The Acquisition of Property on Just Terms

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In the common law world, judges are fond of saying that constitutional interpretation should focus on substance rather than form. But what, precisely, does this mean? No judge would allow the legislature or executive to use artificial or technical distinctions to circumvent constitutional restrictions on their power. Fundamental rights, in particular, are given careful protection. This applies as much to the right to property as any other right. If a constitution puts conditions on the legislature's power to expropriate property, it is unlikely that a court would allow the legislature to avoid the conditions by characterising its actions as regulation when they are clearly of the nature of an expropriation. In this sense, the concepts that define the right to property – such as 'property', 'taking', 'acquisition' and 'compensation' – are not merely labels without substance. Their substance is determined, to at least some extent, by principles beyond the reach of the legislature. But what is substance of property? Or of an acquisition or taking of property? Finding appropriate answers to these questions is bound to be difficult in any country, but they are particularly difficult in Australia, as the 'right' to property is embedded in a provision that is primarily concerned with the distribution of power between the Commonwealth Parliament and the legislatures of the Australian States. Section 51 of the Constitution states that the Commonwealth Parliament 'shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to' a list of subjects; this list includes, in paragraph (xxxi), 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'.

One could say that section 51(xxxi) has begun a second life in constitutional law. The High Court did not examine section 51(xxxi) closely until World War II, when it considered a series of cases on the requisition of property for the war effort and economic reforms. However, the number of cases slowed to a trickle from the early 1950s to the early 1990s. Recently, however, section 51(xxxi) has returned to centre stage in a number of cases in which the High Court has discussed it at length. This article examines the modern jurisprudence of the High Court on section 51(xxxi). Its focus is the importance of purposive interpretation and the idea that 'acquisition of property' can be described in terms of its substance. It begins by examining how the court's interpretation of 'acquisition of property' has broadened the scope of section 51(xxxi). The most difficult questions arise in relation to impositions of a purely financial liability and acquisitions of property by third parties. The general question is whether the court has pressed section

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51(xxxi) into service where other constitutional provisions or doctrines would be better employed. In particular, this article examines whether the ultra vires doctrine, supplemented by a principle of proportionality, could be applied in some of the circumstances currently covered by section 51(xxxi).

1. *Property as 'Innominate and Anomalous Interests'*

The court did not examine the acquisition power closely until 1923 in *The Commonwealth v New South Wales.*[1] The court was asked whether section 51(xxxi) gave the Commonwealth the power to acquire royal metals in land. New South Wales argued that the states held the prerogative right over royal metals and, since it was normally presumed that a power to acquire property did not extend to royal metals unless the legislature made such intention clear, the United Kingdom Parliament must not have intended section 51(xxxi) to give the Commonwealth legislature the power to acquire royal metals. However, the High Court held that

> [t]he power is given to make laws with respect to "the acquisition of property ... from any State"; and property is the most comprehensive term that can be used. No limitation is placed by the Constitution on the property in respect of which the [Commonwealth] Parliament may legislate.[2]

The only limitations were those that arose from the conditions of section 51(xxxi) itself: an acquisition had to be on 'just terms' and it could only be 'for any purpose in respect of which the Parliament has power to make laws'.

The decision in *The Commonwealth v New South Wales* reflected the trend to centralism established with the *Engineers' Case.*[3] How closely this aspect of the centralist theory followed the framers' intentions is unclear. They recognised that the express grant of the power to acquire property in section 51(xxxi) may have been redundant, since the Commonwealth had other powers under which it could acquire property.[4] Section 51(xxxix) (the incidental power) would also include the power to acquire property in some circumstances, but whether the Commonwealth would have a general power to acquire property was uncertain. The framers were aware that the Supreme Court of the United States had held that Congress has a general power of acquisition (known as 'eminent domain') in the absence of any express term in the Constitution, on the basis that the possession of such power was one of the attributes of a sovereign body.[5] In Australia, there was some doubt whether the Commonwealth was sovereign, and hence whether it would have the

1 (1923) 33 CLR 1.

2 Id at 20–21 (Knox CJ & Starke J).

3 *The Amalgamated Society of Engineers v The Adelaide Steamship Company Limited and Others* (1920) 28 CLR 129.

4 See s51(xxxiii) (acquisition of State railways) and s85 (departments of public services of states) and see generally RW Baker, 'The Compulsory Acquisition Powers of the Commonwealth', in Mr Justice Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed, 1961) at 196–197; Haig Patapan, 'The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia' (1997) 25 *Fed LR* 211 at 220–221.

5 See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 640, *Kohl v United States* 91 US 367 at 371–378 (Strong J) (1875).

power of eminent domain in the absence of an express provision to that effect. As Quick and Garran put it, the Commonwealth Parliament could 'only exercise delegated powers carved out for it, and assigned to it, by the sovereign Parliament of Great Britain and Ireland.'[6] The inclusion of section 51(xxxi) therefore resolved any doubts that may have existed in this respect. The scope of the power *vis-à-vis* the States and private owners of property therefore depended on how much scope the High Court would give to the phrase 'acquisition of property'. *Commonwealth v New South Wales* showed that the Commonwealth had a power as generous as that of other sovereign bodies.[7]

The attention of the High Court then turned to the protection of property owners provided by the just terms condition of section 51(xxxi). That the dual character of section 51(xxxi) meant that a generous interpretation of 'acquisition of property' could also favour the citizen became apparent in 1943, in *Minister of State for the Army v Dalziel*.[8] The claimant operated a parking lot on land that he held under a weekly tenancy. Regulations made under the *National Security Act* 1939–43 authorised the Army to take exclusive possession of the land for an indefinite period. The claimant was offered compensation to cover the cost of his rental payments, but he was refused compensation for the loss of profit from the parking business. This followed from the language of the regulations, which provided that no compensation for loss of profit would be paid unless there was an 'acquisition of property'. One issue was therefore whether the Army had acquired property. There was no doubt that the leasehold was property and that, if the Army had acquired the leasehold, there would have been an acquisition of property. However, the claimant still held the leasehold and his landlord retained ownership of the land. Hence, although it was clear that the Commonwealth had acquired some rights over the land, it was not clear that it had acquired property.

The court's interpretation of section 51(xxxi) was purposive, in the sense that the majority stated that the just terms condition was intended to protect the citizen and, for that reason, the section should be construed generously.[9] Nevertheless, a division arose over the meaning of property. Latham CJ, in dissent, maintained that the Commonwealth had only acquired a personal interest in the land, because it had acquired neither a right of disposition nor a general right of use. He also argued that the indefinite duration of its interest meant that it was not comparable to a lease or other possessory interest in land. The other judges stated that the Commonwealth had acquired the advantages of possession and hence it should be subject to the conditions that would ordinarily apply to acquisition of a possessory interest. These judges were concerned that the Commonwealth might attempt to avoid the just terms condition 'by taking care to seize something short of the whole bundle [of rights] owned by the person whom it was expropriating.'[10]

6 Quick & Garren, id at 640.

7 Ultimately, the High Court suggested that the incidental power would have provided a sufficient for the acquisition power: *WH Blakeley & Co Pty Ltd v The Commonwealth* (1953) 87 CLR 501.

8 (1944) 68 CLR 261.

9 Id at 285 (Rich J), at 290 (Starke J), at 295 (McTiernan J).

10 Id at 285 (Rich J).

Accordingly, property, in section 51(xxxi), includes '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.'[11] Since the Commonwealth had acquired possession, even for an indefinite period, it had acquired property under section 51(xxxi).

In some respects, *Minister of the State for the Army v Dalziel* was not a difficult case. That is, it was quite clear that there was a serious interference with the plaintiff's property rights, and his economic loss was significant and easily quantified. Perhaps the court would have been more reluctant to find that an acquisition of property had occurred if the interference with his rights had not been so severe or if his loss could not have been quantified so easily. If, for example, the legislation had merely required the plaintiff to reserve one parking space for a military official for occasional use, the interference might not have been considered an acquisition of property. Nevertheless, *Minister of State for the Army v Dalziel* is quite important because it shows that court would not treat the private law of property as a conclusive indication of the meaning or substance of an acquisition of property in the constitutional setting.

While *Minister of State for the Army v Dalziel* represents a generous interpretation of section 51(xxxi), there were also cases from the same period that represent a more traditionalist approach.[12] However, the majority of cases have followed the views expressed in *Minister of the State for the Army v Dalziel.* Indeed, this is not only reflected in the interpretation of 'property', but in the doctrine of the 'circuitous device'. The leading example of the application of this doctrine is found in the judgment of Dixon J, in the *Bank of New South Wales v The Commonwealth* (*Bank Nationalisation Case*).[13] The case concerned the *Banking Act* 1947, which authorised the nationalisation of private banks in which the majority of shares were owned by Australians. The Act provided that Australian-owned shares would vest in the Commonwealth Bank, subject to payment of 'fair and reasonable compensation'. Although the Act did not directly affect shares held by non-Australians, it gave the Treasurer the power to replace a bank's directors with his nominees, who would then act solely in their own discretion. The court held that the provisions regarding the nominee directors were unconstitutional, because the directors would have the power to cause the private banks to transfer property to the Commonwealth Bank on terms that were not just. Although no such transfer had occurred, Dixon J described the management provisions as 'a circuitous device to acquire indirectly the substance of a proprietary interest without at once providing the just terms guaranteed by section 51 (xxxi) of the Constitution when that is done.'[14] Accordingly, the provisions were invalid. Speaking generally, he also explained that *Minister of the State for*

11 Id at 290 (Starke J), see also at 295 (McTiernan J).

12 See, in particular, *Australasian United Steam Navigation Company Limited v The Shipping Control Board* (1945) 71 CLR 508, where the High Court held that the requisition of a ship did not amount to an acquisition of property.

13 (1948) 76 CLR 1.

14 Id at 349 (Dixon J).

the Army v Dalziel meant that 'section 51(xxxi) is not to be confined pedantically to the taking of title by the Commonwealth to some specific estate or interest in land recognized at law or in equity and to some specific form of property in a chattel or chose in action similarly recognized, but that it extends to innominate and anomalous interests'.[15]

The idea that there is a distinction between the 'substance of a proprietary interest' and the formal bundle of rights that constitute the interest is important, because it casts doubt on the utility of the legal conception of property in resolving constitutional issues. *Minister of State for the Army v Dalziel* and the *Bank Nationalisation Case* suggest that the substance of property lies in the advantages derived from holding property. Hence, an acquisition of property occurs if the Commonwealth manages to secure the advantages of property without acquiring the entire bundle of rights held by the citizen. This position was foreshadowed by the famous opinion of Holmes J in *Pennsylvania Coal Co v Mahon*, where he stated that '[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'[16] In determining whether regulation 'goes too far', he said that one factor for consideration is the extent of the diminution of the 'values incident to property'. When the diminution 'reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.'[17] The extended idea of property apparent in *Minister of State for the Army v Dalziel* and the *Bank Nationalisation Case* reflect the essence of Holmes J's dicta, although Holmes J refers explicitly to the link between property and its economic value. Nevertheless, it is implicit in Australian cases that, if the Commonwealth secures the economic power derived from property, an acquisition of property has occurred even if there has been no formal transfer of title to the property.

2. *Property as an 'Identifiable and Measurable Advantage'*

In recent cases, the court has interpreted 'acquisition of property' very broadly; indeed, one could question whether any 'acquisition' of property is necessary to bring section 51(xxxi) into operation. The beginning of this trend can be found in the judgment of Deane J in *Tasmanian Dams Case.*[18] The legislation in question restricted development on certain land in Tasmania without the consent of the Commonwealth government. The State of Tasmania challenged the legislation on the ground, inter alia, that the restrictions amounted to an acquisition of its property on terms that were not just. On this point, the majority of the court decided against Tasmania.[19] The only interest acquired by the Commonwealth in the land was the power to veto development; according to the majority, the veto did not amount to a proprietary interest and hence there was no acquisition of

15 Ibid.

16 260 US 393 at 415 (1922).

17 Id at 413.

18 *The Commonwealth v Tasmania* (1983) 158 CLR 1.

19 The majority also stated that the Commonwealth had passed the legislation under the external affairs power (s51(xxix)) or the trading corporations power (s51(xx)); hence, the legislation was *intra vires.*

property. The reasons given by the majority were brief, and so it is not clear why they did not regard the veto as one of the 'innominate and anomalous interests' referred to in the *Bank Nationalisation Case.* By contrast, Deane J maintained that the imposition of an absolute prohibition on development should be treated as an acquisition of property, even though the Commonwealth had not acquired a 'material benefit of a proprietary nature'.[20] He said that section 51(xxxi) should not be limited to those situations that would be characterised as acquisitions of property in private law; a restriction on the exercise of property rights may amount to an acquisition of property under section 51(xxxi) if its effect 'is to confer upon the Commonwealth or another an identifiable and measurable advantage or is akin to applying the property, either totally or partially, for a purpose of the Commonwealth'.[21] In his view, both the purpose and the impact of a restriction are important: if the restriction is intended merely to adjust competing interests in resources, it is likely that section 51(xxxi) is not involved. Similarly, if the impact is slight, section 51(xxxi) does not apply.

Although Deane J was in the minority in relation to the interpretation of 'acquisition of property', it now seems that the court follows his views. This is evident in a series of cases on the extinction of debts owed by the Commonwealth.[22] There has been no doubt that a debt should be treated as property, but does the Commonwealth acquire property as a result of extinguishing its debts? In *Georgiadis v Australian and Overseas Telecommunications Corporation*, Mason CJ, Deane & Gaudron JJ stated that '"acquisition" in section 51(xxxi) extends to the extinguishment of a vested cause of action, at least where the extinguishment results in a direct benefit or financial gain (which, of course, includes liability being brought to an end without payment or other satisfaction)'.[23] In *Mutual Pools and Staff Pty Ltd v The Commonwealth of Australia*, McHugh J put it in general terms, as he said that a section 51(xxxi) acquisition of property occurs if the Commonwealth obtains 'a corresponding benefit of commensurate value' from a deprivation of the plaintiff's property.[24]

The application of this principle to other cases involving the extinction or merger of rights is uncertain. The reasoning in the debt cases suggests that, if a servitude on land is extinguished, the owner of the land has acquired property within the meaning of section 51(xxxi). Accordingly, in *Newcrest Mining (WA) Ltd v The Commonwealth*,[25] the court held that an acquisition occurred when Parliament passed legislation that prohibited holders of mining leases from extracting minerals. In *Commonwealth v WMC Resources*,[26] the court was asked

20 Above n18 at 286. Deane J also stated that the acquisition satisfied the just terms condition; hence, he agreed with the majority's view that the legislation was not *ultra vires* the Commonwealth Parliament.

21 Id at 283.

22 In addition to the cases discussed in the text, see *The Commonwealth v Mewett* (1997) 71 ALJR 1102.

23 (1994) 179 CLR 297 at 305.

24 (1994) 179 CLR 155 at 223.

25 (1997) 190 CLR 513.

26 [1998] HCA 8.

whether the extinction of offshore oil exploration permits was an acquisition of property under section 51(xxxi). One point made the analysis more complex than it was in *Newcrest Mining*: in *WMC Resources*, the Commonwealth did not have a proprietary interest in the seabed. It had sovereignty over the seabed, but no property in it. By contrast, in *Newcrest Mining*, the Commonwealth owned the land over which the leases had been granted. Nevertheless, in *WMC Resources*, Toohey and Kirby JJ stated that the Commonwealth acquired the benefit of being able to grant new permits over the same area of the seabed. In their view, this was sufficient for the extinction of the old permits to be treated as an acquisition of property under section 51(xxxi), even though the Commonwealth did not acquire new property rights as a result. This reading of section 51(xxxi) seems to extend 'acquisition' to any form of enrichment resulting from a deprivation of property. For this reason, Brennan CJ and Gaudron J took the opposite view: since the extinction of the permits did not give the Commonwealth a new property interest, nor enhance an existing proprietary interest, there was no acquisition of property under section 51(xxxi).[27]

The issue remains unsettled. The debt cases seem to support the position of Toohey and Kirby JJ, since the extinction of a debt does not confer property rights on the debtor. However, Brennan CJ and Gaudron J could find support for their position in the majority holding in the *Tasmanian Dams Case*, where it was made quite clear that there is an important distinction between the acquisition and deprivation of property.[28] The reasoning in *Australian Tape Manufacturers Association Ltd v The Commonwealth*[29] also supports their position. In this case, Commonwealth legislation would have allowed purchasers of blank recording tapes to copy recorded music onto the blank tapes. To this extent, the music companies would lose their copyright in recorded music. The arrangement was not as one-sided as it sounds, because purchasers would have been required to pay a special levy on blank tapes. The Commonwealth would then distribute the collected levies amongst music companies. One issue was whether giving purchasers the right to copy music was an acquisition of property. The court acknowledged that the legislation deprived the music publishers of their property rights, but it also found that no acquisition of property resulted. Plainly, this is inconsistent with the position taken by Toohey and Kirby JJ in *WMC Resources*, since the extinction of the copyright allowed the Commonwealth to confer copying privileges on the purchasers of recorded music.

Although all judges agree that it is substance, rather than form, which should govern analysis, there is no clear consensus on how acquisitions differ, in substance, from mere deprivations of property, or how property differs from other valuable interests. This leads to a more difficult question: if the extinction of a financial liability of the Commonwealth is an acquisition of property, is the

27 Gummow J held that the rights were not acquired because they were defeasible in any case (as in *Health Insurance Commission v Peverill* (1994) 179 CLR 226); McHugh J stated that s51(xxxi) does not apply to rights created by federal law.

28 Above n18 at 145 (Mason J), 246–248 (Brennan J), and 282–283 (Deane J).

29 (1993) 176 CLR 480 at 499–500.

imposition of financial liability in favour of the Commonwealth also an acquisition of property? The formal distinction between an extinction of a chose in action and the imposition of financial liability may be clear, but if section 51(xxxi) protects against economic loss, the differences in substance are more obscure.

3. *Property and Liability*

Although the reach of section 51(xxxi) remains unclear, there is no doubt that the court has moved some distance from an originalist or literal interpretation of 'acquisition of property'. Purposive interpretation has played, and will continue to play, a significant role in the jurisprudence on section 51(xxxi). The direction that interpretation will take depends, therefore, on the purpose that the court ascribes to section 51(xxxi). In this regard, the court has often stated that the just terms condition of section 51(xxxi) was included for the protection of the citizen.[30] By way of comparison, in the United States, the Supreme Court has said that takings clause of the Fifth Amendment requires compensation so that the government cannot '"forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'".[31] While this seems uncontroversial, it is significant nonetheless; if this is the sole purpose of the clause, there is no particular reason why the burden must take the form of a loss of traditional property. Other sacrifices may be equally deserving of compensation, particularly if they take the form of economically valuable rights.

This question was raised by Mason CJ in *Australian Tape Manufacturers Association Ltd v The Commonwealth*.[32] A further issue in this case was whether the imposition of the levy amounted to an acquisition of property. The levy was a pure monetary liability, in the sense that the purchasers were entitled to pay the levy out of any funds that they held and the Commonwealth acquired no rights in the blank tapes. Plainly, the imposition of a financial liability affects the citizen's wealth, but it is not at all clear that it affects his or her property or, to be more precise, whether it amounts to an acquisition of property under section 51(xxxi). Ordinarily, the courts treat the imposition of a liability as a tax or possibly as a penalty or damages for a breach of obligations arising in private law. In such cases, the citizen can discharge the liability from any of his or her assets or, indeed, by getting some other person to discharge it. There is no such freedom in the typical compulsory acquisition: only the transfer of the specific property will satisfy the

30 See eg, *The Commonwealth v Huon Transport Proprietary Limited* (1945) 70 CLR 293 at 307; *The Australian Apple and Pear Marketing Board v Tonking* (1941) 66 CLR 77 at 85 and 106; *Bank Nationalisation Case*, above n13 at 349–350; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 370–371; *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201–202; *Australian Tape Manufacturers Association Ltd v The Commonwealth*, id at 509; *Georgiadis v Australian and Overseas Telecommunications Corporation*, above n23 at 303; *Newcrest Mining*, above n25 at 657–661 (Kirby J).

31 *Dolan v City of Tigard*, 512 US 374 at 384 (1994), quoting *Armstrong v United States*, 364 US 40 at 49 (1960). The Fifth Amendment provides that '... nor shall private property be taken for public use, without just compensation'.

32 Above n29.

order for acquisition. Nevertheless, the distinction between property and liability is not always clear. If, for example, the Commonwealth appropriated the income earned from a specific fund, it is likely that its actions would be treated as an acquisition of property. This was the holding of the United States Supreme Court in *Webb's Fabulous Pharmacies, Inc v Beckwith*,[33] which concerned a Florida statute that declared that interest accruing from money paid into court 'shall be deemed income of the office of the clerk.' If, however, legislation merely imposes a tax of an equal amount on the fundholder, it is not at all clear that any acquisition has occurred. In *Australian Tape Manufacturers*, the court held that the levy imposed on music purchasers was a tax, and hence the imposition was made under section 51(ii) of the Constitution rather than section 51(xxxi). Accordingly, there was no question of 'just terms'. However, Mason CJ also stated that an imposition of a financial liability would be treated as an acquisition of property under section 51(xxxi) in some circumstances:

> If, for example, a law did no more than provide that a particular named person was under an obligation to pay to the Commonwealth an amount of money equal to the total value of all his or her property, the law would effect an acquisition of property for the purposes of section 51(xxxi), notwithstanding the fact that it imposed merely an obligation to pay money and did not directly expropriate specific notes or coins.[34]

Mason CJ did not indicate whether an acquisition of property would occur if the law was not directed at a 'particular named person', or where the amount of the liability was less than 'the total value of all his or her property'. Neither did he indicate how the purpose of imposing the liability would affect the characterisation of the law. Nevertheless, it is clear that he would not confine 'acquisition of property' to its traditional meaning.

Recently, a similar question arose in the United States, in *Eastern Enterprises v Apfel*.[35] *The Coal Industry Retiree Benefit Act* 1992 ('*Coal Act*') required Eastern Enterprises to pay the health care costs of retired miners who had worked for Eastern before it stopped mining coal, in 1965. Eastern Enterprises claimed that the *Coal Act* infringed both the takings clause of the Fifth Amendment to the Constitution and the due process clause of the Fourteenth Amendment.[36] Although the court declared, by a 5-4 margin, that the *Coal Act* was unconstitutional, no clear principle emerges from the opinions that were given. O'Connor J concluded that the *Coal Act* infringed the takings clause, without finding it necessary to decide whether it also infringed the due process clause; Rehnquist CJ, Scalia and Thomas JJ concurred. Kennedy J concluded that the Act did not infringe the takings clause, but it did infringe the due process clause. Breyer J, with whom Stevens, Souter and Ginsburg JJ concurred, stated that the Act did not infringe either clause. In the end,

33 449 US 155 (1980).

34 Above n29 at 509–510.

35 524 US 498, 141 L Ed 2d 451 (1998) (subsequent citations are to 141 L Ed).

36 The Fourteenth Amendment provides that no State shall 'deprive any person of life, liberty, or property without due process of law'; for the Fifth Amendment, see above n31.

therefore, only a minority concluded that the Act infringed the takings clause. However, the close margin of the decision shows how difficult the question is, and suggests that the Australian High Court might follow the opinion of O'Connor J.

O'Connor J determined that the *Coal Act* effected a taking by applying three criteria used by the Supreme Court in previous judgments, 'the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action.'[37] That the regulation in this case did not relate to specific property was not important; nor, for that matter, did the question seem to warrant a close analysis. On the first criterion, she observed that the legislation imposed 'considerable financial burden upon Eastern', and stated simply that '[t]he fact that the Federal Government has not specified the assets that Eastern must use to satisfy its obligation does not negate that impact.'[38] Similarly, Eastern's 'reasonable investment backed expectations' were, it seems, no more than its expectation that it would not face further liability for the cost of its former employees' health care.[39] On the third criterion, she focused on the retroactive aspect of the legislation: the fact that it reached back nearly thirty years, in her view, made it unable to withstand scrutiny under the takings clause.[40]

As stated above, in *Australian Tape Manufacturers Association Ltd v The Commonwealth*,[41] Mason CJ discussed the issue of liability as an acquisition of property only briefly. Hence, it is not clear whether he would apply the same or similar criteria as those applied by O'Connor J in *Eastern Enterprises v Apfel* if faced with a similar set of facts. However, despite the brevity of Mason CJ's dicta, some differences are apparent. For example, he indicated that he was concerned with an obligation to pay 'an amount of money equal to the total value of all [the affected person's] property'. By contrast, it was not stated in *Eastern Enterprises v Apfel* whether the liability exceeded the value of the company's assets or whether it was so high that it would have forced the sale or transfer of the company's assets (although it was clearly a very heavy burden). Where planning regulations are involved, the American courts generally refuse to find that a taking has occurred unless all, or nearly all, the economic use of the land is lost.[42] As such, the diminution of value relates only to the affected land and not to the landowner's aggregate wealth. Put differently, it is the relative impact on the value of land,

37 Above n35 at 471, quoting *Kaiser Aetna v United States* 444 US 164 (1979) at 175.

38 Id at 475.

39 Id at 476–477.

40 Id at 479 (O'Connor J), stated that it was understandable that Congress sought to provide a solution to the problem of miners' health care benefits; however, she also stated that when 'that solution singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause.'

41 Above n29.

42 *Lucas v South Carolina Coastal Council* 112 S Ct 2886 (1992) is regarded as making the doctrine more generous to property owners, but the diminution of value was almost complete in any case (see William Fisher, 'The Trouble with *Lucas*' (1993) 45 *Stanford LR* 1193 and Richard Lazarus, 'Putting the Correct "Spin" on *Lucas*' (1993) 45 *Stanford LR* 1411).

rather than the absolute impact, which is important. In *Eastern Enterprises v Apfel*, O'Connor J seemed to regard the absolute level of the impact as the important factor whereas, in *Australian Tape Manufacturers*, Mason CJ focused on the relative impact.

O'Connor J's opinion in *Eastern Enterprises v Apfel* shows that, if the courts treat economic value as property, the substance of a 'taking of property' does not become easier to identify. Breyer J adverted to these difficulties, by stating that applying the takings clause to the *Coal Act* 'bristles with conceptual difficulties.'[43] In his view, it would dissolve the distinction between takings and taxation and, indeed, between takings and any regulation which causes economic loss. Even in *Webb's Fabulous Pharmacies, Inc v Beckwith*, the legislation imposed a burden on a 'specific, separately identifiable fund of money'.[44] Moreover, Breyer J stated that O'Connor J's opinion misconceived of the function of guaranteeing compensation. This was put by the Supreme Court in *First English Evangelical Lutheran Church of Glendale v County of Los Angeles*,[45] an earlier takings case, as follows:

> As its language indicates, and as the court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power ... This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.[46]

In *Eastern Enterprises v Apfel*, Breyer J pointed out that the majority decision would not have the effect of allowing an interference with property subject to compensation, but prohibiting the interference altogether. Accordingly, he felt that it made more sense to analyse the Act under the due process clause of the Fourteenth Amendment. The application of the due process clause to economic legislation is highly controversial, and the Supreme Court has been reluctant to revive the substantive economic due process doctrines of the late nineteenth and early twentieth centuries. In *Lochner v New York* and other cases, the Supreme Court struck down social welfare legislation intended to improve working conditions by regulating maximum hours, minimum wages and child labour on the basis that they violated the Bill of Rights.[47] The Supreme Court relaxed its approach in the 1930s, and in cases such as *West Coast Hotel Co v Parrish*[48] and *United States v Carolene Products*[49] it indicated that it would take a more deferential approach in cases involving economic regulation. Nevertheless, in

43 Above n35 at 491.

44 As described by Breyer J in *Eastern Enterprises v Apfel*, id at 482.

45 482 US 304 at 315 (1987).

46 Ibid at 315.

47 *Lochner v New York* 198 US 45 (1905); *Hammer v Degenhart* 247 US 251 (1918); *Bailey v Drexel Furniture Co* 259 US 20 (1922); *Adkins v Children's Hospital* 261 US 525 (1923).

48 300 US 379 (1937).

49 304 US 144 (1938).

Eastern Enterprises v Apfel, Breyer J stated that the doctrine of due process is still available to strike down legislation that imposes a retroactive financial liability, if the legislation is 'fundamentally unfair or unjust'.[50] However, he would have allowed the *Coal Act* to stand, because Eastern Enterprises had a clear moral duty to provide for its former employees' health care. The duty arose from its involvement in the coal mining industry and from assurances given to coal miners regarding health care over many years. Although the assurances were not contractual, they were sufficient to justify the legislation and to refute the argument that the retroactive effect of the legislation was 'fundamentally unfair or unjust'. Plainly, it is important that the case failed on the facts, since this shows that Breyer J believes that the court should show a high degree of deference to the legislature. Nevertheless, it is important that His Honour left the door open for further development of due process in relation to economic and proprietary rights.

4. *Proportionality and Due Process*

The reluctance to revive the doctrine of substantive economic due process explains why O'Connor J focused on the takings clause rather than the due process clause. However, it meant that Her Honour had to extend the takings clause into territory that goes far beyond any traditional understanding of a taking of property.

In the Australian Constitution, there is no direct counterpart to the Fourteenth Amendment, and so the question of substantive economic due process does not arise in the same form. Furthermore, the protection of property in section 51(xxxi) is not cast as a constitutional right in the manner of the takings clause of the Fifth Amendment. Hence, holding that the just terms condition has been infringed may have consequences than a holding that the takings clause has been infringed, as Dixon J pointed out in *Grace Bros Pty Ltd v The Commonwealth*.[51] This is not to say, however, that the general issue of judicial control over economic policy does not arise in similar ways. In particular, under both systems, the express protection of property is distributed across a number of different provisions, and hence it is necessary to consider whether cases resolved under one provision could be more sensibly resolved under another provision. There is a kind of internal balance to be maintained in each system. In *Eastern Enterprises v Apfel*, the court focused on the balance between the takings and due process clauses.

In Australia, sections 92 and 117 have been raised in cases where section 51(xxxi) has also been discussed; so has the limitation against civil conscription in section 51(xxiiiA).[52] The availability of these provisions suggests that the High Court should not find it necessary to extend the idea of an acquisition of property

50 Above n35 at 499.

51 (1946) 72 CLR 269 at 290; see also *Mutual Pools*, above n24 at 202 (Dawson & Toohey JJ).

52 See generally George Williams, *Human Rights under the Australian Constitution* (1999) 129–154; Michael Mathieson, 'Section 117 of the Constitution: The Unfinished Rehabilitation' (1999) 27 *Fed LR* 393.

under section 51(xxxi) into economic or proprietary rights covered by these provisions, even if it is minded to support an individual's claim that legislation is unconstitutional.[53]

While provisions such as sections 92 and 117 are important, it is clear that, taken in isolation, they cannot be compared with a general guarantee of due process in relation to property rights of the type found in the Fourteenth Amendment of the United States' Constitution. There is, however, the general ground of review that Commonwealth legislation lacks a sufficient connection to any of the legislative powers given to Parliament under the Constitution. Hence, an examination of the methods by which the High Court determines whether a sufficient connection exists may reveal that there is a general principle that is roughly analogous to a general right to due process. This brings us to the test of proportionality. The rise of proportionality in recent years can be traced to the judgment of Deane J in the *Tasmanian Dams Case*, where he stated that, for a law to be enacted under the external affairs power, it must be 'capable of being reasonably considered to be appropriate and adapted to achieving what is said to impress it with the character of a law with respect to external affairs'.[54] Implicit in this requirement 'is a need for there to be a reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it.' He gave the 'extravangant example' of a law requiring the slaughter of all sheep in Australia, where the law was enacted to satisfy an obligation under an international convention that required steps to be taken to prevent the spread of a disease which had not yet reached Australian shores. In such a case, '[t]he absence of any reasonable proportionality between the law and the purpose of discharging the obligation under the convention would preclude characterisation as a law with respect to external affairs'.[55]

In recent years, the use of the test of proportionality by members of the High Court has varied. Some idea of its potential impact in relation to property can be gathered from *Re Director of Public Prosecutions; ex parte Lawler*.[56] This case concerned provisions of the *Fisheries Management Act* 1991 (Cth) which authorised the forfeiture of fishing vessels for a violation of the Act. The master of a vessel was convicted under the Act and the vessel was forfeited. The owner of the vessel was not involved in any way with the offences, but, of course, the forfeiture affected him directly. He claimed that the forfeiture of an innocent

53 *Federal Council of the British Medical Association in Australia v The Commonwealth* (1949) 79 CLR 201 at 270, where Dixon J stated that the protection given by section 51(xxxi) 'is a protection to property and not to the general commercial and economic position occupied by traders'. The real issue was whether the limitation against civil conscription applied (section 51(xxiiiA)).

54 Above n18 at 259.

55 Id at 260; for a general discussion, see Williams, above n52 at 85–91; Bradley Selway, 'The Rise and Rise of the Reasonable Proportionality Test in Public Law'(1996) 7 *Public LR* 212; Stephen Gageler and Arthur Glass, 'Constitutional Law and Human Rights' in David Kinley (ed), *Human Rights in Australian Law: Principles Practice and Potential* (1998).

56 (1994) 179 CLR 270 (hereinafter *Lawler*).

person's property was disproportionate to the ends sought by the Act, and hence beyond the Commonwealth's legislative powers.[57] The court did not accept his argument, but some of the statements indicate that proportionality could have a role to play in such cases. In particular, Deane and Gaudron JJ stated that, as a general rule, a law authorising forfeiture is valid only if it is 'reasonably incidental to the power in question', and this 'will usually involve a consideration of whether it is reasonably capable of being seen as appropriate and adapted to achieving, or, as reasonably proportionate to some object or purpose within power'.[58] Deane and Gaudron JJ stated that a law for the forfeiture of the property of an innocent third party would not normally 'satisfy the tests which reveal whether a law is reasonably incidental to a head of legislative power.'[59] On the facts before them, however, they concluded that the owner could have exercised some control over the use of the vessel and hence the difficulty of regulating the fishery justified the use of a strict enforcement regime. Nevertheless, their dicta is important, because it shows that they regard the degree to which laws intrude on private proprietary interests as an important factor to be considered in determining whether a provision is disproportionate. In this respect, there are similarities with the due process clause of the United States' Constitution, in the sense that the impact of property rights is relevant to the issue of constitutionality. To be sure, the similarities only go so far, as the Australian Constitution contains neither an express nor implied right to due process in relation to property. Nonetheless, the similarities raise questions about constitutional interpretation and structure in Australia.

This brings us back to the point about the imposition of financial liability and section 51(xxxi). Suppose that, in Australia, Parliament enacted legislation similar to the *Coal Act* and, like the Supreme Court in *Eastern Enterprises v Apfel*, the High Court decided that the legislation should not stand. In *Eastern Enterprises v Apfel*, O'Connor J believed that the decision should be justified on the basis that the Act infringed the takings clause, rather than the due process clause. In Australia, however, this choice would be cast in terms of the distribution of legislative powers. Commonwealth legislation would only be valid if only if it could be shown that it was enacted under either section 51(xxxi) or under some other head of power. However, it would not be valid under section 51(xxxi) if it failed to provide just terms, and it would not be valid under another power if it lacked a sufficient connection with a head of power. The point here is that the protection of property is not limited to the just terms condition of section 51(xxxi), even though the Constitution provides no general right to due process in relation to property. Accordingly, it is not enough to justify a broad interpretation of 'acquisition of property' on the sole basis that the purpose of the just terms

57 The relevant head of power was s51(x) (fisheries beyond the territorial waters). The court rejected an argument that forfeiture was an 'acquisition of property' under s51(xxxi): see below, text accompanying n78.

58 Above n56 at 286; see also McHugh J at 292.

59 Id at 286.

condition is the protection of the property, since other provisions and principles also have the effect of protecting property. Where section 51(xxxi) does not apply, the extent to which property and economic interests are protected depends on whether the proportionality test applies.

So the question that must be answered is: how widely does the idea of proportionality apply? In this respect, in *Lawler*, Dawson J declined to follow Deane and Gaudron JJ's use of the proportionality test. He stated that '[t]he question is, of course, one of connexion, not whether the means adopted to achieve the end are appropriate or desirable in the view of the court.'[60] Other members of the High Court have continued to express doubts over the use of the proportionality test. For example, in *Leask v Commonwealth*, McHugh J stated that '[i]f there is a sufficient connection between a subject of federal power and the subject matter of a federal law, it matters not that the federal law is harsh, oppressive, or inappropriate or that it is disproportionate or ill adapted to obtain the legislative purpose.'[61] Determining whether the law does have a sufficient connection focuses on its practical and legal operation, which in turn focuses on the 'rights, powers, liabilities, duties and privileges which it creates'; the connection is not established only if the connection is 'so "insubstantial, tenuous or distant" that it cannot sensibly be described as a law 'with respect to' the head of power'.[62] As such, the impact on a property owner is not important.

Proportionality applies in only two exceptional situations. The first is where it is claimed that a law was enacted under a purposive head of power, since 'a court must ask whether it is a law for the specified purpose, and the court may have to inquire into whether the law goes further than is necessary to achieve that purpose.'[63] If, for example, it was argued that legislation was enacted pursuant to the defence power, it would be necessary to ask whether any infringement of property was reasonably proportionate to the legislative objective.[64] Since most powers are not purposive, this exception gives little practical scope for applying the proportionality test. The second exception relates to fundamental rights or other limitations on heads of power in favour of individuals or States. In such cases, the High Court has applied the proportionality test to determine how far a law may intrude on protected rights and interests.[65] Since there is no express or implied general right to property, this exception is also of limited importance to property.

The most recent consideration of the application of the proportionality test in relation to property is found in *Airservices Australia v Canadian Airlines*

60 Id at 291.

61 (1996) 187 CLR 579 at 616.

62 Id at 601–602 (Dawson J), quoting from *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 368–369 (McHugh J), who refers to *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31at 79 (Dixon J).

63 Ibid (Dawson J).

64 See *The King v Foster* (1949) 79 CLR 43 at 97: where the High Court stated that in relation to warrants of possession that were issued under the defence power, the scope of the defence power 'must be measured by the exigencies that are involved.'

International Ltd.[66] The *Civil Aviation Act* 1988 (Cth) allowed the Civil Aviation Authority ('CAA', now Airservices Australia) to charge airlines for air traffic, rescue, fire fighting and meteorological services. The Act also created a lien over aircraft as security for amounts owing to the CAA. The CAA provided services to Compass Airlines and liens over aircraft that Compass held on lease and sub-lease from the respondent owners. The Act made it clear that such liens were effective against the owners, even where the owners were not liable for the charges secured by the liens. The owners claimed that the provisions authorising the liens were acquisitions of property under section 51(xxxi) of the Constitution that were not on just terms. Alternatively, if they were not acquisitions under section 51(xxxi), they were invalid as a disproportionate exercise of whatever head of power under which they were enacted.

The majority held that the imposition of the lien did not amount to an acquisition of property under section 51(xxxi). For these judges, the real issue was whether the enactment of the lien provisions fell within the scope of some other head of power, such as section 51(i) (the trade and commerce power) or section 51(xxix) (the external affairs power). On this issue, Gleeson CJ and Kirby J, and McHugh J (in a separate judgment) applied the 'appropriate and adapted test' from earlier cases, but emphasised that it was not necessary or even desirable to consider alternative measures that might have been employed to secure payment of the charges.[67] Hence, the liens provisions were validly enacted under these heads of power. Hayne and Gummow JJ (in separate judgments) stated simply that the lien provisions bore a sufficient connection with the trade and commerce power, without explaining how the connection had to be established. Gaudron and Callinan JJ (in separate judgments) held the liens were invalid as they amounted to an acquisition of property for which just terms should have been provided. Hence, it was not necessary for them to consider when a proportionality test should have been applied. On balance, therefore, the issue was only considered at length by Gleeson CJ, Kirby J and McHugh J, and they indicated that it was not necessary to apply the proportionality test.

Nevertheless, there were aspects of the judgments that appear to reflect the elements of the proportionality test. For example, Gleeson CJ, Kirby J and McHugh J remarked that the conduct of the respondents was connected with operations of Compass.[68] That is, the availability of the CAA's services made it possible for Compass to fly safely, and hence the CAA had provided an indirect benefit to the owners of the aircraft. In addition, the owners knew that Compass would fly the aircraft and could have discovered easily that Compass would

65 See for example, *Levy v The State of Victoria* (1997) 189 CLR 79 and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; see also Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *MULR* 1; Hoong Phun Lee, 'Proportionality in Australian Constitutional Adjudication' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) at 126; and the works cited above, nn52 and 55.

66 (1999) 167 ALR 392.

67 Id at 415 (Gleeson CJ & Kirby J), at 476 (McHugh J).

68 Id at 416 (Gleeson CJ & Kirby J), at 476 (McHugh J).

thereby incur charges for the CAA's services, and that the liens would be applied to the aircraft. Gleeson CJ, Kirby J and McHugh J also noted that aircraft operators often have few assets other than aircraft and that aircraft are mobile assets; hence, it was desirable for the CAA to have some kind of security over the aircraft to ensure payment of its debts. If there had been no connection between the lienees and the lienors, the lien provisions might not have been appropriate and adapted to the objective of obtaining payment for the services. If, for example, the provisions authorised the seizure of other property belonging to the aircraft owners, the court might have declared them unconstitutional.[69] In this sense, the test of sufficient connection is not as far removed from proportionality as it might appear, since it asks whether the impact on private interests can be justified. To be sure, it is a very loose, impressionistic type of proportionality, since the majority made it clear that they did not consider it necessary or even worthwhile to consider the viability of alternative means of securing payment of the charges. Nevertheless, the point is that there is a kind of proportionality in operation.

Since the rejection of proportionality has been equivocal, we may ask why the High Court is so reluctant to adopt anything more than a loose or impressionistic approach to proportionality. Two primary reasons are evident from the cases. The first focuses on the apparent precision of some versions of the proportionality test. In Canada, in particular, the proportionality test applicable to section 1 of the *Canadian Charter of Rights and Freedoms* involves a detailed multi-step inquiry into questions of fact and policy.[70] In *R v Oakes*, the Supreme Court of Canada stated that section 1 requires the government to show that legislation which does infringe a right or freedom relates to 'concerns which are pressing and substantial in a free and democratic society'.[71] If it does show that this is the case, it must then show: firstly, that the means chosen to achieve the legislative objective are 'rationally connected' to that objective; secondly, that the legislation impairs the right or freedom as 'little as possible'; and thirdly, that the impairment is proportional to the objective.[72] While the *Airservices* approach takes the impact on property rights into account, it is does not frame the analysis with this sort of precision. It seems that so long as the legislation does not offend the judges' sense of what is fair or reasonable, as well as their sense of the limits on their ability and power to determine social issues, the legislation can stand. This does not mean that the High Court would not consider factors that would be taken into account by the Supreme Court when faced with a similar issue, but that the High Court would not need to articulate the reasons for a decision in the same way as the Supreme Court. In particular, it means that the High Court can avoid a detailed consideration of the second step of the *Oakes* test; that is, it is not necessary to ask whether the Commonwealth could have adopted a less drastic means of achieving the same

69 Id at 475 (McHugh J).

70 Section 1 provides that the rights and freedoms set out in the *Charter* are 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

71 (1986) 26 DLR (4th) 200 at 227 (Dickson CJC).

72 Ibid.

legislative objective. George Williams describes this as the core of the *Oakes* test, and it is this aspect of the test to which the Australian judges seem most anxious to avoid committing themselves.[73] Australian judges do refer to the lack of less drastic measures where it supports their argument, but they do not feel bound to discuss alternatives in every case. In *Airservices Australia*, for example, the aircraft owners argued that the CAA could have ensured payment by requiring either bank guarantees or payment in advance for services. The majority did not question the effectiveness of these alternatives, but treated them as irrelevant.[74] Similarly, the High Court does not feel the need to consider empirical evidence of the social or economic background against which legislative policy is enacted. In *Lawler*, *Leask* and *Airservices Australia*, where the validity of the legislation was founded on the practical difficulties of law enforcement, the court accepted the Commonwealth's descriptions of these difficulties at face value. In this sense, the Australian approach does not make proportionality irrelevant, but it does give the judges much greater control over how proportionality should be determined.

The second reason concerns the compatibility of the proportionality test with the structure of the Australian constitutional system. As others have noted, the principle of proportionality has been derived from the jurisprudence of the European Court of Human Rights, where the court developed the test as a means of determining whether an infringement of a protected right exceeds the limitations expressly provided by the Convention.[75] The test is compatible with the overall structure of the Convention, since both the test and the Convention attempt to balance private and public interests. The same could be said of the Canadian *Charter of Rights and Freedoms* and the *Oakes* proportionality test. By contrast, the Australian Constitution is more concerned with the balance between the Commonwealth and the States, and the primary responsibility for protecting human rights has been given to legislative bodies. Some High Court judges have said that it is inappropriate to interpret the Constitution by reference to a doctrine that arose in the context of a human rights instrument, because the Constitution takes a fundamentally different approach to the protection of individual interests.[76] In this sense, the only type of proportionality test that could be applied to all section 51 powers would be one that asks only whether legislation infringes state interests disproportionately, and not whether legislation infringes private interests disproportionately. If this seems to ignore private interests, the defence would be simply that the Constitution makes legislatures responsible for the protection of private interests, rather than the courts. Hence, this version of a proportionality test would protect private interests, but only by ensuring that Commonwealth does not make it impossible or impracticable for a State to protect those interests. From this perspective, the problem with proportionality is not that it is over-precise, or that

73 Williams, above n52 at 90.

74 See above n66 at 415 (Gleeson CJ & Kirby J: 'It is not to the point that it is possible to imagine other steps which might be taken to provide security for payment of charges and penalties. The Parliament has decided upon this regime for Australia.') See also at 476–477 (McHugh J).

75 See Williams, above n52 at 85–91; Kirk, above n65; Lee, above n65.

76 See, in particular, above n61 (Dawson & Toohey JJ).

it requires the courts to determine social policy issues, but that it changes fundamentally the mode of protecting individual interests that the Constitution is based upon.

In terms of compatibility with the design of the Constitution, this argument has much to commend it. The difficulty is that litigants are not motivated by considerations of constitutional design. In cases such as *Lawler* and *Airservices Australia*, the property owners brought proceedings because they felt that legislation impinged on their rights excessively, even though their legal arguments relied upon constitutional provisions that were intended to allocate powers between the Commonwealth and the States. For these owners, the substance of their complaint related to the deprivation of their property, and not to the federal structure of Australia. Judges, of course, are motivated by different considerations than litigants. Nevertheless, the High Court has not found it possible to say that the impact on property is irrelevant to the issue of characterisation. In both *Lawler* and *Airservices Australia*, the majority indicated that there were limits to the powers the Commonwealth could assume in relation to property, irrespective of the difficulties of enforcing specific laws. In both cases, the majority were anxious to make the point that the property owners did have some relationship with the person in breach of the relevant laws, and that the owners had some influence over the person in breach. For this reason, it is more accurate to say that there is a proportionality test in operation, but that it is applied with a high level of deference to the judgment of Parliament.

The problem is that there may still be cases where court believes that an intrusion on individual interests is so great that legislation cannot be permitted to stand. In such cases, judges must decide whether to rely on doctrines that may appear to give the courts an unrestrained power over economic policy, or to see if a narrower basis for review can be found. Developing a broad power of review is bound to be controversial, but attempting to rely on a narrower basis for review may be difficult to reconcile with existing doctrines. In the United States, this tension was evident in the divergent approaches of O'Connor J and Breyer J in *Eastern Enterprises v Apfel*. In Australia, it is evident in cases where the High Court attempts to explicate the substance of an acquisition of property under section 51(xxxi).[77] In *Eastern Enterprises v Apfel*, Breyer J felt that O'Connor J was asking the takings clause to do more than it should. In Australia, we may ask whether the reluctance to rely on the proportionality test may also put a similar strain on the interpretation of section 51(xxxi).

5. *Just Terms and Acquisitions of Property*

The interpretation of 'just terms' also sheds some light on the court's view of the proper scope of section 51(xxxi) and, specifically, the substance of an acquisition of property. The principle that terms must be just could be read as a minimal requirement that there must be a fair balance between the public and private

77 Compare Adrienne Stone, 'Incomplete Theorizing in the High Court' (1998) 26 *Fed LR* 195–205.

interest in the affected property; in other words, it would not necessarily guarantee full compensation for every acquisition of property. If this was the case, section 51(xxxi) could have some application in cases where no monetary compensation was payable. As such, the just terms condition would serve a function similar to that of both the due process and takings clauses of the Constitution of the United States; as such, the just terms condition would represent something like a proportionality test, but within the confines of section 51(xxxi) rather than the general test for a sufficient connection with one of the other heads of legislative power.

In fact, however, this is not the approach taken by the High Court, as it first indicated in *Burton v Honan*[78] in relation to the forfeiture of goods under the *Customs Act* 1901–1950. As in *Re Director of Public Prosecutions; ex parte Lawler*, the legislation allowed for the forfeiture of the property of a person innocent of any crime. In *Burton v Honan*, customs legislation provided that a conviction would operate as a condemnation of goods in the possession of the guilty person. The owner was not given an opportunity to challenge the condemnation. It was argued that forfeiture was an acquisition of property although, in this context, the just terms condition amounted to no more than a constitutional guarantee of due process. The court rejected this argument, as it held that forfeiture falls entirely outside section 51(xxxi) and accordingly there was no requirement for just terms, even in the limited form of an opportunity to challenge the seizure of the goods. Similarly, in *Lawler*, Deane and Gaudron JJ stated that section 51(xxxi) 'applies only to acquisitions of a kind that permit of just terms. It is not concerned with laws in connection with which "just terms" is an inconsistent or incongruous notion.'[79] In principle, this is the same point that was made by the Supreme Court of the United States in *First English Evangelical Lutheran Church* and by Breyer J in *Eastern Enterprises v Apfel*, in relation to the takings clause.[80] However, in the United States, the due process clause remains the logical basis for judicial review. In Australia, any purely procedural guarantee must be found within the terms of the constitutional power under which the legislation authorising forfeiture was enacted. This, of course, is what Deane and Gaudron JJ were prepared to do in *Lawler*, and their approach demonstrates how the interpretation of 'acquisition of property' and the doctrine of proportionality could work together.

If, as *Burton v Honan* shows, 'just terms' necessarily involves some *quid pro quo* for the property owner, what is it that is required? If monetary compensation is required, what is the measure of the compensation? And, more generally, does the measure of compensation reveal anything about the meaning of 'acquisition of property'? The issue here is whether 'just terms' requires only that public and private interests are fairly balanced, or whether it requires full compensation in every case. The two are distinct: fairness to the owner does not necessarily require

78 (1952) 86 CLR 169.

79 Above n56 at 285. See also *Airservices Australia*, above n66 (McHugh J).

80 Above n46.

full compensation for all losses arising from the acquisition.[81] If, for example, a property owner benefits from the scheme of which the acquisition is part, a 'fair compensation' standard might require them to be taken into account. One practical situation concerns land planning regulations: restrictions on the use of land deprive the owner of some of his or her rights in land, but the effect on the neighbourhood may be such that the value of his or her land increases. Moreover, it is not necessarily in the owner's interest to be compensated for every deprivation of property, no matter how slight, since a general policy of full compensation would result in administrative costs that could easily result in an increase in the tax burden that would be greater than any compensation received.

Quick and Garran remarked that section 51(xxxi) only requires a fair balance between the public and private interest.[82] They suggested, for example, that it was legitimate to take into account any offsetting benefits the owner realised as a result of the scheme of which the expropriation was part. [83] In some cases, however, the High Court has taken a position that appears more favourable to the property owner that Quick and Garran seemed to believe that 'just terms' require. For example, in *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth*,[84] where the Commonwealth requisitioned a printing press for military use, the High Court held that the payment of the market price of the press did not satisfy the just terms condition. Further compensation had to be given for the loss of future profits. Similarly, in *The Commonwealth v Huon Transport Proprietary Limited*, Rich J stated that the just terms condition requires payment of interest where there is a delay between the acquisition and payment, on the basis that:

> When a person is deprived of property, no terms can be regarded as just which do not provide for payment to him of the value of the property as at date of expropriation, together with the amount of any damage sustained by him by reason of the expropriation, over and above the loss of the value of the property taken. The amount so ascertained is no more than the just equivalent of the property of which he has been deprived.[85]

Other cases from this period reveal that other judges took a different view. In a dissenting judgment in *Dalziel*, Starke J stated that:

> Under the Australian Constitution the terms of acquisition are, within reason, matters for legislative judgment and discretion. It does not follow that terms are unjust merely because 'the ordinary established principles of the law of compensation for the compulsory taking of property' have been altered, limited or departed from, any more than it follows that a law is unjust merely because the

81 The following discussion draws on Frank Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' (1967) 80 *Harv LR* 1165.

82 Above n5 at 641. See also Williams, above n52 at 148–149.

83 Ibid.

84 (1943) 67 CLR 314.

85 Above n30 at 306–307.

> provisions of the law are accompanied by some qualification or some exception which some judges think ought not to be there. The law must be so unreasonable as to terms that it cannot find justification in the minds of reasonable men.[86]

Subsequently, in *Grace Bros Pty Ltd v The Commonwealth*, Starke J repeated this passage from *Dalziel*;[87] in this case, he was in the majority. In a concurring judgment, Dixon J stated that the just terms condition does not require the Commonwealth to restore the property owner to the pre-acquisition state. Rather, the question is '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.'[88] Similarly, Latham CJ stated that '[j]ustice involves consideration of the interests of the community as well as of the person whose property is acquired.'[89]

The issue also arose in several cases concerning marketing schemes under which the Commonwealth acquired the annual production of certain crops. Growers were paid for their crops, but the amount did not depend solely on the market value of the crops. Indeed, in some cases, the amounts paid exceeded the market values. However, in *The Australian Apple and Pear Marketing Board v Tonking*,[90] the plaintiff claimed that the scheme left him worse off because the amount of compensation did not reflect the superior quality of his produce. As one might expect, the judges who regarded section 51(xxxi) as a guarantee of fundamental rights held that the terms were not just. So, for example, Rich J stated that '[e]ach individual grower has a legal right to be paid the full value of his fruit, and some growers must not be underpaid so that other growers may be overpaid – any regulations which allow this to be done must be unjust.'[91] However, in *Nelungaloo Proprietary Limited v The Commonwealth*,[92] the 'fair compensation' standard was applied. It concerned a pooling scheme under which the Australian Wheat Board compulsorily acquired wheat for resale. The scheme operated in a manner which provided a subsidy to wheat growers if the export price for wheat fell below a guide price, but it also imposed tax on wheat growers if the export price exceeded the guide price. In *Nelungaloo*, growers claimed that the Wheat Board had acquired their wheat on terms that were not just, because they did not receive the price that they could have obtained if they had had direct access to the export market. They argued that, in effect, they were subsidising domestic consumers when the export prices rose above the guide price, contrary to the spirit of *Tonking's Case*. The High Court dismissed their claim, in part because section 51(xxxi) does not guarantee full compensation or payment of the market value of goods. Dixon J. stated that just terms 'appears to refer to what is fair and just between the community and the owner of the thing taken ... Unlike

86 Above n8 at 291; see also Williams J at 308.
87 Above n51 at 285.
88 Id at 290.
89 Id at 280.
90 Above n30.
91 Id at 107.
92 (1947–48) 75 CLR 495.

"compensation", which connotes full money equivalence, "just terms" are concerned with fairness.'[93]

Despite the fact that the interpretation of 'just terms' arose in a number of cases in this period, no clear doctrine emerges. While some judges (Rich and Williams JJ in particular) maintained consistently that 'just terms' had to be equated with full compensation, other judges were inclined to a standard based on 'fair' compensation. Even so, the 'fair compensation' judges sometimes required full compensation. In the *Bank Nationalisation Case*, for example, Starke J stated that '"just terms" require that a party whose property is acquired shall have the pecuniary equivalent of the property acquired',[94] despite his statements in *Dalziel* and *Grace Bros*. It is therefore somewhat surprising that the issue has received comparatively little attention in the modern cases.

The lengthiest discussion on the meaning of 'just terms' in recent cases is that of Kirby J in *Commonwealth of Australia v State of Western Australia*,[95] in relation to provisions of the Defence Regulations that gave the Commonwealth the right to use land belonging to Western Australia (and others) for defence practice. The Regulations provided that the Commonwealth would pay 'reasonable compensation' to anyone who suffered 'loss or damage' as a result. There was no express provision for interest or other expenses incurred as a consequence of the defence activities, and so Western Australia argued that the Commonwealth had attempted to acquire property otherwise than on just terms. Kirby J stated that the object of the just terms condition is to 'ensure economic fairness to the State or person whose property has been acquired' and that the 'true costs' of the Commonwealth's activities 'will not fall unjustly on those whose property rights are extinguished or diminished'.[96] In addition, it enhances Parliament's accountability to taxpayers, since it forces Parliament to take the aggregate costs of its activities into account when deciding which activities to undertake.[97] While Kirby J was not seeking to lay down fixed rules for the assessment of compensation, his emphasis on the cost of Commonwealth activities suggests that property owners should be indemnified fully against the losses caused by the acquisition of property. For example, suppose that, in *Western Australia*, the Commonwealth had to choose one of two equally suitable plots of land for defence practice, and compensation would not have been payable for using either plot. In this situation, the Commonwealth would have no incentive to determine the relative impact of defence practice on the owner of each plot. A rule of full indemnification would force it to compare the aggregate cost of using each plot, as measured by the losses inflicted on property owners by the military use of each plot. By this reasoning, it would not be sufficient only to require payment of the

93 Id at 569.

94 Above n13 at 300.

95 [1999] HCA 5.

96 Id at para 194. The majority found that the question did not need to be answered because there was no acquisition of property. However, Kirby J found that an acquisition had occurred, and hence that it was necessary to determine whether the Regulations provided 'just terms'.

97 Ibid.

market value of each plot, because market values would not necessarily reflect the full cost to the owner of military use.[98] In *Western Australia*, Kirby J concluded that the Defence Regulations could stand, but only because the provision for 'reasonable compensation' could be construed to include payment for any unusual expenses associated with the loss of property as well as payment of interest 'if this were necessary to render the compensation "reasonable" where otherwise it would not be'.[99]

This approach seems to rule out any sort of broad balancing test between the private interests of the property owner and the public interest, as represented by the Commonwealth. Kirby J did not say this explicitly, and it may be unfair to interpret his judgment in this way. However, other judges have indicated recently that 'just terms' does requires full compensation, as opposed to a rough balance between private and public interests. This is quite clear in Brennan J's judgment in *Georgiadis v Australian and Overseas Telecommunications Corporation*, where he stated that:

> In determining the issue of just terms, the court does not attempt a balancing of interests of the dispossessed owner against the interests of the community at large. The purpose of the guarantee of just terms is to ensure that the owners of property compulsorily acquired by government presumably in the interests of the community at large are not required to sacrifice their property for less than its worth. Unless it be shown that what is gained is full compensation for what is lost, the terms cannot be found to be just.[100]

This statement is interesting, because the facts in *Georgiadis* are similar to those of *Nelungaloo*. The legislation in *Georgiadis* was intended to replace the tort system of compensation for employment-related injuries with a no-fault system.[101] The amount of compensation under the no-fault system would have been less than the amount under the tort system, but the number of employees who would have been entitled to compensation would have been greater. Plainly, employees who could have proved fault were left worse off; in a sense, the savings on their compensation were distributed amongst other injured employees. In *Nelungaloo*, this kind of redistribution was accepted, since growers were not left worse off over the long run. In *Georgiadis*, however, the possibility that a no-fault system of compensation for injuries might have been fairer in the broader perspective was irrelevant; in essence, Brennan J adopted the approach in *Tonking's Case*.

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98 Compare *Pennell v City of San Jose* 485 US 1 (1988) at 15–24 (Scalia J); Jack Knetsch & Thomas Borcherding, 'Expropriation of Private Property and the Basis for Compensation' (1979) 29 *U of T LJ* 237; Lawrence Blume, & Daniel Rubinfeld, 'Compensation for Takings: An Economic Analysis' (1984) 72 *Cal LR* 569.

99 Above n95 at para. 195.

100 Above n23 at 310–311. See also J Callinan in *Western Australia*, above n95 at para. 286–287, where he quoted from Dixon J's judgment in *Grace Bros* (above n51), but then suggested that 'fair and just standards of compensation' require full compensation (or, at the very least, the payment of interest).

101 It applied only to Commonwealth employees.

Although the position is not as clear as Brennan J suggested in *Georgiadis*, it is worth considering why he felt it necessary to take such a strict view on compensation. As argued above, it may not be necessary to provide full compensation to ensure that a property owner is treated fairly in a particular case.[102] By ruling out the consideration of counter-balancing benefits, as well as the general public interest, Brennan J makes it clear that an acquisition of property must be viewed in isolation. In this sense, an acquisition of property differs from the imposition of a financial liability or other types of economic loss, since the amount of compensation paid for expropriated property may differ from the actual net economic loss suffered by the property owner.

If, for example, section 51(xxxi) did allow compensation to be based on the net economic loss, the distinction between an acquisition of property and pure economic loss would be more difficult to justify. In this indirect way, Brennan J reinforces the idea that there is a difference in substance between an acquisition of property and other types of economic loss. Precisely what this difference is, or why it should be made, is not explained. With respect to the loss actually suffered, one could contrast the individual's obligations in expropriation with an imposition of a purely financial liability. That is, the expropriation order can only be discharged by the transfer of property described in the order, in the sense that it is not normally possible to discharge the order by substituting other assets or by procuring another person to act as a substitute or proxy for the owner's performance. If the impact of the state-imposed obligation could be avoided or reduced by substitution, then the loss is avoidable in a way that it is not in the ordinary acquisition of property. Where losses can be mitigated, there is greater reason to value the loss in the context of such mitigation.

While the idea of non-substitution might explain why full compensation is necessary, it has to be said that it has not been accepted by the court. That is, the 'identifiable and measurable advantage' formula indicates that section 51(xxxi) applies even where the Commonwealth obtains only a financial advantage. Hence, the court seems to be asking section 51(xxxi) to do more than Brennan J's interpretation of 'just terms' warrants.

6. *Regulation, Acquisitions by Third Parties and the 'Purposes of the Commonwealth'*

The other main issue connected with the interpretation of 'acquisition of property' concerns acquisitions by third parties. Legislation may give one private person the power to acquire property compulsorily from another, or it may have the effect of transferring property rights from one party to another. The question of third party acquisitions is a difficult one, and it has been brought into sharper focus by the court's generosity in interpreting 'acquisition of property' and 'just terms'. The regulation of property usually involves a restriction or deprivation of one person's property rights, and this often gives another person an 'identifiable and measurable

102 Above, n81 and accompanying text.

advantage' as a consequence. If 'just terms' means full compensation, and nothing else, it could be argued that the person disadvantaged by regulation should be entitled to full compensation for the diminution in value of their property.

Section 51(xxxi) does not state clearly whether it applies to third party acquisitions. In some cases, the court has drawn attention to the fact that section 51 provides Parliament with 'power to make laws for the peace, order and good government of the Commonwealth with respect to' the enumerated heads of power, including the power to acquire property on just terms. In *PJ Magennis Pty Ltd v The Commonwealth & Others*,[103] the Commonwealth agreed to provide funds for New South Wales to acquire land. Commonwealth legislation referred to the agreement explicitly, and so the court held that the legislation was subject to the just terms condition of section 51(xxxi). It did not matter that the Commonwealth did not acquire the land, nor that New South Wales did not derive its power to acquire from the Commonwealth, because Parliament had legislated 'with respect to the subject of the acquisition of property.'[104]

Whether section 51(xxxi) would apply to the regulation of property was addressed in *Trade Practices Commission v Tooth and Co Ltd*,[105] which concerned provisions of the *Trade Practices Act* 1974–1978 (Cth) that made it illegal, *inter alia*, for a landlord to refuse to renew the leases of tenants who sold products of the landlord's competitor. In this case, a landlord claimed that the provisions effected an acquisition of their property in favour of the tenants, without just terms. Ultimately, the majority of the court decided that the interference with the landlord's rights was not serious enough to constitute an acquisition of property.[106] However, it also made it clear that section 51(xxxi) did not apply solely to acquisitions by the Commonwealth. Mason J stated that limiting section 51(xxxi) in this way would be 'at variance with the policy which underlies par. (xxxi.) and the protection which it gives to the citizen against compulsory acquisition of his property otherwise than on just terms.'[107] Accordingly, he focused on the nature of the interest acquired, rather than the identity of the acquirer.

The interpretation of 'just terms' may also shed some light on this issue. As explained above, property owners who are disadvantaged by the regulation of property may receive other benefits that offset their losses. The likelihood of obtaining offsetting benefits depends on many factors, such as the influence the owners would have on other governmental decisions. Hence, determining whether compensation is necessary seems to require a more flexible approach than a strict

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103 (1949) 80 CLR 382.

104 Id at 402 (Latham CJ). (The legislation could not stand because the agreement did not provide just terms, as it provided that the price paid for land would not exceed its value on February 10, 1942, which, in some cases, fell far below the market value.)

105 (1979) 142 CLR 397.

106 The landlords remained free to increase the rent and to refuse to renew a lease on any grounds except those specifically mentioned in the Act.

107 Above n105 at 426. See also *Australian Tape Manufacturers Association Ltd v The Commonwealth*, above n29.

interpretation of 'just terms' allows. It is therefore worth asking whether court's interpretation of 'just terms' affects, or should affect, this aspect of the interpretation of 'acquisition of property'. As explained above, it was not clear whether the Commonwealth would have the power to acquire property without an express provision to that effect, and the inclusion of section 51(xxxi) therefore resolved any doubts that may have existed in this respect.[108] The just terms condition was added to ensure that the Commonwealth did not abuse its powers of procurement.[109] This remains a valid point, because the power to acquire property carries certain risks that do not arise in relation to other sovereign powers over property.[110] In particular, in the absence of a constitutional limitation on the power to acquire property, there is a risk that governments would obtain resources by taking property without payment, or on payment at a level far below the market value. Again, this relates to the court's interpretation of 'just terms', because a requirement of full compensation removes the incentive for this type of abuse. By this reasoning, however, full compensation is needed only in cases of procurement, because the risk of an abuse of power is not as great where the government is not procuring resources for its own use.[111] Typically, regulation does not involve an acquisition of property by the government, but merely a deprivation or extinction of property rights. Where regulation brings about a deprivation of property rights, the risk of an abuse of power can be controlled by other means, such as full consultation with affected parties. In doctrinal terms, these controls translate into a principle of due process or proportionality, rather than a principle of full compensation.

Although the High Court tends to focus on the protection of citizens as the purpose of the just terms condition,[112] there is a series of decisions in which the reasoning is compatible with the view that section 51(xxxi) should be confined to cases of government procurement. In the majority judgment in *Attorney-General (Cth) v Schmidt*,[113] Dixon CJ stated that section 51(xxxi) is 'pointed at the acquisition of property by the Commonwealth for use by it in the execution of the functions, administrative and the like, arising under its laws.'[114] He focused on the reference in section 51(xxxi) to the acquisition of property 'for any purpose in respect of which the Parliament has power to make laws', which he described as follows:

> The expression 'for any purpose' is doubtless indefinite. But it refers to the use or application of the property in or towards carrying out or furthering a purpose

108 See above, text accompanying nn5–7.

109 Quick & Garran, above n5 at 641.

110 Joseph L Sax, 'Takings and the Police Power' (1964) 74 *Yale LJ* 36; see also Jed Rubenfeld, 'Usings' (1993) 102(4–6) *Yale LJ* 1077 and compare RL Hamilton, 'Some Aspects of the Acquisition Power of the Commonwealth' (1973) 5 *Fed LR* 265 at 291–293.

111 See Sax, ibid.

112 But compare *Commonwealth of Australia v State of Western Australia*, above n95 at para 194, where Kirby J stated that requiring compensation for acquisitions of property made the government accountable for the costs of its activities.

113 Above n30 at 372.

114 Ibid.

> comprised in some other legislative power. It covers laws with respect to the acquisition of real or personal property for the intended use of any department or officer of the Executive Government of the Commonwealth in the course of administering laws made by the Parliament in the exercise of its legislative power.[115]

He doubted that section 51(xxxi) would extend to any acquisition of property which 'lies outside the very general conception expressed by the phrase "use and service of the Crown".'[116] Hence, in *Schmidt*, section 51(xxxi) did not apply to legislation authorising the seizure of enemy property, because the property was not acquired for the 'use and service of the Crown', but as a penal provision. As discussed above, similar reasoning is found in *Burton v Honan*, and more recently in *Lawler*.

Although the reasoning in *Schmidt* supports the argument that section 51(xxxi) is limited to procurement, it did not concern a transfer of property from one private party to another. The reasoning in both *Magennis* and *Trade Practices Commission v Tooth* suggests that *Schmidt* should be limited to cases where third parties are not involved. Indeed, in *Trade Practices Commission v Tooth*, several members of the court doubted that Dixon CJ was correct in saying that section 51(xxxi) applies only to acquisitions for the 'use and service of the Crown'.[117] However, in more recent cases, the court seems to have returned to Dixon J's view. This is apparent in *Mutual Pools and Staff Pty Ltd v The Commonwealth of Australia*,[118] which concerned claims to a refund of a tax that had been unlawfully imposed in respect of the construction of swimming pools. Although the pool builders had paid the tax, many of them had collected the tax from their own customers. In such cases, the legislation provided that the Commonwealth would pay the tax to the customers and that the builder's claim to a refund would be extinguished. The majority of the court held that the extinction of the claims amounted to an acquisition of property; however, it also held that the legislation was not enacted under section 51(xxxi), because the Commonwealth had no intention of using the fund for its own purposes. Arguably, the customers had acquired the builder's property in the fund, but any such acquisition lay outside section 51(xxxi), because the legislation 'provided a means of resolving or adjusting competing claims, obligations or property rights of individuals as an incident of the regulation of their relationship'.[119] Even if this resolution or adjustment involves a direct transfer of property from A to B, it occurs outside section 51 (xxxi) and hence without the obligation to provide just terms. This is

115 Ibid.

116 Id at 373.

117 Above n105 at 408 (Gibbs J), at 423 (Stephen J), at 426 (Mason J) (as he then was).

118 Above n24. See also *Georgiadis v Australian and Overseas Telecommunications Corporation*, above n23.

119 Id at 171; see also Deane and Gaudron JJ at 189–190: s51(xxxi) does not apply to '...laws which provide for the creation, modification, extinguishment or transfer of rights and liabilities as an incident of, or a means for enforcing, some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest.'

apparent from *Nintendo Company Limited v Centronics Systems Pty Limited*,[120] which involved legislation that changed the copyright rules applicable to printed circuit layouts. The respondent claimed that the changes allowed the appellant to acquire property in its copyright in the circuit layout, without just terms. The court held that, even if the legislation did effect an acquisition of property, it did not infringe section 51(xxxi) because the legislation merely adjusted competing claims to resources. In particular, Dawson J stated that any acquisition of property was for the purposes of the appellant, rather than the purposes of the Commonwealth. In his view, 'purposes', in section 51(xxxi), refers to the use and application of the acquired property, rather than the motive or objective for its acquisition.[121]

It is not clear what *Mutual Pools* and *Nintendo v Centronics* have left of the principle in *Magennis* or, for that matter, *Trade Practices Commission v Tooth* and *Australian Tape Manufacturers*. The court has not stated explicitly that the reasoning in the earlier cases is incorrect, but it now seems that most third party acquisitions lie outside section 51(xxxi). There could still be exceptions; if, for example, legislation requires the third party to make the property available for Commonwealth use or consumption, section 51(xxxi) may still apply.[122] Such cases are likely to be rare, however. In addition, the court has not yet reconciled its decisions in *Mutual Pools* and *Nintendo v Centronics* with its earlier comments on the purpose of section 51(xxxi). In the cases supporting the 'identifiable and measurable advantage' formula, the court stressed the importance of protecting the citizen; similarly, in *Magennis*, *Trade Practices Commission v Tooth* and *Australian Tape Manufacturers*, the protection of the citizen was its central concern, even in relation to third party acquisitions. It remains to be seen whether the purposive interpretation of section 51(xxxi) now concentrates on a theory of government that is primarily concerned with financial incentives for abuse of power of compulsory acquisition.

7. *Conclusion*

The increase in litigation on section 51(xxxi) may be a result of an increased willingness on the part of the High Court to review legislation affecting property interests. Indeed, there are dicta in the cases which suggest that the court has become more willing to review economic legislation under section 51(xxxi). In particular, the extension of section 51(xxxi) to situations where the Commonwealth secures an 'anomalous and innominate interest', or merely an 'identifiable and measurable advantage', seems to extend the provision into the area of economic regulation. However, in most cases the court has ultimately determined that regulatory laws are not invalid by reason of section 51(xxxi).

120 (1994) 181 CLR 134.

121 Id at 164–167.

122 For example, in *Nintendo Company Limited v Centronics Systems Pty Limited*, id at 165–166, Dawson J expressed approval of *McClintock v The Commonwealth* (1947) 75 CLR 1, where it was held that s51(xxxi) applied to legislation requiring growers to deliver their pineapples to canneries, which were required to deliver the processed pineapples to the military forces.

Moreover, the interpretation of 'just terms' as full compensation and the recent emphasis on use or consumption by the Commonwealth seem closer to the original focus of section 51(xxxi). All of this suggests that the real cause for the increase in litigation may be the doctrinal uncertainty engendered by the recent decisions.

The tension underlying the interpretation of section 51(xxxi) arises from the desire to find general principles for issues that are perceived to be linked by many modern lawyers, but which were not perceived to be linked by the framers. That is, the framers would not have expected section 51(xxxi) to apply to economic interests and probably not to intangible property;[123] nor would they have expected it to apply to the regulation of property or, possibly, the acquisition of property under the executive's prerogative powers.[124] In this sense, section 51(xxxi) was thought to provide only a limited and specific type of protection for the property owner. It was only one part of a constitutional design in which other controls on legislative power were in place. This article has raised the possibility that the ultra vires doctrine, supplemented by a principle of proportionality, would provide an alternative to section 51(xxxi) in at least some of the situations that the court seems to regard as an 'acquisition of property'.

123 *See Health Insurance Commission v Peverill*, above n27 at 264 n11 (McHugh J).

124 See *Johnston Fear & Kingham & The Offset Printing Company Proprietary Limited v The Commonwealth*, above n84 at 318–319 (Latham CJ).