**Just Terms/Property**

**S 51 (xxxi)**

“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…”

ALL s51 Cth acquisition of property must be get its power under s51(xxxi)

**Acquisition of Property**

1. (Is it a Commonwealth law? Who passed the law?
   a. If state, there is no duty to provide ‘just terms’.)

2. **Scope** of s51 (xxxi). Any acquisition of property must be under s 51 (xxxi) and not other heads of power.
   a. *Schmidt* says (xxxi) shouldn’t be applied indiscriminately. ‘ground actually covered’ by the section must be kept in mind
   b. Exceptions/excluded from scope of s 51 (xxxi). These don’t req ‘just terms’:
      i. Taxation can be used to acquire property.
      ii. Bankruptcy and acquisition of assets
      iii. Fines, forfeiture or property – punishment.
      1. *Airservices Australia v Canadian Air* (CA loan AA plane. Cth gives statutory lien on plane. AA ➔ bankrupt. Cth keeps plane to recover loss as per lien arrangement. Illogical for Cth to pay compo for plane it has a right to. JT not required)
      iv. Adjustment of private property rights *(Nintendo)*

3. Where was **right to have property** in first place?
   a. Is there a statutory basis – did they own property pursuant to statute?
      i. where property exists only in statute “further analysis is imperative” *Attorney-General (NT) v Chaffey (2007)*
   b. If not in statute, just assume person owned it.

4. Is it **property**? What property did/does person have?
   a. “Any tangible or intangible thing which the law protects under the name of property” *Minister of State for the Army v Dalziel (1944)* -Cth acquiring car park from tenant
   b. “Not to be confined pedantically… extends to innominate and anomalous interests” *Bank of NSW v Cth (Bank Nationalisation Case) (1948)* Cth acquiring bank shares and positions on boards
   c. “every species of valuable right and interest” *Industrial Relations Act Case*
   d. Includes Chose in Action *Giorgiadis* (intangible personal property rights)

5. Was this property similar to a property in a case? Can it be distinguished?
   a. Water? *(ICM about water underground)*
   b. See question above.

6. Is the property being acquired for Cth Purpose?
   a. Is it being **acquired**?
      i. Physically taken?
ii. “immaterial” whether acquisition by Cth/ body authorised/state in agreement.  
*PJ Magennis Pty Ltd v Cth (1949)*

b. Was it for Cth purpose?
   i. Eg migration?

   ii. Did the Cth obtain some **measureable or identifiable benefit**?
       a. If yes = acquisition → (xxxi) applies. *(Georgiadis)*
       b. If no, ≠ acquisition → (xxxi) doesn’t apply *(ICM Agriculture)* (ground water laws)

2. Financial gain? = sufficient benefit *Georgiadis*
   a. Includes extinguishment of a Chose in Action
      i. *Georgiadis* CIA extinguished
      ii. *Smith v ANL* (injured seaman)( statute gave 6 months to bring action before CIA extinguished. Still an acquisition.)
      iii. NB: injury case= Time important. Different facts → distinguishable?

3. Intangible benefits?
   a. Environmental conservation? = benefit. *Newcrest Mining*
   b. Political gain? ≠ sufficient benefit. *WMC Resources*

4. No identifiable/measureable Cth benefit? → ≠ Acq. No need for JT
5. *ICM Agriculture* (ground water case)

   iii. NB: Cth benefit doesn’t have to be the same as the thing lost
       1. Eg *Newcrest* (Cth extinguished C in A, gained environmental benefit)

7. Are the terms of the acquisition ‘just’?
   a. JT = “what is fair and just between the community and the owner of the thing taken” *Nelungaloo Pty Ltd v Cth*
   b. How much is being lost and what is the impact?
   c. Adequate compensation doesn’t really relate. Something can be ‘just’, but not adequate.
      i. Not necessarily market value *Grace Bros v Cth: Dixon J* “a true attempt to provide fair and just standards of compensation or rehabilitating the individual considered as an owner of property, fair and just as between him and the Government of the country.”
   b. Compensation package or procedures to determine fair compensation? may = JT.
      1. Deciding factor: are these procedures adequate?
            i. Slow and indirect procedures. Initiation of procedures uncertain → fair compensation for former owner. No immediate right conferred.
            ii. → Not ‘just terms’
i. Not contingent + well recognised form + provision
made to challenge decisions with reference to ‘just terms’. \(\rightarrow\) Just terms

d. Are interests sui generis/unique? Lesser acquisition?
   i. Some kinds of acquisition can’t be compensated so just terms = lesser
acquisition. (Wurridjal)

CASES

- **Attorney General v Schmidt** – Concerned scope of s51 (xxxi) “ground actually covered”
- **Nintendo v Centronics** – Circuit layouts and the acquisition of intellectual property rights.
- **Mutual Pools v Commonwealth** – Tax on swimming pools paid under unconstitutional law –
commonwealth only to pay tax back to pool companies that had NOT passed the tax onto
their customers (adjusting rights, claims, etc.)
- **Health Insurance Commission (HIC) v Peverill** – doctor’s rebate for bulk billed medical
testing.
   a) Peverill claimed that he had property taken away. He lost, HCA said since rebates
were *statutory rights*, and *inherently variable*, because no Parliament can bind its
successors, this was **NOT AN ACQUISITION**.
- **Georgiadis v AOTC** – chose in action (right to recover damages for injury at work is a CiA –
this is property) Held that extinguishing somebody’s own rights to sue at common law for
injury at work is a BENEFIT ACQUIRED BY THE COMMONWEALTH. So, **having a
benefit taken away can be an acquisition of property.**
- **Newcrest Mining v Commonwealth** – Commonwealth revoked Newcrest mining’s permit
over land to protect the environment. This is STILL and acquisition. Intangible benefit at
common law – but Cf WMC resources.
- **ICM Agriculture v Commonwealth** – fought over water = no measurable benefit to the State
[HCA- “States don’t own the water”]
- **Airservices Australia v Canadian Airlines** – Commonwealth gave itself a lien over aircraft
(owned by CA) that hadn’t paid airport fees. Canadian didn’t own the aircraft, Compass
owned them. HCA said their case was not susceptible to just terms (incongruous).
- **Wurridjal v Commonwealth** – Land Rights Act – statutorily created.
   o Note: s 71 mentioned by Heydon J: right of traditional owners to enter lands in accordance
with traditions.
      • Background: controversy over s 51 (xxxi) and s 122. Do laws acquiring property
in the Territories also have to provide ‘just terms’ (because, don’t forget, Cth
has exclusive control over the Territories, unlike the States).

Facts (law challenged):
- intervention to protect indigenous children in the NT.
- Granting of 5 year leases to Commonwealth over land held under NT Lands Rights
Act.
- Owners had right to recover compensation.

Issue:
- Whether compensation scheme invalid because right to comply is contingent
- Interests protected are *sui generis* (in a class of their own) and not compensable with
money.

- **HELD:** Gummow & Hayne JJ – **NOT CONTINGENT – CAN INCLUDE INTEREST AND TAKE OTHER MATTERS INTO ACCOUNT.** Heydon J –
**NOT CONTINGENT** – (except on finding of acquisition) – adequate protection
of intangible interests.
• Note: the High Court since Gleeson CJ has tended to ‘read down’ constitutional challenges – interpreting legislation to MAKE it constitutionally valid.

• The REAL ISSUE here is whether “just terms” might sometimes require something less than a complete acquisition (see top p 1255) i.e. compo for taking property can never be adequate (Castle-style).