

# SECTION 51(XXXI) AND THE ACQUISITION OF PROPERTY UNDER COMMONWEALTH–STATE ARRANGEMENTS: THE RELEVANCE TO NATIVE TITLE EXTINGUISHMENT ON JUST TERMS

Sean Brennan\*

## I Introduction

In 1988 the Australian people were asked to support the extension of the constitutional requirement of just terms to persons whose property was acquired under the law of a state or territory, and not just a law of the Commonwealth.<sup>1</sup> The amendment was soundly defeated on a day when four separate referendum proposals all failed. The true level of public support for the idea was, however, impossible to gauge due to the way in which the question was presented as part of a larger package.<sup>2</sup>

In recent times, proposals to extend the existing constitutional protection for property rights have again surfaced.<sup>3</sup> At the 2010 federal election the NSW Farmers' Association, a rural industry body, pressed all candidates for a constitutional amendment requiring state governments to pay just terms compensation upon the acquisition of property. In the same year the independent member for the federal seat of Kennedy, Bob Katter, Jr, introduced a private member's bill proposing an alteration to the *Constitution*.<sup>4</sup> It extended just terms coverage to state laws. In the case of both federal and state laws, it also applied the just terms guarantee to 'any restrictions on the exercise of property rights'. In his speech introducing the Bill, Mr Katter linked the constitutional shortfall he identified to Wild Rivers legislation and its potential erosion of Aboriginal property rights, as did historian Ross Fitzgerald in an opinion piece published in a national newspaper.<sup>5</sup>

A referendum proposal to expand state government liability to compensation would face significant political challenges, whether grouped with other proposals as in 1988 or made to stand alone, in particular because of the requirement for a majority of states to support the change and the potential

for state premiers to influence referendum outcomes.<sup>6</sup> Regardless of whether such a proposal proceeds, it is worth asking as a baseline proposition to what extent the *existing Constitution* addresses the policy objective being espoused. For the purpose of this paper that question is asked with specific reference to the property rights of Aboriginal and Torres Strait Islander peoples.

In asking to what extent the states are constrained in relation to the acquisition of property by the constitutional guarantee of just terms in section 51(xxxi),<sup>7</sup> this article examines an argument which has been pressed by litigants in the High Court three times in recent years, with somewhat inconclusive results.

The unfolding and unresolved nature of doctrine makes for a complex discussion. To simplify, I confine the application of constitutional doctrine to a single, nationally-recognised form of Aboriginal and Torres Strait Islander property – native title – but it could of course be applied more widely.<sup>8</sup> The paper builds on some earlier analysis by the author of 'acquisition of property' issues in respect of native title.<sup>9</sup> But it specifically focuses on this question of state coverage and brings to bear these more recent High Court decisions on section 51(xxxi).

The question is relevant for the following reasons. A Commonwealth law, the *Native Title Act 1993* (Cth) ('NTA'), provides a compensation regime for the adverse impact of government action on native title rights and interests. That compensation scheme makes reference to, but does not in all instances simply reproduce, the constitutional formula of 'just terms'. The NTA also authorises state parliaments to extinguish and otherwise diminish native title, subject to clearly defined parameters. Given this centrality of a

Commonwealth law (and the potential departure from a strict just terms standard), it is relevant to ask to what extent the constitutional guarantee of just terms applies to the extinguishment and impairment of native title by states.

## II Are the States Presently Constrained by the Just Terms Guarantee?

### A The Basic Position

The states are not directly bound by the just terms guarantee in section 51(XXXI) and have a much wider constitutional power of eminent domain: ‘They, if they judge it proper to do so for some reason, may acquire property on any terms which they may choose to provide in a statute, even though the terms are unjust.’<sup>10</sup> In 2001 the High Court affirmed that if there are any rights so deeply rooted in our democratic system and the common law that they constrain state legislative power, the requirement of just compensation for the acquisition of property is not one of them.<sup>11</sup>

### B Why the Basic Position Is Not the Last Word: Acquisitions by Parties Other Than the Commonwealth

It is possible, however, for state acquisitions to be drawn into the orbit of the just terms guarantee in the *Commonwealth Constitution*. This is so mainly for two sets of reasons, one legal, one practical. Legally, several factors encourage a broad reading of the words found in section 51(XXXI). They involve use of the phrase ‘with respect to’ in conferring a power relating to the acquisition of property<sup>12</sup> and the basic principles of constitutional interpretation, including *Engineers*,<sup>13</sup> which encourage a broad interpretation of Commonwealth powers. There is also the High Court’s insistence that compliance with the limits in section 51(XXXI) is a matter of substance not form. These legal considerations combine with the practical reality that extensive legal, financial and administrative links exist across the Commonwealth–state divide.

For some time, however, there was disagreement within the High Court as to whether section 51(XXXI) could extend beyond acquisitions by the Commonwealth and its instrumentalities. Sir Owen Dixon was amongst the doubters,<sup>14</sup> and in 1961 the Dixon Court adopted an arcane interpretation of the phrase ‘for any purpose in respect of which the Parliament has power to make laws’ as part of

the effort to constrain the category of acquisitions to which the just terms guarantee applied.<sup>15</sup> In *Schmidt*, the Court said that property for the ‘use and service of the Crown’ would mark the outer boundary of eligible acquisitions.<sup>16</sup> Even Williams J, a judge who took a broader view of who could be an acquirer, agreed that ‘purpose’ was a relevant constraint in this respect and therefore that the Commonwealth must have at least a ‘legal interest’ in the acquisition of property by another.<sup>17</sup>

Almost two decades later, debate continued. Justice Aickin, in his dissenting judgment in *Trade Practices Commission v Tooth*,<sup>18</sup> said it ‘must now be regarded as settled’ that section 51(XXXI) applies where acquired property vested in ‘some person other than the Commonwealth or an agency of the Commonwealth’.<sup>19</sup> Justices Gibbs<sup>20</sup> and Mason<sup>21</sup> in the majority agreed, while Stephen J regarded it as a subject of continuing disagreement<sup>22</sup> and Murphy J preferred the contrary Dixonian view.<sup>23</sup>

Today the position is clear:

1. a Commonwealth law may come within section 51(XXXI) even though the acquirer of property is a state or ‘any other person’, rather than the Commonwealth itself;<sup>24</sup>
2. Justice Williams’ concern is addressed by the less stringent requirement that *someone* obtain a ‘benefit’ from the process of acquisition;<sup>25</sup> and
3. the ‘purpose’ element does not impose the constraint suggested in *Schmidt*.

There is a textualist logic to this, supported by *Engineers* and related principles of interpretation. Section 51(XXXI) speaks of laws with respect to the acquisition of property, not laws for the acquisition of property by the Commonwealth. There is also a philosophical shift at work. Justice Dixon (and several of his contemporaries) tended to the more utilitarian end of the interpretive spectrum in section 51(XXXI) cases. Many of those cases occurred during and immediately after the straitened national circumstances of the Second World War. This provision was, for such judges, the *grant of a power* with a condition attached.<sup>26</sup> More recent High Court judges have tended to place much greater emphasis on the *duality* of section 51(XXXI), elevating its status as a constitutional guarantee of property rights, alongside its self-evident character as a head of power.<sup>27</sup> This contest of ideas, between utilitarianism and rights-protection, has always

been present in section 51(xxxi) analysis<sup>28</sup> and it continues to play out in all aspects of doctrine in a way that remains unresolved. But the balance has been shifting since Dixon's era. This was evident as early as 1979, when Mason J wrote:

As a matter of policy and protection it makes very little sense to say that the Commonwealth cannot pass laws for its acquisition of the citizen's property without giving just terms but it can pass laws for the acquisition of the citizen's property by others without giving any compensation at all.<sup>29</sup>

Once the acquisition of property by a third party is conceivably covered by section 51(xxxi), state acquisitions are not automatically immune from just terms obligations. The key issue becomes: in what circumstances is a state acquisition sufficiently referable to a Commonwealth Act so as to attract the constitutional guarantee?

### **C When Do Interlocking Commonwealth-State Arrangements Result in the Just Terms Guarantee Applying to State Acquisitions?**

A number of High Court cases involve the applicability of the just terms guarantee to interlocking Commonwealth-state arrangements. They include the decisions more than 60 years ago on soldier resettlement, in *PJ Magennis Pty Ltd v Commonwealth*<sup>30</sup> and its contrapuntal successor *Pye v Renshaw*,<sup>31</sup> and more recent judgments about Commonwealth-state regulation of water use<sup>32</sup> and land clearing.<sup>33</sup> Consistent with the ongoing philosophical contest between utilitarian and rights-based values, some judges adopt a more 'aggregationist' approach to such arrangements which is more likely to favour plaintiffs. Others tend to be 'disaggregationists',<sup>34</sup> an approach more likely to favour the Commonwealth. At present, the law remains uncertain but the momentum appears to be with the aggregationists. In their favour they have the oft-cited principle that section 51(xxxi) is concerned with matters of substance, not form.<sup>35</sup>

Typically in such cases a plaintiff challenging state action must engage in a four-step process of reasoning, travelling to and fro between the two levels of the federation in order to establish the following propositions:

1. there is, in the constitutional sense, an 'acquisition of property' on other than just terms, albeit one that it is achieved in an immediate sense by state action;
2. there is a proximity between that state action and a

Commonwealth law sufficient to permit the latter's characterisation (in the 'general' sense, as I will call it) as a law with respect to the acquisition of property;

3. the Commonwealth law satisfies the other prerequisites of section 51(xxxi) doctrine (particularly the more specific 'characterisation' principles that apply to this head of power);<sup>36</sup> and
4. the constitutional consequences of steps 1–3 can be made to flow back to the state level, rendering the state action invalid or inoperative.

In other words a link between the Commonwealth law and the state-based acquisition must be established at two distinct points in the chain:

- in step 2 there must be a 'sufficient connection' in legal and/or practical terms between what the Commonwealth law says regarding state expropriation and the subject matter referred to in section 51(xxxi), that is, the acquisition of property for a Commonwealth purpose (the sufficient connection issue); and
- in step 4 something must achieve a cross-jurisdictional transmission of the just terms guarantee to constrain the otherwise untrammelled state power of compulsory acquisition (the cross-jurisdictional transmission issue).

As discussed below, it appears from recent High Court decisions that factual material regarding Commonwealth-state arrangements, both formal and informal, could have a bearing on step 2 and possibly step 4 as well, depending on the circumstances of the case.

#### **(i) Step 2: Sufficient Connection**

Conceivably, a sufficient connection between a state acquisition, Commonwealth legislation and the words of section 51(xxxi) could be established in a variety of ways. This might include:

- a Commonwealth law which directly authorises, facilitates or permits such an acquisition;
- a Commonwealth law which authorises entry into an intergovernmental agreement that deals with such an acquisition; or
- a Commonwealth law, or an agreement authorised by Commonwealth law, which grants financial assistance to a state on the condition that such an acquisition occur.

The law in such circumstances has been unclear since the Court reached differing conclusions in *Magennis* and *Pye v Renshaw* some 60 years ago.

The earlier case of the two, *Magennis*, concerned a Commonwealth law which authorised the executive to enter into an agreement with New South Wales, ‘substantially in accordance with the form contained in the First Schedule’. The scheduled agreement required the State to acquire land at the value obtaining several years earlier, putting it well below market value and any equivalent of just terms. A majority of the High Court found that the Commonwealth law was one with respect to the acquisition of property otherwise than on just terms, and that the agreement with New South Wales signed by the Commonwealth in reliance on the Act was not legally binding. The basis for cross-jurisdictional transmission of constitutional invalidity identified in *Magennis* is explained later under the next sub-heading.

The decision in *Magennis* suggested that a sufficient connection for general characterisation purposes could exist under such a Commonwealth–state scheme, when considered in aggregate. But uncertainty arose from two factors.

First, it was not clear from the majority judgments at what level of generality the ratio in *Magennis* should be expressed. For Latham CJ, a law approving an agreement or authorising its execution, when the acquisition of property upon certain terms for certain purposes by a state was its central feature, was a law attracting the just terms guarantee.<sup>37</sup> It would render the constitutional provision ‘quite ineffective if by making an agreement with a State’ the Commonwealth Parliament could validly provide for an acquisition under state law upon terms which were not just.<sup>38</sup> Chief Justice Latham added that the capacity for the law to be characterised as a section 96 grant did not preclude its characterisation as one for the acquisition of property.<sup>39</sup>

Justice Williams (with the concurrence of Rich J) also found that the Commonwealth Act authorising the executive to enter into the agreement was a law with respect to the acquisition of property. This followed scrutiny of the terms of the agreement to ascertain the ‘real effect’ of the law.<sup>40</sup> It was relevant that under the agreement the Commonwealth met a substantial share of costs of the cooperative scheme, including some related to the acquisition itself, and derived tangible benefits from the agreement. Justice Williams

described the agreement as a ‘joint venture’ between the Commonwealth and the State to settle returned soldiers on the land, where acquisition of the land was ‘of the essence of the scheme’,<sup>41</sup> and as a ‘scheme [which] requires valid Commonwealth and State legislation to make it effective’.<sup>42</sup> He said that section 51(XXXI) applied to ‘all Commonwealth legislation the object of which is to acquire property for a purpose in respect of which the Commonwealth has power to make laws’.<sup>43</sup> The identity of the acquirer was unimportant, provided the Commonwealth or a body authorised by the Commonwealth derived a legal (not necessarily proprietary) interest – here the agreement conferred contractual rights with respect to the use and disposal of the acquired land.

Justice Webb (like his colleague Latham CJ) emphasised the breadth of the words ‘with respect to’<sup>44</sup> in section 51(XXXI) and said they extended ‘to include an acquisition by the State exercising its powers of acquisition by agreement with the Commonwealth’.<sup>45</sup> As the terms of the agreement were set out in the schedule to the Commonwealth Act it was not significant that the purpose of securing the land at less than fair prices was implied rather than express.<sup>46</sup> Like Latham CJ, Webb J said that the character of the law as a section 96 grant was no bar to its characterisation as a law attracting the just terms guarantee.<sup>47</sup>

The second cause of uncertainty about the legacy of *Magennis* was the case which, two years later, tested the validity of a revised scheme for soldier settlement. In *Pye v Renshaw*, the Court embraced a staunchly disaggregationist view of the scheme which seemed to call into question the earlier majority approach in *Magennis*. Justice Dixon, the dissenter in *Magennis*, and another four members of a High Court bench in 1951 responded to the altered form of the State legislation with a unanimous decision in favour of validity.

New South Wales had revised its legislation with the intention of removing the basis for cross-jurisdictional transmission relied on by the majority in *Magennis* (see below). The plaintiffs in *Pye v Renshaw* sought to argue that *factually* the Commonwealth was still up to its neck in the acquisitions made under state legislation, by reason of the intergovernmental agreement (which continued) and the arrangements for valuations, financial assistance and so on between the State and the Commonwealth. But the unanimous five-member judgment of the Court revealed a complete non-interest in the facts of the inter-governmental arrangements:

What valuations the State chooses to have made and what arrangements it chooses to make before or after resumption with the Commonwealth or anybody else with regard to the closer settlement of soldiers on land in New South Wales are matters equally irrelevant to the validity of any resumption.<sup>48</sup>

The Court also said that the plaintiff's argument was untenable because, apart from anything else, section 51(xxxi) did not prevent the Commonwealth from providing money to a state under section 96 'in order that the State may resume land otherwise than on just terms'.<sup>49</sup> This cast doubt on the establishment of a sufficiency of connection between a state acquisition, a Commonwealth law and the words of section 51(xxxi), where the link with federal law was the provision of financial assistance to the state.

More recent cases have not resolved these uncertainties but they point strongly in two directions. The first is that a Commonwealth law providing *financial support* for a state to effect an acquisition of property may well come within the scope of section 51(xxxi) on grounds of sufficient connection. Though not binding, the strong impression left by the comments of all seven judges in *ICM* is that the just terms guarantee constrains the exercise of section 96 of the *Constitution* in the same way that it does other Commonwealth heads of power. In other words, the Commonwealth cannot provide funding to a state on the condition that it acquire property on other than just terms, whether directly by law or under an agreement authorised by law.<sup>50</sup> The principle detectable in *Magennis* and thought to have been undermined by *Pye v Renshaw* appears resurgent. It is not clear, however, to what extent sufficiency of connection will exist in situations of Commonwealth–state enmeshment, outside section 96 grants that contain conditions requiring unjust acquisition.

The second point to emerge from the more recent cases concerns the potential importance of factual material in establishing the requisite link between a state acquisition and a Commonwealth law.

In *ICM* in 2009, the reasoning of the only judge required to deal with the issue (Heydon J in sole dissent on the result) highlighted the potential significance of facts about the existence and nature of arrangements between the Commonwealth and a state.<sup>51</sup> One of the plurality joint judgments in the *ICM* majority also made a point of reserving the Court's position on the potential for

*informal* intergovernmental arrangements to effect an unconstitutional acquisition of property, given *Magennis* says that, in some circumstances, formal legal arrangements between governments may do so.<sup>52</sup>

Six months later, in *Spencer*, the Court refused to summarily dismiss the allegation of an unconstitutional acquisition of property, noting the unanswered question from *ICM* about factual evidence of informal arrangements between the Commonwealth and a state. The plaintiff challenged restrictions on clearing his farmland imposed by state conservation laws which he said were made in furtherance of agreements with the Commonwealth. Those agreements were authorised by Commonwealth laws which he said were for the purpose of taking property on other than just terms. Chief Justice French and Gummow J noted that, in presenting such a claim, details of intergovernmental communications and negotiations may cast light on the 'practical operation of the Commonwealth and State funding arrangements', though ultimately they left open the question whether informal arrangements could establish a sufficient connection for constitutional purposes.<sup>53</sup>

#### (ii) Step 4: Cross-Jurisdictional Transmission

No matter how 'aggregationist' a judge might be prepared to be, no matter how much he or she may privilege substance over form, the important legal question raised by step 4 remains. If the basic position is that states are constitutionally free to acquire property on whatever terms they wish, why should it make any difference that a *Commonwealth* law has been found invalid due to an absence of just terms? The doctrine here is sketchy and the Court has not yet settled on what it regards as an appropriate limitation device for this aspect of section 51(xxxi) doctrine. The only case to have established cross-jurisdictional transmission of the just terms guarantee is *Magennis*. The plaintiffs in *ICM* and *Spencer* ventured alternative arguments for roping in the states, but the majority of judges disposed of the litigation on other grounds, leaving the status of such arguments uncertain.

In *Magennis* the 'aggregationist'/'disaggregationist' divide between the majority and the dissenters was made visible by this issue. For the majority judges the soldier settlement scheme was a joint venture designed to escape the constitutional requirement of just terms.<sup>54</sup> They pointed to state legislation which made explicit reference to (and ratified) the agreement with the Commonwealth concerning the

soldier settlement scheme. The impugned acquisitions were to be carried out expressly 'for the purposes of the scheme contained in the agreement with the Commonwealth'.<sup>55</sup>

From this the majority argued there was a *textual basis* in the state law for claiming its effectiveness was contingent on the legal validity of the intergovernmental agreement. Thus the cross-jurisdictional link was established. The Commonwealth's requirement of unjust terms made for an invalid federal law and an unconstitutional agreement. That removed the precondition to the effective exercise of state power.<sup>56</sup> Later, under revised inter-governmental arrangements, that textual basis was airbrushed away to good legal effect in *Pye v Renshaw* (even if in reality the Commonwealth and the State exchanged correspondence about funding conditions informally in the wake of *Magennis*).<sup>57</sup>

By contrast, the dissenters in *Magennis*, Dixon J and McTiernan J, put greater emphasis on the independent power of eminent domain enjoyed by state parliaments.<sup>58</sup> As a matter of statutory interpretation Dixon J emphatically rejected the idea that the state power of acquisition depended on the legal enforceability of the intergovernmental agreement or, as Webb J put it in the majority, that properly construed the state law contemplated a valid agreement. The statutory references to the scheme did no more than describe 'a plan set out in an instrument the subject of a public transaction' and implied 'nothing as to its legal status or enforceability'.<sup>59</sup> Justice Dixon also cast doubt on an approach which ascribed a legal character to an agreement between the governments of two polities within the federation.<sup>60</sup>

In short, cross-jurisdictional transmission in *Magennis* depended on textual references in the state acquisition law which referred directly back to the impugned Commonwealth law (or more specifically, the agreement made pursuant to that law). The approach appeared to put weight on the legal/contractual enforceability of the intergovernmental agreement.<sup>61</sup>

More recently, a broad approach was taken by the only judge required to determine this issue of cross-jurisdictional transmission in *ICM*, the dissenting Heydon J. The state instruments which diminished the entitlement of bore licensees to groundwater were 'steps – together with many other steps of cooperation between the Commonwealth and New South Wales – taken in concert to achieve a goal

which depended on a contravention by the Commonwealth of section 51(XXXI)'.<sup>62</sup> Justice Heydon moved beyond the emphasis given to express reliance on Commonwealth action in *Magennis* to make a broader aggregationist point about the validity of state action. If, overall, an intergovernmental scheme *contemplates* unjust acquisitions by the states it does not require a textual nexus of the kind found in *Magennis*: the state action need not be expressly contingent on a binding agreement or an operative Commonwealth law. All that is needed are steps taken in concert to achieve a goal which depended on a contravention by the Commonwealth of section 51(XXXI).<sup>63</sup>

The issue of whether the inter-governmental Funding Agreement for the Lower Lachlan Groundwater System was enforceable as a contract also figured in argument in *ICM*, but was sidelined in the judgments.<sup>64</sup> Instead, attention was focused on covering clause 5 or section 106 of the *Constitution* as the mechanisms for effecting cross-jurisdictional transmission of the just terms guarantee.

Again only Heydon J found it necessary to deal with these suggested links in the chain. In reaching his conclusion he embraced the use of section 106 and covering clause 5 as an alternative means of binding states which engage in joint action with the Commonwealth, to the constitutional outcome of invalidity:

Section 106 of the *Commonwealth Constitution* provides that the Constitution of New South Wales is subject to the *Commonwealth Constitution*. Covering clause 5 provides that the *Commonwealth Constitution* is binding on the people of every State. It follows that the New South Wales Government, which operates under the Constitution of New South Wales, has no power to participate in conduct which is in contravention of section 51(XXXI).<sup>65</sup>

The issue was not advanced by *Spencer*. Because of the abbreviated scope of the case (a motion for summary judgment) and the 'stunted version of Mr Spencer's pleading'<sup>66</sup> in relation to sufficient connection and cross-jurisdictional transmission, French CJ and Gummow J found it unnecessary to comment. The plurality judgment of Hayne, Crennan, Kiefel and Bell JJ agreed with them that it was an open question after *ICM* whether an informal arrangement or understanding between the Commonwealth and a state that an acquisition by the state occur on other than just terms has constitutional significance. It neither could nor should be

answered at this stage of the proceedings, they said.<sup>67</sup> Justice Heydon did not find it necessary to revisit his comments in *ICM*.

These constitutional issues have a bearing on the law of native title and its extinguishment. The next section of the paper will seek to clarify whether in defined situations of state extinguishment of native title the *NTA* functions as a law with respect to the acquisition of property, necessitating the provision of just terms, and whether the immediate acts of extinguishment effected under state law also depend on the provision of just terms for their validity.

### III The Relevance of the Law on Commonwealth-State Schemes for Native Title

The federal *NTA* contains multi-layered provisions dealing with the extinguishment and impairment of native title by legislative and executive action. I set aside those provisions which directly specify the 'extinguishment consequence'<sup>68</sup> of *Commonwealth* action<sup>69</sup> and those which do so *directly* for state and territory action.<sup>70</sup>

More significantly for present purposes, the federal legislation also *authorises state and territory parliaments to enact complementary provisions dealing with extinguishment and impairment*. Potential 'sufficient connection' and 'cross-jurisdictional transmission' issues arise at this point. That potential increases when it is appreciated that many extinguishing acts are co-dependent on other state legislation, that is, state laws dealing with the alienation of Crown land, the grant of mining tenements, the assertion of Crown ownership of resources and so on.

Let us take an illustrative example: a hypothetical lease for a rifle range over never-alienated Crown land in 1980 made under the *Land Act 1933* (WA) ('*Land Act*'), where traditional connection has been maintained. This is the kind of situation for which the validation provisions in part 2 division 2 of the *NTA* were designed. A state law which derogated from native title by methods not applied to other titles (that is, no process of prior acquisition and no compensation) was, after 30 October 1975, unlawful because it conflicted with the requirement under federal law to treat property holders equally regardless of race. That was the effect of the *Racial Discrimination Act 1975* (Cth) ('*RDA*').<sup>71</sup> After *Mabo v Queensland [No 2]*,<sup>72</sup> the Commonwealth acted to retrospectively cancel out the effect of the *RDA* with the

validation provisions of the *NTA*. Once the over-riding standard of non-discrimination was out of the way, states and territories were free once more to make laws that singled out Indigenous property rights for adverse treatment. This they proceeded to do after the *NTA* commenced on 1 January 1994, with state and territory validation provisions that retrospectively deemed a legally ineffective grant to be valid, at the expense of native title holders' legal rights.

The extinguishment consequence of the hypothetical lease for a rifle range will depend on the interaction between at least:

- the *NTA* – authorising state legislation which prescribes extinguishment for the grant of such a lease to the extent of its inconsistency with native title;
- the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) – complementary state native title legislation explicitly incorporating terms from the federal native title legislation and prescribing the extinguishment consequence permitted by that federal Act; and
- the *Land Act* – the source of immediate legal authority for doing the act which affects native title.

With extinguishment triggered at one and two removes from the Commonwealth Act, this example gives rise to two constitutional inquiries:

1. Is the *NTA* a law 'with respect to' the acquisition of property (the sufficient connection issue)?
2. If it is, would extinguishment under state law alone remain valid in the absence of just terms (the cross-jurisdictional transmission issue)?

I will proceed to these questions assuming for the moment that the extinguishment of native title by inconsistent grant is relevantly an 'acquisition of property',<sup>73</sup> and that the 'veto principles' which prevent engagement of section 51(xxxi) on characterisation grounds do not apply here.<sup>74</sup>

I suggest below that purely *legal* analysis yields a positive answer to both issues (sufficient connection and cross-jurisdictional transmission) without resort to additional facts. It is worth noting in addition, however, that discussions of native title in the 1990s assumed that the Commonwealth had agreed to meet 75 per cent of the states' compensation liabilities under the *NTA*.<sup>75</sup> Provision was made in annual

federal budgets for contingent compensation liabilities of this kind. Such *facts* may be material to establishing the existence of formal and informal arrangements between the states and the Commonwealth regarding state extinguishment of native title.

### A Sufficiency of Connection

Is there a sufficient connection between what the federal *NTA* says and does in relation to state extinguishment of native title and the subject-matter of the power in section 51(xxxi), that is, the ‘acquisition of property’?

In *Magenis* it was sufficient that a Commonwealth law authorised entry into an agreement that provided for state acquisitions on defined terms and conditions. Later cases have potentially opened the door to circumstantial evidence of an intergovernmental scheme involving state acquisitions on defined terms and conditions. It appears likely that providing Commonwealth funding to a state on condition that it acquire property on defined terms is a law with respect to the acquisition of property.

In our example under the *NTA*, the Commonwealth provisions dealing with state extinguishment are *explicitly concerned with the legally effective expropriation* of native title rights. Although the grant of the rifle range lease which brings about the extinguishment of native title occurs at two removes from Commonwealth law, it only results in actual expropriation because that outcome is explicitly permitted by a Commonwealth law which, in addition, precludes expropriation contrary to its terms.

Under the Commonwealth Act, if a state law follows a required form, then it ‘may provide that past acts attributable to the state or territory are valid, and are taken always to have been valid’.<sup>76</sup> Where the validated past act is the grant of a lease (subject to immaterial exceptions) the Commonwealth Act expressly states that the validation authorised by federal law ‘extinguishes the native title to the extent of the inconsistency’.<sup>77</sup>

True enough the Commonwealth law does not *mandate* that the states extinguish native title or contractually oblige them to do so. But the words ‘with respect to’ in section 51 of the *Constitution* would seem plausibly to extend paragraph (xxxi) to situations of explicit authorisation as well. The fundamental principles of characterisation support that

proposition. In terms of ‘rights, powers, liabilities, duties and privileges’ created by the federal law:<sup>78</sup> (a) the states are enabled to single out Indigenous property rights for extinguishment where their laws are otherwise ineffective to achieve that result and (b) native title holders are rendered immediately liable to the loss of property rights they would otherwise enjoy under Australian law.

My conclusion, therefore, is that based on the existing case law the sufficiency of connection test is satisfied and that the *NTA*, with its detailed national blueprint for the valid extinguishment of native title, is a law with respect to the acquisition of property. That conclusion does not depend upon the grey area of informal arrangements raised in *Spencer*.<sup>79</sup> Nor is it, in my view, diminished by the fact that it is another federal law – the *RDA* – which prevents the states, absent the *NTA*, from extinguishing native title by inconsistent grant without compensation. In a situation where valuable land rights are being legally wiped out by Commonwealth law, I submit that it does not matter that statute contributes to the pre-existing legal position of native title holders, given that their property rights are also at common law ‘true legal rights ... recognised and protected by the law’<sup>80</sup> and given that section 51(xxxi) can even apply to pure statutory rights in some circumstances.<sup>81</sup>

### B Cross-Jurisdictional Transmission

If the provision in the *NTA* authorising state extinguishment of native title by the grant of a rifle range lease in 1980 is a law with respect to the acquisition of property, what is the consequence? The answer is that the validity of the Commonwealth law depends on the provision of just terms. But the basic constitutional position is that states can go it alone and extinguish native title without compensation. Is there any cross-jurisdictional transmission here of the just terms guarantee, or could the state laws alone validly effect extinguishment on less favourable terms?

It is not necessary to go to untested arguments regarding section 106 of the *Constitution* and covering clause 5, nor to rely on the provisions of an intergovernmental agreement which may or may not amount to a legally enforceable contract. That is because section 109 of the *Constitution* provides the answer. There is a clear legal reason why state action to extinguish native title is vulnerable to the requirement of just terms. A state which sought to extinguish native title in some other way would be inoperative (or



'invalid' in the section 109 sense of the word) because section 11 of the federal Act says that native title may not be extinguished contrary to the Act. Indeed this invalidity is doubly achieved by section 109, because a state law which singled out native title for extinguishment provisions of this kind would also infringe the *RDA*. Western Australian freehold could not have been validly extinguished in 1980 by the inconsistent grant of a rifle range lease.<sup>82</sup> Unlike *Pye v Renshaw* the extinguishment of native title in our example was unambiguously dependent on valid Commonwealth legislation. And our earlier sufficient connection analysis established that the validity of the Commonwealth legislation in turn depended on the provision of just terms.

This brief illustrative example suggests that the technical effect of the validation provisions<sup>83</sup> in the *NTA* is as follows. A provision in Commonwealth law removes what would otherwise be legal obstacles to state acquisitions of property and expressly permits such acquisitions to occur, making it a law which relevantly engages section 51(xxxi). And absent the Commonwealth provisions authorising extinguishment, the state could not effect the acquisitions on its own. Contrary to the objection raised by the dissent in *Magennis*, section 109 'does ... come into play because there is ... Commonwealth law which is inconsistent with any State law necessary to support the resumption'.<sup>84</sup> That Commonwealth law consists of both section 11 of the *NTA* and section 10 of the *RDA*.

#### IV Why Does This Matter?

There are several reasons why the applicability of the just terms guarantee to native title extinguishment by the states might matter. I will highlight one which involves another live issue in section 51(xxxi) case law not dealt with here but relevant to *ICM*, *Arnold* and *Spencer*. That is, 'regulatory acquisitions' or incursions on property rights which fall short of total (direct or indirect) expropriation. Although the starting point for compensating native title holders in the *NTA* is a statutory standard of 'just terms' which presumably mirrors the constitutional requirement, the *NTA* departs from this standard in some situations involving less than total extinguishment. If in these instances the *NTA* provides less than just terms for what would be treated under the *Constitution* as an acquisition of property then there is a problem in the Act. I will adopt an example from the provisions dealing with validated past acts to illustrate the issue.<sup>85</sup>

#### A Validated Past Acts Involving Prolonged Suppression of Native Title

Under the federal *NTA*, Category C of the past acts regime permits states to validate a mining lease and prescribe the 'extinguishment consequence' to be the *suppression* of inconsistent native title rights for the duration of the mine (the so-called 'non-extinguishment principle').

The *NTA* varies the compensation regime for past acts that have this kind of 'non-extinguishment' consequence. Sections 17(2) and (3), in combination with section 20, require compensation only in three situations. It appears that the Commonwealth has gambled that in some situations the prolonged suppression of onshore native title under the non-extinguishment principle will not reach the point on a spectrum that shades into the 'acquisition of property' and that these three provisions adequately cover off against any implications of section 51(xxxi).

In evaluating whether these three categories get that constitutional calculus right, it helps to take note of some constitutional precedents relevant to the 'non-extinguishment principle'. The High Court has recognised since *Bank of New South Wales v Commonwealth*<sup>86</sup> that effective extinguishment can be achieved by indirect means and since *Minister of State for the Army v Dalziel*<sup>87</sup> that an 'acquisition' can occur even when the loss is indefinite rather than permanent.

Of the three categories established by sections 17 and 20 of the *NTA*, one says that just terms compensation is payable if the past act affects offshore native title. There is obviously no gamble with constitutional obligations there.

The other two categories concern onshore native title. Compensation is payable if the past act affects onshore native title and:

- the act could not have been validly done to a freeholder; or
- the similar compensable interest test is satisfied in relation to the act.

These onshore extinguishment provisions will fall short of compliance with section 51(xxxi) if either:

1. the act could have been validly done to a freeholder, the suppression of native title involved amounts to an

‘acquisition’ and the similar compensable interest test is not satisfied; or

2. the act could have been validly done to a freeholder, the suppression of native title involved amounts to an ‘acquisition’ and the application of the similar compensable interest test results in less than just terms.

The similar compensable interest test is satisfied if a state law would compensate freeholders affected by the same act. Where it applies, compensation for native title holders is worked out according to the principles and criteria in the state law.

If either kind of shortfall exists, section 53 of the *NTA* provides for native title holders to obtain top-up compensation in separate proceedings. If, in turn, section 53 needed to be triggered, this may raise questions about the fairness of the process and its delivery of just terms.<sup>88</sup>

Is it possible that section 53 could be triggered? In situation 1 the answer is conceivably yes. In other words, the Commonwealth has gambled that formal equality with uncompensated freeholders under state law is sufficient to secure just terms for an effective ‘acquisition’. It is not obvious why that should be so. It has further gambled that section 53 can mop up any just terms problems, but as noted that may also be open to question on ‘fair process’ grounds.

In situation 2 the answer is also conceivably yes. There is no obvious reason to assume that a state law providing freeholders with compensation for an act such as the grant of a mining lease provides what the *Constitution* calls ‘just terms’ for the effective acquisition of native title rights and interests, a very distinct set of property rights from a different cultural paradigm.<sup>89</sup>

In short the Commonwealth appears to have assumed that formal equality solves the constitutional question of liability to just terms, but the basis for that assumption is not self-evident.

## V Conclusion

This article began by noting recent discussion about a constitutional amendment to extend just terms coverage to state action and the possibility of including infringements of property rights falling short of total acquisition. Such a proposal was couched by reference to Aboriginal property

rights. This paper sought to establish, as a baseline proposition, whether the acquisition and impairment of native title under state law enjoys constitutional protection under existing constitutional arrangements.

Clearly the issue of covering state acquisitions is complex and situation-specific. However, the conclusion from this paper is that (whatever the precise extent of coverage) the just terms guarantee can apply to state extinguishment of native title. In turn, among other things, that draws attention to the appropriateness and even validity of compensation provisions in sections 17 and 20 of the *NTA* which depart from a strict statutory requirement of just terms.

---

\* Senior Lecturer and Director, Indigenous Legal Issues Project, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales. The author acknowledges the comments by participants on an earlier draft of this paper at the Research Workshop on Constitutional Reform and Indigenous Peoples, co-hosted by the Indigenous Law Centre and the Gilbert + Tobin Centre of Public Law in Sydney on 1 July 2011.

- 1 *Constitution Alteration (Rights and Freedoms) 1988* (Cth). The proposal would also have reversed the effect of the High Court decision in *Teori Tau v Commonwealth* (1969) 119 CLR 564 and confirmed the application of the just terms requirement to a law of the Commonwealth enacted under the Territories power in *Constitution* s 122. That outcome has now been achieved through litigation, with the overruling of *Teori Tau* in *Wurridjal v Commonwealth* (2009) 237 CLR 309: see Sean Brennan, ‘*Wurridjal v Commonwealth*: The Northern Territory Intervention and Just Terms for the Acquisition of Property’ (2009) 33 *Melbourne University Law Review* 957, 972–5.
- 2 The extension of just terms was one of three distinct questions included in one of the four referendum proposals, that dealing with ‘rights and freedoms’.
- 3 The topic was included in the briefing book provided to senators and members by the Parliamentary Library identifying ‘significant issues that are expected to arise in the early months of the 43<sup>rd</sup> Parliament’: Diane Spooner, ‘“Property” and Acquisition on Just Terms’, *Parliamentary Library Briefing Book: Key Issues for the 43<sup>rd</sup> Parliament*, 16 September 2010 <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BriefingBook43p/property](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook43p/property)>.
- 4 A Bill entitled *Constitution Alteration (Just Terms) 2010*. The Bill did not proceed beyond its first reading before the dissolution of

- the 42<sup>nd</sup> Parliament.
- 5 Ross Fitzgerald, 'Land Rights Under Threat from the Green Lobby', *The Australian*, 27 March 2010.
- 6 George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 244–5.
- 7 *Constitution* s 51(xxxi) provides: 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'.
- 8 Ultimately it would be appropriate to do so for holdings under state statutory land rights regimes and possibly other forms of property as well.
- 9 Sean Brennan, 'Native Title and the "Acquisition of Property" Under the *Australian Constitution*' (2004) 28 *Melbourne University Law Review* 28.
- 10 *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, 397–8 (Latham CJ) ('*Magennis*').
- 11 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 410 (Gaudron, McHugh, Gummow and Hayne JJ).
- 12 A power to make laws to acquire property for Commonwealth purposes would cover a narrower range of laws than the phrase 'with respect to' does.
- 13 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
- 14 *Andrews v Howell* (1941) 65 CLR 255, 281–2; *Magennis* (1949) 80 CLR 382, 411; *A-G v Schmidt* (1961) 105 CLR 361, 372–3 ('*Schmidt*').
- 15 *Schmidt* (1961) 105 CLR 361, 372–3 (Dixon CJ, Fullagar, Taylor, Kitto and Windeyer JJ agreeing).
- 16 *Ibid* 372–3 (Dixon CJ, Fullagar, Taylor, Kitto and Windeyer JJ agreeing).
- 17 *Magennis* (1949) 80 CLR 382, 422–4.
- 18 (1979) 142 CLR 397 ('*Tooth*').
- 19 *Ibid* 451. See also Chief Justice Barwick's dissenting judgment, which implies the same view: at 403.
- 20 *Ibid* 407.
- 21 *Ibid* 427.
- 22 *Ibid* 423–5.
- 23 *Ibid* 434.
- 24 *Magennis* (1949) 80 CLR 382, 402 (Latham CJ); more recently affirmed by six judges in *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 177 CLR 480, 510–11 (Mason CJ, Brennan, Deane and Gaudron JJ), 526 (Dawson and Toohey JJ) and repeated on several occasions since: see, eg, *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 169 (French CJ, Gummow and Crennan JJ) ('*ICM*').
- 25 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 185 (Deane and Gaudron JJ), cited frequently including, eg, *ICM* (2009) 240 CLR 140, 179–80 (French CJ, Gummow and Crennan JJ).
- 26 *Magennis* (1949) 80 CLR 382, 411 (Dixon J); *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269, 289–91 (Dixon J).
- 27 *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210, 232, quoting *Victoria v Commonwealth* (1996) 187 CLR 416, 559 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
- 28 This ideological or values dimension to s 51(xxxi) is, however, rarely acknowledged, as it is not compatible with the generally legalist outlook of Australian High Court judges.
- 29 *Tooth* (1979) 142 CLR 397, 426.
- 30 (1949) 80 CLR 382 ('*Magennis*'). The majority who found in favour of the plaintiff consisted of Latham CJ, Williams J (with whom Rich J agreed) and Webb J, while Dixon J and McTiernan J dissented.
- 31 (1951) 84 CLR 58.
- 32 *ICM* (2009) 240 CLR 140; *Arnold v Minister Administering the Water Management Act 2000* (2010) 240 CLR 242 ('*Arnold*').
- 33 *Spencer v Commonwealth* (2010) 241 CLR 118 ('*Spencer*').
- 34 See, eg, the discussion of Justice Dixon's dissent in *Magennis* (1949) 80 CLR 382 in *ICM* (2009) 240 CLR 140, 198–9 (Hayne, Kiefel and Bell JJ).
- 35 See, eg, the unanimous full court judgment in *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210, 230.
- 36 To clarify this contrast: the 'general' characterisation requirement is that which applies to all heads of power and entails a test of sufficient connection, while the 'specific' characterisation requirements refer to the way that various 'veto principles' in s 51(xxxi) doctrine (as I have called them in the paper referred to below) operate to take what otherwise appears to be a law with respect to property outside that head of power and ascribes it to one or more other heads of power in a mutually exclusive way. See Sean Brennan, 'The State of Play in Acquisition of Property: *Theophanous v Commonwealth*' (Paper presented at the 2007 Gilbert + Tobin Centre of Public Law Constitutional Law Conference, Sydney, 16 February 2007) <[www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/153\\_SeanBrennan.pdf](http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/153_SeanBrennan.pdf)>. On characterisation problems regarding s 51(xxxi), see also Simon Evans, 'When Is an Acquisition of Property Not an Acquisition of Property? The Search for a Principled Approach to Section 51(xxxi)' (2000) 11 *Public Law Review* 183; Rosalind Dixon, 'Overriding Guarantee of Just Terms or Supplementary Source of Power?: Re-thinking Section 51(xxxi)' (2005) 27 *Sydney Law Review* 639.
- 37 *Magennis* (1949) 80 CLR 382, 402.
- 38 *Ibid* 401.

- 39 Ibid 403.
- 40 Ibid 421.
- 41 Ibid 424.
- 42 Ibid 422.
- 43 Ibid 423.
- 44 Ibid 429–30; see also at 401 (Latham CJ).
- 45 Ibid 430.
- 46 Ibid 431.
- 47 Ibid 429.
- 48 *Pye v Renshaw* (1951) 84 CLR 58, 82.
- 49 Ibid 83.
- 50 This is particularly evident in the joint judgment of French CJ, Gummow and Crennan JJ and the dissenting judgment of Heydon J: *ICM* (2009) 240 CLR 140, 164–5, 167–70 (French CJ, Gummow and Crennan JJ), 206 (Heydon J). See also the less definitive comments of the other plurality judgment in the majority at 198–9 (Hayne, Kiefel and Bell JJ). It is also unlikely that the executive could rely on s 61 of the *Constitution* to enter an intergovernmental agreement which made the ‘unjust’ acquisition of property a condition of Commonwealth financial support: at 169 (French CJ, Gummow and Crennan JJ), 206–7 (Heydon J).
- 51 Ibid 238–9.
- 52 Ibid 164–5, 168 (French CJ, Gummow and Crennan JJ).
- 53 *Spencer v Commonwealth* (2010) 241 CLR 118, 134 (French CJ and Gummow J); see also at 123. The question was unnecessary to answer in an appeal against summary dismissal in advance of a trial. See also at 138 (Hayne, Crennan, Kiefel and Bell JJ).
- 54 *Magennis* (1949) 80 CLR 382, 398 (Latham CJ); 419 (Williams J, Rich J agreeing at 406).
- 55 Ibid 405 (Latham CJ).
- 56 Ibid 403–6 (Latham CJ), 424–5 (Williams J, Rich J agreeing at 406), 430 (Webb J).
- 57 *Gilbert v Western Australia* (1962) 107 CLR 494, 505 (Dixon CJ, Kitto and Windeyer JJ), cited in *ICM* (2009) 240 CLR 140, 164–5, 168 (French CJ, Gummow and Crennan JJ).
- 58 *Magennis* (1949) 80 CLR 382, 412 (Dixon J), 414–5 (McTiernan J).
- 59 Ibid 408.
- 60 Ibid 409. See also Justice McTiernan’s reference to ‘a political arrangement’: at 413.
- 61 Ibid 403–4 (Latham CJ); 423–4 (Williams J, Rich J agreeing at 406).
- 62 *ICM* (2009) 240 CLR 140, 238.
- 63 Ibid 238–9.
- 64 See, eg, ibid 187 (Hayne, Kiefel and Bell JJ).
- 65 Ibid 238.
- 66 *Spencer v Commonwealth* (2010) 241 CLR 118, 134 (French CJ and Gummow J).
- 67 Ibid 138.
- 68 I use this phrase to refer to the legal impact upon native title of a given act. The extinguishment consequence of an act sits on a legal spectrum substantially but not yet fully defined by statute and judicial decision. At one end there is no effect and at the other end there is total extinguishment. In between there are intermediate impacts including partial extinguishment, temporary suppression, impairment and regulation – with no particular clarity on the distinctions, if any, amongst the last three. See Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Lawbook, 4<sup>th</sup> ed, 2009) 370–4.
- 69 *NTA* s 14.
- 70 See generally the future act regime in *NTA* pt 2 div 3.
- 71 *Mabo v Queensland* (1988) 166 CLR 186.
- 72 (1992) 175 CLR 1.
- 73 Brennan, above n 9, 44–77.
- 74 For example, I assume for the purpose of this argument that the *NTA* does not fall outside the province of s 51(xxxi) because it is characterised (in the specific sense of the word referred to in n 36) as a law dealing merely with ‘a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity’: *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 510 (Mason CJ, Brennan, Deane and Gaudron JJ). I accept that to fully establish that the constitutional guarantee applies to validation of state acts under the *NTA* I would need to fully canvass the arguments concerning characterisation of the Act in the specific sense, but that is a task beyond the compass of this paper. This section of the paper is confined to the *general* question of characterisation and sufficiency of connection prompted by cases about Commonwealth–state enmeshment.
- 75 Prime Minister John Howard told a public meeting at Longreach in May 1997:
- if there are any compensation payments ordered to be made in relation to the compulsory acquisition or compulsory resumption of any established native title rights anywhere in Australia, that compensation will not be borne by the pastoralists of Australia, it will be borne by the general body of the Australian taxpayer on the ratio of 75 per cent to be paid by the Commonwealth Government, and 25 per cent to be paid by the State governments...
- Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, Parliament of Australia, *Sixteenth Report: Consistency of the Native Title Amendment Act 1998 with Australia’s International Obligations Under the Convention on the Elimination of all Forms of Racial Discrimination* (2000), app 2, 277. The Parliamentary Secretary responsible for native title, Senator Minchin, told the Senate: ‘We have said as a Commonwealth government that, in relation to the compensation

that is paid by the state government, we will meet 75 per cent of the cost. That again is a continuation of the arrangements made by the Keating government where it committed itself to paying 75 per cent of compensation for past acts': Commonwealth, *Parliamentary Debates*, Senate, 13 May 1997, 3163 (Nick Minchin).

- 76 *NTA* s 19(1).
- 77 *NTA* ss 15(1)(c), 230.
- 78 *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), which is the leading contemporary High Court authority on characterisation principles.
- 79 For a critical perspective on the idea that informal arrangements might provide a basis for extending just terms coverage and a discussion of the implications for conventional characterisation doctrine, see Stephen Lloyd, 'Compulsory Acquisition and Informal Agreements: *Spencer v Commonwealth*' (2011) 33 *Sydney Law Review* 137, 143–5.
- 80 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 111 (Deane and Gaudron JJ), cited in *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232, 244–5 (Gummow, Hayne and Heydon JJ).
- 81 *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210, 232.
- 82 Note the comparable analysis of the creation after 30 October 1975 of a reserve over native title land leading to invalidity in *Western Australia v Ward* (2002) 213 CLR 1, 138–9 (Gleeson CJ, Gaudron, Gummow and Hayne JJ) and the grant of leases to national park authorities in the Northern Territory: at 201–2. See also, more recently, analysis of the grant of a mining lease under the *Mining Act 1978* (WA): *James v Western Australia* (2010) 184 FCR 582, 591–5 (Sundberg, Stone and Barker JJ).
- 83 I do not deal in this paper with other forms of 'statutory extinguishment' in the *NTA*, found in the future act regime (pt 2 div 3) and (depending on the default extinguishment outcome at common law) the 'confirmation' provisions (pt 2 div 2B).
- 84 *Magennis* (1949) 80 CLR 382, 415 (McTiernan J).
- 85 Basically this refers to actions affecting native title between 1975 and 1994 which were invalid due to the *RDA* but were validated with retrospective effect by the *NTA* in 1994.
- 86 (1948) 76 CLR 1, 349 (Dixon J).
- 87 (1944) 68 CLR 261.
- 88 See *Commonwealth v Tasmania* (1983) 158 CLR 1, 288–92 (Deane J).
- 89 For a discussion of just terms and native title, see Celia Winnett, "'Just Terms" or Just Money? Section 51(xxxi), Native Title and Non-Monetary Terms of Acquisition' (2010) 33 *University of New South Wales Law Journal* 776.