Overriding Guarantee of Just Terms or Supplementary Source of Power?: Rethinking s51(xxxi) of the Constitution

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> **Section 51 —** The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: **(xxxi)** The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

1. Introduction

Whether a Commonwealth law infringes the 'just terms' requirement in s51(xxxi) of the Commonwealth Constitution is perhaps one of the most common questions to arise in advising on the validity of Commonwealth legislation. Legal advisors have long faced a difficult task, however, in determining when s51(xxxi) will be engaged.

In many ways, this task has been greatly simplified in recent years, as the High Court has given a broad meaning to the concepts of 'property' and 'acquisition', and has also given a clear conceptual framework for determining when an acquisition of property will fall outside or be 'excepted' from the application of par (xxxi). In this context, the Court has said that the requirements of compensation in par (xxxi) will be inapplicable in four categories of case: (i) where the proprietary interests affected are understood to be 'inherently susceptible' to variation or termination, and thus, not protected against uncompensated acquisition; (ii) where the acquisition is such that, by its very nature and object, concepts of compensation are irrelevant or incongruous; (iii) where the law in question is not directed at an acquisition of property 'as such'; or (iv) in the face of any evidence of a contrary intention in the terms of another source of Commonwealth legislative power, whether in s51 or elsewhere.

Despite this important clarification, however, significant difficulties remain with the current exceptions-based approach.[1] Under the current approach, general rules of constitutional construction may be ignored, and in some cases a focus on form may substitute for attention to questions of substance and degree. As a result, commentators such as Evans argue that reconsideration of the approach to

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1 See for example Simon Evans, 'When is an Acquisition of Property Not an Acquisition of Property' (2000) 11 *PLR* 183 at 186.

s51(xxxi) is urgently called for, and in particular, that attention is required to the underlying values protected by s51(xxxi).

While Evans is undoubtedly correct about the need to engage in this inquiry, overseas experience would suggest that there is likely to be substantial disagreement as to the correct answer to the question posed.[2] No immediate consensus seems likely to emerge on which of any of these underlying constitutional values is to be given expression or priority under s51(xxxi).

In the interim, the main task of constitutional scholars in this area must therefore be to promote a clear and conceptually coherent debate in this area of discourse, in the hope that over time, a sufficient overlapping consensus on the scope and application of par (xxxi) will emerge.

It is against this understanding that this article is framed.

The argument made in this article is therefore necessarily a modest one: no attempt is made at this stage to provide a substantive theoretical account of the proper scope to be afforded to the protection of property rights under the Commonwealth Constitution. Rather, the article proposes what is hoped will be a *clearer* and *more transparent* approach to the application of par (xxxi). It is further hoped that this new approach may in turn have some potential to facilitate a more effective form of substantive engagement with and debate about the underlying values protected by s51(xxxi).

In essence, the argument is made for a move away from the current rule-exceptions-based approach to the power contained in s51 (xxxi) toward an approach based explicitly on a low-level proportionality-style analysis.[3]

That is, it is argued that rather than being treated as a source of power which abstracts from the content of other sources power under s51, par (xxxi) should in fact be read as a purely *supplementary* rather than primary source of power, which will be engaged where and only where no other source of power (whether in s51 or s122) can be said to support a Commonwealth enactment (a 'supplementary power' approach). In this way, no question will arise as to whether a particular acquisition is excepted from the requirements of par (xxxi): the question will rather be, whether a law has a sufficient connection to a source of power other than par (xxxi) to be upheld as valid under s51, or if not, whether the terms for any acquisition are 'just'.

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2 See for example, the ongoing debate between two of the leading normative theorists of the United States takings clause: Richard Epstein, 'Takings, Exclusivity and Speech: The Legacy of *PruneYard v Robins*' (1997) 64 *U Chic LR* 21; Frank Michelman, 'The Common Law Baseline and Restitution for the Lost Commons: A Reply to Professor Epstein' (1997) 64 *U Chic LR* 57.

3 Compare André van der Walt, 'The Constitutional Property Clause' in Janet McLean, *Property and the Constitution* (1999) at 129–34 (suggesting that the current jurisprudence has already fully embraced a proportionality-style approach). In suggesting that the Court is yet fully to embrace a clear proportionality-based approach, I am in agreement with Evans, above n1 at 203 n96 ('[a]ny proportionality-based approach is not uniformly accepted at this stage').

It is argued that both the text and legislative history of par (xxxi) provide ample support for adoption of the supplementary power approach, and further, that while this approach departs in from the abstraction rule developed by Dixon CJ in his famous judgment in *Attorney–General (Cth) v Schmidt*,[4] it in fact better reflects the overall approach taken by Dixon CJ in *Schmidt* and, earlier, in *Burton v Honan*.[5]

Further, the fact that under an ultra vires approach questions of validity would be determined almost wholly without reference to par (xxxi) would not mean that a Commonwealth law's effect on proprietary interests would be irrelevant. Rather, if the High Court were to adopt a supplementary power-based understanding, in tandem with a rights-attentive approach to determining whether a law is '*reasonably appropriate and adapted*' to an end within power, some significant protection of proprietary interests of a traditional common law (or closely analogous) kind will remain. That is, as Tom Allen has noted, an ultra vires approach has the potential to provide an important degree of protection for proprietary interests, quite apart from the operation of par (xxxi).[6] A supplementary power approach would therefore retain much of the same analytical focus as the current approach to par (xxxi), but at the same time, would offer the potential for a more transparent account of the proportionality judgments currently made by the Court under the exceptions-based approach to par (xxxi).

A. Outline

The article is divided into six parts. Part 2 outlines the Court's traditional approach to the interpretation of par (xxxi); Part 3 sets out the four modern categories of exception developed by the Court in the last decade or so. Part 4 then sets out the difficulties with the current exceptions-based approach, and sets out the arguments for its reconsideration. Part 5 explains how a supplementary power approach is consistent with the text and history of par (xxxi) and the early case law in this area. In Part 6, the argument is then made for the advantages of the supplementary power/ultra vires approach over the current exceptions-based approach, in terms of analytical consistency and transparency; and, finally, in Part 7, objections to the supplementary power approach are canvassed.

2. The Court's Current Approach

A. Defining an 'Acquisition of Property'

Section 51(xxxi) was said by Dixon J in *Bank of NSW v Commonwealth*[7] to serve a double purpose, namely: the conferral of power on the Commonwealth, and the protection of individual property holders.[8] As the basis for both a grant of power and rights-protective limitation, Dixon J held that the concept of 'property' in par

4 (1961) 105 CLR 361 (hereafter *Schmidt*).

5 (1952) 86 CLR 160 (hereafter *Burton v Honan*).

6 Compare Tom Allen, 'The Acquisition of Property on Just Terms' (2000) 22 *Syd LR* 351.

7 (1948) 76 CLR 1 (hereafter *Bank Nationalization Case*).

8 Id at 349–50 (Dixon J).

(xxxi) was to be given a broad ambit, free of 'any pedantic limitation'.[9] His Honour also held that the concept of 'acquisition' was not to be unduly limited, and should be understood to include both direct and indirect acquisitions. That is, the engagement of par (xxxi) could not be avoided by employment of a 'circuitous device'.[10]

In *Attorney–General (Cth) v Schmidt,*[11] Dixon CJ (with whom Fullagar, Kitto and Taylor JJ agreed) went on further to elaborate the principles governing an 'indirect' acquisition of property. In a much-quoted passage, his Honour said:

> [i]t is in accordance with the soundest principles of interpretation to treat as inconsistent with any construction of other powers conferred in the context which would mean that they included the same subject or produced the same effect and so authorized the same kind of legislation but without the safeguard, restriction or qualification.[12]

Dixon CJ thereby established two complementary propositions, which have formed the basis for all subsequent analyses of the meaning of par (xxxi). First, par (xxxi) is to be construed liberally and with an attention to substance over form. Under this approach, direct as well as indirect acquisitions are included within the ambit of par (xxxi) as well as acquisitions 'on behalf' of or to the benefit of a third party.[13]

Secondly, where a law may be supported by either par (xxxi) *or* another source of power under s51, the limitation contained in par (xxxi) is to be applied beyond the scope of its own terms, as if it also applied in terms to the alternative source of power ('the abstraction rule') (that is, at least if the other source of power is contained in s51 rather than s122).[14] The result is that par (xxxi) is often described, though not wholly accurately,[15] as having the status of an overriding or freestanding 'constitutional guarantee'.[16]

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9 Id at 349; 299 (Starke J). Compare previous statements in *Minister for the Army v Dalziel* (1944) 68 CLR 261 at 290 (Starke J) (term should be construed to include 'every species of valuable right and interest including real and personal property, incorporeal hereditaments … and choses in action'). See also *Dalziel* at 276, 284–285, 295.

10 *Bank Nationalization Case*, above n7 at 349.

11 *Schmidt*, above n4.

12 Id at 371–372.

13 See *McClintock v The Commonwealth* (1947) 75 CLR 1 (Rich & Williams JJ) (law authorising acquisition by pineapple canneries would fall within par (xxxi)); *PJ Magennis Pty Ltd v The Commonwealth & Ors* (1949) 80 CLR 382 (acquisition of land for the benefit of NSW within par (xxxi)).

14 Compare *Teori Tau v The Commonwealth* (1969) 119 CLR 564 (hereafter *Teori Tau*) (finding that s122 is not subject to the abstraction rule); *Newcrest Mining (WA) Ltd v BHP Mineral Ltd and The Commonwealth* (1997) 190 CLR 513 (hereafter *Newcrest*) (Brennan CJ, Dawson, McHugh JJ affirming that s122 is not subject to the abstraction rule, Gaudron, Gummow & Kirby JJ overruling *Teori Tau* and finding s122 is subject to the abstraction rule, Toohey J not deciding the question).

15 See *The Commonwealth v WMC Resources* (1998) 194 CLR 1 at 49 (McHugh J) (hereafter *WMC Resources*).

Dixon's twin principles of interpretation have been affirmed by the Court on numerous occasions.[17]

In *Commonwealth v Tasmania* (the *Tasmanian Dam Case*),[18] Mason J went on to suggest that there might be a third principle relevant to determining when par (xxxi) applied, on the basis that:

> [t]o bring the constitutional provision into play it is not enough that the legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however, slight or insubstantial it may be.[19]

His Honour (Murphy and Brennan JJ concurring in the relevant respect)[20] then held that no such benefit accrued to the Commonwealth in the circumstances of the case.

In subsequent decisions in *Australian Capital Television Pty Ltd v The Commonwealth (No 2)*,[21] and *Australian Tape Manufacturers Association Ltd v The Commonwealth*,[22] members of the Mason Court again appeared to rely, at least in part, on this restrictive notion of acquisition to exclude the operation of par (xxxi). Any trend toward a broad application of this principle seems to have been halted, however, by later decisions such as *Newcrest Mining (WA) Ltd v The*

16 See for example *The Commonwealth v Tasmania* (hereafter *Tasmanian Dam Case*) (1983) 158 CLR 1 at 282; *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201–202; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509 (hereafter *Australian Tape Manufacturers*); *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 168, 180, 184, 185; *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 241, 259 (hereafter *Peverill*); *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 277, 283, 285 (hereafter *Lawler*); *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 (hereafter *Georgiadis*) at 303, 312, 320; *Gambotto v Resolute Samantha Ltd* (1995) 69 ALJR 752 at 754; 131 ALR 263 at 267; *Newcrest*, (1997) 190 CLR 513; *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 at 193 (hereafter *Airservices Australia*); *Smith v ANL Ltd* (2000) 204 CLR 493 at 500, 520, 542 (hereafter *Smith*).

17 For subsequent statements affirming the liberal approach to construction see for example *Australian Tape Manufacturers*, id at 509 (Mason CJ, Brennan, Deane & Gaudron JJ); *Mutual Pools*, id at 184–185 (Deane & Gaudron JJ); *Georgiadis*, id at 303 (Mason CJ, Deane & Gaudron JJ); *Newcrest*, above n16 at 595 (Gummow J); *WMC Resources*, above n15 at 49 (McHugh J); *Airservices Australia*, id at 181 (Gleeson CJ & Kirby J); *Smith*, id at 533 (Hayne J). For statements expressly affirming the second principle, or abstraction rule, see for example, *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 445 (hereafter *Tooth*); *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160 (hereafter *Nintendo*) (Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ); *Mutual Pools*, above n16 at 177–178 (Brennan J); *Newcrest*, above n16 at 567–68 (Gaudron J), 593, 596 (Gummow J); *WMC Resources*, above n15 at 15 (Brennan CJ), 91 (Kirby J); *Airservices Australia v Canadian Airlines*, above n16 at 304 (Callinan J); *Smith*, above n16 at 521 (Kirby J), 543 (Callinan J).

18 *Tasmanian Dam Case*, above n16.

19 Id at 145.

Commonwealth,[23] and *Commonwealth v WMC Resources Ltd,*[24] in which the Court treated the accrual of highly intangible benefits to the Commonwealth as sufficient to attract the application of par (xxxi).[25] It would therefore seem that the two principles of construction identified by Dixon CJ remain the key focus in determining the approach to the prima facie scope of application of par (xxxi).

Beyond this, however, difficult questions still arise as to when par (xxxi) will in fact apply so as to require just terms, as opposed to when its prima facie application will be displaced by one of numerous exceptions developed by the Court in this area of discourse.

3. *'Exceptions' to the Broad and Overriding Application of Par (xxxi)*

A. 'Acquisitions of Property' to which Par (xxxi) is Inapplicable

Despite the Court's treatment of par (xxxi) as having the status of something like a constitutional guarantee, no justice has suggested that par (xxxi) should apply to every acquisition of property by the Commonwealth. As Dixon J said in *Bank Nationalization Case*,[26] any limitation on the acquisition of property other than on just terms '*does not apply except with respect to the ground actually covered by par (xxxi) of s51*'.[27] And par (xxxi) is phrased in terms of a power to acquire 'property … on just terms' for particular purposes (the 'purpose proviso') and not

20 Id at 182 (Murphy J); 248 (Brennan J).

21 (1992) 177 CLR 106 at 165–166 ((Brennan J) (McHugh J agreeing at 245)), 199 ((Dawson J) (finding that the benefit conferred on political parties by free-time advertising provisions was not a benefit of the necessary kind)).

22 *Australian Tape Manufacturers*, above n16 at 527 (Dawson & Toohey JJ) (Mason CJ, Brennan, Deane & Gaudron JJ concurring at 499, McHugh J concurring at 528) (finding that privilege conferred on public to make recordings of copy-right material onto blank tapes not benefit of the necessary kind).

23 *Newcrest*, above n16 at 634 (Gummow J) (Gaudron, Toohey & Kirby JJ concurring in the relevant respect) (finding proclamations conferred identifiable and measurable advantages on the Commonwealth and the Director of National Parks and Wildlife, in terms of minerals freed from the rights of Newcrest to mine them, and land freed from the rights of Newcrest to occupy and conduct mining operations thereon). Compare at 573 (McHugh J) (relying on dictum from the *Tasmanian Dam Case*)

24 *WMC Resources*, above n15 at 30 (Toohey J), 56 n179 (McHugh J), 72–73 (Gummow J), 97 ((Kirby J) (finding that modification of petroleum exploration permits in designated area in Timor Strait allowed the Commonwealth more readily to fulfil its international law obligations with Indonesia, and was a benefit in necessary sense)); compare at 17, 20 (Brennan J), 38 (Gaudron J) (finding no benefit to the Commonwealth).

25 See also *Airservices Australia*, above n16 at 145 (McHugh J) (explicitly rejected a pedantic, legalistic approach – holding that the relevant statutory liens divested the respondents of a valuable interest, and conferred an advantage on the CAA in terms of the fact that it could refuse to approve removal of the aircraft from Australia until the charges were paid). But for a more cautious view about the significance of *Newcrest* and *WMC Resources* in this context, see Allen, above n6 at 357.

26 *Bank Nationalization Case*, above n7.

27 *Schmidt*, above n4 at 372.

simply, in terms of a power to acquire property *simpliciter*. The Court has thus always held that there are certain circumstances in which an acquisition of property by the Commonwealth will be outside the scope of par (xxxi).

Historically, the Court has tended to identify these circumstances on a strongly case-by-case basis.[28] In the last ten years, however, the Court has provided much stronger guidance in this area, by identifying the 'ground actually covered by' par (xxxi) in a more abstract and conceptual manner.

In doing so, I suggest that the Court has identified three distinct (though overlapping)[29] categories in which an 'acquisition of property' will fall outside the scope of par (xxxi). First, the Court has held that par (xxxi) does not apply to a category of property 'inherently susceptible to modification'. Second, par (xxxi) does not apply to acquisitions in relation to which the concept of compensation is irrelevant or incongruous. Third, the Court has held that par (xxxi) will not apply where the law is not one for the acquisition of property *as such,* but rather, part of and incidental to a general regulatory scheme aimed at the adjustment of competing rights and liabilities.

The development of these categories is set out below.

Category 1 – Rights 'Inherently Susceptible to Variation'

The first category of exception was applied in 1993 by Black CJ and Gummow J in the Full Federal Court in *Minister for Primary Industry and Energy v Davey*.[30] The origin of this exception is, however, more commonly identified with the High Court's decision a year later in *Health Insurance Commission v Peverill*.[31]

In *Peverill*, the Court heard a challenge under par (xxxi) to the validity of a Commonwealth law which purported retrospectively to reduce the amount which a patient (and thus, by reason of an assignment of that benefit, a medical practitioner) was entitled to claim by way of reimbursement for certain pathology services. The Court dismissed the challenge on the basis that the law was supported by s51(xxiiiA) and the implied incidental power, and did not engage par (xxxi). In characterising the law as such, Mason CJ, Deane and Gaudron JJ placed emphasis on the fact that the relevant statutory right to reimbursement was of a kind inherently susceptible to variation.[32] McHugh J went further, finding that given its basis in statute, the relevant right was always '*subject to repeal or alteration at the discretion of Parliament*', and hence totally outside the protection of the guarantee in par (xxxi).[33]

28 See *Tooth*, above n17 at 402 (Gibbs J) ('I am not sure that a completely satisfactory explanation has yet been given of the principles by which it is to be determined which laws do, and laws do not, fall within s51(xxxi)).'

29 See *Airservices Australia*, above n16 at 194 (Gaudron J).

30 (1993) 47 FCR 151 at [45]. For decisions of the Federal Court applying this category, see also *Bienke v Minister for Primary Industries and Energy* (1996) 63 FCR 567.

31 *Peverill*, above n16.

32 Id at 237.

33 Id at 264–265.

In *Georgiadis v Australian and Overseas Telecommunications Corporation,*[34] a decision handed down concurrently with *Peverill,* these same four justices again emphasised the significance of the question whether rights were of a common law or statutory origin. Mason CJ and Deane and Gaudron JJ appeared to suggest that, had the origin of the Commonwealth's liability to the appellant been statutory rather than common law in origin, it would have been inherently susceptible to modification and thus outside par (xxxi).[35] In dissent, McHugh J was of the opinion that the origin of the Commonwealth's liability did arise by operation of statute rather than by a combination of common law and Constitutional mandate, and held that:

> the Commonwealth authority has not acquired the property of the plaintiff. This is because the right of the plaintiff to bring his action was dependent upon federal law and was always liable to be revoked by federal law. A right which can be extinguished by a federal law enacted under a power other than s51(xxxi) is not a law which falls within the terms of that paragraph of the Constitution.[36]

Four years later, in *Newcrest,*[37] members of the Court again endorsed the principle that par (xxxi) will not apply wherever the relevant rights or interests are understood to be 'inherently susceptible to modification'. Gummow J addressed this exception at some length, holding that vulnerability to modification was a question of degree rather than of kind, and then went on to hold (consistent with the finding of the majority) that while there was an 'inherent but limited liability to impairment of the rights conferred by the mining tenements' under the *Mining Ordinance 1939* (NT) the interference with those rights by the Commonwealth in expanding national park protection over the relevant area[38] went far beyond the scope of the relevant limitation.[39]

A year later, in *WMC Resources*,[40] a majority of the Court went on expressly to affirm the validity of the first category of exception,[41] with three justices (Gaudron, McHugh and Gummow JJ) finding that it applied to the facts in question.[42] Justices Gaudron and Gummow, this time joined by Kirby J (dissenting) also emphasised that in their Honours' view, vulnerability to modification was a question of context and degree,[43] with Gaudron J and Gummow J carefully distinguishing the mining leases in *Newcrest* from the exploration permits in question.[44]

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34 *Georgiadis*, above n16.
35 Id at 305–306.
36 Id at 325.
37 *Newcrest*, above n16.
38 By passage of the *National Parks and Wildlife Conservation Amendment Act 1987* (Cth) and by proclamation of certain areas as attracting the operation of the *National Parks and Wildlife Conservation Act 1975* (Cth) as amended.
39 *Newcrest*, above n16 at 634–635.
40 *WMC Resources*, above n15.
41 Id at 38 (Gaudron J), 55 (McHugh J), 73 (Gummow J), and 91–92 (Kirby J).
42 Id at 38 (Gaudron J), 55 (McHugh J), and 73 (Gummow J).
43 Id at 38 (Gaudron J); 73–75 (Gummow J); 94 (Kirby J) (dissenting in the result).

Category 2 – Compensation as 'Incongruous'

Several early decisions of the High Court established on a case-by-case basis that laws imposing fines, penalties or forfeitures[45] were not such as to attract the operation of par (xxxi). In *Trade Practices v Tooth*,[46] Gibbs J then suggested that these laws all affected acquisitions in circumstances where 'no question of just terms could sensibly arise'.[47]

In *Mutual Pools*,[48] McHugh J built on Gibbs J's suggestion, stating that compensation in theses cases would be a wholly 'irrelevant or incongruous' notion. His Honour said:

> [t]he compound conception of an 'acquisition of property on just terms' predicates a compulsory transfer of property from a State or person in circumstances which require that the acquirer should pay fair compensation to the transferor. When, by a law of the Parliament, the Commonwealth or someone on its behalf compulsorily acquires property in circumstances which make the notion of fair compensation to the transferor irrelevant or incongruous, s51(xxxi) has no operation.[49]

This understanding was also endorsed by Mason CJ, Deane and Gaudron JJ, in *Re Director of Public Prosecutions; Ex parte Lawler*[50] *and Georgiadis*,[51] both handed down at the same time as *Mutual Pools.*

In *Newcrest,*[52] Gummow J repeated the language used by McHugh in *Mutual Pools*, stating that: '[t]here are laws in respect of which 'just terms' is an incongruous notion'.[53] His Honour then gave by way of example laws imposing a fine or forfeiture,[54] and incorporated by reference like examples cited by McHugh J in *Mutual Pools*.[55] Gaudron J (in whose reasons Toohey J concurred in the relevant respect)[56] also repeated her support for this principle.[57]

In the Court's more recent decision in *Airservices Australia v Canadian Airlines,*[58] the second category of exception was somewhat less prominent in the Court's reasoning. However, only Callinan J would have rejected this category as a valid general exception to the application of par (xxxi). The other dissentient,

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44 Id at 38 (Gaudron J), 73–75 (Gummow J).
45 *Burton v Honan*, above n5; *Cheatley v The Queen* (1972) 127 CLR 291; *Re Director of Public Prosecutions; Ex parte Lawler*, above n16.
46 *Tooth*, above n17.
47 Id at 408.
48 *Mutual Pools*, above n16.
49 Id at 219–220.
50 Id at 285 (Deane & Gaudron JJ).
51 *Georgiadis*, above n16 at 306–307 (Mason CJ, Deane & Gaudron JJ).
52 *Newcrest*, above n16.
53 Id at 595.
54 Id at 595, citing *Lawler*, above n16 at 285.
55 *Mutual Pools*, above n16 at 177–178, 197–198, 220–222.
56 (1997) 197 CLR 513 at 560.
57 Id at 569 n155.
58 *Airservices Australia*, above n16.

Gaudron J, expressly acknowledged this second category as a valid exception to the application of par (xxxi) though her Honour did not think that it applied to the statutory liens in question.[59] In the majority, McHugh J strongly reaffirmed the position he had taken in *Mutual Pools,* and further suggested that the other members of the majority should be also understood as *impliedly* endorsing that position (his Honour found that the provision of compensation for the imposition of a security would be wholly incongruous, and that liens were properly characterised as reasonably appropriate and adapted to securing the payment of aircraft service fees).[60] Gummow J (with whom Hayne J agreed in the relevant respect) also held that the concept of compensation was irrelevant or incongruous in the context of a fee for services.[61]

Gummow J further went on to incorporate into this second category a previously distinct category of exception, arising where an acquisition could be said to be voluntary or at least uncoerced.[62] His Honour said that, where a person voluntarily permits the employment of an aircraft in circumstances where by law operation of the aircraft requires the purchase of certain safety services, it would be incongruous to say that par (xxxi) applies to protect the person from paying the price of those services.[63]

Category 3 – No Acquisition of Property 'as such' (the 'Characterization' Exception)

In the 1983 *Tasmanian Dam* Case,[64] Deane J was the only justice to take a broad view of the prima facie applicability of par (xxxi).[65] However, in the course of his judgment, Deane J also suggested an expansive exception to the application of par (xxxi) in terms that, where legislation effects:

59 Id at 198.

60 Id at 253.

61 Id at 297.

62 For the original category, see *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 270–271 (Dixon J).

63 *Airservices Australia*, above n16 at 298. In this light, it is thus suggested that the reliance by Hayne J (McHugh J concurring) in *Smith*, above n16 at 515 on the concept of an uncoerced acquisition (that is, the notion that the law in question did not of its own force effect an acquisition) should be treated, not as a distinct category of exception, but rather as falling within the broad ambit of category two: see 204 CLR 493 at 515. Compare the explanation provided in *Tooth*, above n17 at 417 (Stephen J) ('in *British Medical Association v The Commonwealth,* Dixon J contrasted acquisition under pl. (xxxi) with the case of a voluntary sale, speaking of the former as involving the taking of property from him 'against his will without just compensation'. Section 51(xxxi) involves 'a compound conception, namely 'acquisition-on-just-terms' (*Grace Bros Pty Ltd v The Commonwealth* (Dixon J)). An integral part of that conception is the need for just terms. The existence of that need presupposes an inability on the part of the owner of the property to insist upon payment of whatever amount he may nominate as the price of the thing acquired').

64 *Tasmanian Dam Case,* above n16.

65 His Honour was the only member of the Court who would have held that par (xxxi) was engaged by the relevant provisions of the World Heritage (Western Tasmania Wilderness) Regulations 1983 (Cth) (hereafter *Wilderness Regulations*).

> [n]o more than a readjustment of competing claims between citizens in a field which needs to be regulated in the common interest, such as zoning under a local government statute, it will be apparent that no question of acquisition of property for a purpose of the Commonwealth is involved.[66]

Ten years later, in a joint judgment in *Australian Tape Manufacturers v The Commonwealth,*[67] Mason CJ, Brennan, Deane and Gaudron JJ approved this reasoning, stating the relevant exception in even more general terms. Their Honours observed that:

> [i]n a case where an obligation to make a payment is imposed as ... a genuine adjustment of competing rights, claims or obligations of persons in a particular relationship or area of activity, it is unlikely that there will be any 'acquisition of property' within s51(xxxi) of the Constitution.[68]

And while the Court did not rely on this exception in the *Tape Manufacturers Case*,[69] this dictum was again approved by the Court in *Georgiadis*[70] *and Mutual Pools*,[71] and has been applied by the Court on several subsequent occasions.

Thus, for example, in *Nintendo Co Ltd v Centronics Systems Pty Ltd,*[72] the Court held par (xxxi) was inapplicable because the *Circuits Layout Act 1989* (Cth) was not directed toward an acquisition of property '*as such*', but rather toward the adjustment and regulation of competing claims, rights and liabilities of the designers or first makers of original circuit layouts.[73]

More recently, in *Airservices,* four members of the Court relied on this category of exception, in upholding the validity of the statutory liens imposed by Pt VI of the *Civil Aviation Act 1988* (Cth). Justice Gummow held that the liens were imposed as part of a general regulatory scheme for civil aviation safety and as such, the 'line drawn in *Australian Tape Manufacturers* [was] to be drawn in the present case'[74] (that is, his Honour was willing to apply the *Tape Manufacturers* exception on the basis of precedent, if not to endorse this exception in more general terms). In their joint judgment, Gleeson CJ and Kirby J used the express language of 'characterisation' to find that the imposition of the relevant liens did not engage s51(xxxi).[75] And Hayne J, in concurring in the reasoning of Gummow J, expressly endorsed the characterisation-based reasoning of the Court in *Nintendo*.[76]

66 *Tasmanian Dam Case,* above n16.
67 *Australian Tape Manufacturers*, above n16.
68 Id at 510.
69 Id at 511.
70 *Georgiadis*, above n16 at 306–307 (Mason CJ, Deane & Gaudron JJ).
71 *Mutual Pools*, above n16 at 171–172 (Mason CJ), 180 (Brennan J), 189–90 (Deane & Gaudron JJ).
72 *Nintendo*, above n17.
73 Id at 160.
74 *Airservices Australia*, above n16 at 200.
75 Id at 180–181.
76 Id at 304.

In addition, in dissent in the result, Gaudron J also cited the Mason Court's decisions in *Nintendo, Tape Manufacturers, Peverill, Mutual Pools* and *Georgiadis,* as well as the earlier decision of Dixon J in *Schmidt* as establishing that '[i]t is well settled that the guarantee contained in s51(xxxi) does not apply to a law that is not properly characterized as a law *for* the acquisition of property even though the law affects property interests' (emphasis added).[77] Thus, despite the expression of doubt by some members of the Court as to the usefulness of the *Tape Manufacturers* line of reasoning,[78] it has to date commanded clear majority support from the Gleeson as well as Brennan and Mason Courts.

B. Concurrent Sources of Power

At least since *Airservices,* these three categories of exception may fairly safely be treated as exhaustive of the circumstances in which an 'acquisition of property' will fall outside the scope of application of par (xxxi).

Even where an acquisition of property exists for the purposes of par (xxxi) however, there may still be cases where the just terms requirement is held to be inapplicable. That is, the High Court has held that a fourth category of 'exception'[79] applies to exempt an acquisition of property from the requirements of par (xxxi) wherever the acquisition is of a kind which, by reason of its relationship to another subject matter of Commonwealth power, was not one which was intended to attract requirements of compensation.

Category 4 – Contrary Constitutional Intention

While often applied in early decisions of the Court, this exception was first clearly articulated in the Court's decision in *Nintendo.*[80] In dismissing the par (xxxi) challenge on two alternate bases (one of which was the application of the third characterisation-based exception) the majority in that case held the Commonwealth's power to regulate patents was engaged and was, by necessary implication, not subject to the requirements of par (xxxi).[81] Dawson J reached a similar conclusion, suggesting that an exercise of the power in par (xviii) was to be compared to an acquisition of property under the bankruptcy power, or the readjustment of property rights between parties to a marriage.[82]

In *Mutual Pools,* Mason CJ went on to describe this exception in terms that:[83]

77 Id at 196.

78 Id at 299–300 (Gummow J). See also *Smith*, above n16 at 514, Gaudron and Gummow JJ again expressed this reservation, stating that the 'adjustment of competing rights' formula was of limited assistance, because 'many [if not all] laws may be so described'.

79 This final category of exception is perhaps the purest category of exception outlined, as a true exception to the application of the abstraction rule, rather than a mere exclusion of certain kinds of acquisition from the definition of 'acquisition of property' in par (xxxi).

80 *Nintendo*, above n17.

81 Id at 159–160.

82 Id at 166.

83 Mutual Pools, above n16 at 169.

> [i]t is a well-accepted principle of interpretation that, when a power is conferred and some qualification or restriction is attached to its exercise, other powers should be construed, *absent any indication of contrary intention*, so as not to authorize an exercise of the power free from the qualification or restriction.[84] Hence, the effect of s51(xxxi) when read in conjunction with the other legislative powers of the Parliament is that, *subject to any contrary intention*, it forbids the making of laws with respect to the acquisition of property from any State or person for a relevant purpose on terms that are not just.[85] (emphasis added)

His Honour went on to explain: '[a]n indication of contrary intention may be provided by the express terms in which a specific power is conferred or by the very nature of the subject-matter of a specific power or what is included within it',[86] and cited by way of example the Commonwealth's power under s51(xxxiii) (acquisition of State railways) and s51(xvii) (bankruptcy). Deane and Gaudron JJ took a similar approach, holding that the constitutional guarantee in par (xxxi) applied to other powers by operation of a rule of construction rather than in terms, and as such, its operation was subject to displacement by a contrary intention.[87]

In *Lawler,* Deane and Gaudron JJ again affirmed this principle, citing by way of example of powers evincing such a contrary intention, the taxation and bankruptcy powers.[88] In *Airservices,* Gaudron J also suggested that the power to acquire State railways (s51(xxxiii)) and the copyright, trademarks and patents power (s 51(xviii)) were within this category of exception.[89]

4. Questioning the Current Approach

The recent case law therefore reveals four relatively clear categories of circumstance in which the requirements of compensation in par (xxxi) will be inapplicable to Commonwealth legislation which touches or alters interests of a proprietary character.

This can be seen to represent a significant advance on the more ad hoc approach taken by the Court prior to 1993. Despite this advancement, however, all four of the categories of exception identified remain problematic to some greater or lesser degree.

The difficulty with the first category of exception is that it seems to invite a sharp yes/no response, based on a construction of the formal incidents of the

84 See *Schmidt*, above n4 at 370–372 (Dixon CJ).

85 *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77; *Johnston Fear and Kingham and The Offset Printing Co Pty Ltd v The Commonwealth* (1943) 67 CLR 314; *Bank Nationalization Case*, above n7 at 349–350 (Dixon J).

86 *Mutual Pools*, above n16 at 169–170.

87 Id at 187–188.

88 *Lawler*, above n16 at 284.

89 *Airservices Australia*, above n16 at 195, citing *Mutual Pools*, above n16 at 170 (Mason CJ); *Nintendo*, above n17 at 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ). See also *Smith*, above n16 at 511 (Gaudron and Gummow JJ) (once again noted that certain powers in the Constitution contemplate the acquisition of property other than on just terms, but did not elaborate on the list provided by Gaudron J in *Airservices*).

relevant statute or common law proprietary interest, when in fact the Court has tended in the decided cases to prefer a more substantive, balancing-type approach.

The second category of exception also tends to suggest a fairly formalistic approach to the question whether a law constitutes a fine, penalty or forfeiture, when the question is actually one of substance and degree. As Gleeson CJ and Kirby J said in *Airservices*: '[a] federal law is not removed from 'acquisition' simply because it is described as a 'forfeiture'. It is not the name, but the character of the taking, that controls the outcome of constitutional characterisation.'[90] Once this kind of substantive approach is taken, however, the second category of exception becomes indistinct from the third category of exception, which is itself highly problematic, in that it does not appear to be consistent with more general principles of constitutional construction.

It is well settled that the general rule of constitutional construction is that a law may be said to have multiple possible characterisations and, as such, be supported by several overlapping sources of power, whether in s51 or s122.[91] So much was clearly acknowledged by Deane and Gaudron JJ in *Mutual Pools,*[92] in developing the third category of exception.

Nonetheless, in applying the third category of exception, the Court has regularly '*appear[ed] to search for the "dominant or sole character" of the law*'.[93] That is, the Court has treated the fact that a law has the character of a law with respect to say, inter-state commerce, as mutually exclusive with it being a law with respect to par (xxxi).

However, as McHugh J noted in *Airservices*, it is difficult to see how this can be reconciled with the general rule about construction, which permits multiple characterisations to be placed on a law.[94] If the result in the cases applying the third category of exception is in fact correct, an alternative basis would therefore seem to be required to support those results.

It could also be argued that the fourth 'contrary intention' category of exception is somewhat inconsistent with modern principles of constitutional construction, which eschew the use of legal fictions.[95] This category of exception is based on the operation of two distinct and opposing rules of construction, which find no basis in the text or history of the drafting of the Constitution, but are, rather, based on a somewhat artificial imputation of a *necessary* intention on the part of

90 *Airservices Australia*, above n16 at 181 [101].

91 *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 192–193 (Stephen J); The *Tasmanian Dam Case*, above n16 at 151–152 (Mason CJ); *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 295 (Mason CJ) (hereafter *Cunliffe*).

92 *Mutual Pools*, above n16 at 188.

93 *Airservices Australia*, above n16 at 248 (McHugh J).

94 Compare Evans, above n1 at 196.

95 See for example *Pyrenees Shire Council v Day; Eskimo Amber Pty Ltd v Pyrenees Shire Council* (1998) 192 CLR 330 at 387 (Gummow J) ('The prevalence in modern fused systems of administration of law and equity of substance over form marks the spirit of the times as unfavourable to the preservation of legal fictions and hostile to the creation of new legal fictions').

the Framers. While the result reached would seem to give a common sense reading to the scope of the limitation on power contained in par (xxxi) the use of two opposite forms of imputed intent to reach this result would seem unduly artificial.

Allen has suggested that one way to avoid some of the difficulties associated with the current approach would be to adopt a narrower definition of the concepts of 'property' and 'acquisition' in par (xxxi)[96] by limiting the range of valuable interests recognised as proprietary in character, and by requiring the kinds of benefit conferred on the Commonwealth to be more direct.[97]

While broadly sympathetic to this position, however, this article suggests that some caution is required before embracing the precise narrowing solution proposed by Allen.

First, as Dixon J noted in the *Bank Nationalization Case,* a broad and substantive approach is generally to be preferred when interpreting the scope of a grant of constitutional power.

Secondly, as Callinan J showed in *Smith*,[98] distinctions of the kind proposed by Allen, and previously made by some members of the High Court in cases such as the *Tasmanian Dam Case, Australian Capital Television* and the *Tape Manufacturers Case* would appear difficult to maintain in any principled manner.

This article therefore seeks to articulate an alternative way in which the prima facie scope of application of par (xxxi) might be narrowed, without resort to bright-line, more formalistic distinctions of this kind. The alternative proposed is that the scope of operation of par (xxxi) should be narrowed by abandoning the current abstraction rule, in favour of an approach which treats par (xxxi) as having operation as a wholly *supplementary* or secondary rather than primary source of power.

A. The Purpose Proviso

In developing the abstraction rule in *Schmidt,*[99] Dixon J (with whom Fullagar, Kitto and Taylor JJ agreed) clearly stated that the rule was to be understood in the context of the limitation on the application of par (xxxi) effected by the purpose proviso.[100]

As Dixon J explained in the earlier case of *Burton v Honan*, the effect of the purpose proviso should be understood to be such that:

> [t]he short answer to [the argument that the forfeiture was made other than on just terms] is that the whole matter lies outside the power given by s51(xxxi). It is not an acquisition of property for any purpose in respect of which the Parliament has power to make laws. It is nothing but forfeiture imposed on all persons in

96 Compare Allen, above n6 at 362–363, 380 (suggesting, though not concluding, that there were arguments that the Court should not unduly extend the concept of 'acquisition of property' in par (xxxi)).

97 Allen, above n6 at 351–52.

98 *Smith*, above n16 at 546.

99 *Schmidt*, above n4.

100 Id at 372.

> derogation of any rights such persons might otherwise have in relation to the goods, a forfeiture imposed as part of the incidental power for the purpose of vindicating the Customs laws. It has no more to do with the acquisition of property for a purpose with respect to which the Parliament has power to make laws within s51(xxxi) than the imposition of taxation itself, or the forfeiture of the goods in the hands of the actual offender.[101]

In other words, his Honour held that where the purpose of a law is to enforce or support the effective operation of some other operative legislative provision, the purpose of the law is not one for which the Commonwealth Parliament has power to make laws. Rather, the purpose of the law is simply a purpose incidental thereto,[102] and thus outside the terms of the purpose proviso.

If Dixon J's reasoning in *Burton* were read in isolation, the effect of his Honour's reasoning might have appeared somewhat anomalous. That is, it might have been thought that the abstraction rule was inapplicable only to laws at the outer edges of the Commonwealth's legislative power (that is, in its exercise of the incidental power) and not in relation to laws squarely within the scope of some primary power. However, the purpose proviso was clearly understood by Dixon J to operate in conjunction with the further limitation or proviso, that certain powers were 'wholly outside' the abstraction rule.[103] (This, of course, corresponds to what is identified above as the fourth category of exception).

Section 51(xxxi) was therefore understood by his Honour to be inapplicable wherever a law was either within the scope of a power which necessarily encompassed a power to acquire property or within the scope of the implied incidental power.

In this understanding, the purpose proviso may be treated as supporting the inference that par (xxxi) was intended to operate as a *purely supplementary* grant of power, in the nature of an extended incidental power, rather than a primary grant of power subject to conditions.

That is, the purpose proviso is read here as indicating that par (xxxi) was intended to have operation in aid of the purposes of other paragraphs in s51, or the purposes of Commonwealth legislative powers contained elsewhere in the Constitution,[104] *where and only where* power might otherwise be thought to be lacking under those provisions.

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101 *Burton v Honan,* above n5 at 180–181.

102 Compare also in this context, *Bank Nationalization Case*, above n7 at 265–266 (Rich & Williams JJ).

103 *Burton v Honan*, above n5 at 180.

104 The scope of the purpose proviso may coincide with the purpose limitation contained in s81 of the Constitution: see for example the views expressed by Barwick CJ and Gibbs J in *Australian Assistance Plan Case* (1975) 134 CLR 338. However, several justices of the High Court have held that the purpose limitation in s81 is less restrictive: see *Australian Assistance Plan Case* (McTiernan, Mason & Murphy JJ), and as such, the jurisprudence on s81 currently provides limited guidance in the context of a supplementary powers approach. See discussion in Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) at 259–261.

In this understanding, par (xxxi) does not provide any assistance where a law is beyond the scope of a purposive power, as a Commonwealth law which provides just terms and serves the relevant constitutional purpose (ie meets the requirements of a supplementary power approach) will also clearly be a valid exercise of a purposive power.

However, par (xxxi) will have potential practical significance as *an extended incidental power,* in aid of acquisitions incidental to non-purposive powers, where the whole purpose of the law is characterised as directed toward an acquisition of property, rather than as merely incidental to another legislative purpose, and thus beyond the scope of the incidental power. That is, only where a law would otherwise be beyond the scope of the incidental power will par (xxxi) be engaged, as a supplementary or extended incidental power which permits the Parliament to affect proprietary interests in a manner which goes beyond that which can be characterised as 'reasonably necessary' to or incidental to the purposes of the primary power itself, on the basis that it will be required by the Court to provide just terms (and, of course, to abide by all other limitations on Commonwealth power).

Understood in this way, par (xxxi) will ultimately apply in terms in a very limited number of cases. It is submitted, however, that this result is in fact entirely consistent with the original understanding of the Framers, who saw par (xxxi) as designed to confirm rather than confer Commonwealth power in this area.

B. Constitutional History

That is, the *Convention Debates* reveal that par (xxxi) was included by the Framers only for more abundant caution,[105] to supplement the express incidental power, rather than as a primary source of legislative power, let alone as an independent constitutional guarantee.[106]

In proposing the insertion of par (xxxi) at the 1898 Convention, Edmund Barton said:

> [t]here is no express provision in the Constitution for the acquisition by the Commonwealth of any property the acquisition of which might become necessary. It has been suggested to me that sub-section (37) [now (xxxix)] of clause 52 [now 51] might give sufficient power of legislation for that purpose, but there is doubt on the subject.[107]

In response, Isaac Isaacs asked whether the clause would not be redundant, in light of the scope the express incidental power.[108] He argued in support of this position

105 See for example, Roger Hamilton, 'Some Aspects of the Acquisition Power of the Commonwealth' (1973) 5 *Fed LR* 265 at 267.

106 Compare Evans, above n1 at 198 (suggesting that 'the Convention Debates provide little help in determining the meaning of the section'); Simon Evans, 'Property and the Drafting of the Australian Constitution' (2001) 29 *Fed LR* 121 at 129 ('[c]learly enough, [the legislative history] provides little assistance in interpreting s51(xxxi)'), 132, 150.

107 *Official Record of the Debates of the Australasian Federal Convention* (3rd Session, Melbourne, 20 January to 17 March 1898) at 151.

that the defence and territories power, in conjunction with the express incidental power, gave the Commonwealth Parliament power in the same terms as that given to the United States Congress[109] (and as Quick and Garran note in their 1901 *Commentaries on the Constitution,* United States precedent at the time supported Isaacs' understanding of the express incidental power, as applied in the United States context).[110]

However, a majority of the delegates took a more cautious view of the scope of the incidental power. In the course of the debate, Patrick Glynn interpreted United States constitutional authority to suggest that the incidental power was insufficient, and John Quick also expressed doubts as to whether the incidental power would prove sufficient in Australia (he also expressed the fear that, in the event that it did not authorize certain acquisitions, the Commonwealth would be crippled).[111]

Therefore, while par (xxxi) was withdrawn in January 1898 for procedural reasons,[112] it was ultimately reintroduced two months later. In introducing the proposed amendment in its final form at the Convention in Melbourne, Edward O'Connor noted the purpose of par (xxxi) as follows:

> [s]ome question has been raised as to whether the Commonwealth has the power inherently of acquiring property under just terms of compensation … [and] [I]t is quite clear that there must be a power compulsorily taking property for the purposes of the Commonwealth …. And this clause is framed to provide for that.[113]

As Quick and Garran explain:

> [i]t was not considered advisable to allow the right of eminent domain in the Commonwealth to be dependent upon any implied or incidental power [especially in light of the less absolute character of Australian sovereignty] … Hence all possible doubt as to the right of the Commonwealth to acquire property for federal purposes has been removed by [s51(xxxi)], which renders it unnecessary to resort to the "ways and means" ssxxxix.[114]

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108 *Official Record of the Debates of the Australasian Federal Convention* id at 151–152. One might argue that the correctness of Isaacs' position was ultimately borne out in *WH Blakeley & Co Pty Ltd v The Commonwealth* (1953) 87 CLR 501 at 521 per curiam ('[t]he power to acquire property compulsorily would probably have been regarded as forming an incident of almost every other power which is expressly granted by s51 in the absence of par (xxxi) and the grant of a specific power would have been in itself unnecessary. At all events that it the view which no doubt would now commend itself to constitutional lawyers').

109 *Official Record of the Debates of the Australasian Federal Convention*, above n107 at 154.

110 John Quick & Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 640.

111 *Official Record of the Debates of the Australasian Federal Convention* , above n107 at 152.

112 See procedural objections raised by George Turner, *Official Record of the Debates of the Australasian Federal Convention*, above n107 at 152–153. I note that Turner also raised certain substantive objections, about the negative effect of such a power on Commonwealth fiscal restraint, which seem to have been somewhat misconceived. Compare Evans, above n106 at 128–129, suggesting that Turner's substantive objections seemed to call for a fuller response.

113 *Official Record of the Debates of the Australasian Federal Convention*, above n107 at 1874.

114 Quick & Garran, above n110 at 641

That par (xxxi) was intended to operate as a specific form of incidental power is supported by its placement in s51 with other supplementary sources of power in pars (xxxii)-(xxxix) (excluding, perhaps, par (xxxv)) and in contemporary treatises which referred to par (xxxi) under the heading 'auxiliary and incidental powers'.[115]

There was certainly no explicit suggestion at the time of the adoption of the Constitution that s51(xxxi) was inserted as a *limit* on Commonwealth power, rather than as an extension or affirmation of Commonwealth power.

5. The Ultra Vires Approach and the Protection of Common Law Rights

If par (xxxi) is wholly supplementary in nature, then where any other source of Commonwealth legislative power is identified in support of a Commonwealth law, the validity of that law will be tested according to ordinary ultra vires principles, and other relevant constitutional limitations, without any reference to the express protection of proprietary interests contained in par (xxxi) (the 'ultra vires approach').

However, as Allen has noted,[116] it does not follow that the law's effect on proprietary interests, and whether such effect is mitigated by the provision of compensation which might be considered adequate or 'just', would necessarily be irrelevant.

When determining whether a law is supported by a particular head of Commonwealth legislative power, the Court asks whether there is a 'sufficient connection' between the law and the particular power in question to support a finding of validity. In many instances, sufficiency of connection may be tested by asking whether the relevant law is '*reasonably capable of being considered appropriate and adapted*' to achieving an end within power. Under this approach, attention is directed, among other things, to whether a law unnecessarily infringes other constitutional values.[117] Where, for example, a law gratuitously infringes common law rights and freedoms, the effect of the law may be so disproportionate to its ends, that it can no longer be considered to be within power. Thus, as Selway, Kirk and others have noted, the 'reasonably appropriate and adapted' test

115 See for example Harrison Moore, *The Commonwealth of Australia* (1902) at 159. Though, of course, it should also be noted that Moore also made comments which might be read as supporting a broad application of the abstraction rule – see for example at 160 (suggesting that par (xxxi) may be compared to the Fifth Amendment of the United States Constitution).

116 Compare Allen, above n6 at 362–369.

117 Protected constitutional values in this context clearly encompass common law liberties such as freedom of speech, freedom of association (*Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 200 (Dixon J), free exercise of religion and the right to property (*Plenty v Dillon* (1991) 171 CLR 635). Whether rights created by statute, or as a matter of international human rights law, would also count as relevant 'constitutional values' in this context is a much more complex question, which it is beyond the scope of this paper fully to explore. However, if, for example, statutory interests may create legitimate expectations of protection sufficient to attract the operation of par (xxxi) there is no reason in principle why those statutory interests should not be considered as carrying some constitutional weight under a supplementary power/ ultra vires approach.

represents a form of low-level proportionality analysis.[118] This is to be contrasted with higher-level forms of proportionality analysis applied in the context of determining whether a constitutional right or guarantee is impermissibly infringed.[119]

It is relatively well accepted that a low-level proportionality-style analysis may be appropriate where a Commonwealth legislative power is truly purposive in nature.[120] The defence power is the paradigm example of a purposive power,[121] but certain other powers, such as the treaty implementation aspect of the external affairs power, have also been considered as having this character.[122]

In addition, however, there is also some judicial support for the view that low-level proportionality analysis should apply in determining whether a law is properly characterised as within the scope of the incidental power.[123]

As others have noted, there is always a danger that adoption of low-level proportionality analysis may lead the Court erroneously to apply higher-level proportionality concepts wholly inappropriate to the task of characterisation.[124] Caution is therefore required before adopting this kind of proportionality analysis.[125] It is argued, however, that with the appropriate degree of caution in mind, there are strong rule-of-law-based reasons for adopting a low-level proportionality approach to characterisation of laws passed pursuant to the incidental power.[126] The concept of a government of limited powers is, after all, ultimately based on a concern to prevent arbitrary infringement of individual liberty and equality, rather than on limitation for its own sake. In determining where the true outer limits of Commonwealth legislative power lie, it thus would seem appropriate to have regard to the ultimate constitutional concern for liberty.[127]

In this understanding, questions of proportionality will be relevant to validity wherever the Commonwealth Parliament purports to acquire or limit proprietary interests, *except* in cases where the Commonwealth is able to rely on the core of a non-purposive power in support of the relevant law.

While this core area of Commonwealth power might be thought to pose a real danger of constitutionally permissible taking of property by the Commonwealth, it is suggested that the fourth category of exception applied by the Court to the application of s51(xxxi) in fact renders this danger illusory.

If one attempts to enumerate those powers in s51 which would of their own force encompass a power to acquire property, without reliance on the incidental

118 Brad Selway, 'The Rise and Rise of the Reasonably Proportionality Test in Public Law' (1996) 7 *PLR* 212; Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *MULR* 1.

119 Selway, above n118 at 215–216; Allen, above n6 at 368.

120 See for example, *Cunliffe*, above n91 at 355 (Dawson J).

121 Id at 356 (Dawson J); *Kruger v The Commonwealth* (1997) 190 CLR 1 at 102 (Gaudron J). See also for example *Stenhouse v Coleman* (1944) 69 CLR 457 at 471; *The King v Foster* (1949) 79 CLR 43 at 97 (scope of power must be measured by 'exigencies … involved').

122 *Cunliffe*, above n91 at 324 (Brennan J); *Victoria v The Commonwealth* (1996) 187 CLR 416 at 487 (Brennan CJ, Toohey, Gaudron, McHugh & Gummow JJ). Compare also the *Tasmanian Dam Case*, above n16 at 260 (Deane J).

power, it is suggested that those powers most likely comprise the Commonwealth's powers in respect of taxation, bankruptcy, patents, marriage (or at least marital property) and the acquisition of State railways powers. They would certainly not include subject-matter powers such as the commerce, fisheries or quarantine powers, or powers over persons such as the race or aliens power (see Appendix 1).

On this analysis, it would then appear that *all* of those non-purposive powers which include within their core the power to acquire property have in fact been excepted by the Court from the requirement of just terms contained in par (xxxi).

Moreover, as Appendix 1 further attempts to show, there do not appear to be any additional non-purposive powers outside s51, other than those contained in ss85 and 122, which would alone support an acquisition of property.

The result is such that, under an ultra vires approach, all acquisitions by the Commonwealth which are currently subject to scrutiny under par (xxxi) would remain the subject of a low-level proportionality inquiry.[128] (And the only exception to this rule might arise if s122 were ultimately found, contrary to the High Court's decision in *Teori Tau*,[129] to be subject to the requirements of par (xxxi).)

The real advantage of the ultra vires approach, however, is that it is consistent with broader principles of constitutional construction; and, in addition, has the potential to shift the doctrinal focus away from formal tests such as 'congruity' and 'inherent susceptibility to modification' toward an explicit focus on substantive factors such as the purpose of the law in question, the degree to which the law affected proprietary interests, and whether the law provided any compensation or broader quid pro quo which could mitigate that effect.

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123 Compare *Australian Communist Party v The Commonwealth*, above n117 at 193 (Dixon J); *Davis v The Commonwealth* (1988) 166 CLR 79 at 100 (Mason CJ, Deane & Gaudron JJ) (endorsing broad relevance of freedom of speech in determining whether the law was within scope of incidental power); 116 (Brennan J) (endorsing the more limited principle that 'freedom of speech can hardly be an incidental casualty of an activity undertaken by the Executive Government to advance a nation which boasts of its freedom'); *Nationwide News v Wills* (1992) 177 CLR 1 at 30–31 (Mason CJ); 101 (McHugh J); *Cunliffe*, above n91 at 296 (Mason CJ); 388 (Gaudron J). Compare also *Al-Kateb v Godwin* (2004) 78 ALJR 1099 at [42] (McHugh J) (stressing that proportionality principles were inapplicable because the relevant law was squarely within the scope of the immigration power, rather than reliant on the power incidental thereto); *Mulholland v Australian Electoral Commission* [2004] HCA 41 at [262], [270] (affirming the relevance of proportionality principles to the task of characterisation). It should be noted, however, that some members of the Court have also at times clear disagreement with such an approach: see for example *Nationwide News v Wills* at 88–89 (Dawson J); *Cunliffe*, above n91 at 352; *Leask v The Commonwealth* (1996) 187 CLR 579 at 605 (Dawson J) 624 (Gummow J); *Kruger*, above n121 at 53 (Dawson J) For further discussion of these cases see for example the discussion in John Doyle & Belinda Wells, 'How Far Can the Common Law Go Towards Protecting Human Rights' in Phillip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) at 45–47; Kirk, above n118 at 39–40.

124 Kirk, above n118 at 36. Compare also *Mulholland*, above n123 at [39] (Gleeson CJ) (indicating that, as a general matter, his Honour had no objection to the use of the concept of 'proportionality', provided that it was applied with attention to the appropriate degree of strictness).

125 Compare *Victoria*, above n122 at 488 (Brennan CJ, Toohey, Gaudron, McHugh & Gummow JJ).

126 Compare Doyle & Wells, above n123.

6. *Advantages of the Ultra Vires Approach*

The supplementary power/ultra vires approach has the potential to provide a clearer and more transparent understanding of the kinds of substantive balancing judgment the Court is currently required to undertake in determining whether a law is within one of the first three exceptions to par (xxxi).

Thus, for example, in a case such as *Newcrest* or *WMC Resources,* rather than asking whether the particular mining or exploration leases in question were 'inherently susceptible to modification' (or if so, to what degree), under an ultra vires approach the Court would be required to focus squarely on the *extent* to which the relevant mining interests were modified to the detriment of the plaintiffs, as well as the degree of connection between the Commonwealth's actions and its international obligations, and in particular, on the specificity and directive nature of those obligations.

Rather than focusing as the Court did in *Trade Practices v Tooth, Lawler* or *Airservices* on whether the relevant provision could be deemed a forfeiture, a penalty, or a fee for service, the Court would be required more explicitly to address whether the relevant laws were in some sense necessary to deter, punish or remedy specific illegal conduct, or to secure compliance with particular legal obligations, and the extent to which the law interfered with the proprietary interests of those wholly unconnected to any illegality or breach of obligation, or not benefiting from it in any way, as compared to those benefiting from, or being implicated or involved in particular breaches of obligation, where legitimate expectations of the protection of proprietary interests would be weaker.

In each case, attention would be directed straight to the substance of the characterisation inquiry, rather than to the somewhat misleading question of whether the interest in question was inherently susceptible to modification (which turns out to be a question of degree) or whether the acquisition was of a kind which logically precluded the possibility of compensation (which is a characterisation question in the first place).

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127 The fact that the relevant kind of judicially enforced limits on legislative power will only apply in relation to Commonwealth and not state laws does not in my view provide any overwhelming objection, especially in the context of a discussion of par (xxxi) given that par (xxxi) itself does not impose any limitation on state legislative power. Compare Kirk, above n118 at 36. The asymmetry in judicial rights–protection can in part be justified by the nature of the federal system itself, where the overlapping nature of Commonwealth and state legislative power can be seen to provide an important guarantee of individual liberty and equality against the possibility of infringement by the states, but not by the Commonwealth. That is, Commonwealth legislation is not subject to the cross-cutting effect of state legislative power, whereas a state law infringing most fundamental human rights is subject to the check of potential federal legislative override under s51 (xxix) and s109 of the Constitution: see for example *Human Rights (Sexual Conduct) Act 1994* (Cth) (making state law criminalising homosexual sex invalid).

128 Section 85(ii) must necessarily fall into category four (that is, as is impliedly if not expressly excluding the operation of par (xxxi) and current High Court authority does not support the application of the abstraction rule to s122: *Teori Tau*, above n14. But compare *Newcrest*, above n16 (where three justices would have affirmed and three justices overruled *Teori Tau*).

129 *Teori Tau*, above n14 (finding that s122 is not subject to the abstraction rule).

Further, an ultra vires approach would allow the Court to avoid the confusion created by the third category of exception (that is, given its potential inconsistency with general principles of construction) while focusing directly on substantive low-level proportionality considerations.

Thus, in a case such as *Tape Manufacturers,* the Court would have been required to focus exclusively on the questions of whether the removal of part of the exclusive copyright over music recordings was necessary to the scheme of indirect, collective royalty-collection through the blank tape levy, and whether that scheme substantially interfered with existing copyright interests, in a manner which was substantially deleterious to copyright owners.

In *Georgiadis,* the Court would have considered whether the move toward a system of statutory compensation for Commonwealth employees actually in some practical sense required abolition of existing common law liability, or whether the legislation in question was aimed at achieving a wholly gratuitous cost-saving to the Commonwealth, and, further, whether and to what extent the change in the relevant scheme of liability disappointed or interfered with employees' legitimate expectations of personal injury protection, in a way which subverted the assumptions on which prior occupational choices, or choices about whether to insure against the risk of personal injury were made.

In both cases, this would seem to represent a much more transparent kind of balancing analysis than the implicit balancing required in determining whether the extinguishment of certain rights of exclusive reproduction, or certain existing common law actions against the Commonwealth, was directed toward the acquisition of the relevant rights 'as such', or rather, to the adjustment of competing rights and interests in the copyright/employment areas.

7. Objections

Some commentators will object that the ultra vires approach would be substantially less protective of proprietary rights than the current exceptions-based approach to par (xxxi) and that such an 'anti-rights' shift should be resisted.[130] Others may suggest that a low-level proportionality analysis may create the danger of unrestrained judicial policy-balancing, for which there is no constitutional authorisation. In either view, a closely *text-based* approach is seen as a safer course: whether for the protection of proprietary interests, or for the preservation of the separation of powers.

It must be noted, however, that the language of s51(xxxi) itself plays a relatively small part in shaping the contours of the current approach to determining whether a Commonwealth law affecting proprietary interests is within power.[131]

The current rule-exceptions based approach relies on a double set of interpretive presumptions, and incorporates criteria of a very vague and somewhat circular character (what, after all, constitutes 'a forfeiture provision' rather than a

130 I am indebted to George Winterton for a very helpful exchange on this issue.

131 Compare van der Walt, above n7 at 129 ('[t]he Australian property clause … does not offer any textual assistance to the courts for the development of [a] limitation-oriented constitutional property jurisprudence').

gratuitous acquisition of an offender's property, or an acquisition of property 'as such'?). That is, it is suggested that the current approach does not provide anything like a clear *textual* rather than common law-type restraint on judicial balancing in this area.

It is therefore suggested that, under either the current or proposed approach, the balance struck by the High Court between the protection of proprietary rights and the power of the Commonwealth to promote other social interests will largely be a matter of individual judicial judgment, informed by the existing body of case law in this area.

While the existing case law provides an important guide to the exercise of judicial judgment, it is not altogether satisfactory as currently understood, to the extent that it obscures the substantive balancing required of the Court under all of the first three categories of exception, and stands in a certain tension with other principles of constitutional construction. It is thus suggested that it will tend to have a limited potential to guide the Court in approaching the question whether par (xxxi) is engaged in a particular instance.

It is therefore suggested that the supplementary power approach is unlikely, *of its own force*, to be any more or less protective of property rights, or more or less subjective, than the current exceptions-based approach. Rather, the question will be as to how individual judges approach the task of making the low-level proportionality style-judgments necessary for most decisions regarding legislative characterisation, whether in the guise of an exceptions-based approach or more transparent ultra vires approach. Similarly, where no such balancing is required, because the law falls within the fourth category of exception, or is squarely within the scope of a non-purposive primary power, no material difference is likely to arise.

8. Conclusion

As noted at the outset, this article does not attempt to provide a theory which would help answer, in a deeper substantive sense, how the members of the Court should in fact go about striking the balance between proprietary and other interests. For some readers, this will mean that the proposal advanced is all too modest in aspiration, and thus offers little potential to change the discourse in this area.

In answer, however, I suggest that a low-level proportionality approach has the capacity to make judicial value-choices in this area clearer and more transparent than under the current exceptions-based approach, and thus more readily subject to fruitful critical examination and debate. In doing so, it is hoped that the supplementary power apporach may have some potential to encourage the Court as well as academic commentators to turn more directly to the question of the deeper theoretical basis for protecting proprietary interests against legislative infringement.

It is therefore argued that, if the Court were minded to revisit its approach to s51(xxxi),[132] serious consideration should be given to the advantages of adopting the supplementary power understanding of par (xxxi) as a promising first step toward a more analytically consistent, substantive approach to the scope to be given to the constitutional protection of proprietary interests.

Appendix 1

	Purposive power	**Non-purposive power** *where core of power encompasses a power to acquire property*	**Non-purposive power** *where core does not encompass power to acquire property & reliance on incidental power would be required*
Section 51	• Defence – (vi) • Treaty–implementation aspect of external affairs –(xxix) • Control of railways for military purposes – (xxxii)	• Taxation– (ii) • Marriage – (xxi); divorce and matrimonial causes – (xxii) • Bankruptcy – (xvii) • Copyright, trademarks, patents – (xviii) • Acquisition of State railways – (xxxiii)	• Trade and commerce – (i) • Bounties – (iii) • Borrowing money – (iv) • Postal services – (v) • Lighthouses – (vii) • Astronomical observations – (viii) • Quarantine – (ix) • Fisheries – (x) • Currency, coinage – (xii) • Banking – (xiii) • Insurance – (xiv) • Weights and measures – (xv) • Bills of exchange – (xvi) • Naturalisation and aliens – (xix) • Corporations – (xx) • Pension – (xxiii); benefits and allowances (xxiiiA) • Service and execution of process/judgments – (xxiv); recognition of judgments – (xxv) • Race power – (xxvi) • Immigration and emigration – (xxvii) • Influx of criminals (xxviii) • External affairs (xxix) • Relations with Pacific islands – (xxx) • Construction of railways – (xxxiv) • Conciliation and arbitration (xxxv)

132 As did its approach to s92 (the other 'economic rights' provision in the Constitution) in *Cole v Whitfield* (1988) 165 CLR 360. For the suggestion that the current jurisprudence is equivalent to the pre-*Cole v Whitfield* position on s92, see George Williams in Evans, above n1 at 186 n23.

	Purposive power	**Non-purposive power** *where core of power encompasses a power to acquire property*	**Non-purposive power** *where core does not encompass power to acquire property & reliance on incidental power would be required*
Other	• Detention of federal prisoners by States – s120	• Power to acquire property from State department – s85(ii) • Territories power – s122	• Composition and election of the Parliament – Pts II–IV • Seat of government, Commonwealth places – s52(i) • Commonwealth departments – s52(ii) • Regulation of composition and power of Executive – ss64–66 • Regulation of composition and jurisdiction of the Courts – ss 71–73, 76–80 • Payment to States of surplus revenue – s94; provision of financial assistance to the States – s96; assumption of State debts – ss 105, 105A • Establishment of Inter–state Commission s101 • Power to create new State/ alter State boundaries – ss121, 123