on the subject therefore remains unclear. Australian fisheries continue to be controlled by a divided system of jurisdiction. But as Windeyer J. said:

> This arrangement of, generally speaking, complementary laws in respect of different areas, must seem wise and convenient, except perhaps for fishermen and lawyers.[35]

It is to be hoped that Australian judges will admit the importance of the policy considerations that have carried the day in the United States[36] and Canada.[37] In today's complex world it may be doubted that it is satisfactory to have jurisdiction over various areas of the sea divided between State and Commonwealth and between various heads of power. Such a division can only lead to uncertainty in domestic and international action. One therefore hopes that, when occasion arises to consider the problems of off-shore jurisdiction again, recognition will be more unanimously given to the vital importance of the oceans for Australia's security and commerce and the responsibilities of the nation State.

H. BURMESTER

TEORI TAU v. THE COMMONWEALTH OF AUSTRALIA[1]

Constitutional Law — Commonwealth power to make laws for the Territories — Constitution section 122 — Acquisition of property on just terms — Constitution section 51 (xxxi) — High Court Rules — Order 35 Rule 2.

The proceeding before the High Court was a special case under Order 35 Rule 2[2] for a declaration whether an ordinance of the Territory of Papua and New Guinea made pursuant to the New Guinea Act 1920 or the New Guinea Act 1920-1926 or the Papua and New Guinea Act 1949-1964 which provides for compulsory acquisition of property, is

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[35] (1969) 43 A.L.J.R. 275, 298F.

[36] *United States v. California* (1946) 332 U.S. 19.

[37] *Reference re Ownership of Offshore Mineral Rights* (1968) 65 D.L.R. (2d) 353.

[1] (1970) 44 A.L.J.R. 25. High Court of Australia: Barwick C.J., McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ.

[2] Order 35 rule 2 of the High Court Rules provides: "If it appears to the Court or a Justice that there is, in a proceeding, a question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact determined, the Court or Justice may make an order accordingly and may direct that question of law to be raised for the opinion of the Court or of the Full Court, either by special case or in such other manner as the Court or Justice deems expedient".

invalid if it fails to provide just terms for such acquisition. Three ordinances were passed by the Territory's Administration providing generally for the vesting in the Crown in the right of the Commonwealth of Australia or in the Administration of the Territory of minerals in that territory. The question before the Court assumed that the ordinances in question were otherwise valid exercises of delegated power, and only asked, provided they were otherwise valid, whether they would be invalidated by the failure to provide just terms for the acquisition of property in the Territory. In other words, whether the power to make laws for the government of a territory of the Commonwealth under section 122[3] of the Constitution includes a power akin to that possessed by the constituent States of the Commonwealth to make laws for the compulsory acquisition of property without necessarily providing in those laws for terms of acquisition which can be seen in the circumstances to be "just". As the joint judgment[4] put it:

> We are concerned only with the constitutional question, whether any ordinance which acquires or provides for the acquisition of property can be constitutionally valid if it does not provide just terms of acquisition.[5]

The High Court unanimously held that since section 122 (the source of power to make laws for the government of the territories of the Commonwealth) is "general and unqualified", it is consequently apt to confer, *inter alia,* a power to make laws for the compulsory acquisition of property without just terms—that is, in short, section 122 is not limited or qualified by section 51 (xxxi).[6] They concluded that they had no doubt whatever that:

> the power to make laws providing for the acquisition of property in the Territory of the Commonwealth is not limited to the making of laws which provide just terms of acquisition.[7]

The question which consequently arises from the express provision of section 51 (xxxi) is whether it is possible, or even necessary, to infer from the general nature of the Constitution, as a matter of construction,

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[3] S. 122 of the Constitution of Australia provides: "The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit."

[4] The joint judgment of the High Court (seven judges) was delivered by Menzies J.

[5] (1970) 44 A.L.J.R. 25, 26.

[6] S. 51(xxxi) of the Constitution provides: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:— 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".

[7] *Op. cit.,* 26.

that this is the only power of compulsory acquisition reposed in the Commonwealth—apart from section 85 (ii)[8] of the Constitution—in other words, whether the maxim *expressio unius personae vel rei, est exclusio alterius* applies?[9]

(1) Are the "Territories" a part of "The Commonwealth"?

The question involved here is whether the territories, to which section 122 refers, are principally to be regarded as parts of the Commonwealth. No view was expressed by the High Court in this case, but in *Spratt v. Hermes*[10] this view was at least expressed by some members of the Court. It is essential to recall, in this respect, a passage in the judgment of Barwick, C.J. in *Spratt v. Hermes*[11] where he said:

> It may be granted that the word "Commonwealth" is used in the Constitution sometimes geographically . . . and sometimes as a reference to the political entity which the Constitution created . . . It may also be granted that the powers which were given to the Commonwealth were of different orders, some federal, limited by subject matter, some complete and given expressly, and some no doubt derived by implication from the very creation or existence of the body politic. Consequently, the need to observe the nature of the powers sought to be exercised at any time by the Commonwealth is ever present. But, the Constitution brought into existence

[8] S.85(ii) permits the Commonwealth when any department of the Public Service of a State is transferred to the Commonwealth to acquire any property of the State, of any kind used but not exclusively used in connexion with the department.

[9] Mention should be made of the fact that the Commonwealth as a fully sovereign power, has the legal right within its constitutional limits to deal as it thinks fit with anything and everything within its territory. This "legal right" would be extensive enough to incorporate what Grotius called the right of "eminent domain" i.e. the power of a sovereign State compulsorily to acquire the property of its subjects, although this right is limited morally, if not legally to acquisitions for "ends of public utility" and should be subject to the duty to make good the loss to the dispossessed owner. The Commonwealth may also exercise executive power by operation of the doctrine of the royal prerogative, compulsorily to acquire the property of its subjects, though there would seem to be no evidence, in England at least, to show that the Crown's requisitioning powers were ever exercised without payment of compensation or that a claim to do so was ever made: see: *Attorney-General v. De Keyser's Royal Hotel, Ltd* [1920] A.C. 508; *Burmah Oil Co. (Burma Trading) Ltd v. Lord Advocate* [1964] 2 All E.R. 348; [1965] A.C. 75; *Nissan v. Attorney-General* [1967] 2 All E.R. 1238 (C.A.); [1969] 1 All E.R. 629 (H.L.); and Latham C.J.'s recognition of the Commonwealth's executive power in this respect in *Johnston Fear and Kingham v. The Commonwealth* (1943) 67 C.L.R. 314.

In *Tau's Case,* there was of course no question relating to the exercise of the prerogative power or the right of eminent domain. The foregoing analysis merely shows the width of the acquisition powers of the Commonwealth and the limitations thereon.

[10] (1965) 114 C.L.R. 226.

[11] *Ibid.*

> but one Commonwealth which was, in turn, destined to become the nation. The difference in the quality and extent of the powers given to it introduced no duality in the Commonwealth itself.[12]

In the middle of page 247, His Honour continued:

> Although the territories may not be included in the federal system in the sense that the powers of the Commonwealth with respect to them are not federally circumscribed, they are, in my opinion, clearly included in the expression "The Commonwealth", e.g. throughout Chap. I of Constitution. I see no occasion for contrasting a Commonwealth which contains or embraces only the constituent elements of a federation with a Commonwealth which includes all the areas over which it can by one power or another legislate. If the fundamental concept of a single Commonwealth is accepted, there would seem to be no need to entertain any distinction between territories which originally contained people who were members of a colony at the point of federation and other territories or to seek to find significance in the presence within a territory of the seat of government.[13]

One comment to be made about these passages is that they do contain observations to the effect that the territories are part of "the Commonwealth". Furthermore, they contain observations that there is no constitutional distinction to be drawn (and all members of the Court accepted this)[14] between one territory and another, albeit there are external and internal territories.

This view was re-affirmed, although somewhat implicitly, by the Full High Court in *Tau's Case* where it was said:

> What we decide in this respect is not, of course, limited to the Territory of Papua and New Guinea, although it happens that the question has first arisen expressly for decision in connexion with that territory. Our decision applies to all the territories, those on the mainland of Australia as well as those external to the continent of Australia.[15]

One qualification, however, appears to be that although there may be one Commonwealth, one should look at the nature of the power that is in question. It is not suggested that these statements categorically assert that the Territory of Papua and New Guinea is geographically a part of the Commonwealth but that the powers in section 51 of the Constitution, so far as they are applicable, would apply to the Territory, notwithstanding the provisions of section 122. Of course, generally speaking, it is not necessary to have resort to section 51 because the power, so far

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[12] *Id.*, 246-247.

[13] In this connection see also Menzies J. at 269-270; but his Honour's view is inconsistent with that of Dixon C.J. in *Lamshed v. Lake* (1958) 99 C.L.R. 132.

[14] (1965) 114 C.L.R. 226; per Barwick C.J. at 241, Kitto J. at 258, Taylor J. at 264, Menzies J. at 269-270, Windeyer J. at 273; and Owen J. at 280.

[15] (1970) 44 A.L.J.R. 25, 26.

as it is necessary for the Territory, would be found in section 122. However, assuming there were no section 122, then the Commonwealth would seem to have power under section 51 to legislate with respect to the subject matters therein enumerated and to cover territories in that legislation.[16]

(2) What is the Relationship Between Section 122 and Section 51 (xxxi)?

One principal question which arose in this case with regard to the territories is the relation of the power given to the Commonwealth by section 122 to the remainder of the Constitution. Is the grant of power in section 122 untrammelled by any of the restrictions written or conventional which apply to the grant of powers in section 51?

The High Court in a series of cases[17] has rejected the argument that a power of compulsory acquisition can arise from any constitutional source other than section 51 (xxxi). This view was re-echoed by the Full High Court in *Tau's Case* when it recognised that—

> It has been held with respect to the heads of legislative power granted by s. 51 of the Constitution that by reason of the presence in that section of par. (xxxi) none of the other heads of power, either of itself or aided by the incidental power, embraces a power to make laws for the acquisition of property.[18]

Thus if one looks at the defence power,[19] for example, one finds nothing in it about acquisition and, if there were no placitum xxxi, the view could readily be taken that the defence power includes in it a power to acquire property for defence purposes. Such would be an incident of the defence power. However, because placitum xxxi is expressed in the Constitution, the proper view, it was argued, would be that that is the only power of acquisition in respect of matters of defence or indeed in respect of any matters in which the Commonwealth has power and for which the Commonwealth wishes to acquire property. Placitum xxxi is the sole power of acquisition and there is no more reason for saying that the defence power does not carry with it a power

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[16] Menzies J. in *Spratt v. Hermes* (1965) 114 C.L.R. 226, 270 also adhered to this view when his Honour said:

> Moreover, it has to be remembered that s. 122 is not the only source of power to make laws for the government of the territories. A law of the Commonwealth made under s. 51 may operate within the territories simply because they are parts of the Commonwealth.

[17] *Andrews v. Howell* (1941) 65 C.L.R. 255, 282; *Johnston Fear and Kingham v. The Commonwealth* (1943) 67 C.L.R. 314; *The Minister of State for the Army v. Dalziel* (1944) 68 C.L.R. 261; *Real Estate Institute of N.S.W. v. Blair* (1946) 73 C.L.R. 213; *P. J. Magennis Pty Ltd v. The Commonwealth* (1949) 80 C.L.R. 382; *W. H. Blakely & Co. Pty Ltd v. The Commonwealth* (1953) 87 C.L.R. 501, 521; *Re Dohnert Muller Schmidt & Co.* (1961) 35 A.L.J.R. 54.

[18] (1970) 44 A.L.J.R. 25, 26.

[19] See s. 51(vi) of the Constitution.

of acquisition than there is to saying that section 122 does; they are both powers of the Commonwealth which, in the absence of anything else in the Constitution, would carry with them a power to acquire property.

The High Court unanimously rejected this argument on the ground that:

> Section 51 is concerned with what may be called federal legislative powers as part of the distribution of legislative power between the Commonwealth and the constituent States. Section 122 is concerned with the legislative power for the government of Commonwealth territories in respect of which there is no such division of legislative power. The grant of legislative power by s. 122 is plenary in quality and unlimited and unqualified in point of subject matter. In particular, it is not limited or qualified by s. 51 (xxxi) or, for that matter, by any other paragraph of that section.[20]

The Court then went on to stress that there is no distinction to be drawn between the "internal" territories and the "external" territories of the Commonwealth:

> Our decision applies to all the territories, those on the mainland of Australia as well as those external to the continent of Australia.[21]

Thus the High Court was prepared to hold that the Commonwealth could, with impunity, compulsorily acquire property in the Australian Capital Territory without regard to the limitation on its power expressed in placitum xxxi.

In effect, this statement further reinforces the proposition that there is only one Commonwealth in the sense explained above, and that the Constitution should not be read in compartments,[22] but this is not the same as saying that section 51 (xxxi) limits or qualifies section 122. What is maintained is that the Constitution expressly provides a legislature with respect to acquisition of property and reading the Constitution as a whole, that is the only power in the Constitution.

The power conferred upon the Parliament is to legislate with respect to the government of territories. It is therefore not so much a matter of implication as a matter of ascertaining the ambit of that power and in ascertaining the ambit of that power one would look at it in the context

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[20] (1970) 44 A.L.J.R. 25, 26.

[21] *Ibid.*

[22] Barwick C.J. recognised this essential point in *Spratt v. Hermes* (1965) 114 C.L.R. 226, 246:

> . . . it seems to me, with the utmost respect, to be an error to compartmentalize the Constitution, merely because for drafting convenience it has been divided into chapters. No doubt on some occasions some assistance may be obtained from the place in the layout of the Constitution which a particular provision occupies when resolving ambiguities in language. But this does not call for disjoining a part of the Constitution from the rest.

of the Constitution as a whole and without placitum xxxi one would conclude that that power is sufficiently wide to embrace within it a power to acquire property for purposes of the administration of the territory in question. To postulate the contrary would be equivalent to reading the Constitution in compartments, and this may lead to many absurdities and incongruities.

This view was succinctly put by Barwick C.J. when discussing the ambit of section 122 in *Spratt v. Hermes,* for his Honour there said that:

> . . . this does not mean that the power [i.e. section 122] is not controlled in any respect by other parts of the Constitution or that none of the provisions to be found in chapters other than Chap. VI are applicable to the making of laws for the Territory or to its government. It must remain, in my opinion, a question of construction as the matter arises whether any particular provision has such an operation, the construction being resolved upon a consideration of the text and of the purpose of the Constitution as a whole.[23]

If this is so, then the exposition made in this note must surely be what His Honour had in mind, and therefore one must be at pains trying to reconcile that reasoning with the construction put on section 122 by the Full Court in *Tau's Case.*

Another issue which seems to have carried significant weight in the judgment of the Court is whether the limitation in placitum xxxi ought to be confined only to the scheme of federal jurisdiction enumerated in section 51; alternatively, whether it was the intention that section 51 should have no application to section 122, and because placitum xxxi is found in that section, then, *ipso facto,* that limitation should have no application to section 122.

One may concede that in so far as placitum xxxi is found in section 51, that proposition could on that basis be maintained but would it have made any difference if placitum xxxi had found itself in a separate and independent section in the Constitution such as section 116?[24] The following objections may be raised against this argument. First there seems to be nothing in the particular form of words used in section 51 that could be the foundation of this reasoning. The foundation is rather that, because there is a power of acquisition that is the only power of acquisition. As Professor Colin Howard has already said:[25]

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[23] *Id.,* 242.

[24] It is particularly significant to note that in *Tau's Case* the Court held that: "While the Constitution must be read as a whole and as a consequence, s. 122 be subject to other appropriate provisions of it as, for example, s. 116 . . ." (1970) 44 A.L.J.R. 25, 26.

[25] *Australian Federal Constitutional Law* (1968) 357.

> Whichever section is in question in its relation to section 122, it is to be evaluated on its own merits and not automatically disposed of as having no application because it is in chapter 3.[26]

In the same vein Barwick C.J. put it succinctly thus:

> There does not seem to me to be any single theme running throughout Chap. III which requires it to be treated so much all of one piece that if any of it relates only to federal matters, every part of it must likewise be restrained.[27]

Does not this reasoning equally apply to section 51 or for that matter to Chapter I? It is submitted that it does.

Secondly, placitum xxxi is a very different power from the other kinds of power enumerated in section 51. It has no independent content apart from other legislative powers. The acquisition of property must be made for a purpose "in respect of which the Parliament has power to make laws". Thus, if placitum xxxi stood by itself, it would not make any sense; there would be nothing for it to do. It is an express grant of power of acquisition but is at the same time subject to the limitation that acquisition must be only for purposes in respect of which the Parliament is empowered to make laws, and that is what distinguishes it from other powers in section 51. Of course, it must be borne in mind that the section starts off with the phrase "subject to this Constitution", and thus the question arises as to its relation to section 122. In respect of sections other than section 122 one would have to read the phrase "subject to this Constitution" as either a limitation or an extension of those powers and it may be that the phrase is equally capable of being used to import section 122. But it is submitted that this phrase is of fairly weak import and does not ultimately advance or destroy the argument either way.

Since, therefore, placitum xxxi is the only express power of acquisition, there is no less reason for saying that the presence of paragraph xxxi in section 51 operates upon the construction of the Commonwealth powers in section 51 than there is for saying that it operates upon the Commonwealth power in section 122.

In *Lamshed v. Lake,*[28] Dixon C.J. stressed the point that there was no warrant for supposing that the other legislative powers of the Commonwealth, particularly those in section 51, were to be read as having no reference to Territories on the rather artificial ground that Territories were specifically covered by section 122. He took a similar view with respect to constitutional prohibitions, regarding section 116 as applying

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[26] Or, for that matter, in any other chapter.

[27] *Spratt v. Hermes* (1965) 114 C.L.R. 226, 245.

[28] (1958) 99 C.L.R. 132, 142-143.

to laws made under section 122 as much as to any other relevant powers of the Commonwealth.[29] His Honour's general approach is summarized in the following passage:

> What has been said is enough to show that when s. 122 gives a legislative power to the Parliament for the government of a territory the Parliament takes the power in its character as the legislature of the Commonwealth, established in accordance with the Constitution as the national legislature of Australia, so that the territory may be governed not as a *quasi* foreign country remote from and unconnected with Australia except for owing obedience to the sovereignty of the same Parliament but as a territory of Australia about the government of which the Parliament may make every proper provision as part of its legislative power operating throughout its jurisdiction.[30]

It is submitted that this approach is infinitely to be preferred to the rather intricate and artificial separation or compartment doctrine implicit in the judgment of the High Court in *Tau's Case*.

The emphasis is that the power contained in placitum xxxi is a power of a special kind. It is a wide power. It speaks of the acquisition of property on just terms for any purposes in respect of which the Parliament has power to make laws. The stress is on the word "any" in that context. But it is a power devoid of any operation without reference to other legislative powers, and it is in terms apt to apply as well to section 122 as to any other section conferring legislative power on the Parliament.[31]

(3) Is section 122 Disjoined from the Constitution?

What it is proposed to demonstrate is whether, in the light of the Court's reasoning in *Tau's Case,* section 122 ought now to be regarded as a disjoined section? The Court said that:

> Section 122 of the Constitution of the Commonwealth of Australia is the source of power to make laws for the government of the territories of the Commonwealth. In terms, it is general and unqualified. It is apt to confer, amongst other things, a power to make laws for the compulsory acquisition of property.[32]

Thus, apart from being "general and unqualified"[33] is it also all-embracing? *Spratt v. Hermes,* if nothing else, demonstrates quite vividly

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[29] *Id.,* 143.

[30] *Id.,* 143-144.

[31] This contention has in fact once been decided by Bridge J. in *Kean v. The Commonwealth* (1963) 5 F.L.R. 432, 439-440. At p. 439 he said: " . . . I think that an exercise under the Constitution of legislative power given by s. 122 is conditional on the provision of 'just terms' as contemplated by s. 51(xxxi)." This statement may now be regarded as having been overruled by the High Court.

[32] (1970) 44 A.L.J.R. 25, 26.

[33] But in another passage, the Court conceded that s. 122 is subject at least to s. 116.

that section 122 is part of the Constitution, and should not be disjoined from it.[34] Along the same lines is a statement in the judgment of Dixon C.J. in *Lamshed v. Lake*[35] in which his Honour quoted a passage from his own judgment in the *Airlines Case*,[36] saying,

> . . . "For my part, I have always found it hard to see why s. 122 should be disjoined from the rest of the Constitution and I do not think that *Buchanan's Case* and *Bernasconi's Case* really meant such a disjunction". To this view I adhere.

With this view the majority concurred (Williams J. dissenting). On the basis of these authorities one might conclude that section 122 should not be disjoined from the rest of the Constitution. But there are authorities which present an opposite view, i.e. that section 122 is not subject to some other power and therefore to that extent disjoined from the rest of the Constitution. Two of these authorities are *Buchanan v. The Commonwealth*[37] and *R. v. Bernasconi.*[38] The former held (by the whole Court) that laws made under section 122 were unaffected by restrictions imposed by the provisions of section 55 of the Constitution and the latter, that the right of trial by jury guaranteed by section 80 of the Constitution does not apply to the Territory of Papua. Although both cases may be distinguished from the present on the ground that the powers involved in them were concerned with the distribution of functions between the Commonwealth and States and therefore have no application to the Territories,[39] nevertheless it would seem that, by the same token, the High Court implicitly held that, because in their view section 122 is not qualified by section 51 (xxxi), to that extent, section 122 is disjoined from the rest of the Constitution. One conclusion that might be drawn from this state of affairs is that the ambit of section 122 is still unsettled and undelineated and the limitations to which it is subject have not yet been completely determined.

(4) Conclusion

The decision of the High Court has been criticized for its failure to deal with the problem of the relation between sections 122 and section 51 more fully and for the apparent haste in which the decision was given. The decision was given without hearing any argument from the Com-

[34] 114 C.L.R. 226, 242 per Barwick C.J., per Windeyer J. at 277.

[35] 99 C.L.R. 132, 145.

[36] *Australian National Airways Pty. Ltd. v. The Commonwealth* (1945) 71 C.L.R. 29, 85.

[37] (1913) 16 C.L.R. 315.

[38] (1915) 19 C.L.R. 629.

[39] For example, in *Buchanan's Case* it was said that s. 55 of the Constitution had no application to a law made under s. 112, but that was so because s. 51(ii) —the taxation power—is concerned with the division of powers between the Commonwealth and the States and s. 55 was merely a limitation upon the power in s. 51(ii), and this is the ground that has been more recently accepted as the basis upon which that decision can be accepted: see Dixon C.J. in *Lamshed v. Lake,* (1958) 99 C.L.R. 132, 142; Kitto, J. in *Spratt v. Hermes,* (1965) 114 C.L.R. 226, 252.

monwealth or Bouganville Copper Pty Ltd. The decision was given without a single reference to a previous decided case or scholarly opinion. The Court said that "although this Court has not heretofore decided this question, the topic to which it relates is by no means unfamiliar to it".[40] But the Court, it may respectfully be suggested, ought to have examined the question of the relation between section 51 and section 122 as legal opinion has been divided on this question.[41] It may be that it was thought that there was a special urgency about the case which required a quick decision but it has been suggested that other litigation with respect to receipts duties and the Trade Practices Tribunal were of equal urgency. One hesitates to conclude that the speed of decision by the Court simply reflects the Court's estimate of the gravity and anti-social significance of the defendant's behaviour in the circumstances.

The decision of the Court is not only open to criticism on the ground that it has not dealt with doubts raised by cases and writings in recent years. The implications of the Court's view are not very fully examined in the judgment. One question which is unanswered is this: if section 51 does not limit the power in section 122 so that the Commonwealth may acquire property for the purposes of the Territory without just terms, are the people of the States deprived of the Constitutional guarantee when property in a State is acquired for that purpose?[42]

In conclusion, it is respectfully submitted that the High Court's view of the relation of the power contained in section 122 to the remainder of the Constitution is too formalistic. Should it make such a significant difference that placitum xxxi happens to find itself under section 51 and not as a separate and independent section in the Constitution? What is so special about section 116 that makes that section essentially different from placitum xxxi, from the point of view of Constitutional interpretation? Moreover, it is submitted that whether or not section 122 is subject to any other section of the Constitution should depend on the character and effect of that other section and not merely on where it appears in the Constitution.

One cannot, it is also suggested, entirely ignore the policy implications of the Court's view. By leaving section 122 virtually untrammelled the Court has given to the Commonwealth a power which is less limited than it ought to be. Whether this is in fact the very result which the Court desires to achieve is of course unknown, but if this is the Court's intention, one may respectfully disagree with the Court on this matter.

ABASS C. BUNDU

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[40] (1970) 44 A.L.J.R. 25, 25.

[41] 44 A.L.J. 49. See L. Zines, " 'Laws for the Government of any Territory': Section 122 of the Constitution" (1966) 2 F.L.Rev. 72 and H. A. Finlay, "The Dual Nature of the Territories Power of the Commonwealth" (1969) 43 A.L.J. 256. The Court also paid no regard to the opinion expressed by Mr Justice Bridge in *Kean v. The Commonwealth* (1963) 5 F.L.R. 432.

[42] Cf. L. Zines, *op cit.*, at 93.