confer on the holder under the *Mining Act.* In particular, the Commonwealth is empowered by the Regulations to exclude and remove persons from a DPA for the duration of defence force practices specified by notice[153]. There is no limitation on the frequency of such practices. Nor is there any restriction on when operations may occur, or the length, variety or intensity of particular operations (whether for hours, days or months). The requirement that notice be given is not an absolute one[154]. It must be given "as is reasonably required" having regard to risks to persons and property. But so far as the federal law is concerned, it confers upon the Commonwealth powers to regulate access to, and use of, the land without any hint of the inhibition that might arise in the use of land susceptible to mining exploration approved and regulated by State officers under State law.

174 Whereas by the *Mining Act*, the holder of a mining tenement (including an exploration licence) has rights of entry at will and, indeed, an obligation to exercise such rights which may not be lawfully impeded or obstructed, it is an offence against the Defence Force Regulations[155] to remain upon a DPA, without permission, at any time specified in an instrument. Persons on a DPA in

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149 *Mining Act*, ss 71, 85.

150 *Mining Act*, Pt IV, Div 4.

151 *Mining Act*, s 87(1).

152 Defence Force Regulations, reg 49.

153 Defence Force Regulations, regs 53, 54.

154 reg 52.

155 reg 53(1). See also reg 53(2) in relation to vehicles, vessels or aircraft and reg 53(3) in relation to conditions on which permission may be given.

contravention of this provision may be removed[156]. Interference with equipment or with the operation of equipment installed pursuant to the Regulations is prohibited[157]. This is so irrespective of whether a practice has been authorised or not.

175 The foregoing provisions demonstrate to my mind a direct conflict between the provisions of the State law and of the federal law in question. The most obvious inconsistency concerns the designation of the person having the power to decide who may, and may not, have access to, enter upon or remain on the land comprising the DPA. The large powers conferred by the *Mining Act* upon a tenement holder in some circumstances override even the rights of a grantee of an estate in fee simple. This is apparent from the language of that Act[158]. The Act provides for the landowner to take possession of the land on termination of a mining tenement (including an exploration licence). This provision, if it were to apply to land within a DPA, would conflict directly with, and impair, the exercise of the power of the Commonwealth to control access to such land so long as it remained subject to a declaration under the Defence Force Regulations[159].

176 To the terms of the Regulations must be added the facts pleaded by the Commonwealth which Western Australia does not dispute[160]. These assert that the land held in fee simple and pursuant to the special lease, as well as "the land outside those areas but within the [DPA]" is used for the purpose of defence and the training of defence forces on a large number of days of any given year. The particulars of use, accepted by Western Australia, indicate the intensiveness of the defence operations conducted in the Lancelin DPA. The number of operations are expressed in terms of succeeding years:

1993: Army, 203 days; Navy, 125 days; Airforce, 36 days.

1994: Army, 171 days; Navy, 116 days; Airforce, 36 days.

1995: Army, 190 days; Navy, 117 days; Airforce, 36 days.

1996: Army, 200 days; Navy, 84 days; Airforce, 36 days.

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156 reg 54.

157 regs 49(4) and 53(2A).

158 *Mining Act*, s 113.

159 reg 49.

160 Amended Statement of Claim, par 8.

1997: Army, 207 days; Navy, 125 days; Airforce, 7 days.

1 January to 30 April 1998: Army, 82 days; Navy, 72 days.

177 Allowing for some overlap and for joint operations, the level of use is clearly substantial. It is open to inference that, during, immediately before and after such use, movement and operations (as for mineral exploration) would be out of the question. Similarly, vehicles, heavy equipment, mine shafts and the like would be at risk of destruction unless removed although doubtless a humble pick and shovel could be left behind. Even outside the actual periods of naval gunnery and the firing of air to surface weapons, there could be hazards in the use of the land arising from unexploded ordnance. With all respect to those of a different view, the notion that mineral explorations could proceed on such land in the way envisaged by the State *Mining Act*, at least otherwise than by the express authority of the Commonwealth and under its control[161], appears completely fanciful.

178 Once land is brought within a DPA, the *Mining Act* with its procedures and permissions conferring legal rights and imposing legal obligations cannot apply so long as the designation of the DPA remains in force. It is scarcely surprising that this should be so given the high constitutional function which the Defence Force Regulations secure. The corporate defendants have applied for the exercise by the Wardens of the jurisdiction conferred by the *Mining Act* directed to the grant of a mining tenement comprising an exploration licence. There is no ultimate purpose in such applications other than the grant of such licences. However, if such a licence were granted, it would be inconsistent with the incidents, nature and purposes of a DPA. Accordingly, the Wardens' jurisdiction does not exist in such an area. It is not a case that the jurisdiction might be warped and altered to conform to the requirements of federal law governing the DPA. That would amount to a distortion, not an application, of the *Mining Act* whose object is to facilitate and encourage exploration for minerals. Upon the land in the DPA, that purpose is simply not available, at least by the authority and decisions of a State Warden and a State Minister. To permit their decisions to affect the land in question would be to alter, impair or detract from the operation of federal law. To the extent that the State law purports to do this, it is invalid within the area of the DPA. If the federal law is valid, the land within the DPA is not available for mineral exploration governed by State law.

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161 By the *Lands Acquisition Act* 1955, s 53(2), the federal Minister is empowered to grant easements and other rights, powers and privileges over or in connection with land vested in the Commonwealth. Pursuant to that power, authority was envisaged to permit the State to grant licences for exploration for minerals in certain circumstances but under control of the federal Minister. Western Australia declined to invoke these powers preferring to rely on its asserted entitlements.

179 This conclusion of direct inconsistency between the *Mining Act* and Defence Force Regulations, taken on its own, would entitle the Commonwealth to the first declaration it claims, relating to the absence of jurisdiction in the Wardens. It would also warrant a declaration in the form secondly sought to the effect that the *Mining Act*, insofar as it purports to apply to any land within the DPA, is invalid. In order to achieve the Commonwealth's objectives, it would be unnecessary to make the third declaration and the alternative forms of the first and second. However, these conclusions require consideration of the counterclaim by Western Australia. It asserts, relevantly, that the Defence Force Regulations, regs 49 to 53, effect an acquisition of property of the State otherwise than on just terms and are thus invalid under the Constitution. To this counterclaim, the Commonwealth has demurred.

The State's interests in the land within the DPA are "property"

180 It was not disputed in these proceedings that the portion of the DPA which fell beyond the land held by the Commonwealth under the grants in fee simple, or pursuant to the special lease, amounted to unalienated Crown land vested in the Crown in right of Western Australia[162]. As such, the land was subject to disposal in accordance with the *Land Act* 1933 (WA)[163]. Specifically, inconsistent federal law aside, it was open to the State, in accordance with the *Mining Act* and for fees recoverable by it, to provide for exploration licences in respect of such land. Even in relation to the land within the DPA in respect of which fee simple interests or leasehold interests had been granted to the Commonwealth, Western Australia retained defined rights over the minerals beneath the land surface which were not granted to the Commonwealth but reserved and "held back" to the Crown in right of the State[164]. To the extent that the Defence Force Regulations have the consequence that the Commonwealth is entitled to prohibit or to regulate the exploration for, and mining of, metals and minerals which are situated on or in the DPA, a question of acquisition otherwise than on just terms arises.

181 The starting point is a reminder of the purpose of the constitutional "just terms" requirement. It is to ensure, in the interests of the community at large, that a State or other owner of property compulsorily acquired by the Commonwealth for its purposes is not required to sacrifice that property for less than it is worth[165]. Unless it is shown that what is gained is full compensation for what is lost, the "terms" provided by the Commonwealth are not "just". The acquisition law is

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162 See *Land Act* 1933 (WA), s 3(1) "Crown Lands".

163 s 7.

164 *Commonwealth of Australia v State of Western Australia* [1999] HCA 5 at [146] per Gummow J.

165 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 639.

invalid because it does not meet the standards set by the Constitution. The terms of the paragraph refer expressly to the acquisition of property "from any *State* or person"[166]. This Court is ordinarily concerned with acquisitions of property, or suggested acquisitions, from persons. But this is a case where the acquisition is alleged to be from a State and clearly that is contemplated by the power. Three questions are raised. Is what the Commonwealth secured "property"? Has there been an "acquisition" for a purpose in respect of which the federal Parliament has power to make laws? If so, does the law, pursuant to which the acquisition of property has occurred, provide "just terms"?

182 The concept of "property" has been applied most broadly[167]. It extends beyond conventional estates and interests recognised at law and in equity whether in realty or in personality. It includes "innominate and anomalous interests"[168]. The scope of "property" in the present context is best illustrated by *Minister of State for the Army v Dalziel*[169]. The National Security (General) Regulations, reg 54, provided for the Minister, on behalf of the Commonwealth, to take possession of any land for defence purposes and to use it as fully as if the Minister had an unencumbered interest in fee simple in the land. The Commonwealth, however, took neither the existing leasehold nor the fee simple. As in the present instance, there was no dispute that the Regulation was otherwise valid, being for the defence of the country[170]. As here, what was disputed was whether the Regulation provided for an "acquisition" within the Constitution and, if so, whether another regulation, reg 60H, afforded "just terms". This Court, by majority, answered the first question in the affirmative[171] and the second in the negative[172]. The contention that the Commonwealth's interest was a mere statutory creation, neither recognised by the common law nor equity and thus not "property", was rejected. Starke J explained[173]:

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166 Constitution, s 51(xxxi). Emphasis added.

167 *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 20-21; *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 285.

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

169 (1944) 68 CLR 261.

170 (1944) 68 CLR 261 at 271.

171 Per Rich, Starke, McTiernan and Williams JJ; Latham CJ dissenting.

172 Per Rich, McTiernan and Williams JJ; Latham CJ and Starke J dissenting.

173 (1944) 68 CLR 261 at 290.

> "Now is this right of the Commonwealth an acquisition of property within the meaning of the Constitution? It is said ... that to gain a mere temporary possession of property is not expressed by the word acquire, but by such words as gain, obtain, procure, as to obtain (not acquire) a book on loan. But the construction of the Constitution cannot be based on such refinements. However, the ownership of the land the possession of which is taken under reg 54 is not transferred to the Commonwealth nor is any estate therein, but a temporary possession. The right conferred upon the Commonwealth may be classified, I think, under the denomination of *jura in re aliena*, and so a right of property, the subject of acquisition. Nothing is gained by comparing the right given by reg 54 to the Commonwealth with various estates or interests in land of limited duration or with rights over the land of another recognized by the law, for it is a right created by a statutory regulation and dependent upon that regulation for its operation and its effect. And the operation and effect of the regulation gives the Commonwealth the right to possession of the land of another for a period, limited only as already mentioned, and to do in relation to the land anything which any person having an unencumbered interest in fee simple in the land would be entitled to do by virtue of that interest ... The Commonwealth ... cannot so exercise its legislative power of acquisition unless the terms are just."

183 The Commonwealth submitted that it had not "acquired" such interests from Western Australia. Certainly, it had not gone through a process of compulsory acquisition as permitted by the successive federal *Lands Acquisition Acts*[174]. Yet, although the continuing or residual interests of the State (accepted as identical for present purposes with the interests of the Crown in right of the State) differed as between those parcels of land within the DPA in which the Commonwealth had its various interests, it is impossible to dispute that with respect to *all* of the land within the DPA, the State had interests in the nature of "property". Especially is this so if the reasoning in *Dalziel* is kept in mind. It is most obviously so in the areas of DPA beyond the Commonwealth's fee simple and leasehold interests. But it is also true of the freehold and leasehold areas themselves. To establish an "acquisition" it is sufficient to show that the Commonwealth has derived an "identifiable benefit or advantage"[175]. The question is whether the State was deprived of "the reality of proprietorship"[176]. The value of Western Australia's interests would vary as between the different parcels, reflecting the State's separate

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174 *Lands Acquisition Act* 1955, Pt II, Divs 1, 3; *Lands Acquisition Act* 1989, ss 16(b), 41.

175 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 185.

176 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 595, 633; *The Commonwealth v WMC Resources Ltd* (1998) 72 ALJR 280 at 333; 152 ALR 1 at 75.

interests in each. But "property" it is. And, relevantly, property of the State. If the Commonwealth has "acquired" such property, the law with respect to such acquisition must provide "just terms".

The federal law effects an "acquisition"

184 The word "acquisition" is not to be treated pedantically. It is not limited to the physical taking of title or possession in, relevantly, a State's "property". Nor is it to be confined by reference to traditional conveyancing principles and procedures[177]. The present is not a case where the State's property interests have been extinguished by federal law. So far as the land acquired in fee simple is concerned, the mineral interests reserved by the grant would remain for exploitation or disposal by the State were the Commonwealth to terminate its interest in the Lancelin Training Area and surrender or sell the land to the State or sell it to a private purchaser. Similarly, the State's interest in the land governed by the special lease would revive at the conclusion of the term if there were no renewal of the lease, provided the designation of the entire area as a DPA were likewise terminated. It is this designation, and the consequent operation of the Defence Force Regulations which has the effect, whilst it endures, of "modifying" or "depriving" the State of its property interests[178].

185 So long as that modification or deprivation endures it represents an "acquisition" for constitutional purposes. It is a fundamental mistake to confine the notion of "acquisition" to the taking of full ownership of the "property" concerned. *Dalziel* illustrates this point beyond argument. There the "acquisition" comprised the taking of possession of vacant land and then for a period limited to the duration of the War and six months thereafter. It is sufficient that such advantage should flow from the use of the property for at least such time as constitutes "acquisition". Similarly, it is erroneous to conclude that the only "acquisitions" to which the Constitution addresses its attention are those achieved by the processes of compulsory acquisition established by the *Lands Acquisition Acts.* The constitutional provision is designed to provide protection against the taking of property interests which fall short of ownership and for durations of control falling short of permanency. All that is necessary is that the Commonwealth should have acquired an "identifiable benefit or advantage".

186 It is not essential that the benefit acquired by the Commonwealth should exactly correspond with the rights which the property owner has lost in the

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177 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 633-635.

178 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 185.

transaction[179]. Were it otherwise, the Commonwealth could readily avoid the constitutional guarantee[180]. It could evade the obligation to pay "just terms" for the loss of mining interests because a federal interest existed to establish a national park[181]. It could avoid the payment of just terms for large scale investment in petroleum exploration in the name of legitimate foreign policy objectives[182]. Or, as here, it could decline to provide just terms to compensate a State for the loss of its proprietary interests in minerals and their exploration because of the needs of national defence. Because national defence is also (as the Constitution states) the defence "of the several States"[183] it may be that in the future, as in the past, cooperative arrangements would be made by the States for the use by the Commonwealth of unalienated Crown land of the States for defence purposes. But where there is no agreement or the State disputes that the federal law providing for acquisition of property from it provides "just terms", the Constitution's requirements are clear. The federal Parliament can enact a law for the acquisition of property for a purpose in respect of which it has the power to make laws. But it cannot do so at the expense of a State or of any person. The prerequisite of the validity of such federal law is that it provides for acquisition of the property on "just terms".

187 In the view which I take of the effect of the Defence Force Regulations, it is unnecessary for me to examine the operation of the *Lands Acquisition Acts* as they provide the federal receptacle for the acquisition of the fee simple and leasehold interests within the DPA. Because of those Regulations the entire area, and access to it, come under the power of the Commonwealth. The identifiable benefit or advantage to the Commonwealth was the ultimately unimpeded control which it thereby gained over the entire DPA, undifferentiated as to parts. The loss of property interests suffered by the State is the loss of control over, and potential revenue from the exploitation of minerals found in the DPA during the currency of the designation of the area as a DPA. There is an adequate correspondence between the loss of the State's interest and the countervailing benefit or advantage

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179 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 304-305; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 634.

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

181 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513.

182 As was held to be the case in *The Commonwealth v WMC Resources Ltd* (1998) 72 ALJR 280; 152 ALR 1.

183 Constitution, s 51(vi).

gained by the Commonwealth[184]. The one is the result of the other. At the very least, the Commonwealth, by reason of the Defence Force Regulations, acquired the benefit of relief from the burden of the State's interests[185]. For that relief, which will endure during the currency of the DPA, the federal law to be valid must provide "just terms".

The federal law provides "just terms" and is valid

188 The Commonwealth argued that, if the foregoing conclusions were reached, the Defence Force Regulations adequately provided for the payment of just terms and so were valid. The relevant Regulations are regs 57 and 57A. They appear under the heading "Compensation for loss, injury or damage". The pertinent provisions of reg 57 read:

> "(1) The Commonwealth shall pay reasonable compensation to a person who:
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> ...
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> (b) sustains loss or damage by reason that an area is declared to be a defence practice area under subregulation 49(1);
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> (c) sustains loss or damage by reason of the use of land for the purposes of a defence operation or practice authorized under regulation 51; or
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> (d) sustains loss or damage otherwise caused by the operation of this Part."

189 The machinery for the provision of such compensation involves the making of a written claim[186]. If no decision is made on such claim within 60 days a decision is deemed to have been made refusing compensation[187]. Provision is made for the review of a decision refusing compensation or in respect of an amount of compensation paid which is claimed to be inadequate. Such review is conducted by a person or a board of persons appointed by the Secretary of the Department of

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184 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 185; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 634; *The Commonwealth v WMC Resources Ltd* (1998) 72 ALJR 280 at 297; 152 ALR 1 at 25-26.

185 cf *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 530.

186 reg 57(2)(a).

187 reg 57(3).

Defence[188]. Within 60 days this "reviewing authority" is obliged to make a decision[189]. A person whose interests are affected is then entitled to apply to the Administrative Appeals Tribunal for further review of that decision[190]. Under the *Administrative Appeals Tribunal Act* 1975 (Cth), an "appeal" to the Federal Court of Australia on a "question of law" lies from any decision of the Tribunal[191]. These provisions fall short of the conferral of an express right to just terms enforceable in a court of law[192]. Nor is there an express entitlement to interest. However, the Commonwealth submitted that the Regulations sufficiently met the constitutional requirement, if that were necessary. Western Australia submitted that they did not.

190 In resolving the dispute it is appropriate to deal first with a point of construction argued by Western Australia. It was submitted that reg 57 did not "evince any intention to apply to a State" and that, therefore, the Regulations contained no provisions whatever for "just terms" where property was acquired from a State. This submission must be rejected. By the *Acts Interpretation Act* 1901 (Cth)[193] expressions used in any federal Act to denote persons generally (such as "person" ...) are to be read, unless the contrary intention appears, as including a reference to a body politic. Thus, in a federal Act, a reference to "person" will ordinarily be broad enough to include a reference to a State. Also by the *Acts Interpretation Act,* it is provided that where an Act confers upon an authority power to make (relevantly) Regulations, unless the contrary intention appears, "expressions used in any instrument so made ... shall have the same meanings as in the Act conferring the power". Furthermore, the *Acts Interpretation Act* shall "apply to any instrument so made ... as if it were an Act and as if each such ... regulation … were a section of an Act"[194].

191 Accordingly, where the Defence Force Regulations provide that the Commonwealth shall pay "reasonable compensation to a person who sustains loss

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188 reg 57A(4). The Secretary may delegate the functions to an officer in the Defence Force or an officer in the Australian Public Service. See reg 57B.

189 reg 57A(6).

190 reg 57A(8).

191 See s 45.

192 cf *Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Act* 1990 (Cth), s 24.

193 s 22(1)(a).

194 s 46(1)(a).

or damage by reason that an area is declared to be a [DPA]"[195] etc they are, by force of the *Acts Interpretation Act,* to be read as including an obligation to pay reasonable compensation to a State. There is no provision in the Regulations suggesting a contrary intention. If the requirement that such compensation be paid to a State were constitutionally essential to the validity of the Regulations (as I think to be the case), that would afford an additional reason for construing the Regulations in a way which would conform to the Constitution where the contrary construction would not.

192 But does the scheme for the payment of compensation provided in the Regulations meet the necessities established by the Constitution as explained by this Court? The requirement that the federal law permitting an acquisition of property by the Commonwealth should provide "just terms" is one essential to the valid exercise of constitutional power[196]. However, because it is part of the "composition" of the legislative power in question, a measure of latitude will be accorded to the Parliament in respect of the provisions it makes on the subject[197]. The use of the precise words of the constitutional formula is not essential, although it is not unknown for the Parliament, perhaps for greater safety, to make express its purpose that an Act shall provide "just terms" and that the phrase shall "have the same meaning as in paragraph 51(xxxi) of the Constitution"[198]. Alternatively, synonyms may be used[199]. There is no statement in the Defence Force Regulations which is precisely equivalent to these formulations; but that is by no means fatal.

193 Where different language is used, it is for the courts to determine whether that language provides the "just terms" essential to validity, or not[200]. The word "compensation", which is common in this area of legislative discourse, has been

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195 reg 57(1)(b).

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

197 *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 291, 294-295. Ultimately, it is for the courts to determine whether "just terms" have or have not been provided invalidating the subject law: *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 300; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 262.

198 As was done in *Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Act* 1990 (Cth), s 24(1). See *The Commonwealth v WMC Resources Ltd* (1998) 72 ALJR 280 at 327; 152 ALR 1 at 67.

199 See *Lands Acquisition Act* 1989, s 55(1) ("The amount of compensation ... [as] will justly compensate the person for the acquisition").

200 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 300.

held apt to meet the "just terms" requirement[201]. That word is used, for example, throughout the *Lands Acquisition Acts* dealing with the consequences of acquisition by the Commonwealth of property interests[202]. Various attempts have been made by this Court to explain what will be required of federal law so that it meets the "just terms" precondition to validity. Several of these attempts have been expressed in language to the effect that the law must make provision which is "not unreasonable"[203]. I regard this as a rather unhelpful elaboration[204]. It is devoid of any real content. It does no more than to distract attention from the language used in the Constitution itself.

194 That language requires that the federal law should include appropriate "terms" to ensure economic fairness to the State or person whose property has been acquired. It is important not to lose sight of the object of the requirement. It reflects a basic principle of fundamental civil rights[205]. It ensures that, where the Commonwealth takes over the proprietary interests of others (whether permanently or for any period that qualifies as an "acquisition") it will compensate the subject of the acquisition justly. Doing so will ensure that the true costs of the Commonwealth's activities, at least where performed pursuant to federal law, will not fall unjustly on those whose property rights are extinguished or diminished. It will also ensure that, before acquisitions take place pursuant to federal law, proper consideration is given to the costs for which the Commonwealth is thereby rendered accountable. It is useful to keep these objectives in mind in testing whether a particular legislative provision for compensation meets the stringent constitutional requirements.

195 Now turn back to the Defence Force Regulations. They use the words "reasonable compensation". It is to be paid in a broad range of circumstances where the person (ie the "State") sustains "loss or damage". It is true that this phrase falls short of one of the formulations in the *Lands Acquisition Act* 1989 which talks of "loss, injury or damage suffered, or expense reasonably incurred"[206].

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201 *Andrews v Howell* (1941) 65 CLR 255 at 264, 270, 282; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 216.

202 *Lands Acquisition Act* 1989, Pt VII.

203 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 291; *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 279-280; *McClintock v The Commonwealth* (1947) 75 CLR 1 at 24.

204 See *Lane's Commentary on The Australian Constitution*, 2nd ed (1997) at 327.

205 Universal Declaration of Human Rights, Art 17. See *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-661 ("Interpretative principle").

206 s 55(2)(c).

However, the additional words add little of substance or relevance in the circumstances of the State's potential claim here. That claim would be adequately encompassed by the words "loss or damage". The breadth of the circumstances giving rise to an entitlement to "reasonable compensation" goes beyond the "loss or damage" caused by the mere declaration of an area as a DPA[207]. Were there to be any damage to the mineral deposits of, or reserved to, the State by the defence operations or practice in the DPA, it would be covered[208]. To catch any possible residue of harm, the Regulations afford a right to the payment of "reasonable compensation" for any loss or damage sustained which is "otherwise caused by the operation of this Part"[209]. The scope of the circumstances encompassed by the entitlement to compensation could therefore not be broader. I see no reason why it would not be construed, in an appropriate case, to include provision for interest if this were necessary to render the compensation "reasonable" where otherwise it would not be.

196 It is true that the Defence Force Regulations do not contain an elaboration of the notion of "compensation" such as appears in the successive federal *Lands Acquisition Acts*. But neither is the concept of "just terms" elaborated in the language of the Constitution. If the words "reasonable compensation" in the Regulations were construed to conform to the constitutional requirements, content being provided to the extent necessary to validity, the brevity of the formula would present no ultimate difficulty. There is no reason why the regulation should not be construed to conform to the Constitution. There is every reason why it should.

197 But can it be said that the failure to afford a right of action against the Commonwealth immediately enforceable in a court of competent jurisdiction[210] deprives the Regulations of an essential attribute required by the Constitution? The facility to bring a claim directly to a court of law has been a feature of successive *Lands Acquisition Acts*. More recently, an alternative procedure of application to the Administrative Appeals Tribunal has also been provided under that law[211]. The scheme of the Regulations falls short of affording the facility of direct access to a court. However, the Administrative Appeals Tribunal is an independent national statutory body enjoying wide jurisdiction and large powers. Some of its presidential members are also federal judges. At least as it is presently constituted, I see no reason why a facility of access to it, with "appeal" on, and reference of, questions of law to the Federal Court would fall short of according "just terms" as

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207 reg 57(1)(b).

208 reg 57(1)(c).

209 reg 57(1)(d).

210 cf *Lands Acquisition Act* 1955, s 28; *Lands Acquisition Act* 1989, s 82.

211 *Lands Acquisition Act* 1989, ss 71, 81.

constitutionally required. There is, for example, nothing intrinsically unjust in the Parliament's providing a procedure for determining a quantum of compensation "outside the ordinary judicial process"[212] provided procedural fairness is assured[213], no purported attempt is made to confer on a tribunal the judicial power of the Commonwealth[214], the tribunal's decisions are susceptible to judicial review including in this Court[215] and the ultimate compensation afforded measures up to the constitutionally essential requirement of "just terms". We should avoid imposing a formalist interpretation of the Constitution which confines all disputes about such compensation to the courts. For many claimants courts are too slow, expensive and effectively unavailable for the enforcement of their rights. Tribunals may be more innovative in their procedures, speedy and inexpensive and thus more likely, in a given case, to deliver the actuality of "just terms" as the Constitution envisages. The fact that, in this case, the compensation claimed would doubtless be substantial and the claimant is a State with access to skilled legal representation does not alter the general point. In contemporary Australian society, tribunals may often be more effective in affording true justice. No constitutional impediment prevents the Parliament, in proper cases, from enlisting the services of tribunals, at least in the way done here.

198 Most, if not all, of the questions of importance which would be likely to arise in compensation proceedings would be questions of law. They would thus eventually attract the jurisdiction of the Federal Court. In these circumstances, I would not invalidate the compensation provisions of the Regulations on the ground that they laid down procedures falling short of requirements deemed essential to validity. At least in the context, and for the purposes, of the compensation claims apt to arise under the Defence Force Regulations, the procedures of administrative, and ultimately judicial, review, are within the latitude which a court will accord to the lawmaker. Accordingly, the Regulations pass the test of affording "just terms" to any State whose property is acquired by the declaration of an area as a DPA or otherwise by the operation of the Defence Force Regulations.

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212 *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 291.

213 *Andrews v Howell* (1941) 65 CLR 255 at 284; *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77 at 87, 99; *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth* (1943) 67 CLR 314 at 324, 327; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 218, 300, 350-351.

214 *Huddart, Parker & Co Proprietary Ltd v Moorehead* (1909) 8 CLR 330 at 357; *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530 at 542-543; [1931] AC 275 at 295-296; *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 at 566.

215 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 276, 323, 368.

199 The result is that Western Australia's counterclaim concerning the absence of "just terms" in the applicable federal law fails. It is unnecessary to consider whether the *Lands Acquisition Acts* of the Commonwealth, as applicable to the State's interests acquired here fall short of the constitutional requirements. As those requirements are met by the federal law most directly applicable to use of the land as a DPA, and each of the categories of Western Australia's proprietary interests are within such land, the complaints of the State about the other federal laws are inessential. For deprivation of any of its proprietary interests, Western Australia has entitlements to compensation under the Regulations. Those entitlements conform to the constitutional requirement. The Commonwealth is therefore entitled to succeed on its demurrer to Western Australia's counterclaim.

Orders

200 The demurrer by Western Australia to the Commonwealth's amended statement of claim should be dismissed. The demurrer by the Commonwealth to the counterclaim of Western Australia should be allowed and the counterclaim of Western Australia should be dismissed.

201 The matter should be stood over to be listed before a single Justice to make orders for the hearing and disposition of the action. The precise terms of that relief will be for the Justice concerned. Sufficient relief to the Commonwealth in this Court would include declarations:

(a) That the Wardens appointed pursuant to the provisions of the *Mining Act* 1978 (WA) do not have jurisdiction to consider applications for mining tenements in or over land within the Defence Practice Area at Lancelin, Western Australia so long as the land is declared to be a Defence Practice Area within the meaning of the Defence Force Regulations; and

(b) That the *Mining Act* 1978 (WA), in so far as it purports to apply to any land comprised within the said Defence Practice Area, is invalid.

Such declarations should be made. Costs of the demurrers, if sought, should be reserved to the Justice disposing of the action.

202 HAYNE J. The central question in this matter is whether the State of Western Australia can grant rights under the *Mining Act* 1978 (WA) ("the Mining Act") in relation to any part of the land known as the Lancelin Training Area.

203 The Lancelin Training Area is on the coast of Western Australia, north of the naval base at HMAS Stirling, Cockburn Sound. It has been declared a Defence Practice Area under reg 49 of the Defence Force Regulations. (Those Regulations are made pursuant to s 124(1) of the *Defence Act* 1903 (Cth).) The Lancelin Training Area is a large area of land, air and sea used for naval gunnery and for air to surface weapons firing. It includes three parcels of land in which the Commonwealth has an interest. The Commonwealth is registered under the *Transfer of Land Act* 1893 (WA) as proprietor of an estate in fee simple of two of those parcels - known as Melbourne Location 3989 and Melbourne Location 4004. The Commonwealth is lessee of the third parcel under a Special Lease from the State of Western Australia. The balance of the Defence Practice Area is neither owned nor leased by the Commonwealth.

204 The Commonwealth acquired its interests in the three parcels of land I have mentioned by agreements made under s 7(4) of the *Land Act* 1933 (WA)[216]. Section 8(1) of the *Lands Acquisition Act* 1955 (Cth) vested the land in the Commonwealth "according to the tenor of the instrument or assurance"[217].

205 The Commonwealth paid $1480.50 and $842 for the two freehold parcels. It pays a yearly rent of $360 for the leasehold land.

206 Both of the Crown Grants and the Special Lease reserve property in any minerals on the land to the State. The Commonwealth does not contend that it has

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216 Section 7(4) provided at the relevant times:

> "The Governor is authorized to agree with the Governor General of the Commonwealth or other appropriate authority of the Commonwealth for the sale or lease of any Crown lands to the Commonwealth and to execute any instruments or assurance for granting, conveying or leasing the land to the Commonwealth."

217 Section 8(1) provided:

> "Where an agreement is entered into by the Commonwealth with a State for the acquisition of Crown land, an instrument or assurance executed by the Governor of that State for the purpose of carrying out the agreement is, by force of this Act and notwithstanding anything in the law of the State, valid and effectual to vest the land in the Commonwealth according to the tenor of the instrument or assurance."

The *Lands Acquisition Act* 1955 was repealed by the *Lands Acquisition (Repeal and Consequential Provisions) Act* 1989 (Cth) at the commencement on 9 June 1989 of the *Lands Acquisition Act* 1989 (Cth).

any property in those minerals. It does deny that the State can grant rights under the Mining Act to enter any of the three parcels of land or to explore for or recover any minerals that may be found on that land. And the Commonwealth's contention is not confined to these three parcels of land. It contends that the State has no authority to grant rights under the Mining Act in relation to any of the other land in the Defence Practice Area.

207 By an instrument dated 29 November 1985, the Commonwealth Minister for Local Government and Administrative Services gave authority to the State to grant exploration licences on behalf of the Commonwealth in respect of land vested in the Commonwealth, the minerals in or under which were owned by the State. This authority referred to, and relied on, s 53(2) of the *Lands Acquisition Act* 1955. That sub-section provided:

> "The Minister may authorize the grant of easements, or other rights, powers or privileges (other than leases or occupation licences), over or in connexion with, land vested in the Commonwealth."

The State does not intend to, and contends that it need not, rely on this authority to grant rights under the Mining Act over any of the land within the Defence Practice Area.

208 The third and fourth defendants have applied for exploration licences under the Mining Act. The areas that are the subject of the applications are within the Defence Practice Area. One application is for an area of which part is in the land leased under the Special Lease; the other applications are for areas that are partly within one or more of the two freehold areas and the leasehold area. Each application extends to areas within the Defence Practice Area that are outside any of these three parcels of land.

209 The Mining Act provides for the steps that are to be taken on an application for an exploration licence[218]. Those steps can include a Warden of Mines conducting a hearing[219] and giving the Minister a report recommending the grant or refusal of the application and setting out the reasons for the recommendation[220]. The Wardens of South West Mineral Field (being the mineral field within which the Defence Training Area lies) are the second defendants to the action.

210 By its Amended Statement of Claim, the Commonwealth seeks a declaration that the Mining Act "does not bind the Crown in the right of the Commonwealth",

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218 ss 56B - 70.

219 s 59(4).

220 s 59(5).

that the Mining Act is invalid in so far as it purports to apply to the Defence Practice Area or the three parcels of land, and that the Mining Wardens appointed under the Mining Act do not have jurisdiction to consider applications for mining tenements in or over any land within the Defence Practice Area or the three parcels.

211 The State of Western Australia demurred to this Amended Statement of Claim and counterclaimed for a declaration that, in so far as the laws that the Commonwealth contends give rise to inconsistency of laws do so, they result in the acquisition by the Commonwealth of the State's property otherwise than on just terms contrary to s 51(xxxi) of the Constitution and are invalid.

The Issues

212 The issues presented by the demurrers can be identified as follows:

1. In its terms, does the Mining Act give power to authorise exploration and mining of the Defence Practice Area, including the three parcels of freehold and leasehold land?

2. In their terms, do the two Crown Grants to the Commonwealth and the Special Lease to the Commonwealth reserve to the State of Western Australia power to permit exploration and mining of the land dealt with by the instrument?

3. Are some, or all, of the provisions of the Mining Act applied to any part of the Defence Practice Area by either the *Commonwealth Places (Application of Laws) Act* 1970 (Cth) ("the Application of Laws Act") or s 64 of the *Judiciary Act* 1903 (Cth)?

4. If either of the first two questions is answered in the affirmative

   (a) is the grant or reservation of that power inconsistent with a law of the Commonwealth?

   (b) is that law of the Commonwealth a valid law; in particular does it constitute an acquisition of property otherwise than on just terms, contrary to s 51(xxxi) of the Constitution?

The Mining Act

213 Does the Mining Act in its terms purport to permit the State to grant rights over the land in the three parcels in which the Commonwealth has an interest or over the other parts of the Defence Practice Area?

214 Part III of the Mining Act identifies "land open for mining". It divides land open for mining into three categories -"Crown Land"[221], "Public Reserves, etc"[222] and "Private Land"[223] - and makes separate provision for each.

215 Section 18 provides that "[a]ll Crown land, not being Crown land that is the subject of a mining tenement, is open for mining ...". Section 23 provides that "[s]ubject to this Act, a mining tenement may be applied for" in respect of a public reserve or other land of a kind referred to in s 24 or s 25 but "no mining shall be carried out on or under any such land otherwise than in accordance with a relevant consent obtained in relation to that land under section 24 or section 25"[224]. Section 27(1) provides that "[s]ubject to this Act, a mining tenement may be applied for in respect of any private land ... and such land is open for mining in accordance with this Act".

216 The Defence Practice Area does not come within any of the classes of land specified in ss 24 and 25 of the Mining Act (that identify the land described in Div 2 as "Public Reserves, etc").

217 The State submitted that for the purposes of the Mining Act the whole of the Defence Practice Area, including the three parcels in which the Commonwealth has interests in freehold or leasehold, is open for mining in accordance with the Act. It submitted that the three parcels in which the Commonwealth has interests are "private land" and that the balance of the Defence Practice Area is "Crown land". The latter submission (that the balance of the Defence Practice Area is Crown land) was not, and could not be, disputed. The former submission raises more difficult questions.

218 Private land is defined in s 8(1) of the Mining Act as meaning -

> "... any land that has been or may hereafter be alienated from the Crown for any estate of freehold, or is or may hereafter be the subject of any conditional purchase agreement, or of any lease or concession with or without a right of

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221 Pt III, Div 1, ss 18-22.

222 Pt III, Div 2, ss 23-26A.

223 Pt III, Div 3, ss 27-39.

224 s 23(a).

acquiring the fee simple thereof (not being a pastoral lease within the meaning of the *Land Act 1933* or a lease or concession otherwise granted by or on behalf of the Crown for grazing purposes only or for timber purposes or a lease of Crown land for the use and benefit of the Aboriginal inhabitants) but -

(a) in relation to mining for minerals other than gold, silver and precious metals, for the purposes of Division 3 of Part III, does not include land alienated before 1 January 1899, except as provided in that Division;

(b) other than in so far as the primary tenement may be treated as private land in relation to mining for gold pursuant to a special prospecting licence or mining lease under section 56A, 70 or 85B, does not include land that is the subject of a mining tenement; and

(c) no land that has been reserved for or dedicated to any public purpose shall be taken to be private land by reason only that any lease or concession is granted in relation thereto for any purpose".

219 The State submitted that the two parcels of land in which the Commonwealth has a freehold interest is land that has been alienated from the Crown for an estate of freehold, that the third parcel is land that is the subject of a lease granted by the Crown and that accordingly all three parcels of land are private land for the purposes of the Mining Act.

220 In considering that submission, it must be noted that the definition of "Crown land" in s 8(1) excludes "land that has been lawfully granted or contracted to be granted in fee simple by or on behalf of the Crown" and "land that is subject to any lease granted by or on behalf of the Crown" other than specified types of leases[225] that are not relevant for present purposes.

221 When the definitions of "private land" and "Crown land" refer to land that has been granted in fee simple by the Crown and to land that is subject to a lease granted by the Crown, do they refer to land that has been granted by the State to the Commonwealth?

222 It will be seen that the definition of "private land" does not use exactly the same expressions as the definition of "Crown land". The definition of private land speaks in terms of land "alienated from the Crown for any estate of freehold" and land that "is … the subject … of any lease" whereas the definition of Crown land refers to land "lawfully granted … in fee simple by or on behalf of the Crown" and

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225 The leases excluded are pastoral leases, leases for grazing or timber purposes, and leases for the use and benefit of the Aboriginal inhabitants.

"land that is subject to any lease granted by or on behalf of the Crown". I do not consider that anything turns on these differences. There is nothing in the different expressions to suggest that land described as having been alienated from the Crown is different from the land that is described as having been lawfully granted by the Crown. For present purposes the important question is whether the land that is so described (as alienated from, or lawfully granted by, the Crown) is intended to include land that has been granted to the Commonwealth.

223 The references to grants by the Crown and to alienation from the Crown are to be understood in the light of the provisions made in that regard by the *Land Act*. In particular, they are to be understood having regard to the special provision made by s 7(4) of that Act which provides for the Governor of the State to agree with the Governor-General of the Commonwealth or "other appropriate authority of the Commonwealth" for the sale or lease of any Crown lands to the Commonwealth. By contrast, sub-ss (1) to (3) of s 7 authorise the Governor "in the name and on behalf of Her Majesty" to dispose of the Crown lands within the State and to make valid and effectual "[a]ll grants and other instruments disposing of any portion of Crown lands in fee simple or for any less estate" that are made in accordance with that Act.

224 The references in the Mining Act to land "alienated from" or "granted by" the Crown are more appropriate to describe land that has been dealt with in accordance with s 7(1) to (3) than land dealt with pursuant to the separate and distinct regime prescribed by s 7(4). Central to the operation of the latter provision is agreement between Western Australia and the Commonwealth for the sale or lease of the land whereas the focus of the former provisions is upon "grants and other instruments disposing" of the land. Accordingly, when the Mining Act definitions refer to land alienated from, or granted by, the Crown they are to be taken as referring to land dealt with in accordance with s 7(1) to (3); they do not refer to land dealt with in accordance with s 7(4). To read the Mining Act otherwise would be to ignore the distinction drawn by the *Land Act*.

225 This conclusion is reinforced by the presumption that one polity in the federation (here, Western Australia) does not intend to bind another polity (here, the Commonwealth) and it will be necessary to return to this subject. But before doing so, it is necessary to consider the consequences of adopting the construction I favour (namely, that the references in the definitions of private land and Crown land to land granted by or alienated from the Crown do not include land sold or leased to the Commonwealth pursuant to s 7(4) of the *Land Act*). In particular, although the State did not suggest that the three parcels of land held by the Commonwealth are Crown land, the definition of private land in the Mining Act must be understood in the light of the definition of Crown land.

226 Section 8(1) defines Crown land as meaning:

"... all land in the State, except -

(a) land that has been reserved for or dedicated to any public purpose other than -

(i) land reserved for mining or commons;

(ii) land reserved and designated for public utility for any purpose under the *Land Act 1933*;

(b) land that has been lawfully granted or contracted to be granted in fee simple by or on behalf of the Crown;

(c) land that is subject to any lease granted by or on behalf of the Crown other than -

(i) a pastoral lease within the meaning of the *Land Act 1933*, or a lease otherwise granted for grazing purposes only;

(ii) a lease for timber purposes; or

(iii) a lease of Crown land for the use and benefit of the Aboriginal inhabitants;

(d) land reserved or constituted as a townsite under the *Land Act 1933*".

It can be seen that Crown land is defined negatively, as "all land in the State" except the types of land referred to in pars (a) to (d). The three parcels of land held by the Commonwealth do not come within either par (a) or par (d). (They are not reserved for or dedicated to a public purpose as that term is defined in s 8(1)[226] and are not reserved or constituted as a townsite.) And if none of the three parcels is private land they would not come within par (b) or par (c). On its face then, this might suggest, contrary to the submissions of both the State and the Commonwealth, that the land is Crown land for the purposes of the Mining Act. But that is not so. The three parcels of land are neither private land nor Crown land. The statutory definitions of these expressions must be read in the light of the presumption referred to earlier, that one polity in a federation does not intend to bind another polity.

227 The Mining Act contains no express statement about whether it is intended to apply to the Crown (or as it is often put "binds the Crown") in right of Western

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226 "[A]ny of the purposes for which land may be reserved pursuant to section 29 of the *Land Act 1933*, and any purpose declared by the Governor pursuant to that Act, by notification in the *Government Gazette* to be a public purpose within the meaning of that Act."

Australia or the Commonwealth. Yet it is clear from the definition of Crown land and from the scheme of the arrangements made for mining on Crown land and for mining on land of the kinds dealt with in Div 2 of Pt III that the Act is intended to operate in relation to land that is held by the State of Western Australia. And that conclusion follows notwithstanding what the majority in *Bropho v Western Australia*[227] referred to as "the entrenched presumption that a statute does not bind the Crown"[228]. Nor, given the terms of the Mining Act, is it necessary to consider how strong that presumption may be. As was the case with the legislation considered in *Bropho*, there is here no difficulty in discerning in the provisions of the Mining Act a legislative intent that the provisions of the Act apply to land of the State of Western Australia[229].

228 But the conclusion that the Mining Act is intended to apply to land that is land of the enacting State is not conclusive of whether the Act is intended to apply to land that is no longer held by the enacting State but is now held by the Commonwealth. There are other considerations that affect that question.

229 It is as well to begin the examination of this question from some fundamental propositions. First, it is well accepted that "the Constitution is predicated upon the continued separate existence of the Commonwealth and the States, not only in name, but as bodies politic to which the Constitution proceeds to distribute powers of government"[230]. It has therefore been held that Commonwealth legislative powers are impliedly restricted so as to preclude their exercise by making laws that single out a State, or the States as a group, so as to impose on them some special burden or to inhibit or impair their continued existence or their capacity to function[231]. It is, however, clear that subject to that limitation, the Commonwealth may, in the exercise of its legislative powers affect the executive capacity of a

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227 (1990) 171 CLR 1.

228 (1990) 171 CLR 1 at 14 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

229 cf *Bropho v Western Australia* (1990) 171 CLR 1 at 24 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

230 *Re Residential Tenancies Tribunal of New South Wales; Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 440 per Dawson, Toohey and Gaudron JJ. See also *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 83 per Dixon J.

231 *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 217 per Mason J; *Re Residential Tenancies Tribunal* (1997) 190 CLR 410 at 440 per Dawson, Toohey and Gaudron JJ.

State. The States, on the other hand, do not have specific legislative powers and do not have power to affect the capacities of the Commonwealth executive[232].

230 The content and application of these principles has been controversial[233] and it may well be that there is still room for doubt about them. But it is clear that whatever the content or application of these principles, it is not right to say that State laws cannot by their own force bind the Commonwealth. A submission to that effect was expressly rejected by the majority in *Re Residential Tenancies Tribunal*[234] and it is a proposition that cannot be supported in principle. The contrary view expressed by Fullagar J in *The Commonwealth v Bogle*[235]

> "[t]o say that a State can enact legislation which is binding upon the Commonwealth in the same sense in which it is binding upon a subject of the State appears to me to give effect to a fundamental misconception"

should be rejected for the reasons given by the majority in *Re Residential Tenancies Tribunal*. No doubt, if State legislation contains no provision dealing with its effect on the Commonwealth, deciding whether a State law is intended to bind the Commonwealth may be difficult. Further, if the State law is intended to bind the Commonwealth, there may be a difficult issue about whether it is a law that affects the capacities of the Commonwealth executive (as distinct from the particular exercise of those capacities)[236]. But the first question is whether the State law, in this case the Mining Act, is to be construed as intending its operation to affect the Commonwealth.

231 In *Jacobsen v Rogers* five members of the Court said that[237]:

> "It must, we think, now be regarded as settled that the application of the presumption that a statute is not intended to bind the Crown extends beyond

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232 *Re Residential Tenancies Tribunal* (1997) 190 CLR 410 at 440 per Dawson, Toohey and Gaudron JJ.

233 *The Commonwealth v Bogle* (1953) 89 CLR 229 at 259 per Fullagar J; cf *The Commonwealth v Cigamatic Pty Ltd (In liq)* (1962) 108 CLR 372.

234 (1997) 190 CLR 410 at 438 per Dawson, Toohey and Gaudron JJ.

235 (1953) 89 CLR 229 at 259.

236 *Re Residential Tenancies Tribunal* (1997) 190 CLR 410 at 438-439 per Dawson, Toohey and Gaudron JJ.

237 (1995) 182 CLR 572 at 585 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

> the Crown in right of the enacting legislature to the Crown in right of the other polities forming the federation[238]."

As was explained in *Bropho*[239], the application of the presumption that legislation does not bind the Crown may require consideration of the strength that was given to it at the time the relevant legislation was enacted, at least in cases where the question is whether the legislation affects the executive of the enacting polity. But it may be doubted that difficulties of that kind intrude upon the present question which is one concerning the intention of a legislature to affect the executive of another polity in the Federation.

232 The various cases referred to in *Bropho* as warranting the conclusion that the strength of the presumption may vary according to when particular legislation was enacted are cases that concern the effect of legislation on the executive of the polity that enacts it. The presumption now in question owes its origin to the fact of federation and is a presumption that is not encrusted with the extensive history of particular statements of the applicable rules of statutory construction that is mentioned in *Bropho*. That being so, it may be doubted that the strength of the presumption should be seen as varying over time.

233 There would be a powerful indication of an intention that the Mining Act should extend to land held by the Commonwealth if, on its face, it sought to prescribe a regime governing mining on all land in the State.

234 The generality of the definition of Crown land ("all land in the State except …") coupled with the apparent matching of some exceptions from the definition of Crown land with some inclusions in the definition of private land (notably the references to land granted by or alienated from the Crown) might suggest, at first sight, that the Mining Act is intended to apply one of three possible regimes for mining to all areas of land in the State. And the fact that the State claims ownership of all minerals might reinforce that impression. But closer examination of the Act reveals that this is not so.

235 As has already been noticed, the Mining Act makes special provision for "land that has been reserved for or dedicated to any public purpose"[240]. Such land (with some exceptions that are not material) is excluded from the definition of Crown land. Further, par (c) of the definition of private land makes plain that land

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238 See *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd* (1979) 145 CLR 107 at 135-136 per Mason and Jacobs JJ.

239 (1990) 171 CLR 1 at 22-23 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

240 Definition of "Crown land", s 8(1).

"reserved for or dedicated to any public purpose" is not to be taken to be private land only because some lease or concession is granted in relation to it for any purpose.

236 Division 2 of Pt III (ss 23-26A) deals with some, but not all, of the land that is described as reserved for or dedicated to any public purpose. Sections 24 and 25 identify the kinds of land to which the division applies. The public purposes referred to in the definitions of private land and Crown land are limited to public purposes of the State[241], but not all such land is dealt with by this division. In general, s 24 deals with national parks, nature reserves and the like and s 25 with the foreshore, sea bed and navigable waters and with land reserved as a townsite. The details of the application of these two sections is not important. What is significant is that consideration of these provisions reveals that the Mining Act does not prescribe a regime for mining in respect of all land in Western Australia.

237 Further, the exclusion of land reserved for any State public purpose from the definition of Crown land, coupled with the very limited provisions made in Div 2 of Pt III for mining of some, but not all, land reserved for such purposes, suggests strongly that the Mining Act is not intended to apply to land held by the Commonwealth.

238 This conclusion does not depend upon the application of principles of the land considered in *Melbourne Corporation v The Commonwealth*[242]. If, as was submitted by Western Australia, the Mining Act did apply to land of the Commonwealth because Commonwealth land is, for the purposes of the Act, "private land", the Act would treat that land in the same way as it treats privately held land. Treatment in that way would not amount to some discrimination against the Commonwealth and would not amount to subjecting the Commonwealth to some special burden or disability[243]. No doubt, a conclusion that the Act was discriminatory or imposed some special burden or disability on the Commonwealth would be a powerful, perhaps decisive, reason for deciding that the Act is not to be construed in a way that leads to that result but, as I say, I do not reach my conclusion by this path. For present purposes it is important to note that, while there may be no relevant discrimination or imposition of burden or disability, the construction of the Act for which the State contends is one that does lead to the differential treatment of land held for State and for Commonwealth public purposes and the treatment of Commonwealth land as if it were private land.

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241 See definition of "public purpose" in s 8.

242 (1947) 74 CLR 31.

243 cf *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 61 per Latham CJ, 74 per Starke J, 99 per Williams J; *Re Residential Tenancies Tribunal* (1997) 190 CLR 410 at 507 per Kirby J.

These are conclusions that one should be slow to reach given the presumption that one polity does not intend, by its legislation, to affect the other polities in the federation.

239 There is one further (albeit less powerful) indication in the statute that should be noted and suggests that the Mining Act is not intended to apply to Commonwealth land. Section 21 of the Mining Act provides that land that is not the subject of a mining tenement or land on which mining operations are lawfully being carried on under an agreement in writing with the owner of the land may be "resumed on behalf of the Crown pursuant to the *Land Acquisition and Public Works Act 1902* as though the taking or resumption were required for a public purpose". Section 22 then provides that "[w]here any private land is taken or resumed" under s 21 "that land shall for the purposes of this Act be taken to be Crown land". These provisions are more consistent with the private land provisions of the Mining Act applying only to land granted to private holders than it is with their application to land held by the Commonwealth.

240 Taking account of these various matters I consider that the Mining Act does not reveal an intention that it should apply to land granted to or leased by the Commonwealth under s 7(4) of the *Land Act*. And that is so notwithstanding that limiting the definition of private land to land that has been alienated to private persons requires that the equivalent exclusion from the definition of Crown land should be limited in like fashion. Read as a whole the definition of Crown land must be read as referring to that part of the waste lands in Western Australia[244] still under the control of the State. That is, the definition of Crown land should be read as referring to all land held by the State that does not fall within any of the exceptions mentioned. It is only if the definition of Crown land is read in that way that effect is given to the presumption that the legislature of one polity does not intend to bind the other polities in the federation.

241 It is convenient to deal at this point with two particular arguments

- that the Application of Laws Act applies the Mining Act to the three parcels of land held by the Commonwealth in freehold or leasehold; and

- that s 64 of the *Judiciary Act* requires that in the present proceeding the Court apply the provisions of the Mining Act to regulate the rights between the parties.

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244 The management of which was vested in the Western Australian legislature by the *Western Australia Constitution Act* 1890 (Imp).

The Application of Laws Act

242 The point can be dealt with shortly.

243 Section 4(1) of the Application of Laws Act provides that:

> "The provisions of the laws of a State as in force at a time (whether before or after the commencement of this Act) apply, or shall be deemed to have applied, in accordance with their tenor, at that time in and in relation to each place in that State that is or was a Commonwealth place at that time."

244 If (as I consider is the case) the Mining Act does not provide a regime for mining or exploration of the parcels of land owned or leased by the Commonwealth the Application of Laws Act can lead to no different result. Applying the Mining Act, in accordance with its tenor, provides no regime regulating mining on the land.

245 As for the balance of the Defence Practice Area, it is not a place "acquired by the Commonwealth for public purposes" within s 52(i) of the Constitution and is not a Commonwealth place under the Application of Laws Act. The Application of Laws Act may therefore be put to one side.

Judiciary Act, s 64

246 The present proceeding being one to which the Commonwealth or a State is a party, s 64 of the *Judiciary Act* provides that "the rights of parties shall as nearly as possible be the same ... as in a suit between subject and subject". The State submitted that because the Mining Act applies the regime set out in Div 3 of Pt III to exploration and mining on private land, s 64 of the *Judiciary Act* applies that regime to Commonwealth land.

247 The precise operation of s 64 may not yet have been fully elucidated. But it must now be accepted that the rights referred to in the section are more than procedural and include the substantive rights to which effect is to be given in the suit[245]. For present purposes, what is important is that the section requires that the rights of parties be as nearly as possible the same as in a suit between subject and subject.

248 No doubt issues of the meaning and validity of the legislation that has been relied on in the present proceeding could arise in litigation between subject and

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245 *South Australia v The Commonwealth* (1962) 108 CLR 130 at 140 per Dixon CJ; *Maguire v Simpson* (1977) 139 CLR 362; *The Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 262 per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ.

subject but if those issues did arise in such a suit, it could not be suggested that the legislation should be construed or given effect otherwise than in accordance with the terms of the legislation and ordinary principle. But the State's reliance on s 64 seeks to go further than having the legislation construed in accordance with its terms and having its validity assessed according to ordinary principles. It seeks to say that s 64 requires that those provisions of the Mining Act that apply to exploration and mining of private land should be applied to the three parcels of land held by the Commonwealth. That is not to make the rights of the parties to the present proceeding as nearly as possible the same as they would be in a suit between *subject and subject*. The State seeks to make the rights of the parties to the present proceeding as nearly as possible the same as they would be in a suit between *the State* and a subject. This is to create rights and obligations that are not provided for by the legislation and that would not be recognised or enforced in any proceeding between subject and subject. Section 64 does not lead to the conclusion for which the State contended.

The Provisions of the Crown Grants and the Special Lease

249 The two Crown Grants and the Special Lease contain provisions dealing with minerals and mining. Do those provisions permit the State to grant rights under the Mining Act?

250 There are four reservations in the Crown Grants:

- first, a reservation in favour of the Crown "or for any person or persons acting in that behalf by Our or their authority" to resume and enter upon possession of any part of the land (not exceeding one-twentieth of the whole of the land) for purposes (among other things) of exercising "the power to search for minerals hereinafter reserved" and to do so without compensation;

- secondly, a reservation in favour of the Crown "or for any person or persons acting in that behalf by Our or their authority" to search and dig for stones or other materials for works;

- thirdly, a reservation in favour of the Crown of all mines and minerals "with full liberty at all times to search and dig for and carry away the same; and for that purpose to enter upon the said land or any part thereof"; and

- fourthly, a reservation in favour of the Crown of all petroleum on or under the surface of the land "with the right reserved to Us ... and persons authorised by Us ... to have access to the said land for the purpose of searching for and for the operations of obtaining petroleum in any part of the said land subject to and in accordance with ... the Petroleum Act 1967 ...".

251 The Special Lease contains reservations to the same effect as the first three reservations found in the Crown Grants; it does not contain a reservation

equivalent to the fourth reservation about petroleum that is found in the two Crown Grants.

252 The first of these reservations confers a power to resume part of the land granted or leased (up to one-twentieth of it). And it speaks of persons "acting in that behalf by Our or Their authority" doing so "for the purpose of exercising the power to search for minerals and gems hereinafter reserved". The proposed grant of rights under the Mining Act is not a proposal to resume the land. The first reservation therefore does not apply to the circumstances now under consideration.

253 In considering the construction of the other reservations, it is important to note some differences between their terms. The first two reservations speak of persons "acting in that behalf by Our or their authority"; the third reservation concerning mines and minerals does not. The fourth reservation (found in the Crown Grants but not in the Special Lease) refers expressly to the Act that governs exploration for, and recovery of, petroleum (the *Petroleum Act* 1967 (WA)); the third reservation does not refer to the Mining Act.

254 The State contended that the reservations in the instruments should be construed amply and in favour of the grantor because the grantor was the Crown but I doubt that the construction of these instruments should be approached with any such predisposition when they are instruments made between two polities in the Federation. The principle of construction relied on by the State finds its place in the construction of grants by the Crown to a subject[246]. Other considerations intrude when the instruments are made between two polities. In any event, however, the language of the reservations does not admit of the construction urged by the State. The reservations do not reserve to the State the power to grant rights under the Mining Act.

255 The reservation of mines and minerals in favour of the Crown does not refer to "persons acting in that behalf by Our or their authority". It does not refer directly or indirectly to the Mining Act. In those circumstances it cannot be said that that reservation was intended to reserve to the State of Western Australia the power to grant rights under the Mining Act. Nothing else in the Crown Grants suggests the reservation of such a power.

256 One of the conditions of the Special Lease obliges the Commonwealth to permit occupation by authorised bee-keepers, fishermen, prospectors and miners, consistent with the safe and effective use of the area for its leased purpose of "Naval Gunfire Support Range Danger Area and Army Training Area". But even taking that condition into account in construing that instrument, the reservations

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246 *Hume Steel Ltd v Attorney-General (Vict)* (1927) 39 CLR 455 at 463 per Isaacs J, 465 per Higgins J; *Earl of Lonsdale v Attorney-Geneal* [1982] 1 WLR 887 at 901 per Slade J; [1982] 3 All ER 579 at 590-591.

that are contained in the Special Lease (and, in particular, the reservation of mines and minerals) cannot be read as reserving to the State the right to grant interests under the Mining Act.

257 For these reasons the Mining Act does not prescribe a regime for exploration or mining of the three parcels of land held by the Commonwealth in freehold or leasehold. But, of course, other considerations arise in relation to the balance of the Defence Practice Area. That is unalienated Crown land of the State of Western Australia. Subject to questions of inconsistency and acquisition other than on just terms, this land is open for mining in accordance with those provisions of the Mining Act that regulate mining and exploration on Crown land.

Inconsistency and Acquisition of Property

258 No question of inconsistency between the Mining Act and Pt X of the *Lands Acquisition Act* 1989 arises. Neither the Mining Act nor the terms of the reservations on the Crown Grants and Special Lease authorise the granting of rights to explore for or mine on the three parcels of land in which the Commonwealth has an interest. Although the Mining Act does authorise the granting of rights to explore for or mine on the balance of the Defence Practice Area, the land has not been acquired by the Commonwealth under its lands acquisition legislation.

259 For the reasons given by Gummow J, there may be a question of inconsistency that arises from the particular operation of Pt XI of the Defence Regulations (dealing with Defence Practice Areas) and the Mining Act and a question of acquisition otherwise than on just terms. But those questions would arise (and could be resolved) only in the light of the particular circumstances of a concrete case. Thus, to take only one obvious example, very different considerations may arise if unconditional permission were given to conduct mining operations on the State's Crown land in the Defence Practice Area and notice was then given of a year long defence operation affecting that area, from the considerations that would arise if the permission to conduct mining operations was conditional, or if a particular defence operation would take only a few hours or days.

260 For the reasons given by Gummow J, I agree that the declaration sought by the State in its counterclaim should not be made.

261 I agree with the orders proposed by Gummow J.

262 CALLINAN J. In these reasons I refer to the land contained in the deeds of grant and the leased land as the alienated land, and the land outside the alienated land but covered by the Declaration made under the Defence Force Regulations (Cth) as the unalienated land.

263 Subject to the qualifications and additional matters which I will state I agree with the following conclusions and reasons for judgment of Hayne J: that as a matter of construction the *Mining Act* 1978 (WA) has no application to the lands contained in the alienated land; that the *Commonwealth Places (Application of Laws) Act* 1970 (Cth) does not apply the *Mining Act* to the alienated land; and, that s 64 of the *Judiciary Act* 1903 (Cth) does not have the effect of enabling Western Australia and the Wardens of the South West mineral field to grant rights and interests in the alienated land in accordance with the *Mining Act*.

264 However I also agree with the reasons and conclusion of Kirby J, again, subject to such qualifications as I state, that there is a direct conflict between State law, that is State law entitling the State to explore for minerals and mine them on any of the lands, and the Declaration made under the Defence Force Regulations, if they are effective according to their tenor.

The effect of the reservations

265 Leaving aside for present purposes the effect of the Declaration, in my opinion, the reservations in the grants and the lease would entitle the State of Western Australia to search for, win and transport minerals from the alienated land (but not pursuant to the *Mining Act*). Their language is explicit and ample for those purposes. The reservations were obviously made for good reason. Their language should be given practical utility. Indeed, even in the absence of their explicit language, those rights would probably still be exercisable by the State. As Porter LJ said in *Borys v Canadian Pacific Railway Co*[247], delivering the advice of the Committee:

> "… the absence of a clause giving a right to work does not abrogate or limit the powers of the respondents. Inherently the reservation of a substance, which is of no advantage unless a right to work it is added, makes the reservation useless unless that right follows the grant. The true view is that such a reservation necessarily implies the existence of power to recover it and of the right of working."

266 Counsel for the Commonwealth, in argument went so far as to assert that the reservations would permit mining of a minimal kind only, mining he argued, by pick and shovel only perhaps. At the time that the grants and lease were made large scale mining operations, utilizing open cuts, were commonplace in Australia.

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247 [1953] AC 217 at 227-228.

That the possibility of operations of some magnitude was within the contemplation of the parties can be inferred from the reservation in the grants of the right to resume up to one twelfth of the land contained in them to explore for minerals. The argument of the Commonwealth must be rejected.

267 To hold otherwise would be to confer upon the Commonwealth proprietary and other rights which it chose not to acquire and for which it did not pay. For reasons which I will state I am of the opinion that a right to sterilize, restrict or adversely affect the rights of exploration and mining in or with respect to land, is a right for which the Commonwealth, acquiring or deriving the benefit of that right should pay compensation on just terms.

The Defence Force Regulations and the declaration made under them

268 The Regulations made under the *Defence Act* 1903 (Cth) relevantly provide as follows:

"Declaration of defence practice area

49(1) The Minister may, by notice published in the *Gazette*, declare any area of land, sea or air in or adjacent to Australia to be a defence practice area for carrying out a defence operation or practice of a kind specified in the notice.

(2) The Minister shall not make a declaration under subregulation (1) in respect of private land unless:

(a) the consent in writing of the occupier of the land has first been obtained; or

(b) it is necessary or expedient in the interests of the safety or defence of the Commonwealth to carry out on that land a defence operation or practice of a kind specified in the notice without that consent.

(3) The Minister shall not, in a notice under subregulation (1), declare an area of sea or air to be a defence practice area unless it is an area of sea or air in which it is necessary or expedient in the interests of the safety or defence of the Commonwealth to carry out a defence operation or practice of the kind specified in the notice.

(4) Where the Minister declares a defence practice area under subregulation (1), a chief of staff may from time to time, by notice published in the *Gazette*, authorise the installation, for a period not exceeding 2 years that is specified in the notice, of equipment for defence purposes:

(a) in an area of sea that is, or is part of, the defence practice area; or

(b) on the sea-bed or in the subsoil beneath that area; or

(c) in the superjacent waters.

Tabling and disapproval of declarations

50(1) Where private land is the subject of a declaration made under subregulation 49(1), the Minister shall cause a copy of the declaration to be laid before each House of the Parliament within 15 sitting days of that House after the date on which the declaration was made.

(1A) If a copy of a declaration is not laid before each House of the Parliament in accordance with the provisions of subregulation (1), the declaration shall be void and of no effect.

(2) If either House of the Parliament, within 15 sitting days of that House after a copy of a declaration referred to in subregulation (1) has been laid before that House, passes a resolution disapproving of the declaration, then:

(a) if the declaration has not come into operation – it shall not come into operation; or

(b) if the declaration has come into operation – the declaration shall cease to have effect on the day on which the resolution is passed.

Authorisation to carry out a defence operation or practice

51(1) A chief of staff may, in writing, authorize the carrying out in a defence practice area, at a time specified in the instrument, of a defence operation or practice in which:

(a) members of the Defence Force;

(b) members of the armed forces of a country other than Australia; or

(c) members of the Defence Force and the armed forces of a country other than Australia;

are to take part.

Notice to public of operation or practice

52(1) Where, under subregulation 51(1), a person authorizes the carrying out of a defence operation or practice, that person shall cause such notice of the operation or practice to be given as is reasonably required for the protection of persons or property that may be affected by that operation or practice having regard to:

(a) the time and place of the carrying out of the operation or practice;

(b) the nature of the equipment and ammunition proposed to be used in the course of that operation or practice and the risk to those persons or that property or the injury or damage that is likely to arise from that use; and

(c) the forms of communication available to that person for the giving of that notice to the public.

(2) Where a person authorises the installation of equipment under subregulation 49(4), the person must cause such notice:

(a) of the installation as is reasonably required to advise persons in reasonable proximity, within the defence practice area concerned, of the place where the equipment is installed; and

(b) of activities of those persons that would be likely to disturb the equipment or interfere with its operation;

to be given to those persons, having regard to:

(c) the nature of the equipment; and

(d) the risk of damage to the equipment or interference with its operation; and

(e) the forms of communication available to that person for the giving of that notice to those persons.

Prohibition of being in a defence practice area

53(1) A person shall not, without reasonable excuse, be in a defence practice area at a time specified in an instrument under subregulation 51(1) relating to the carrying out in that area of a defence operation or practice, except with the permission of:

(a) the chief of staff or other officer who authorized the operation or practice; or

(b) an officer participating in the operation or practice.

…

(2) A person shall not, without reasonable excuse, permit any vehicle, vessel or aircraft to be in a defence practice area at a time specified in an instrument under subregulation 51(1) relating to the carrying out of a defence operation or practice, except with the permission of:

(a) the chief of staff or other officer who authorized the operation or practice; or

(b) an officer participating in the operation or practice.

…

(2A)Where the installation of equipment is authorised under subregulation 49(4), a person must not knowingly disturb the equipment or interfere with its operation, except with the permission of:

(a) a chief of staff; or

(b) an officer participating in a defence operation or practice in relation to which the equipment was installed.

…

(3) Permission under subregulation (1), (2) or (2A):

(a) may be given if it is reasonably required for the protection of persons and property in the defence practice area or for the safety or defence of the Commonwealth;

(b) shall be in writing;

(c) is effective for such period as is specified in the instrument; and

(d) is subject to such conditions (if any) specified in the instrument as are reasonably required for the protection of persons and property in the defence practice area or for the safety or defence of the Commonwealth.

(4) Without limiting the generality of subregulation (3), the chief of staff or other officer giving permission under subregulation (1), (2) or (2A) may impose conditions in relation to the conduct of persons in a defence practice area or in relation to a vehicle, vessel or aircraft in that area.

(5) A person shall not, without reasonable excuse, fail to comply with a condition specified in an instrument of permission given to the person under this regulation.

…

(6) Where a vehicle, vessel or aircraft is in a defence practice area in contravention of subregulation (2), (2A) or (5) each of:

(a) in the case of a vehicle – the driver, owner and the hirer (if any) of the vehicle;

(b) in the case of a vessel – the master, owner and the charterer (if any) of the vessel, and the agent (if any) for the vessel; or

(c) in the case of an aircraft – the pilot, owner and the charterer (if any) of the aircraft, and the agent (if any) for the aircraft;

is guilty of an offence against subregulation (2), (2A) or (5), as the case may be, but an offender is not liable to be punished more than once in respect of the same offence.

…

Removal from defence practice area

54(1) A person:

(a) who, in contravention of regulation 53, is, or permits a vehicle, vessel or aircraft to be, in a defence practice area at a time specified in an instrument under subregulation 51(1); or

(b) who fails to comply with a condition specified in an instrument of permission given to that person under regulation 53;

may, without affecting any other proceedings that may be taken against the person, be removed from the area by, or under the direction of, a member of the Defence Force, a member or special member of the Australian Federal Police or a constable.

(2) Any vehicle, vessel or aircraft in a defence practice area in contravention of regulation 53 may be removed from the area by, or under the direction of, a member of the Defence Force, a member or special member of the Australian Federal Police or a constable.

Duties etc. of authorized officers

55 Where a member of the Defence Force gives a direction to a person under regulation 54, the member shall, if requested by that person, produce evidence that he or she is a member of the Defence Force for inspection by that person and, if the member fails to do so, that person is not obliged to comply with that direction.

Obstruction etc. of member of Defence Force etc.

56 A person shall not, without reasonable excuse, obstruct or hinder a member of the Defence Force, a member or special member of the Australian Federal Police or a constable in the exercise by that member, special member or constable of a power conferred by this Part or obstruct or hinder a person acting under a direction referred to in regulation 54.

…

Compensation for loss, injury or damage

57(1) The Commonwealth shall pay reasonable compensation to a person who:

(a) sustains loss or damage by reason of entry upon, and survey of, land in accordance with regulation 58;

(b) sustains loss or damage by reason that an area is declared to be a defence practice area under subregulation 49(1);

(c) sustains loss or damage by reason of the use of land for the purposes of a defence operation or practice authorized under regulation 51; or

(d) sustains loss or damage otherwise caused by the operation of this Part.

(2) A claim for compensation under this regulation shall:

(a) be in writing, signed by the person making the claim; and

(b) be addressed to the Secretary.

(3) Where no decision is made in respect of a claim for compensation within the period of 60 days after the date on which the claim was made, a decision refusing compensation shall be deemed to have been made."

269 There are several matters to notice about the Regulations. A Declaration made under them may be made unilaterally. A Declaration may be made as a matter of expediency. Equipment, in the discretion of a chief of staff may be installed for up to two years (and presumably for successive periods of two years after notice published in the *Gazette*) anywhere within a declared area. A Declaration has, in a relevant respect, the character of subordinate legislation in that it must be laid before Parliament and be subject to disallowance there. It is entirely within the discretion of a Chief of Staff when, and where a defence operation or practice may be carried out. It is impermissible for a person or a person's vehicle, vessel or aircraft to be in an area subject to a Declaration, at the place of, and during the period of a notified defence practice without reasonable excuse. Conditions with respect to the presence of a person in a defence practice area may be imposed by the Chief of Staff or another officer. A breach of a notification or condition constitutes an offence.

270 Regulation 57 is concerned with the payment of "reasonable compensation". The Commonwealth has 60 days within which to decide upon a claim. There is no provision for the determination of a claim by a court, or any procedure for its enforcement, or the payment of interest. The Regulations in this regard may be contrasted with the elaborate provisions in respect of these matters contained in the *Lands Acquisition Act* 1989 (Cth) Pts VII and VIII.

Has there been an acquisition of property?

271 Loss or damage, the term used in reg 57, may not be a term entirely apt to describe a diminution in value of real property or its utility for mining purposes (permanent or temporary) by reason of what, if they were not otherwise authorised, would be regarded as major trespasses and nuisance able to be committed at will by a stranger.

272 A right to mine is a valuable right. But that is not the only valuable right that a State has with respect to land in which there may be minerals. The mere possibility of their existence will often, indeed usually, give rise to a valuable right, or interest, the right to explore for them, an assignable right and one for which a State may expect to receive rent or other consideration, and other benefits, both tangible and intangible, such as, perhaps, infrastructure on, and in the vicinity of the land, and economic and other advantages in a region that it may wish to promote. Interference with a right of that kind plainly reduces the value of such a right either temporarily or permanently. Here the measure of control for which the Commonwealth contends and which the Declaration commands would involve a very substantial restriction upon a right to explore for, win and transport minerals. Whilst the test, whether what the Commonwealth has done (here the making of the

Declaration) amounts to an "acquisition" in constitutional terms will depend on what might be able to be done under the statute or instrument authorising or effecting the "acquisition", rather than what the Commonwealth may at any one time in its discretion actually choose to do, in this case, the uncontradicted pleaded facts give a good insight into just how intrusive and incompatible with mining the Commonwealth's activities under the Declaration may be. In this regard I refer to, without repeating, the details of the extensive periods and frequency of usage by the defence forces, which are set out in the reasons for judgment of Kirby J.

273 In *Minister of State for the Army v Dalziel*[248] Starke J said:

> "Property, it has been said, is *nomen generalissimum* and extends to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action. And to acquire any such right is rightly described as an 'acquisition of property'. On the other hand a mere personal licence such as is not assignable would not be rightly described as property[249]. There is no doubt, I think, that taking possession of land pursuant to reg 54 confers a definite legal right upon the Commonwealth in the nature of property[250], but I should not think that the right acquired pursuant to reg 54 is assignable.
>
> Now is this right of the Commonwealth an acquisition of property within the meaning of the Constitution? It is said in the *Imperial Dictionary* that to gain a mere temporary possession of property is not expressed by the word acquire, but by such words as gain, obtain, procure, as to obtain (not acquire) a book on loan. But the construction of the Constitution cannot be based on such refinements. However, the ownership of the land the possession of which is taken under reg 54 is not transferred to the Commonwealth nor is any estate therein, but a temporary possession. The right conferred upon the Commonwealth may be classified, I think, under the denomination of *jura in re aliena*, and so a right of property, the subject of acquisition."

274 And McTiernan J in the same case said[251]:

> "The word 'property' in s 51 (xxxi) is a general term. It means any tangible or intangible thing which the law protects under the name of property. The

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248 (1944) 68 CLR 261 at 290.

249 cf Leake, *Uses and Profits of Land*, (1888) at 196-199.

250 cf Pollock and Wright, *Possession in the Common Law*, (1888) at 22-23.

251 (1944) 68 CLR 261 at 295.

> acquisition of the possession of land is an instance of the acquisition of property."

275 The intervention of governments acting by the unilateral stroke of the executive pen, may produce quite different consequences from the transactions of ordinary citizens. "[I]nnominate and anomalous interests" may be created[252]. Take this case. It is not easy to find any perfect analogy between a proprietary right or interest that might be created in private law and what the Declaration, if valid, does for, and provides to the Commonwealth.

276 In *The Tasmanian Dam Case*[253] Deane J held that the prohibitions imposed by the World Heritage (Western Tasmania Wilderness) Regulations (Cth) and the *World Heritage Properties Conservation Act* 1983 (Cth), s 11 constituted an acquisition of property within the meaning of s 51(xxxi) of the Constitution, the property in question being the benefit of the prohibition of the exercise of the right to use and develop the land. But his Honour also held that other restrictions upon activities said to be of a less restrictive kind imposed by some other sections of the Commonwealth legislation precluded the proclamations in respect of those provisions from constituting an acquisition of property.

277 His Honour also held that such acquisitions of property as had purportedly occurred were invalid because the relevant section of the legislation (s 17 of the *World Heritage Properties Conservation Act*) did not confer an immediate right to be paid compensation and was therefore intrinsically unfair.

278 Mason J in his reasons drew a distinction between the approach to the Fifth Amendment to the United States Constitution, "… nor shall private property be taken for public use, without just compensation" and s 51(xxxi) of the Australian Constitution. His Honour said of the latter[254]:

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

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

253 *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1.

254 *The Tasmanian Dam Case* (1983) 158 CLR 1 at 145. In *Pennsylvania Coal Co v Mahon* 260 US 393 (1922), the Supreme Court of the United States ruled that making it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it: at 414 per Holmes J delivering the opinion of the Court. But the Court said such matters were discretionary; they were matters of degree.

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

279 Mason J (whose reasoning was similar to that of Murphy J[255] and Brennan J[256]) then cited the following passage of Dixon J from the *Bank Nationalisation Case*[257]:

> "I take *Minister of State for the Army v Dalziel*[258] to mean that s 51(xxxi) is not to be confined pedantically to the taking of title by the Commonwealth to some specific estate or interest in land recognized at law or in equity and to some specific form of property in a chattel or chose in action similarly recognized, but that it extends to innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property. Section 51(xxxi) serves a double purpose. It provides the Commonwealth Parliament with a legislative power of acquiring property: at the same time as a condition upon the exercise of the power it provides the individual or the State, affected with a protection against governmental interferences with his proprietary rights without just recompense. In both aspects consistency with the principles upon which constitutional provisions are interpreted and applied demands that the paragraph should be given as full and flexible an operation as will cover the objects it was designed to effect."

280 For myself I would not regard that passage as authority for the proposition that, for there to be an acquisition within the meaning of s 51(xxxi), the Commonwealth must necessarily in all cases and for all purposes have acquired an interest in property, however slight or insubstantial it may be. The real point about the exercise of power in respect of property by governments (other than town planning and other special or like powers which may require separate consideration) is that they can effectively achieve the benefit of many aspects of proprietorship without actually becoming proprietors, either of a property as a whole or some component of it.

281 As I have already suggested analogies with dealings between voluntary parties at arms length in a free market place are in many respects illusory in the context of the exercise of government power falling short of the assumption of ownership by government. To be able to prevent or restrict the usage of property in a certain way is just as much an incident of ownership as is an ability to use it

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255 *The Tasmanian Dam Case* (1983) 158 CLR 1 at 181-182.

256 *The Tasmanian Dam Case* (1983) 158 CLR 1 at 246-248.

257 *Bank Nationalisation Case* (1948) 76 CLR 1 at 349.

258 (1944) 68 CLR 261.

without restriction. It is no answer to say that an owner who remains the owner of the property in name, and can use it perhaps for one or two limited purposes, but not for other proper and permissible, valuable purposes, still has and enjoys proprietary rights.

282 But in any event, in this case, and in my view in *The Tasmanian Dam Case*, there has, in a real sense, been an acquisition of something in the nature of a valuable item of property. The Declaration may be compared to a restrictive convenant: if one person (for his or her own reasons) wishes to sterilize or restrict the usages of another person's land, the latter, in a free market place, would demand recompense, and the former would expect to have to pay it. The parties' rights and obligations would be defined by a restrictive covenant, or perhaps in some cases an easement. The benefit of each of these is valuable, and of a proprietary kind and may, in some circumstances, be assignable[259]. The covenantor or grantor (and successors) wishing to be relieved of the burden, are potential purchasers. And, subject to the terms of the covenant and legislation governing assignments, persons other than the covenantor and successors, may also be potential purchasers and assignees[260].

283 In *The Tasmanian Dam Case*[261], Deane J said that "laws which *merely* prohibit or control a particular use of, or particular acts upon, property plainly do not constitute an 'acquisition'". With respect I doubt whether such a statement can categorically be made. However, in deciding that the legislation in *The Tasmanian Dam Case* went beyond, as his Honour had defined it, mere extinguishment or deprivation, he used language which might, with some adaptations be employed to describe the ambit of the Declaration made under the Regulations in this case[262]:

> "In the present case, the Commonwealth has, under Commonwealth Act and Regulations, obtained the benefit of a prohibition, which the Commonwealth alone can lift, of the doing of the specified acts upon the HEC land. The range of the prohibited acts is such that the practical effect of the benefit obtained by the Commonwealth is that the Commonwealth can ensure, by proceedings for penalties and injunctive relief if necessary, that

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259 Assignability may not be a definitive test of property. See *Commissioner of Stamp Duties (NSW) v Yeend* (1929) 43 CLR 235 at 245 per Isaacs J.

260 See Bradbrook and Neave, *Easements and Restrictive Covenants in Australia*, (1981) par 1315 and following; Butt, *Land Law*, 3rd ed (1996) at pars 1713-1726. See also *Forestview Nominees Pty Ltd v Perpetual Trustees WA Ltd* (1998) 72 ALJR 621; 152 ALR 149.

261 (1983) 158 CLR 1 at 283.

262 (1983) 158 CLR 1 at 287. See also Gummow J in *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 595, 602, 634-635.

the land remains in the condition which the Commonwealth, for its own purposes, desires to have conserved. In these circumstances, the obtaining by the Commonwealth of the benefit acquired under the Regulations is properly to be seen as a purported acquisition of property for a purpose in respect of which the Parliament has power to make laws. The 'property' purportedly acquired consists of the benefit of the prohibition of the exercise of the rights of use and development of the land which would be involved in the doing of any of the specified acts. The purpose for which that property has been purportedly acquired is the 'application of the property in or towards carrying out' Australia's obligations under the Convention[263]. The compensation which would represent 'just terms' for that acquisition of property would be the difference between the value of the HEC land without and with the restrictions."

284 The caution expressed by Hamilton[264] in my opinion has much to commend it:

"A necessary first step in formulating a test for s 51(xxxi) … is for Australian courts firmly to grasp the principle that the various separate rights of user of property are in themselves property. The Court in *Dalziel's* case[265] recognized that by taking away some rights of user, in particular the right to possession, the Commonwealth could make property practically worthless. … What needs to be recognized is that property is a bundle of rights, and each right in that bundle is itself property the subject of acquisition. Whenever the Commonwealth seeks to control the exercise of one of the rights in the bundle a question of acquisition is on the threshold."

285 It follows, in my opinion, that the Declaration made under the Regulations in this case involves a purported acquisition of property within the meaning of s 51(xxxi).

Just terms?

286 In *Grace Bros Pty Ltd v The Commonwealth*[266], Dixon J referred to the need for legislation authorising an acquisition by the Commonwealth to provide fair and just standards of compensation:

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263 See *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372 per Dixon CJ.

264 Hamilton, "Some Aspects of the Acquisition Power of the Commonwealth", (1973) 5 *Federal Law Review* 265 at 291.

265 (1944) 68 CLR 261.

266 (1946) 72 CLR 269 at 290.

> "The inquiry rather must be whether the law amounts to a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property, fair and just as between him and the government of the country. I say 'the individual' because what is just as between the Commonwealth and a State, two Governments, may depend on special considerations not applicable to an individual."

287 The Regulations that I have quoted do not in my opinion make provision for such fair and just standards of compensation. There is no stated entitlement to interest[267]. They do not confer an immediate right to payment. Payment depends, in the first instance at least, upon the outcome of an administrative process. The fact that the process may be reviewable (and then only upon a very limited basis) by a Court of the Commonwealth[268] appointed pursuant to Chapter III of the Constitution can hardly be regarded as provision for fair and just standards of compensation for acquisition on just terms[269].

288 After all, until relatively recently substantial claims for compensation following acquisition by the Commonwealth, were routinely pursued in this Court[270].

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267 *Bank Nationalisation Case* (1948) 76 CLR 1 at 301 per Starke J; cf *The Tasmanian Dam Case* (1983) 158 CLR 1 at 291 per Deane J.

268 The Regulations provide a right to apply to the Administrative Appeals Tribunal for a review of decisions regarding compensation: r 57A(10). Appeal from decisions of the AAT to the Federal Court is available, but is limited to questions of law: *Administrative Appeals Tribunal Act* 1975 (Cth) s 44.

269 The defence power does not of course confer any greater right to acquire upon the Commonwealth on other than just terms than any other power: See *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 594 per Gummow J.

270 See for example *Albany v The Commonwealth* (1976) 12 ALR 201. Section 62 of the *Lands Acquisition Act* 1955 (Cth) conferred jurisdiction upon the High Court and the courts of the States and Territories to deal with matters arising under the Act. Section 19 provided that land owners could, in the absence of agreement, take action against the Commonwealth in a court of competent jurisdiction, which included the High Court. Provision was made for removal of actions into the High Court where the amount claimed exceeded the jurisdiction of the lower courts (s 28(9)) and where proceedings had been instituted in the High Court and another court (s 28(10)). The *Lands Acquisition Act* was amended by the *Jurisdiction of Courts (Miscellaneous Amendments) Act* 1979 (Cth). The amendments removed the relevant references to the High Court. Section 44 of the *Judiciary Act*, enacted in 1976, gave the High Court power to remit "any matter" to the Federal Court or to a Supreme Court. This

(Footnote continues on next page)

289 In practice, actual loss or damage, and some of the effects of a Declaration, a defence practice or a defence operation, may not be ascertainable and calculable until they have long since occurred. Unexploded and buried ordnance may constitute a special hazard, particularly to miners. This alone is likely to raise very serious doubts in the mind of a prospective purchaser whether to purchase, and as to an appropriate purchase price.

290 Very large sums of money, rights of personal significance to the persons affected and distress at displacement are involved in many compensation cases. So too, difficult questions, not only of law but also of fact regularly arise in such cases. There will often be very marked differences between expert witnesses on factual matters and the final issue of fair value. One very fruitful area of dispute in valuation cases is the identification of what is a discrete question of law or of fact, or, commonly, mixed law and fact. In *Melwood Units Pty Ltd v Commissioner of Main Roads* [271], the Judicial Committee referred to errors in relation to principles of valuation interchangeably with errors of law. All of this gives rise to special and difficult problems upon which the courts have not spoken with a unanimous voice as to what, in a particular valuation case, will constitute an appellable error of law[272]. The difficulties that have arisen in compensation cases are with respect well described by Kirby P in this passage[273]:

> "Because of the sparse economy and potential ambiguity of the phrase 'the value of the land', a vast body of common law 'principle' has been developed by courts to give meaning to the phrase as it applies to recurring fact situations following compulsory acquisition of the land. About some of the 'principles' developed by the common law there may be debate. Many of them appear to fresh minds to be ambiguous and contentious. Others appear to be arbitrary categories of indeterminate reference, designed as much to obscure the judicial leaps to judgment that are required in these cases as to provide guidance about when, and how far, to leap[274]."

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replaced s 45. The change ensured the Court, of its own motion, could remit a matter. The original jurisdiction of the High Court in compensation matters, in consequence, has effectively ceased to be exercised.

271 [1979] AC 426 at 435, 437.

272 See the discussion and summary of the cases in Jacobs, *The Law of Resumption and Compensation in Australia* (1998) at pars 33.8 to 33.13.

273 *Yates Property v Darling Harbour Authority* (1991) 24 NSWLR 156 at 159.

274 cf *Leichhardt Municipal Council v Seatainer Terminals Pty Ltd* (1981) 48 LGRA 409 at 434.

291 These considerations highlight the undesirability of a determination of compensation other than by a proper judicial process including the availability of the usual, and not a restricted right of appeal or review.

292 Acquisition on just terms is synonymous, in my opinion, with acquisition according to justice and that means justice as administered by a court or tribunal fully and properly equipped to adjudicate upon all relevant matters and not subject to a truncated review or appellate process.

293 In my opinion therefore, the State is entitled to explore for and win minerals on the alienated land. The Declaration precludes mining on neither those lands nor on the unalienated land because it is invalid. How in fact rights to explore and mine the alienated land are to be exercised does not fall for consideration in this case. The *Mining Act* is not, as I have said the regime to regulate that exercise. In the case of petroleum (save for the leased land in respect of which there is no such reservation) because of the express reference in the reservations to the *Petroleum Act* 1967 (WA), the State may act under that statute. As for the means to be adopted for the exploration for and exploitation of other minerals on the alienated land, I express no opinion.

294 Hayne J has pointed to some differences in language in the reservations. These might suggest that for some purposes (perhaps quarrying) both the State and persons authorised by it may enter upon the alienated lands, whilst for mining purposes, this right of entry is confined to the State. It is unnecessary to decide here whether a narrow construction of that reservation is required in light of the fact that at the time of the grants and to the knowledge of the parties, a State would rarely carry on a mining activity in its own right. Nor is it necessary for this Court in these proceedings to determine whether the State would need a special statute or whether it has sovereign power otherwise to look for, and mine minerals other than petroleum on the land subject to the grants, or petroleum and other minerals on the leased land.

295 As for the unalienated land, in my opinion it is open for mining under the *Mining Act*, or otherwise as the State may determine and is lawful according to State law.

296 I would have asked the parties to agree upon the form of appropriate declarations and orders to reflect these reasons and granted liberty to apply.