

NATIVE TITLE AND THE ‘ACQUISITION OF PROPERTY’ UNDER THE AUSTRALIAN CONSTITUTION

SEAN BRENNAN*

[The ‘just terms’ guarantee in s 51(xxxi) of the Constitution offers protection for the property rights of Australians, but does this protection extend to indigenous people who have native title rights and interests in land? Gummow J of the High Court has suggested the answer is no, at least where native title is extinguished by the grant of inconsistent rights over the same land to third parties. This article reviews recent case law on the meaning of ‘property’ and ‘acquisition’ under s 51(xxxi). The Australian law on native title — in particular its characterisation, its content and its extinguishment — is examined and assessed against the law on s 51(xxxi). The conclusion drawn is that in general the extinguishment of native title answers the description of an ‘acquisition of property’. Gummow J’s analysis that native title is inherently defeasible, and therefore that the ‘just terms’ guarantee does not apply to its extinguishment by inconsistent grant, should be rejected on the basis of precedent and principle.]

CONTENTS

I	Introduction.....	29
II	Native Title as ‘Property’.....	30
	A Conceptualising Native Title: Different Streams of Thought.....	30
	1 Native Title as ‘Title’.....	32
	2 Native Title as a Fact-Specific Accumulation of Rights.....	37
	3 A Sui Generis Set of Interests.....	39
	B The Meaning of ‘Property’ under s 51(xxxi).....	41
	C Native Title as Property for the Purposes of s 51(xxxi).....	43
III	Native Title Extinguishment and ‘Acquisition’.....	44
	A The Law on Extinguishment of Native Title.....	44
	1 Relatively Settled Propositions of Extinguishment Law.....	44
	B The Law on ‘Acquisition’ under s 51(xxxi).....	47
	1 A Liberal Construction.....	47
	2 “‘Acquisition” as Distinct from Deprivation’.....	48
	3 An ‘Identifiable and Measurable Countervailing Benefit’.....	48
	4 A Proprietary Benefit?.....	49
	5 Acquired by Whom?.....	53
	6 The Emerging Doctrine of Inherently Vulnerable Rights.....	53
	C Extinguishment of Native Title as the ‘Acquisition of Property’.....	59
	1 Observations from the High Court to Date.....	60
	2 Starting from First Principles.....	62
	3 Does the Extinguishment of Native Title Produce a ‘Benefit’?.....	62

* BA, LLB, LLM (ANU); Lecturer and Director of the Treaty Project, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales. I acknowledge the assistance of George Williams, Jenny Clarke, Kent McNeil, Kevin Gray, the anonymous referees who made comments on an earlier draft of this article, the Editorial Board of the *Melbourne University Law Review*, and Melanie Schwartz for her research assistance. I also acknowledge the Lionel Murphy Foundation for its generous financial support during the early research stage of this article.

2004]	<i>Native Title and the 'Acquisition of Property'</i>	29
	4 Gummow J on Native Title and Inherent Vulnerability	65
	5 Additional Arguments against Gummow J's Approach.....	71
IV	Conclusion.....	77

I INTRODUCTION

The rights of indigenous peoples in relation to land and waters across Australia survived the acquisition of British sovereignty.¹ However, according to Western law and its doctrine of 'native title', many of these rights have now been extinguished, chiefly as a result of the Crown granting parcels of land to other people.

Since 1901, Australians have enjoyed protection of their property rights under s 51(xxxi) of the *Constitution*. A Commonwealth law that is concerned with the 'acquisition of property' is invalid unless the property is acquired on 'just terms'.² Gummow J, a judge whose views most often reflect those of the current High Court,³ stated in *Newcrest Mining (WA) Ltd v Commonwealth* that the granting of rights inconsistent with those of indigenous people to third parties by the Crown does not attract the operation of that constitutional guarantee.⁴ This article investigates that proposition and concludes that it is not well supported by precedent, policy or principle.

Two bodies of law are relevant to an examination of this area: the common law and statutory law of native title; and s 51(xxxi) of the *Constitution*. The former, the law of native title, is only twelve years old.⁵ In 2002, the High Court decided a trilogy of test cases: *Western Australia v Ward*,⁶ *Wilson v Anderson*⁷ and *Members of the Yorta Yorta Aboriginal Community v Victoria*.⁸ Those decisions clarified the answers to some basic questions, but left a host of others unanswered. The law relating to s 51(xxxi) of the *Constitution* recently had 'a second life'⁹ after a long period of quiescence following World War II. The flood of s 51(xxxi) cases decided by the High Court in the 1990s has now slowed to a trickle. Left behind is a rights guarantee of considerably broader scope than was

¹ *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo [No 2]*').

² Section 51(xxxi) of the *Constitution* provides:

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

³ Gummow J was recently identified in an empirical analysis of constitutional (and indeed all) decisions given by the Gleeson High Court in its first five years as the judge most likely to be in the majority: Andrew Lynch, 'The Gleeson Court on Constitutional Law: An Empirical Analysis of Its First Five Years' (2003) 26 *University of New South Wales Law Journal* 32, 47, 49.

⁴ (1997) 190 CLR 513, 613 ('*Newcrest*').

⁵ Native title was first recognised in 1992 in *Mabo [No 2]* (1992) 175 CLR 1.

⁶ (2002) 191 ALR 1 ('*Ward*').

⁷ (2002) 190 ALR 313.

⁸ (2002) 194 ALR 538 ('*Yorta Yorta*').

⁹ Tom Allen, 'The Acquisition of Property on Just Terms' (2000) 22 *Sydney Law Review* 351, 351.

previously thought to exist under the section, but a body of law with many disparate strands and few unifying principles.¹⁰

Substantial gaps in both bodies of law, therefore, limit our ability to draw conclusions concerning the ‘just terms’ guarantee and the extinguishment of native title in particular fact situations. For example, courts have found it difficult to characterise and describe, in Western legal terms, what it means to have recognisable native title. It also remains unclear why one Crown action might ‘regulate’ native title while another is said to ‘extinguish’ it. The dividing line in s 51(xxxi) law between legitimate regulation and the compensable ‘acquisition of property’ is also difficult to define.

Nonetheless, it is possible to tackle the intersection of native title law with the law on constitutional ‘acquisitions of property’ at a level of general principle and appellate court authority. This article addresses three questions. First, is native title ‘property’? Second, does the extinguishment of native title amount to an ‘acquisition’? Third, is Gummow J correct in *Newcrest* in saying that native title, though ‘property’, is an inherently defeasible right that is outside the category of interests protected by the ‘just terms’ guarantee?¹¹

Another major threshold question in s 51(xxxi) law — the *characterisation* of a statute as one *with respect to* the acquisition of property — is not dealt with in this article. Briefly, however, I contend that as the *Native Title Act 1993* (Cth) has been treated by the High Court as an ‘exclusive code’ governing the extinguishment and impairment of native title,¹² it is appropriately characterised as a law with respect to the acquisition of property, whatever aspect of characterisation doctrine¹³ might be employed to contest that proposition.

II NATIVE TITLE AS ‘PROPERTY’

A *Conceptualising Native Title: Different Streams of Thought*

The characterisation and description of the content of indigenous land rights and interests in Western legal terms is one of the abiding questions of native title law in Australia. Even after the 2002 trilogy of High Court test cases, the

¹⁰ See 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; Simon Evans, ‘From Private Property to Public Law’ (2000) 28 *Federal Law Review* 155, 162–3; George Williams, *Human Rights under the Australian Constitution* (2002) 153.

¹¹ An important qualification must be made regarding Gummow J’s suggestion in *Newcrest*. Native title may be extinguished by either executive action (for example, the making of a freehold grant under Crown lands legislation) or by legislative action (for example, the kind of statutory abolition of native title found in the *Queensland Coast Islands Declaratory Act 1985* (Qld) and dealt with by the High Court in *Mabo v Queensland* (1988) 166 CLR 186 (*‘Mabo [No 1]’*)). Gummow J in *Newcrest* treated native title as an inherently defeasible right outside the protection of the ‘just terms’ guarantee only in this first context, that is, executive extinguishment: see below n 257 and accompanying text. This qualification complicates some of the discussion which follows. It is necessary, however, given the distinction drawn by Gummow J in *Newcrest*.

¹² *Western Australia v Commonwealth* (1995) 183 CLR 373, 453 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

¹³ Evans, ‘When Is an Acquisition of Property Not an Acquisition of Property?’, above n 10, esp 186.

answers remain elusive.¹⁴ This suggests that establishing that native title rights and interests are 'property' in the constitutional sense might be difficult. A heavy weight of constitutional authority, however, points to a simple conclusion: as valuable legal rights¹⁵ in relation to land and waters, native title rights and interests are property in the s 51(xxxi) sense of the word. I will support this conclusion by first describing the ways in which native title rights and interests have been conceptualised, and then relating that conceptualisation to the case law concerning the meaning of 'property' in the context of the constitutional guarantee.

In defining the character and content of native title, the High Court is addressing an age-old challenge for the law: how to translate a complex social reality into legal concepts and language. Native title involves additional complications, including the demanding cross-cultural nature of the inquiry and the history of discrimination and dispossession against which the contemporary inquiry must now be conducted. Two streams of thought can be identified, each well-established in the current Australian law recognising traditional indigenous rights in land. These streams remain unreconciled¹⁶ and to some extent are epitomised in Brennan J's judgment in *Mabo v Queensland [No 2]*¹⁷ where he referred to native title as both ownership and something more fact-specific and dependent on local law and custom.¹⁸

¹⁴ In *Ward* (2002) 191 ALR 1, the High Court said some important things about the way that native title is characterised and its content described in Western legal terms. Ultimately the High Court remitted the case to the Federal Court for further hearing, partly because of the generalised way in which the applicants had characterised their native title. This left many tensions unresolved.

¹⁵ The majority in *Commonwealth v Yarmirr* (2001) 208 CLR 1 said that when the common law recognises native title rights 'it will, by the ordinary processes of law and equity, give remedies in support of the relevant rights and interests to those who hold them': at 49 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁶ Noel Pearson has suggested a means of reconciling the apparent paradox by distinguishing between the external and internal aspects of native title. He argues that '[t]he notion that the content of the native title is solely to be determined by reference to the rights established under *Aboriginal* law and custom as a matter of fact is misconceived': Noel Pearson, 'The Concept of Native Title at Common Law' in Galarrwuy Yunupingu (ed), *Our Land Is Our Life: Land Rights — Past, Present and Future* (1997) 150, 161 (emphasis in original). He argues that native title has first, 'an aspect in relation to the rest of the world, which is able to be described by the common law, because it is inherent to the occupation of land and identical to *the kind on* [sic] *dominion that people of different societies assert over land*' (at 160) (emphasis added), and secondly, 'an aspect in relation to its holders which must be ascertained by reference to *Aboriginal* law and custom': at 160. Together, Pearson argues (at 160–1), these

two aspects of native title determine its content. Where there are questions relevant to the rights of the native title holders as between themselves, then content must be determined by reference to *Aboriginal* law and custom. Where there are questions relevant to the rights of native title holders as against those outside of the *Aboriginal* system of law and custom, then these must be determined by the common law.

See also Kent McNeil, 'The Relevance of Traditional Laws and Customs to the Existence and Content of Native Title at Common Law' in Kent McNeil (ed), *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (2001) 416, 420–1, who essentially agrees with this analysis. Comments in the majority joint judgment in *Ward* (2002) 191 ALR 1 about the relevance of factual evidence as to particular laws and customs suggest that the current High Court is not inclined to accept the internal–external distinction as a way of reconciling the contradictions in Australian native title law on the issue of characterisation and content: at 17, 37, 39–40.

¹⁷ (1992) 175 CLR 1.

¹⁸ Despite writing emphatically that 'the ownership of land within a territory in the exclusive occupation of a people must be vested in that people' (ibid 51), Brennan J also said that native

1 *Native Title as 'Title'*

The first stream of thought approaches these questions at a high level of generality and contains a number of related ideas. First, it recognises in the assertions of native title by indigenous peoples under traditional law the same sense of *dominion over land* that societies across the world assert in relation to territory, and equates it with ownership or something similar. In *Mabo [No 2]*, with fairly modest evidence regarding the operation of traditional law and custom,¹⁹ the High Court was comfortable making an order that the Meriam people enjoyed possession, occupation, use and enjoyment of the island of Mer 'as against the whole world'.²⁰ In no less than 21 of the 30 positive determinations of native title since *Mabo [No 2]* (some of them ranging up to 136 000 square kilometres in area), indigenous groups have been recognised as enjoying possession, occupation, use and enjoyment of a determination area to the exclusion of all others.²¹ Such plenary determinations resemble the choice made by a number of

title 'has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs': at 58. This duality within his judgment prompts several questions. Is the characterisation and content of native title determined case by case as a matter of fact, with an intensive focus on the demonstration of particular traditional laws and customs and the inductive proof of native title right by right? Or can native title holders asserting exclusive rights take the benefit of a priori assumptions about the scope of their title, based upon arguments of nondiscrimination in the ownership of property, or arguments relying on the presumptions of English property law? See Kent McNeil, *Common Law Aboriginal Title* (1989).

¹⁹ See B A Keon-Cohen, 'The *Mabo* Litigation: A Personal and Procedural Account' (2000) 24 *Melbourne University Law Review* 893.

²⁰ (1992) 175 CLR 1, 76 (Brennan J).

²¹ Subject, of course, to valid acts of extinguishment, Commonwealth and state legislation and other recognised qualifications. See the consent determinations in *Buck v New South Wales* (Unreported, Federal Court of Australia, Lockhart J, 7 April 1997); *Deeral v Charlie* [1997] FCA 1408 (Unreported, Beaumont J, 8 December 1997); *Mualgal People v Queensland* [1999] FCA 157 (Unreported, Drummond J, 12 February 1999); *Saibai People v Queensland* [1999] FCA 158 (Unreported, Drummond J, 12 February 1999); *Dauan People v Queensland* [2000] FCA 1064 (Unreported, Drummond J, 6 July 2000); *Mabuiag People v Queensland* [2000] FCA 1065 (Unreported, Drummond J, 6 July 2000); *Poruma People v Queensland* [2000] FCA 1066 (Unreported, Drummond J, 7 July 2000) (incorporating *Warraber People v Queensland*); *Masig People v Queensland* [2000] FCA 1067 (Unreported, Drummond J, 7 July 2000); *Wik Peoples v Queensland* [2000] FCA 1443 (Unreported, Drummond J, 3 October 2000); *Anderson v Western Australia* [2000] FCA 1717 (Unreported, Black CJ, 28 November 2000) (in respect of part of the determination area); *Kaurareg People v Queensland* [2001] FCA 657 (Unreported, Drummond J, 23 May 2001) (in respect of four of the five related applications); *Passi v Queensland* [2001] FCA 697 (Unreported, Black CJ, 14 June 2001); *Ngalpil v Western Australia* [2001] FCA 1140 (Unreported, Carr J, 20 August 2001); *Brown v Western Australia* [2001] FCA 1462 (Unreported, French J, 19 October 2001); *Nangkiriny v Western Australia* (2002) 117 FCR 6; *James v Western Australia* [2002] FCA 1208 (Unreported, French J, 27 September 2002); and the litigated determinations in *Wandarang People v Northern Territory* (2000) 104 FCR 380 (in respect of part of the determination area); *Ngalakan People v Northern Territory* (2001) 112 FCR 148; *Rubibi Community v Western Australia* (2001) 114 FCR 523. Included in this statistic is the consent determination (following prolonged litigation) in the Miriuwung Gajerrong claim: *A-G (NT) v Ward* [2003] FCAFC 283 (Unreported, Wilcox, North and Weinberg JJ, 9 December 2003). Exclusive possession, occupation, use and enjoyment rights were recognised over part of the determination area. I have counted it as one determination, although the Full Court of the Federal Court appears to have split the application geographically into its Western Australian and Northern Territory components. The Wanjina/Wungurr-Willingin application (*Neowarra v Western Australia* [2003] FCA 1402 (Unreported, Sundberg J, 8 December 2003)) has not been included in the list because it is, at the time of writing, a draft determination. It seems likely, however, to be added to the 'plenary

Australian legislatures when confronted with the task of translating traditional connection to land into Western property concepts under land rights legislation. Traditional lands have been returned as *freehold* under statutory schemes operating in the Northern Territory,²² Queensland²³ and South Australia,²⁴ as has land granted on other bases (including residence and historical association) in other jurisdictions.

In *Yanner v Eaton*, the High Court characterised native title as 'a perception of socially constituted fact'.²⁵ This phrase was coined by the English writers Kevin Gray and Susan Francis Gray to describe how 'property' is a term used where the actual facts 'on the ground'²⁶ are so 'essentially undeniable'²⁷ as to render any non-proprietary description of a person's interest improbable or unrealistic. One example, they said, is the native *title* of Australia's indigenous peoples:

Brennan J ... declined to believe that the indigenous inhabitants of a settled colony lost all 'proprietary interest' in the land which they continued to occupy or could 'lawfully have been driven into the sea at any time after annexation'. For Brennan J, 'a community which asserts and asserts effectively that none but its members has any right to occupy or use the land has an interest in the land that must be proprietary in nature: there is no other proprietor ... The ownership of land within a territory in the exclusive occupation of a people must be vested in that people.' Accordingly Brennan J accepted — and it is now widely agreed to be clear law — that the customary land claims of Aboriginals comprise a 'proprietary community title' which represents 'a burden on the Crown's radical title' even after the assumption of Crown sovereignty over the territory in question.²⁸

As this extract indicates, a related idea is the notion of 'title' within the concept of native title. Although sometimes disparaged as Eurocentric or potentially misleading,²⁹ the 'title' idea has been stubbornly persistent in case law.³⁰

determinations' list as a litigated outcome yielding an exclusive possession determination in relation to part of the original application. Olney J, the trial judge in the offshore case of *Yarmirr v Northern Territory* (1998) 82 FCR 533, said that assertions by witnesses to the effect that 'I own that country', at least in the absence of more, 'do not seem to be an assertion of the type of dominion over the country that might normally be associated with ownership in its most absolute form': at 576. In a later case, however, Olney J insisted that an estate 'is *always* associated with, and owned by, a group of living people who have established connections to the original ancestors in a variety of ways': *Hayes v Northern Territory* (1999) 97 FCR 32, 41 (emphasis added).

²² *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

²³ *Aboriginal Land Act 1991* (Qld); *Torres Strait Islander Land Act 1991* (Qld).

²⁴ *Pitjantjatjara Land Rights Act 1981* (SA); *Maralinga Tjarutja Land Rights Act 1984* (SA).

²⁵ (1999) 201 CLR 351, 373 (Gleeson CJ, Gaudron, Kirby and Hayne JJ) ('*Yanner*').

²⁶ Kevin Gray and Susan Francis Gray, 'The Idea of Property in Land' in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (1998) 15, 18.

²⁷ *Ibid* 27 fn 72.

²⁸ *Ibid* 26–7 (citations omitted).

²⁹ See, eg, *Commonwealth v Yarmirr* (2001) 208 CLR 1, 38 (Gleeson CJ, Gaudron, Gummow and Hayne JJ). In *Mabo [No 2]* (1992) 175 CLR 1, Toohey J was uneasy about the term 'title' because he found it 'artificial', 'capable of misleading' and too culturally specific to Anglo-Australian property law, although interestingly his Honour proceeded to use it without qualification many times throughout his judgment: at 178–9.

³⁰ The High Court was content to use the phrase 'native title *to* land' (emphasis added) without qualification in *Western Australia v Commonwealth* (1995) 183 CLR 373, 435, 452 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ), 492–3 (Dawson J), and was quite comfort-

Individual, often usufructuary or subsistence, rights (to hunt, fish, and so on) are conceived in both case law and legal and anthropological commentary as derivative of, or pendant upon, an underlying title to land.³¹ The extent to which this idea can coexist with the far-reaching doctrine of partial extinguishment that emerged from *Ward* remains unresolved. That case appears to endorse the idea of freestanding individual native title rights abstracted from a unifying notion of title to land.³² However, Brennan J's comment in *Mabo [No 2]* that 'it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary community title'³³ illustrates a 'pendant right-underlying title' analysis that also appears to underpin the subsequent High Court decision in *Yanner*:

The term 'native title' conveniently describes 'the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants'. The native title of a community of indigenous Australians is comprised of the collective rights, powers and other interests of that community, which may be exercised by particular sub-groups or individuals in accordance with that community's traditional laws and customs. Each collective right, power or other interest is an 'incident' of that indigenous community's native title. This case concerns the native title right, or incident, to hunt estuarine crocodiles exercised by an individual, the appellant, who is a member of a community, the Gunnamulla clan, who have native title in the land on which the individual exercised the right, within a tribe of indigenous Australians, the Gungaletta.

The exercise of rights, or incidents, of an indigenous community's native title, by sub-groups and individuals within that community, is best described as the exercise of privileges of native title. The right, or incident, to hunt may be a component of the native title of a numerous community but the exercise by individuals of the privilege to hunt may be defined by the idiosyncratic laws and customs of that community.³⁴

[A]n important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land. Regulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land ...³⁵

able with the notion of usufructuary rights as 'incidents' of native title. See also the phrase 'antecedent title': at 423 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). In *Mabo [No 2]* (1992) 175 CLR 1, Deane and Gaudron JJ indicated that the word 'title' was no misnomer because native title projects considerable legal stability, strength and resistance to obliteration: at 90–1. In *Wik Peoples v Queensland* (1996) 187 CLR 1 ('*Wik*'), Kirby J was even more emphatic that what 'is in issue is *title* in respect of land': at 237 (emphasis in original).

³¹ See, eg, the discussion of 'core' and 'contingent' rights in relation to land in Peter Sutton, *Kinds of Rights in Country: Recognising Customary Rights as Incidents of Native Title* (2001) National Native Title Tribunal <http://www.nntt.gov.au/metacard/files/Customary_rights/customary_rights.pdf>.

³² *Ward* (2002) 191 ALR 1, 20, 30, 40 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

³³ (1992) 175 CLR 1, 51.

³⁴ *Yanner* (1999) 201 CLR 351, 383–4 (Gummow J) (citations omitted).

³⁵ *Ibid* 373 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

Another dimension to this first stream of thought is those provisions of the *Native Title Act 1993* (Cth) which are premised on a 'quasi-freehold' view of native title: the elaborate statutory provisions dealing with compensation for extinguishment and impairment of native title,³⁶ the residual category of valid future acts³⁷ and the 'non-extinguishment principle' which appears throughout the Act.

These statutory provisions reflect another argument within this first school of thought based on nondiscrimination principles. Soon after *Mabo [No 2]*, Noel Pearson suggested that it would be 'Legal Darwinism'³⁸ to deny Aboriginal people any conception of ownership of land on the basis that 'such was their lack of sophistication and level of "civilisation" that they were (and are) as animals roving over the landscape having no sense of property in the soil.'³⁹ In overthrowing the doctrine of terra nullius, he wrote in 1993, the High Court 'now presumes that all humankind in occupation of land must have some sense of ownership which ought to be recognised and respected.'⁴⁰ The most emphatic statement to this effect came from the judgment of Brennan J:

It would be wrong, in my opinion, to point to the inalienability of land by that community and, by importing definitions of 'property' which require alienability under the municipal laws of our society, to deny that the indigenous people owned their land. The ownership of land within a territory in the exclusive occupation of a people must be vested in that people: land is susceptible of ownership and there are no other owners.⁴¹

Principles of nondiscrimination expressed in Australian law embody the same sentiment and have played a critical role in the evolution of native title law. In assessing whether the Queensland government's attempt in 1985 to extinguish all traditional title in the Torres Strait (and thereby cut short the *Mabo* litigation) breached the *Racial Discrimination Act 1975* (Cth), the High Court in *Mabo v Queensland [No 1]*⁴² was content to fit native title within a legal paradigm based on ownership of property. Indeed, as recently as 2002, the High Court recognised that the principle of nondiscrimination under international and Australian law operates very much in the way Pearson suggests:

Because no basis is suggested in the Convention or in the [*Racial Discrimination Act 1975* (Cth)] for distinguishing between different types of property and

³⁶ Sections 17, 43A(4)(h), 51, 240.

³⁷ Part 2, sub-div 3M.

³⁸ Noel Pearson, '204 Years of Invisible Title: From the Most Vehement Denial of a People's Rights to Land to a Most Cautious and Belated Recognition' in M A Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution — The Aboriginal Land Rights Decision and Its Impact on Australian Law* (1993) 75, 76.

³⁹ *Ibid* 78.

⁴⁰ *Ibid*.

⁴¹ *Mabo [No 2]* (1992) 175 CLR 1, 51. See also his Honour's comments that after native title is extinguished, the Crown's interest is enhanced because 'there is then no *other* owner' (emphasis in original) — 'no other proprietor than the Crown': at 60. Noel Pearson recently presented a paper which borrowed this concept for its title: Noel Pearson, 'Land Is Susceptible of Ownership' (Paper presented at the High Court Centenary Conference, Canberra, 10 October 2003) <<http://www.capeyorkpartnerships.com/noelpearson/pdf/nphighcourt03.pdf>>.

⁴² (1988) 166 CLR 186.

inheritance rights, the [Act] must be taken to proceed on the basis that different characteristics attaching to the ownership or inheritance of property by persons of a particular race are irrelevant to the question whether the right of persons of that race to own or inherit property is a right of the same kind as the right to own or inherit property enjoyed by persons of another race.⁴³

This nondiscriminatory principle regarding ownership of land in Australian and international law has also given rise to an argument of fairness: that a presumptive freehold view is fairer because it is unreasonable to expect indigenous people to specify their rights under native title one by one, when the grantee of a fee simple is free 'to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination'.⁴⁴

One other legal argument related to this first stream of thought should be mentioned. Canadian Professor Kent McNeil argued in 1989 that the principles of English land law require that indigenous people in occupation of land in 1788 are entitled to a presumption that they held fee simple title.⁴⁵ This argument was left open in *Mabo [No 2]*. Indeed, in 1995, the High Court said in passing that

those involved in establishing the British Colony of Western Australia knew that *there were Aborigines who, by their law and customs, were entitled to possession of land* within the territory to be acquired by the Crown and settled as a Colony.⁴⁶

Despite quoting the passage containing this observation with approval in *Ward*,⁴⁷ the current High Court maintained elsewhere in the judgment that:

The finding that predecessors of the claimants occupied the claim area at sovereignty does not, without more, identify the nature of the rights and interests which, under traditional law and custom, those predecessors held over that area. The fact of occupation, taken by itself, says nothing of what traditional law or custom provided. Standing alone, the fact of occupation is an insufficient basis

⁴³ *Ward* (2002) 191 ALR 1, 48 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁴⁴ *Fejo v Northern Territory* (1998) 195 CLR 96, 126 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) ('*Fejo*'), quoting *Commonwealth v New South Wales* (1923) 33 CLR 1, 42 (Isaacs J), in turn quoting Charles Sweet, *Challis's Law of Real Property: Chiefly in Relation to Conveyancing* (3rd ed, 1911) 218.

⁴⁵ McNeil, *Common Law Aboriginal Title*, above n 18, 298. This argument was based on extensive research into the history, principles and authorities of English land law: at 193–243. McNeil has since developed his arguments further, deriving the following propositions from Brennan J's judgment in *Mabo [No 2]*. Where an Aboriginal group was in exclusive occupation of an area at the time the Crown acquired sovereignty, it obtained a 'proprietary title akin to ownership' by operation of the common law. An Aboriginal group other than the one which was in exclusive occupation (for example, a group with rights to come onto land for limited purposes) may have obtained a lesser interest under Western native title law. The recognition of native title implies that there is a decision-making jurisdiction within the group which is governmental in nature. While not discounting it as a property right, McNeil maintains that native title, as recognised in *Mabo [No 2]*, 'has jurisdictional as well as proprietary attributes': Kent McNeil, 'Self-Government and the Inalienability of Aboriginal Title' (2002) 47 *McGill Law Journal* 473, 506; McNeil, 'The Relevance of Traditional Laws and Customs to the Existence and Content of Native Title at Common Law', above n 16.

⁴⁶ *Western Australia v Commonwealth* (1995) 183 CLR 373, 431 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) (emphasis added).

⁴⁷ (2002) 191 ALR 1, 57 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

2004] *Native Title and the 'Acquisition of Property'* 37

for concluding that there was what the primary judge referred to as 'communal title in respect of the claim area' or a right of occupation of it.⁴⁸

Putting aside this apparent contradiction in *Ward*, it appears from the above passage that the current High Court has set its face against McNeil's argument. More broadly, in its recent decisions the Court has tended to drift away from this first school of thought towards a second, which treats native title in an increasingly atomised and fragmentary way.

2 *Native Title as a Fact-Specific Accumulation of Rights*

Rather than viewing native title in general terms as a form of property ownership, this second stream of thought treats native title as highly 'fact specific'.⁴⁹ This approach has found favour with the current High Court, although the Court is yet to explain how it sits compatibly with *Mabo [No 1]*, the order and much of Brennan J's analysis in *Mabo [No 2]*, the 'quasi-freehold' provisions of the *Native Title Act 1993* (Cth), its own decision and analysis in *Yanner* and its own observations in *Ward* cited above.

In *Ward*, the High Court indicated that native title rights and interests encompass a spectrum of legal possibilities, including some entitlements that Australian law has barely glimpsed thus far. The outer boundaries have been only loosely defined by statute,⁵⁰ in a formula drawn in turn from Brennan J's analysis in *Mabo [No 2]*: native title rights and interests are those communal, group or individual rights and interests in relation to land or water, which are possessed under traditional law and custom by people who thereby have a connection with that land or water, and which are recognised by the common law of Australia.⁵¹

The expansive possibilities hinted at in *Ward* apparently derive from the High Court's view that 'the connection which Aboriginal peoples have with "country" is essentially spiritual.'⁵² The majority suggests that native title rights and interests transcend the boundaries of the Western legal imagination:

It is wrong to see Aboriginal connection with land as reflected only in concepts of control of access to it. To speak of Aboriginal connection with 'country' in only those terms is to reduce a very complex relationship to a single dimension. It is to impose common law concepts of property on peoples and systems which saw the relationship between the community and the land very differently from the common lawyer.⁵³

The High Court has therefore repeatedly cautioned against an excessive preoccupation with concepts familiar to a common law property lawyer when analys-

⁴⁸ Ibid 39–40 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁴⁹ *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139, 147 (Richard P).

⁵⁰ *Native Title Act 1993* (Cth) s 223.

⁵¹ *Mabo [No 2]* (1992) 175 CLR 1, 57 (Brennan CJ). See also *Yorta Yorta* (2002) 194 ALR 538, 549 (Gleeson CJ, Gummow and Hayne JJ).

⁵² (2002) 191 ALR 1, 15 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁵³ Ibid 39. Gleeson CJ, Gaudron, Gummow and Hayne JJ also asserted that 'there may be several kinds of rights and interests in relation to land that exist under traditional law and custom. Not all of those rights and interests may be capable of full or accurate expression as rights to control what others may do on or with the land': at 40 (emphasis in original).

ing the character and content of native title. As the three-way joint judgment in *Yorta Yorta* stated, “[t]he rights and interests under traditional laws and customs will often reflect a different conception of “property” or “belonging””.⁵⁴ It would be wrong, therefore, according to the majority joint judgment in *Commonwealth v Yarmirr*,

to start consideration of a claim under the [*Native Title Act 1993* (Cth)] for determination of native title from an a priori assumption that the only rights and interests with which the Act is concerned are rights and interests of a kind which the common law would traditionally classify as rights of property or interests in property. That is not to say, however, that native title rights and interests may not have such characteristics.⁵⁵

The crucial point of difference from the first stream of thought identified above lies in the emphasis on the fact-specific or variable content of the laws and customs of different native title holding groups. The second stream of thought discounts the *general* approach to characterisation and content which would, like the *Racial Discrimination Act 1975* (Cth), treat race-based variations as essentially irrelevant. Instead it focuses on the variable content of traditional law and custom within each native title holding group as the factual basis for characterising the ‘artificially defined jural right[s]’⁵⁶ of native title. In doing so, the ‘fact-specific’ school of thought disdains a ‘presumptive freehold’ view: ‘it is a mistake to assume that what the [*Native Title Act 1993* (Cth)] refers to as “native title rights and interests” is necessarily a single set of rights relating to land that is analogous to a fee simple.’⁵⁷

This stream of thought does not rule out the possibility that a group’s native title amounts to ‘possession, occupation, use and enjoyment to the exclusion of all others’, but claims instead that this phrase is not a useful starting point because the focus is on the specific content of local law and custom. In rejecting a submission from the *Ward* claimants, the majority joint judgment stated:

The first of the steps in this argument, that native title will ‘ordinarily’ be practically equivalent to full ownership, is a statement about the frequency with which rights will be found to exist. Whether it is right or wrong depends on what is meant by ‘ordinarily’. But whatever is meant by it, the proposition is not a useful commencing point for any consideration of the issues that now arise. It is not useful because it assumes, rather than demonstrates, the nature of the rights and interests that are possessed under traditional law and custom. Further, to speak of ‘ownership’ of the land being ‘vested in’ the community or people is to speak in the language of the common lawyer and, therefore, to use words which carry with them legal consequences that may or may not be warranted.⁵⁸

⁵⁴ (2002) 194 ALR 538, 551 (Gleeson CJ, Gummow and Hayne JJ).

⁵⁵ (2001) 208 CLR 1, 38–9 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁵⁶ Gray and Gray, above n 26, 27. See also *Yanner* (1999) 201 CLR 351, 373 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

⁵⁷ *Ward* (2002) 191 ALR 1, 37 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁵⁸ *Ibid.*

As noted above, the High Court has hinted at an as yet unarticulated breadth to what might be included within the envelope of native title rights, given their spiritual nature. To date, however, this focus on 'fact-specific' content seems only to diminish the practical value of native title recognition to the groups in question, at least as against other land users and the state.⁵⁹ Together with the far-reaching doctrine of partial extinguishment confirmed in *Ward*, the High Court's interpretation of native title exerts a great deal of pressure on applicants to abandon the generalised ownership concept (despite its significant toehold in Australian native title law) in favour of fragmentation and atomisation, at least where there has been any significant European land tenure history in the area concerned.⁶⁰

The majority's conception of native title in *Ward* can be summarised as follows. The Court expressed a preference for viewing native title as a bundle of rights rather than as a presumptive fee simple.⁶¹ Their Honours acknowledged that native title rights and interests may be communal, group or individual.⁶² Finally, and importantly for our purposes, they insisted that the rights and interests that will be 'recognised' by the common law for statutory purposes are those which 'consist in relation to land and waters.'⁶³ The Court emphasised the spiritual nature of indigenous connection to land.⁶⁴ Their Honours accepted that 'a core concept of traditional law and custom [is] the right to be asked permission and to "speak for country"',⁶⁵ although they noted that later extinguishment can have an impact on this characterisation.⁶⁶ After partial extinguishment has occurred they suggested that it is preferable to express traditional rights and interests 'by reference to the activities that may be conducted, as of right, on or in relation to the land or waters.'⁶⁷ The Court was also insistent that the relationship to land is complex and that there are types of recognisable rights beyond those familiar to the common law property lawyer.

3 *A Sui Generis Set of Interests*

Until the tensions within Australian native title law identified above have been resolved, it seems that native title must be treated as a sui generis set of interests.⁶⁸ These interests can encompass what Western law might call personal, usufructuary and strictly proprietary interests,⁶⁹ plus potentially something

⁵⁹ See, eg. *ibid* 40 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁶⁰ *Ibid* 30.

⁶¹ *Ibid* 37.

⁶² *Ibid* 16.

⁶³ *Ibid*.

⁶⁴ *Ibid* 15.

⁶⁵ *Ibid* 38.

⁶⁶ *Ibid* 30.

⁶⁷ *Ibid*.

⁶⁸ *Mabo [No 2]* (1992) 175 CLR 1, 89 (Deane and Gaudron JJ), 133 (Dawson J); *Wik* (1996) 187 CLR 1, 215 (Kirby J).

⁶⁹ For discussion of these issues, see Janice Gray, 'Is Native Title a Proprietary Right?' (2002) 9(3) *E Law — Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v9n3/gray93.html>>; Lisa Strelein, 'Conceptualising Native Title' (2001) 23 *Sydney Law Review* 95; McNeil, 'Self-Government and the Inalienability of Aboriginal Title',

beyond that, as yet undefined in Western legal terms but related to the particular spiritual relationship of indigenous groups to their land. Future cases will presumably test the outer boundaries of characterisation and content, but the key question here is the extent to which that suite of interests can be encompassed within the notion of ‘property’. It was on this issue — the proprietary nature of indigenous rights in land — that the plaintiffs in *Milirrpum v Nabalco Pty Ltd*⁷⁰ foundered before Blackburn J when the existence of native title was first unsuccessfully tested in the Australian courts.

Gray and Gray suggest that the term ‘property’, at common law, already stretches to accommodate three different dimensions ‘in a creative tension’:⁷¹

- the raw facts of possessory control over land (‘property as fact’);
- the conceptual allocation of artificially defined rights in relation to land (‘property as a right’); and
- the restricted entitlement or even duty to use and look after land for communal benefit (‘property as responsibility’).

If this constitutes the common law’s mental universe as far as ‘property’ is concerned, then perhaps the notion of ‘property’ already encompasses the High Court’s conception of native title. Certainly Gray and Gray’s ecumenical approach to the concept of property has found favour with the Court. For example, rather than fixing on a highly specific a priori characterisation of property as a legal concept, the majority judges in *Yanner* moved to a much higher level of abstraction,⁷² displaying attitudes to the term ‘property’ which ranged from the startlingly agnostic⁷³ to the frankly instrumental.⁷⁴ Their Honours effectively dispelled any impression that the legal notion of property is tightly constrained by fixed doctrinal requirements. Instead, property is an ‘elusive’ concept of variable content, capable of covering a very wide range of legal interests. Regardless of the other effects of the *Yanner* decision, the characterisation of property as a broad and highly contingent intellectual construct would surely enhance the very ability to accommodate cultural difference that confounded the plaintiffs in *Milirrpum*.⁷⁵

above n 45; McNeil, ‘The Relevance of Traditional Laws and Customs to the Existence and Content of Native Title at Common Law’, above n 16.

⁷⁰ (1971) 17 FLR 141 (*Milirrpum*).

⁷¹ Gray and Gray, above n 26, 51.

⁷² (1999) 201 CLR 351, 366 (Gleeson CJ, Gaudron, Kirby and Hayne JJ): ‘property is ... a legally endorsed concentration of power over things and resources’, quoting Kevin Gray, ‘Property in Thin Air’ (1991) 50 *Cambridge Law Journal* 252, 299.

⁷³ *Ibid.* Gleeson CJ, Gaudron, Kirby and Hayne JJ stated that (citations omitted):

The concept of ‘property’ may be elusive. Usually it is treated as a ‘bundle of rights’. But even this may have its limits as an analytical tool or accurate description, and it may be, as Professor Gray has said, that ‘the ultimate fact about property is that it does not really exist: it is mere illusion’.

⁷⁴ *Ibid.* 388. Gummow J stated that (citations omitted):

Equity brings particular sophistications to the subject. The degree of protection afforded by equity to confidential information makes it appropriate to describe it as having a proprietary character, but that is not because property is the basis upon which protection is given; rather this is because of the effect of that protection.

⁷⁵ (1971) 17 FLR 141.

2004] *Native Title and the 'Acquisition of Property'* 41

The focus of this article, however, is even more specific and less restrictive than the common law conception of 'property'. The issue here is whether native title is 'property' for the purposes of s 51(xxxi) of the *Constitution* and it is to that case law which I now turn.

B *The Meaning of 'Property' under s 51(xxxi)*

The case law on 'property' for the purposes of s 51(xxxi) can be reduced to two propositions: that its meaning and coverage are extremely broad and that it is not confined to the definition of property under the common law.⁷⁶ It may be that in the 1890s the drafters of s 51(xxxi) had only a 'physicalist' conception of property in mind — one concerned with 'land, buildings and other material objects'.⁷⁷ However, the breadth of the term for the purposes of s 51(xxxi) was established by the High Court early in the 20th century. In 1923, Knox CJ and Starke J called it 'the most comprehensive term that can be used' and went on to say that '[n]o limitation is placed by the *Constitution* on the property in respect of which Parliament may legislate.'⁷⁸

A broad reading of the term was later confirmed in *Minister of State for the Army v Dalziel*.⁷⁹ In 1948, Dixon J was not breaking any new ground when he wrote this widely quoted statement on the breadth of the 'property' notion under s 51(xxxi):

s 51(xxxi) is not to be confined pedantically to the taking of title by the Commonwealth to some specific estate or interest in land recognized at law or in equity and to some specific form of property in a chattel or chose in action similarly recognized ... it extends to innominate and anomalous interests.⁸⁰

Five decades later, McHugh J, a judge who has shown little sympathy for the adventurous use of the constitutional guarantee,⁸¹ reaffirmed the breadth of the

⁷⁶ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349 (Dixon J); *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297, 311–12 (Brennan J), 314 (Dawson J) ('*Georgiadis*'); *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151, 160 (Black CJ and Gummow J) ('*Davey*').

⁷⁷ *Health Insurance Commission v Peverill* (1994) 179 CLR 226, 264 fn 11 (McHugh J) ('*Peverill*'). The cursory treatment of what was to become section 51(xxxi) at the constitutional conventions of the 1890s is discussed in Simon Evans, 'Property and the Drafting of the *Australian Constitution*' (2001) 29 *Federal Law Review* 121, 128–32. The only examples of property used in debate related to land, but Evans says that overall there was 'no discussion of what property is': at 132.

⁷⁸ *Commonwealth v New South Wales* (1923) 33 CLR 1, 21.

⁷⁹ (1944) 68 CLR 261, 285 (Rich J), 290 (Starke J) ('*Dalziel*').

⁸⁰ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349.

⁸¹ McHugh J was in the minority when the majority found that the 'just terms' guarantee applied to the plaintiff in *Georgiadis* (1994) 179 CLR 297, *Newcrest* (1997) 190 CLR 513 and *Smith v ANL Ltd* (2000) 204 CLR 493. He joined the majority in rejecting the application of the 'just terms' guarantee in a number of other cases: *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 ('*Mutual Pools*'); *Re DPP (Cth)*; *Ex parte Lawler* (1994) 179 CLR 270; *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 ('*WMC*'); *Commonwealth v Western Australia* (1999) 196 CLR 392; *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133.

High Court's approach to the 'property' question in *Newcrest*.⁸² Putting aside the explicit recognition that rights owing their existence entirely to *statute* can also amount to property for the purposes of s 51(xxxi),⁸³ there have been very few developments on this front in the past 50 years.

Individual judges have occasionally dwelt on the question of what is needed to establish 'property' for the purposes of s 51(xxxi). 'Assignability' — or the capacity to be assumed by third parties — has been discussed in several recent cases, and Brennan J has indicated that 'the want of assignability of a right is a factor tending against the characterization of a right as property'.⁸⁴ In *Yanner*, however, Gummow J confirmed that this quality is not always essential to the categorisation of an interest as 'property', even at common law.⁸⁵ A degree of 'permanence or stability' has also been described as one of property's core characteristics.⁸⁶ This is an idea with some intuitive appeal,⁸⁷ as the later analysis of 'acquisition' suggests.

Generally, however, the issue has not troubled the High Court in s 51(xxxi) litigation.⁸⁸ Indeed, in some recent cases, the Commonwealth has simply conceded the right in question is 'property', choosing to focus its defence instead

⁸² In that case, McHugh J said that '[t]he constitutional term "property" has been liberally construed. It encompasses traditional estates and recognised interests in land and chattels and extends to include choses in action, intangible property rights and "innominate and anomalous interests": *Newcrest* (1997) 190 CLR 513, 573.

⁸³ See Kirby J's discussion of recent developments in *WMC* (1998) 194 CLR 1, 99.

⁸⁴ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 166. See also *Pevevill* (1994) 179 CLR 226, 242 (Brennan J); *WMC* (1998) 194 CLR 1, 13–14 (Brennan CJ); *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 528 (Dawson and Toohey JJ).

⁸⁵ (1999) 201 CLR 351, 388.

⁸⁶ *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, 1248 (Lord Wilberforce).

⁸⁷ Those who benefited from the free advertising time during election periods in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 did not acquire 'property' in Dawson J's view partly because the right (if it was that) was 'of a temporary nature': at 199. Brennan J has twice emphasised permanence or stability as an indicator of a proprietary interest: see *Pevevill* (1994) 179 CLR 226, 241, 243 (susceptibility to a 'form of repetitive or continuing enjoyment'), and his judgment as Chief Justice in *WMC* (1998) 194 CLR 1, 13–14. See also *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 528 (Dawson and Toohey JJ) and the comments of Kirby J in *WMC*, below n 88. This idea, however, needs further exploration because, as Kent McNeil has pointed out to the author, consumables such as food or drink might not qualify as property if permanence is an essential attribute.

⁸⁸ For completeness I note that Brennan J has suggested other criteria by which rights may be ruled out from constitutional consideration as property, although they do not appear relevant to our purposes here. In *WMC* (1998) 194 CLR 1, 17, his Honour said that 'a right ... to compel the performance of a public law duty is not itself property', referring to his earlier judgment in *Pevevill* (1994) 179 CLR 226, 243–4. In the latter case, his Honour also indicated that a statutory right which is a gratuity will not be property: at 245. In *WMC* (1998) 194 CLR 1, 99, Kirby J, on the basis that property in its constitutional sense has no fixed content, set forth a number of typical features which tend for or against characterisation of a particular right as property (emphasis added):

Some interests, of their nature, are much more likely to be catalogued as protected by the guarantee than others. If the interests are *ephemeral, prone to ready variation or dependent upon benefits paid out of the consolidated revenue*, they will much more readily be classified as falling outside the constitutional protection than where they are *exclusive, transferable, require substantial investment, impose significant obligations and partake, by analogy, of the familiar features of stable and valuable property interests* long recognised by the common law.

on other aspects of the section.⁸⁹ Since plaintiffs rarely fail to establish 'property' in reported s 51(xxxi) cases, it is difficult to discern principles governing what is and what is not property, beyond the basic proposition that the term must be liberally construed.

C Native Title as Property for the Purposes of s 51(xxxi)

No High Court judge has yet denied that native title is property for the purposes of s 51(xxxi). Despite the fact that no native title holder has been required to argue before the High Court that their title comes within the constitutional definition of 'property', already Gummow,⁹⁰ Deane,⁹¹ Gaudron⁹² and McHugh JJ⁹³ have indicated that it does. To this can be added the following judicial observations: the inalienability of an interest is not a bar to its recognition as property for common law — let alone constitutional — purposes;⁹⁴ the concept of property in s 51(xxxi) 'includes interests in land which fall far short of full ownership';⁹⁵ a right to fish (a usufructuary right or something analogous to it) amounts to property for s 51(xxxi) purposes despite not being a proprietary right under private law;⁹⁶ even personal rights may be property;⁹⁷ and the constitutional term 'property' appears to have become virtually a synonym for valuable legal rights.⁹⁸

There is a degree of ambiguity about the legal characterisation of native title rights and interests. It is clear, however, as the High Court recently emphasised, that they are rights 'in relation to land or waters.'⁹⁹ Given the breadth of the term 'property' in its constitutional sense, on any reasonable analysis native title rights ought to qualify as property for that purpose.

⁸⁹ See, eg, *Newcrest* (1997) 190 CLR 513, 573 (McHugh J); *Davey* (1993) 47 FCR 151, 160 (Black CJ and Gummow J).

⁹⁰ *Newcrest* (1997) 190 CLR 513, 613.

⁹¹ *Mabo [No 2]* (1992) 175 CLR 1, 111.

⁹² *Ibid.*

⁹³ *Newcrest* (1997) 190 CLR 513, 576.

⁹⁴ *Yanner* (1999) 201 CLR 351, 388 (Gummow J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 166 (Brennan J); *Peeverill* (1994) 179 CLR 226, 241 (Brennan J).

⁹⁵ *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, 444 (Aickin J, dissenting on the result); *Dalziel* (1944) 68 CLR 261.

⁹⁶ *Davey* (1993) 47 FCR 151, 160 (Black CJ and Gummow J).

⁹⁷ *Georgiadis* (1994) 179 CLR 297, 314 (Dawson J).

⁹⁸ *Dalziel* (1944) 68 CLR 261, 290 (Starke J); *Peeverill* (1994) 179 CLR 226, 235 (Mason CJ, Deane and Gaudron JJ); *Commonwealth v Mewett* (1997) 191 CLR 471, 535 (Gummow and Kirby JJ).

⁹⁹ *Ward* (2002) 191 ALR 1, 16 (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See also *Native Title Act 1993* (Cth) s 223.

III NATIVE TITLE EXTINGUISHMENT AND ‘ACQUISITION’

A *The Law on Extinguishment of Native Title*

The recent High Court decisions in *Ward and Wilson v Anderson*¹⁰⁰ have clarified some questions about extinguishment law, but those rules have not yet settled into a comprehensive doctrine. Instead we have a slowly accumulating set of propositions accompanied by continuing uncertainty, in particular about the dividing line between extinguishment, partial extinguishment, impairment, mere regulation (if it represents something distinct from impairment) and acts with no legal effect on native title. I begin by identifying those propositions of extinguishment doctrine which appear to have attained a reasonable degree of judicial unanimity, together with those spelt out in statute.

1 *Relatively Settled Propositions of Extinguishment Law*

The power to extinguish native title, and indeed any other property right, is a concomitant of sovereignty.¹⁰¹ With the acquisition of sovereignty, the Crown acquired radical title to the land, and that radical title provided the ‘logical postulate’ for the exercise of legal control over the land, supporting the doctrine of tenure when parcels were granted to third parties and underpinning the conversion of land to full beneficial ownership when the Crown appropriated land for its own use.¹⁰² The ‘antecedent rights and interests’ of a native title holding group constitute ‘a burden on the radical title of the Crown.’¹⁰³

Native title is not extinguished by the actions of private individuals; rather, extinguishment occurs as a consequence of official action by Parliament or the executive.¹⁰⁴ Extinguishment is permanent:¹⁰⁵ once extinguished, native title cannot be revived, at least in the technical sense that the common law will not recognise it anew.¹⁰⁶ The extinguishment of native title by Parliament requires the demonstration of a clear and plain intention to do so.¹⁰⁷ That was once a requirement which also applied to ‘executive extinguishment’,¹⁰⁸ but apparently

¹⁰⁰ (2002) 190 ALR 313.

¹⁰¹ *Mabo [No 2]* (1992) 175 CLR 1, 63 (Brennan J).

¹⁰² *Ibid* 50.

¹⁰³ *Ibid* 57. The High Court has since said that while it regards ‘radical title’ as a ‘useful tool of legal analysis’, it should not be given undue emphasis: *Yorta Yorta* (2002) 194 ALR 538, 550 (Gleeson CJ, Gummow and Hayne JJ). See also *Commonwealth v Yarmirr* (2001) 208 CLR 1, 51 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁰⁴ *Western Australia v Commonwealth* (1995) 183 CLR 373, 469 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

¹⁰⁵ *Native Title Act 1993* (Cth) s 237A.

¹⁰⁶ *Fejo* (1998) 195 CLR 96, 131 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). Note that in some instances the *Native Title Act 1993* (Cth) permits past acts of extinguishment to be disregarded, statutorily cancelling out extinguishment and replacing it with suppression for the duration of the grant, vesting or other act: ss 47, 47A, 47B, 238.

¹⁰⁷ *Western Australia v Commonwealth* (1995) 183 CLR 373, 423 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). See also *Mabo [No 1]* (1988) 166 CLR 186, 213 (Brennan, Toohey and Gaudron JJ), 223 (Deane J); *Mabo [No 2]* (1992) 175 CLR 1, 64 (Brennan J), 111 (Deane and Gaudron JJ), 195–6 (Toohey J); *Wilson v Anderson* (2002) 190 ALR 313, 330 (Gaudron, Gummow and Hayne JJ).

¹⁰⁸ The phrase ‘executive extinguishment’ will be used as a shorthand expression for extinguishment by the executive, which typically happens by the grant of inconsistent rights to third parties

this is no longer the case.¹⁰⁹ A doctrine of inconsistency applies to executive extinguishment: 'A Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land necessarily extinguishes the native title.'¹¹⁰ Thus, the grant of fee simple to a third party, in the High Court's view, necessarily crowds out the exercise of any concurrent rights in the same land and permanently extinguishes native title.¹¹¹ The recent High Court decisions in *Ward* and *Wilson v Anderson* indicate that a number of other tenures regarded as providing the grantee with exclusive possession will also be treated as totally extinguishing native title. The *Native Title Act 1993* (Cth) lists hundreds of categories of land grant which it treats as 'exclusive possession' tenures that completely extinguish native title.¹¹² It also deems certain vestings and public works to be completely extinguishing acts.¹¹³

A test of inconsistency requires a precise, case-by-case comparison of two sets of rights: on one side the grantee holding interests from the Crown, and on the other the native title holding group whose rights derive from traditional law and custom.¹¹⁴ When investigating the alleged inconsistency of a Crown grant with the survival of native title, the Court's analysis will focus on the legal rights created at the time of grant, not their exercise or otherwise in practice.¹¹⁵ In other words, even if the grantee of a fee simple never took possession of their land, evidence of their non-use could not overcome the legal inconsistency of the rights given to them as against those of the native title holders.¹¹⁶

Native title will also be extinguished if land is reserved from sale for a public purpose in a manner inconsistent with the continued enjoyment of that native title.¹¹⁷ Reservation itself will not necessarily extinguish all native title in the relevant land; this will depend, for example, on 'what, if any, rights in others were created by the reservation or later asserted by the executive.'¹¹⁸ Vesting rights in the Crown (or its agencies) over land or natural resources may extin-

and by the Crown appropriating land to itself in a way inconsistent with the survival of native title.

¹⁰⁹ *Ward* (2002) 191 ALR 1, 35–6 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹¹⁰ *Mabo [No 2]* (1992) 175 CLR 1, 68 (Brennan J). See also *Western Australia v Commonwealth* (1995) 183 CLR 373, 422 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *ibid* 36 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹¹¹ *Fejo* (1998) 195 CLR 96, 128 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

¹¹² Part 2, div 2B, sch 1.

¹¹³ Section 23B(3), (7).

¹¹⁴ *Ward* (2002) 191 ALR 1, 36 (Gleeson CJ, Gaudron, Gummow and Hayne JJ), citing with approval *Ward v Western Australia* (2000) 99 FCR 316, 343 (Beaumont and von Doussa JJ). See also *Wik* (1996) 187 CLR 1, 126 (Toohey J), 217, 249 (Kirby J).

¹¹⁵ *Ward* (2002) 191 ALR 1, 73 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹¹⁶ *Wik* (1996) 187 CLR 1, 133 (Toohey J), 135 (Gaudron J), 185 (Gummow J), 238 (Kirby J); *Fejo* (1998) 195 CLR 96, 154–5 (Kirby J).

¹¹⁷ *Ward* (2002) 191 ALR 1, 55–6 (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Mabo [No 2]* (1992) 175 CLR 1, 68 (Brennan J). Deane and Gaudron JJ basically agreed, adding that reservation for an inconsistent purpose 'where third party rights intervened' would extinguish native title: at 90. See also *Western Australia v Commonwealth* (1995) 183 CLR 373, 433–4 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

¹¹⁸ *Ward* (2002) 191 ALR 1, 74 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

guish native title, but again it requires close examination of the rights given to the vestee and, so it appears, whether the vesting conveyed a legal estate in fee simple to a body or person as trustee of a public trust.¹¹⁹ The construction of public works can itself be an extinguishing act.¹²⁰

Below these forms of total extinguishment of native title is the idea of partial extinguishment. According to current High Court authority, a fee simple grant permanently extinguishes the native title of an indigenous group as it exists inside the defined boundaries of the freehold grant. Thus, partial extinguishment in a *spatial* sense is part of Australian native title law. Partial extinguishment in a *functional* sense is now, after *Ward*, clearly also part of that law. For example, the grant of various pastoral leases in Western Australian and the Northern Territory was ‘inconsistent with the continued existence of the native title right to control access to and make decisions about the land’¹²¹ and therefore extinguished native title to the extent of the inconsistency.¹²²

Those propositions of total and partial extinguishment stated above that rely on common law rather than statutory analysis may require modification in particular instances due to the *Native Title Act 1993* (Cth). The operation after 1975 of the *Racial Discrimination Act 1975* (Cth) and the validation provisions of the *Native Title Act 1993* (Cth)¹²³ can lead to a variety of extinguishment, partial extinguishment and non-extinguishment outcomes, depending on many variables.¹²⁴

The *Native Title Act 1993* (Cth) provides another level to extinguishment doctrine with the so-called ‘non-extinguishment principle’.¹²⁵ Where this operates, the exercise of those native title rights or interests which are inconsistent with the rights given to a grantee by the Crown is suppressed for the duration of the grant, but these rights ‘spring back’ to have full effect upon expiry of the grant. *Consistent* native title rights can continue to be exercised throughout the term of the grant.

Below this level is the category of legitimate *regulation* of native title. In *Mabo [No 2]*, Brennan J held that ‘[a] clear and plain intention to extinguish

¹¹⁹ In *Yanner* (1999) 201 CLR 351, the High Court found that the statutory vesting in the Crown of property in wild animals in Queensland did not extinguish native title rights in relation to those animals. In *Hayes v Northern Territory* (1999) 97 FCR 32, Olney J also found particular vestings did not operate to extinguish native title, because they did not imply exclusive possession (at 114–16), and in another case because land was merely vested in ‘an emanation of the Crown’ (at 130). In *Ward* (2002) 191 ALR 1, the majority found that vesting a reserve under s 33 of the *Land Act 1933* (WA) conveyed the legal estate in fee simple to the land to the body or person in question, obliged them to hold the land on trust for the stated purposes and completely extinguished native title (subject to the operation of the *Native Title Act 1993* (Cth)): at 81. Note also that relevant provisions of the *Native Title Act 1993* (Cth) may operate, such as s 23B(3).

¹²⁰ *Native Title Act 1993* (Cth) ss 23B(7), 23C(2).

¹²¹ *Ward* (2002) 191 ALR 1, 121 (for Northern Territory pastoral leases); see also at 68 (for Western Australian pastoral leases).

¹²² In coming to this conclusion, the High Court majority in *Ward* relied on an erroneous interpretation of Parliament’s intention in enacting s 23G of the *Native Title Act 1993* (Cth): see Sean Brennan, ‘Native Title in the High Court of Australia a Decade after *Mabo*’ (2003) 14 *Public Law Review* 209, 212.

¹²³ Part 2, divs 2, 2A, 2AA.

¹²⁴ The variables include the past tenure of the land in question, the terms of individual state and territory statutes and precisely when particular grants were made. See, eg, *Ward* (2002) 191 ALR 1, 75.

¹²⁵ Section 238.

native title is not revealed by a law which merely regulates the enjoyment of native title or which creates a regime of control that is consistent with the continued enjoyment of native title.¹²⁶

The regulation category appears to be a residual one, to which all of those acts which affect native title but fall short of extinguishment are consigned. One aspect of 'regulation' brought to the fore in *Yanner* was the question of *prohibitions*. It appears that a *conditional* prohibition on the exercise of a native title usufructuary right (that is, a general ban on an activity — hunting, for example — coupled with a permit or licence scheme whereby it can be lawfully carried out) will not extinguish native title but merely regulate it.¹²⁷ Beyond 'regulation' would be the category of actions which have no impact on native title.

B *The Law on 'Acquisition' under s 51(xxxi)*

The constitutional definition of 'acquisition' puts a number of hurdles in the path of those seeking the protection of the 'just terms' guarantee. An alleged acquisition may be deemed no more than a mere extinguishment or diminution of rights. There may be no demonstrated 'benefit' to the Crown or third parties. That benefit may not be shown to be proprietary (if that is indeed an additional requirement). The 'property' itself may be deemed 'inherently defeasible' in a way that denies the applicability of the 'just terms' guarantee. Any one of these individual elements of acquisition doctrine is sufficient to defeat a plaintiff seeking s 51(xxxi) protection. It is upon these refinements of acquisition doctrine that I will now focus.

1 *A Liberal Construction*

It seems reasonably clear that the term 'acquisition' is to be given a broad and liberal interpretation.¹²⁸ Usually this proposition is linked to the status of s 51(xxxi) as a 'constitutional guarantee' of just terms. The High Court stresses far more frequently the importance of giving 'property' a broad construction in light of the section's status as a constitutional guarantee. It has, however, been suggested that *all* elements of s 51(xxxi) need to be given a generous interpretation in order for the section to fulfil its proper function as both a head of legislative power and a constitutional guarantee.¹²⁹

¹²⁶ (1992) 175 CLR 1, 64 (citations omitted).

¹²⁷ *Yanner* (1999) 201 CLR 351, 373 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

¹²⁸ For example, in *Mutual Pools* (1994) 179 CLR 155, Deane and Gaudron JJ, after observing that s 51(xxxi) requires a liberal construction appropriate to a constitutional guarantee, stated (at 184–5) that

the word 'acquisition' is not to be pedantically or legalistically restricted to a physical taking of title or possession. Once it is appreciated that 'property' in s 51(xxxi) extends to all types of 'innominate and anomalous interests', it is apparent that the meaning of the phrase 'acquisition of property' is not to be confined by reference to traditional conveyancing principles and procedures.

See also *Re DPP (Cth); Ex parte Lawler* (1994) 179 CLR 270, 285 (Deane and Gaudron JJ); *Commonwealth v Western Australia* (1999) 196 CLR 392, 457 (Kirby J); *Dalziel* (1944) 68 CLR 261, 285 (Rich J).

¹²⁹ *Mutual Pools* (1994) 179 CLR 155, 184 (Deane and Gaudron JJ).

2 “Acquisition” as Distinct from Deprivation¹³⁰

The next proposition — that the constitutional guarantee concerns itself with the acquisition of property and not merely the extinguishment or deprivation of rights — is an important judicial tool for limiting the reach of s 51(xxxi). A number of appellate judges¹³¹ have pointed out that s 51(xxxi) is not the same as the United States ‘takings’ clause on which it was modelled.¹³² The protection of just terms applies to ‘acquisition of property’, not ‘takings’: ‘the mere extinguishment by the Commonwealth of a right enjoyed by an owner in relation to his or her property does not amount to an acquisition of property’.¹³³

Immediately, however, this proposition must be qualified. As Brennan CJ remarked in *Commonwealth v WMC Resources Ltd*, the constitutional guarantee cannot be allowed to become a ‘hollow facade’.¹³⁴ Acquisition is thus a matter of substance, not form. So, while ‘the distinction between extinguishing rights in property and acquiring them ... must be maintained ... in some instances to extinguish the rights of one person may result in the acquisition of rights by another’.¹³⁵ If ‘the mere destruction of property is insufficient to enliven the guarantee’,¹³⁶ what must the petitioner seeking ‘just terms’ coverage bring before the court?

3 An ‘Identifiable and Measurable Countervailing Benefit’¹³⁷

The answer is evidence of ‘benefit’. Either the Commonwealth or someone else must derive an advantage from the divestee’s loss. Proof of the loss itself is not sufficient. Applicants must show ‘some identifiable and measurable countervailing benefit or advantage accruing to that other person as a result’.¹³⁸ However, the law about ‘benefit’ has been clouded by complication as a result of more experimental s 51(xxxi) challenges in recent years. For example, in an attempt to refute the existence of an ‘acquisition’ in the constitutional sense, this aspect of the doctrine is sometimes stretched to the point where it strains credibility.¹³⁹

The question of benefit seems to be a matter of degree. In *Minister for Primary Industry and Energy v Davey*,¹⁴⁰ the Commonwealth reduced the number of

¹³⁰ Ibid 185 (Deane and Gaudron JJ).

¹³¹ See, eg, *Davey* (1993) 47 FCR 151, 160 (Black CJ and Gummow J).

¹³² *United States Constitution* amend V.

¹³³ *Mutual Pools* (1994) 179 CLR 155, 172 (Mason CJ) (citations omitted); see also at 194 (Dawson and Toohey JJ).

¹³⁴ (1998) 194 CLR 1, 15, quoting *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 510 (Mason CJ, Brennan, Deane and Gaudron JJ).

¹³⁵ *Mutual Pools* (1994) 179 CLR 155, 194 (Dawson and Toohey JJ).

¹³⁶ *Davey* (1993) 47 FCR 151, 160 (Black CJ and Gummow J).

¹³⁷ *Mutual Pools* (1994) 179 CLR 155, 185 (Deane and Gaudron JJ).

¹³⁸ Ibid (citations omitted).

¹³⁹ In *Newcrest* (1997) 190 CLR 513, McHugh J said that in effectively extinguishing Newcrest’s interest in the land (the right to mine) ‘the Commonwealth obtained nothing which it did not already have’: at 573. His co-dissenter Brennan CJ did not share that view: ‘By force of the amendments ... the Commonwealth was left in undisturbed possession of the minerals on and under the land ... The Commonwealth’s interest in respect of the minerals was enhanced by the sterilisation of Newcrest’s interests therein’: at 530.

¹⁴⁰ (1993) 47 FCR 151.

units under which access to fishing grounds was rationed amongst trawling operators. Reducing the total number of available units was likely to lead to smaller and less viable operators selling out to larger competitors. The market-driven consolidation of the industry meant a consequential benefit flowed as a matter of market logic to the remaining operators.¹⁴¹ Nevertheless, Black CJ and Gummow J found that the alleged consequential benefits of rationalisation were too remote from the original Commonwealth law to make it one with respect to the acquisition of property.¹⁴²

So the evidence of benefit may be a question of fact and degree about which minds might reasonably differ. A more significant problem presently afflicts the meaning of 'benefit'. It concerns its *legal character*. Clearly a 'victim' of acquisition must suffer loss of 'property' broadly defined. But must the benefit gained by another — the identifiable and measurable advantage — itself be proprietary in character?

4 *A Proprietary Benefit?*

This was once a non-issue. During World War II, when the Commonwealth seized an offset printer for defence purposes¹⁴³ or compulsorily acquired fruit to stabilise agricultural industries and ensure the steady supply of staple products,¹⁴⁴ there was an obvious correspondence between what was lost by one and gained by another. After acquisition, exactly the same property was in the hands of the Commonwealth. The 'benefit' was clearly proprietary.

In the last two decades, however, cases have arisen where the gain is something different to the loss. 'Sterilisation' cases have involved not the compulsory acquisition of land but its legislative 'inoculation' against certain uses such as building a dam¹⁴⁵ or mining.¹⁴⁶ Other cases have forced an examination of the correlative 'benefit', if any, to the Commonwealth of extinguishing causes of action against itself,¹⁴⁷ or the use of legislation to head off windfall gains from the Medicare system¹⁴⁸ or from the Australian Tax Office.¹⁴⁹ Here, the gain may differ from the loss, and the question prompted is whether the words of s 51(xxxi) pin the requirement of property only on what is taken or also on what is gained.

Perhaps as a constitutional guarantee of rights as well as a head of legislative power, the analysis should focus on the divestee seeking just terms and whether

¹⁴¹ 'Counsel submitted that the intention and effect of the acquisition scheme was to reduce the number of boats trawling in the fishery. This was expected to increase the annual catch and earnings per vessel': *Davey* (1993) 47 FCR 151, 161 (Black CJ and Gummow J).

¹⁴² *Ibid* 163.

¹⁴³ *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v Commonwealth* (1943) 67 CLR 314.

¹⁴⁴ *Australian Apple and Pear Marketing Board v Tonking* (1941) 66 CLR 77.

¹⁴⁵ *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dams Case*').

¹⁴⁶ *Commonwealth v Western Australia* (1999) 196 CLR 392; *Newcrest* (1997) 190 CLR 513.

¹⁴⁷ *Georgiadis* (1994) 179 CLR 297; *Commonwealth v Mewett* (1997) 191 CLR 471.

¹⁴⁸ *Peeverill* (1994) 179 CLR 226.

¹⁴⁹ *Mutual Pools* (1994) 179 CLR 155.

he or she is deprived of property.¹⁵⁰ For policy and doctrinal reasons, however, we can understand why the High Court may want to adhere to a requirement that the Commonwealth or a third party obtain a proprietary benefit. If all that is needed to exceed mere ‘destruction or restriction of property rights’¹⁵¹ and establish ‘acquisition’ is a public policy gain — the enhancement of environmental or foreign policy objectives, for instance — ‘acquisition’ may cease to function as any kind of limitation device at all.¹⁵²

The first challenge to the idea that a benefit must be proprietary appeared in *Commonwealth v Tasmania* (*Tasmanian Dams Case*)¹⁵³ in 1983. Proclamations by a Commonwealth Minister had blocked development activity on land vested in the Tasmanian Hydro-Electric Commission. The proclamations were made in fulfilment of international obligations to protect the environment. Mason J expressed the conventional view in a way that has been cited many times since:

To bring the constitutional provision into play it is not enough that 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.*¹⁵⁴

Deane J, however, flirted with the idea that a mere policy benefit for the Commonwealth would be sufficient to establish an ‘acquisition’ for constitutional purposes. His Honour’s analysis was tinged with ambiguity on the question and it appears that ultimately he maintained that the benefit derived by the Commonwealth must be, and was in this case, proprietary.¹⁵⁵ However, the reasoning was sufficiently ambiguous that some interpret the connection between the incorporeal policy benefit and an interest in property as minimal.¹⁵⁶

¹⁵⁰ In *Peeverill v Health Insurance Commission* (1991) 32 FCR 133, 143, Burchett J stated (emphasis in original):

the peaceful enjoyment of one’s possessions, must, by its nature, be concerned with the other side of the transaction — with its effect upon the ‘person’ from whom the acquisition is made. If property is acquired *from* him, its transmutation into some other form in the hands of the Commonwealth is not really to the point.

Cf *Georgiadis* (1994) 179 CLR 297, 304–5 (Mason CJ, Deane and Gaudron JJ).

¹⁵¹ *Davey* (1993) 47 FCR 151, 160 (Black CJ and Gummow J).

¹⁵² See also Gavan Griffith and Geoffrey Kennett, ‘Constitutional Protection against Uncompensated Expropriations of Property’ [1998] *Australian Mining and Petroleum Law Association Yearbook* 49, 56:

If the achievement of general Commonwealth objectives constituted a relevant ‘benefit or advantage’, there would be no reason in principle why every Commonwealth law which reduced the scope of a person’s rights did not thereby effect an ‘acquisition’ (since every Commonwealth law is *ex hypothesi* directed at the achievement of Commonwealth objectives).

¹⁵³ (1983) 158 CLR 1.

¹⁵⁴ *Ibid* 145 (emphasis added).

¹⁵⁵ *Ibid* 283–8.

¹⁵⁶ See, eg, D F Jackson and Stephen Lloyd, ‘Compulsory Acquisition of Property’ [1998] *Australian Mining and Petroleum Law Association Yearbook* 75, 87:

the owner of the land (in effect, the Tasmanian government) was prohibited from using or developing the land, thereby advancing the Commonwealth government’s environmental objectives. This, for Deane J, was a sufficient benefit to make the extinguishment of rights not ‘mere’ extinguishment.

In 1993, all seven High Court judges in *Australian Tape Manufacturers Association Ltd v Commonwealth* agreed that a benefit must be proprietary in character.¹⁵⁷ Yet within a year, unity on the question had again broken down and, after a spate of experimental s 51(xxxi) litigation in the 1990s,¹⁵⁸ the continuing divergence of opinion has disconcerted commentators.¹⁵⁹

Some High Court judges consistently required a proprietary benefit, most notably Dawson and Toohey JJ.¹⁶⁰ But on 9 March 1994, a quartet of s 51(xxxi) 'test cases' saw the rest of the Court apparently diluting the hardline insistence on proprietary benefit which had commanded unanimous support only 12 months before.

In *Mutual Pools & Staff Pty Ltd v Commonwealth*, Mason CJ implied that a benefit could exist independently of an interest in property.¹⁶¹ His apparent motivation was a concern that governments might rely on this aspect of doctrine to circumvent the requirement for just terms. For Mason CJ, such a triumph of form over substance would contradict longstanding authority and undermine the function of an express constitutional guarantee. Joined by Deane and Gaudron JJ in *Georgiadis v Australian & Overseas Telecommunications Corporation*, delivered on the same day, Mason CJ again made no reference to proprietary notions when he discussed the 'distinct financial benefit' derived by the Commonwealth from the extinguishment of causes of action against it.¹⁶² Similarly, Brennan J, without acknowledging any shift in position, seemed to supply an alternative to 'proprietary benefit' when he suggested in *Mutual Pools* that a discharge from the Commonwealth's liability to a plaintiff can be an 'acquisition of property' where the Commonwealth 'received a benefit precisely corresponding with the plaintiff's loss of its property.'¹⁶³ Interestingly, his Honour cited Deane J's judgment in the *Tasmanian Dams Case* as support for his position.

¹⁵⁷ (1993) 176 CLR 480, 499–500 (Mason CJ, Brennan, Deane and Gaudron JJ), 528 (Dawson and Toohey JJ), 528 (McHugh J, agreeing with Dawson and Toohey JJ). Thus a statutory exemption for 'home-taping' diminished the exclusive intellectual property rights of copyright holders, but did not attract just terms because it yielded no benefit to the Commonwealth or others in the form of a proprietary interest.

¹⁵⁸ See, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480; *Davey* (1993) 47 FCR 151; *Peeverill* (1994) 179 CLR 226; *Georgiadis* (1994) 179 CLR 297; *Mutual Pools* (1994) 179 CLR 155; *Commonwealth v Mewett* (1997) 191 CLR 471; *Newcrest* (1997) 190 CLR 513; *WMC* (1998) 194 CLR 1.

¹⁵⁹ See, eg, Griffith and Kennett, above n 152, 55: 'The decision in *WMC* confirms a position of some uncertainty as to what kind of "benefit or advantage" is necessary to raise an extinguishment of proprietary rights to the status of "acquisition".'

¹⁶⁰ *Mutual Pools* (1994) 179 CLR 155, 195, 201 (Dawson and Toohey JJ); *Peeverill* (1994) 179 CLR 226, 248–9 (Dawson J), 256 (Toohey J); *Georgiadis* (1994) 179 CLR 297, 315 (Dawson J), 320 (Toohey J); *Australian Capital Television Pty Limited v Commonwealth* (1992) 177 CLR 106, 198 (Dawson J). Note, however, Toohey J's acceptance of 'distinct financial benefit' arising from the extinguishment of a cause of action in *WMC* (1998) 194 CLR 1, 30.

¹⁶¹ (1994) 179 CLR 155, 173.

¹⁶² (1994) 179 CLR 297, 306. The same 'coalition' of judges reiterated in another of the March 1994 cases that 'the derivation by the Commonwealth of a financial advantage in association with the extinguishment of a right to receive a payment from the Commonwealth may constitute an acquisition of property for the purposes of s 51(xxxi) of the Constitution': *Peeverill* (1994) 179 CLR 226, 236.

¹⁶³ *Mutual Pools* (1994) 179 CLR 155, 176 (citations omitted).

In *Newcrest*, a subsequent ‘land sterilisation’ case, Brennan CJ described ‘the benefit of relief from the burden of Newcrest’s rights to carry on operations for the recovery of minerals’ as ‘property’.¹⁶⁴ Six months later, he found no benefit to the Commonwealth from extinguishing the plaintiff’s offshore petroleum exploration rights. As the Commonwealth had no property in the continental shelf, it was ‘under no liability reciprocal to the permit or interest and acquires no benefit by the modification or extinguishment.’¹⁶⁵

It may appear from Brennan CJ’s acceptance of Newcrest’s claim and denial of WMC’s that his notion of benefit remains very close to, if not identical with, a requirement of ‘property’. The uncertainty persists, however, because in *WMC* he stated a general formulation which, like that in *Mutual Pools*, emphasised reciprocal liability rather than proprietary benefit.¹⁶⁶

In *Mutual Pools*, Deane and Gaudron JJ expressed their dilution of the proprietary benefit rule in a different way, which has subsequently found favour among other members of the High Court.¹⁶⁷ Again, they suggested that an identifiable benefit may itself permissibly stand at one remove from a proprietary interest, as long as the divestee’s loss can be defined as ‘property’, saying that ‘[f]or there to be an “acquisition of property”, there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property.’¹⁶⁸

In the same case, McHugh J implied that evidence of a ‘direct beneficiary’ in whom is vested ‘a corresponding benefit of commensurate value’ is sufficient. His Honour made no mention of an additional requirement that the benefit be itself proprietary.¹⁶⁹

Cases subsequent to 1994 have not finally clarified whether a benefit itself must be proprietary. Some judges apparently veer between insisting on a proprietary benefit and adopting a less stringent position.¹⁷⁰ Others appear prepared to relax the benefit requirement so that any ‘identifiable benefit or advantage’ will suffice — even mere policy gains that presumably can be always demonstrated when Parliament takes legislative action.¹⁷¹ Depending on the

¹⁶⁴ *Newcrest* (1997) 190 CLR 513, 530.

¹⁶⁵ *WMC* (1998) 194 CLR 1, 20.

¹⁶⁶ His general formulation was expressed as: ‘Where a law of the Commonwealth creates or authorises the creation of a right, a statutory modification or extinguishment of the right effects its acquisition if, but only if, it modifies or extinguishes a reciprocal liability to which the party acquiring the right was subject’: *ibid* 17.

¹⁶⁷ *Ibid* 27 (Toohey J); *Newcrest* (1997) 190 CLR 513, 634 (Gummow J).

¹⁶⁸ *Mutual Pools* (1994) 179 CLR 155, 185.

¹⁶⁹ *Ibid* 223. Again, his Honour seemed motivated to dilute the old rule by a concern with substance, not form, and a concern about evasion of the constitutional guarantee by a circuitous device.

¹⁷⁰ As to McHugh J, see *Newcrest* (1997) 190 CLR 513, 573; cf *ibid*. As to Gummow J, see *WMC* (1998) 194 CLR 1, 72 (Gummow J); cf *Newcrest* (1997) 190 CLR 513, 634.

¹⁷¹ See, eg, *WMC* (1998) 194 CLR 1, 97, where Kirby J referred to the ‘external affairs benefit’ and ‘the taxation benefits’ secured by implementing the *Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, opened for signature 11 December 1989, 1654 UNTS 105 (entered into force 9 February 1991). See also *Commonwealth v Western Australia* (1999) 196 CLR 392, 487, where Callinan J cast doubt on Mason J’s orthodox statement of proprietary benefit in the *Tasmanian Dams Case* (see above n 154 and accompanying text for a discussion of this statement).

actual state of the law, the High Court has either allowed a dilution of doctrine to pass without comment, or it has curiously refrained from denying that any dilution of the original rule is implied or intended.

5 *Acquired by Whom?*

While the High Court has struggled to define the legal character of the 'benefit', doctrine on who may be the 'beneficiary' is much clearer. While the question was debated within the Court in the 1940s and again in the 1980s, the position is now clear: s 51(xxxi) applies to an acquisition of property by anyone, not merely the Commonwealth.¹⁷²

In the 1940s, doubts were expressed as to whether s 51(xxxi) extended beyond acquisitions by the Commonwealth itself.¹⁷³ Starke and Williams JJ supplied an affirmative answer in *McClintock v Commonwealth*¹⁷⁴ in 1947, and by the end of the decade Latham CJ had joined them in this view.¹⁷⁵ Despite occasional attempts to keep the issue alive,¹⁷⁶ by 1984 (when the High Court decided *Clunies-Ross v Commonwealth*)¹⁷⁷ the issue had apparently been put beyond doubt. In that case a six-way joint judgment declared that 'the legislative power conferred by s 51(xxxi) extends at least to some acquisition by entities other than the Commonwealth'.¹⁷⁸ Subsequent comments by various judges have left little doubt that the 'just terms' guarantee can extend to acquisitions by any person as long as the other requirements of s 51(xxxi) are satisfied.¹⁷⁹

6 *The Emerging Doctrine of Inherently Vulnerable Rights*

The final aspect to be examined, which is an offshoot of 'acquisition' law, is the notion of 'inherently defeasible' or 'inherently vulnerable' rights. The idea of property rights which are inherently susceptible to defeasance and thus outside the ambit of the 'just terms' guarantee emerged in the early 1990s. At that time appellate courts sought to find a persuasive doctrinal explanation for rejecting some of the more adventurous attempts to attract the guarantee. The essence of that adventurism was that the alleged property rights at stake were creatures of statute, not the common law. The principle of parliamentary sovereignty still

¹⁷² Subject, obviously, to other textual and doctrinal constraints; for example an acquisition under a Commonwealth law.

¹⁷³ Latham CJ remarked in 1946 that, at that time, the Court had not yet expressly considered whether or not the 'just terms' limitation applied to Commonwealth laws with respect to the acquisition of property by third parties: *Real Estate Institute of New South Wales v Blair* (1946) 73 CLR 213, 224.

¹⁷⁴ (1947) 75 CLR 1, 23 (Starke J), 36 (Williams J). See also *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 250 (Rich and Williams JJ).

¹⁷⁵ Latham CJ confidently asserted that just terms applied 'whether the acquisition be by the Commonwealth or by a State or by any other person': *P J Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, 402.

¹⁷⁶ See, eg, *A-G (Cth) v Schmidt* (1961) 105 CLR 361, 372 (Dixon CJ); *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, 434 (Murphy J); *Tasmanian Dams Case* (1983) 158 CLR 1, 181 (Murphy J).

¹⁷⁷ (1984) 155 CLR 193.

¹⁷⁸ *Ibid* 202 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

¹⁷⁹ *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 510–11 (Mason CJ, Brennan, Deane and Gaudron JJ), 526 (Dawson and Toohey JJ); *Mutual Pools* (1994) 179 CLR 155, 189 (Deane and Gaudron JJ), 199 (Dawson and Toohey JJ).

exerts a considerable sway with the High Court and such litigation challenged the basic principle that what Parliament can do, it can undo.¹⁸⁰

I will later argue that Gummow J's attempt to apply the 'inherent vulnerability' doctrine to the many situations where native title has been extinguished by inconsistent grant is seriously flawed. It is necessary first to examine the content and pedigree of that doctrine, as this will reveal why its application by Gummow J to the executive extinguishment of native title pursuant to legislative authority is, in my view, misconceived.

It was Gummow J (then a judge of the Federal Court) who, in a joint judgment with Black CJ in 1993, noted the emergence of s 51(xxxi) cases based on the diminution of rights created by statute. Their Honours rejected an argument that amendments to statutory fishing quotas in the instant case amounted to an 'acquisition of property':

the units may be transferred, leased, and otherwise dealt with as articles of commerce. Nevertheless, *they confer only a defeasible interest*, subject to valid amendments to the [North Prawn Fishery Management] Plan under which they are issued. The making of such amendments is not a dealing with the property; *it is the exercise of powers inherent at the time of its creation and integral to the property itself.*¹⁸¹

This marked the genesis of an explicit doctrine of inherent defeasibility or vulnerability. Subsequently it has been applied to deflect a number of assertions of 'just terms' entitlement. In *Health Insurance Commission v Peverill*,¹⁸² a doctor insisted on his entitlement to a Medicare rebate for a pathology test. Parliament had reduced the claimable amount by changing the rebate category applying to that particular pathology test. Dr Peverill sought to invalidate the statutory amendment by invoking the constitutional guarantee. The entire High Court rejected his claim. McHugh J said the doctor's claim was a 'mere statutory benefit ... conferred subject to the risk that either it or the s 20 benefit itself could be altered or revoked at any time by the Parliament.'¹⁸³ The joint judgment of Mason CJ, Deane and Gaudron JJ found that Dr Peverill's 'rights' were

statutory entitlements to receive payments from consolidated revenue *which were not based on antecedent proprietary rights recognized by the general law*. Rights of that kind are rights which, as a general rule, are inherently susceptible of variation.¹⁸⁴

Evidence of the doctrine can also be found in a number of other cases at appellate level.¹⁸⁵ 'Inherent vulnerability' has emerged as an additional doctrinal

¹⁸⁰ See *Allpike v Commonwealth* (1948) 77 CLR 62; *Kartinyeri v Commonwealth* (1998) 195 CLR 337; *WMC* (1998) 194 CLR 1, 49–50 (McHugh J).

¹⁸¹ *Davey* (1993) 47 FCR 151, 165 (Black CJ and Gummow J) (emphasis added).

¹⁸² (1994) 179 CLR 226.

¹⁸³ *Ibid* 267–8 (citations omitted).

¹⁸⁴ *Ibid* 237 (emphasis added).

¹⁸⁵ *Georgiadis* (1994) 179 CLR 297, 305–6 (Mason CJ, Deane and Gaudron JJ), 325 (McHugh J); *Bienke v Minister for Primary Industries and Energy* (1995) 63 FCR 567 (Full Court of the Federal Court) ('*Bienke*'); *Commonwealth v Mewett* (1997) 191 CLR 471, 532 (McHugh J); *Newcrest* (1997) 190 CLR 513, 613 (Gummow J) (in relation to native title); *WMC* (1998) 194

tool available to judges, who are required to address and answer the 'compensability question' in s 51(xxxi) litigation. The 'compensability question' has both a general and a specific meaning. In general, it acts as a shorthand for the expression 'whether something attracts the guarantee of just terms in s 51(xxxi) of the *Constitution*'. More specifically, it adverts to the *policy* element that, together with the technical aspects of s 51(xxxi) doctrine, can play a role in answering that inquiry. That policy consideration is wrapped up in the question: should the losses incurred by property holders as a result of parliamentary action taken in the name of the community be compensated by the community, or should those losses lie where they fall?¹⁸⁶

General comment here about the doctrine of inherent vulnerability will be confined to three matters of potential significance in native title litigation. The first issue is the identification of the verbal element of s 51(xxxi) to which the doctrine of inherent vulnerability relates. This article treats it as an aspect of 'acquisition' law because this is the dominant mode of expression in the judgments referred to above.¹⁸⁷ The conceptual basis of the doctrine is not, however, totally clear. There are strong arguments, for example, that the categorisation of a right as inherently defeasible, and thus outside the protection offered by s 51(xxxi), relates to its character as 'property' rather than the question of 'acquisition'. Brennan J in *Peeverill* joined the rest of the Court in rejecting the doctor's claim to just terms, and did so by relying on a variant of the inherent vulnerability doctrine.¹⁸⁸ The ground for refusal was not, however, the doctor's failure to establish 'acquisition', but rather that the right 'conferred on assignee practitioners is not property':

a right to receive a benefit to be paid by a statutory authority in discharge of a statutory duty is *not susceptible of any form of repetitive or continuing enjoyment* and cannot be exchanged for or converted into any kind of property. On analysis, such a right is susceptible of enjoyment only at the moment when the duty to pay is discharged. *It does not have any degree of permanence or stability.* That is not a right of a proprietary nature, though the money received when the medicare benefit is paid answers that description.¹⁸⁹

Similarly, Kirby J in *WMC* stated:

it is necessary, in every case, to examine the legislation in question so as to determine whether the nature of the interests involved are inherently defeasible

CLR 1, 16–17 (Brennan CJ), 36–8 (Gaudron J), 51–2 (McHugh J), 68–75 (Gummow J), 92–6 (Kirby J).

¹⁸⁶ See generally Frank Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' (1967) 80 *Harvard Law Review* 1165. See also Kevin Gray, 'Land Law and Human Rights' in Louise Tee (ed), *Land Law: Issues, Debates, Policy* (2002) 211, 233. By referring to the compensability question in that sense, I do not mean to suggest that resolving the threshold question of whether the 'just terms' guarantee applies in a particular fact situation does not involve some rigorous technical analysis, or that on some occasions this will be all that is required in order to grant or refuse recovery.

¹⁸⁷ *Peeverill* (1994) 179 CLR 226, 235, 237 (Mason CJ, Deane and Gaudron JJ); *Georgiadis* (1994) 179 CLR 297, 304–6 (Mason CJ, Deane and Gaudron JJ); *Bienke* (1995) 63 FCR 567, 581, 584.

¹⁸⁸ Brennan J said that 'the right conferred on assignee practitioners by the Principal Act is ... something expected, the fulfilment of the expectation being dependent on the continued will of the Parliament': *Peeverill* (1994) 179 CLR 226, 245.

¹⁸⁹ *Ibid* 243–4 (emphasis added).

or, however ‘innominate and anomalous’ *so partake of the quality of ‘property’* that the guarantee in s 51(xxxi) is attracted.¹⁹⁰

It may well be that this offers a sounder doctrinal path in difficult s 51(xxxi) cases, where legislative action disturbs a sense of relative permanence in the distribution of goods across society. Using this property analysis, the courts can ask themselves a doctrinal question which makes the underlying policy issue explicit: is the right inherently defeasible, or does it display enough robust property-like characteristics with a sufficient ‘degree of permanence or stability’ that its statutory alteration warrants constitutional categorisation as an acquisition of property? Such a property-based approach to statutory entitlements accords with the United States Supreme Court’s approach under the ‘takings’ clause, as McHugh J pointed out in *Peeverill*.¹⁹¹ The essential idea is that someone who holds something ‘solid’, with an air of robust continuity about it, is entitled to compensation when it is taken from them in a way that someone who holds something more transitory is not; in Frank Michelman’s terms, ‘questions of compensation seem to presuppose the idea that an existing distribution should normally have a degree of permanence — an idea which seems bound up with the existence of “property”’.¹⁹²

Despite its logical appeal, the problem with integrating the concept of inherent vulnerability with the definition of ‘property’ rather than ‘acquisition’ is the substantial accretion of constitutional doctrine around the term ‘property’, which all points to giving it a very broad and unrestricted meaning. As it happens, however, much of the judicial analysis to date seems to place the doctrine of inherent vulnerability somewhere between these two ideas of ‘property’ and ‘acquisition’. This is perhaps symptomatic of the difficulty in disaggregating the textual elements of s 51(xxxi) into separate analytical concepts, when so often the various limbs of doctrine blur into each other.¹⁹³

The blurriness occurs here because judges frequently talk in terms of the impossibility of acquisition when the property rights in question display certain inherently defeasible qualities. Apparently, the unstable nature of the ‘property’ reflects back on the notion of ‘acquisition’, making it conceptually impossible in the circumstances.¹⁹⁴ Rather than deny outright that the rights in question are ‘property’ for constitutional purposes, the analysis implies that they belong to some ‘second-tier’ category of property, unlikely to attract the guarantee when Parliament acts to alter or remove them.

It is worth noting that another explanation for the inherent vulnerability doctrine has been put forward. McHugh J has twice treated the alteration of a right based in statute as satisfying the doctrinal requirements of both ‘property’ and

¹⁹⁰ (1998) 194 CLR 1, 91–2 (emphasis added) (citations omitted).

¹⁹¹ (1994) 179 CLR 226, 261–2. Note that his Honour was opposed to an analysis which would deny the character of ‘property’ to such rights: at 263–4; *WMC* (1998) 194 CLR 1, 56 fn 179.

¹⁹² Michelman, above n 186, 1203.

¹⁹³ As Kirby J has observed: ‘Each word of s 51(xxxi) is important and has been scrutinised by this Court. But it is essential to view the paragraph as a whole. In particular, the acquisition of property is a compound conception’: *WMC* (1998) 194 CLR 1, 90.

¹⁹⁴ See, eg, *Davey* (1993) 47 FCR 151, 165 (Black CJ and Gummow J); *ibid* 75 (Gummow J).

'acquisition', but as failing to attract the guarantee on the basis of *characterisation*. For example, in *WMC* his Honour said:

The defeasible character of the permit, if established, is relevant only to the question whether s 51(xxxi) withdraws from the content of s 51(xxix) the power to enact the *Consequential Provisions Act*, not whether the permit constituted 'property'.¹⁹⁵

Other judges have blurred the distinction between characterisation and acquisition approaches, implying that both are possibly at work in their analysis of inherently defeasible rights.¹⁹⁶ For the moment, the analytical basis of the doctrine remains unclear.

The second matter of significance is the relevant line of demarcation. What marks one right as inherently defeasible and another as capable of constitutional 'acquisition'? To date, these 'statutory rights' cases have all shared a common feature: the hunt for some distinguishing characteristic of non-defeasibility, some status which enables the right to transcend the fragility of its purely statutory origin.¹⁹⁷ The High Court has not succeeded in defining the essence of inherent defeasibility. In a relatively short time, a wide variety of doctrinal 'contenders' have emerged, one or more of which may eventually become an entrenched feature of 'acquisition' law. Several seem little more than an assertion that pure statutory rights, or inherently defeasible rights,¹⁹⁸ are subject to the same overriding doctrinal requirement of 'benefit' that applies to all other property rights.¹⁹⁹

The notion that benefit will be enough contradicts or at least dilutes an earlier attempt to draw a line around the inherent defeasibility doctrine. The joint judgment of Mason CJ, Deane and Gaudron JJ in *Georgiadis* had suggested that

¹⁹⁵ *WMC* (1998) 194 CLR 1, 56 fn 179. See also *Peverill* (1994) 179 CLR 226, 263–5.

¹⁹⁶ *WMC* (1998) 194 CLR 1, 35–6 (Gaudron J); *Georgiadis* (1994) 179 CLR 297, 305–7 (Mason CJ, Deane and Gaudron JJ). This article does not deal in detail with this additional threshold question of characterisation.

¹⁹⁷ For example, an insistence that the removal of Crown immunity from suit is rooted in the *Constitution* and the common law, and not merely the *Judiciary Act 1903* (Cth): *Commonwealth v Mewett* (1997) 191 CLR 471, 550–2 (Gummow and Kirby JJ).

¹⁹⁸ If the two categories are not necessarily identical, as to which, see the third issue dealt with presently.

¹⁹⁹ In *WMC* (1998) 194 CLR 1, Brennan CJ ventured that the guarantee could be attracted if a purely statutory right 'modifies or extinguishes a reciprocal liability to which the party acquiring the right was subject': at 17. The positive endowment of a right upon a third party (rather than relief from liability) was also considered sufficient: 'where the rights ... though created by statute, are properly regarded as proprietary in nature, a Commonwealth law which purported to effect a *compulsory transfer of those rights to a third party* would be a law for the acquisition of property': at 17 (emphasis added). Toohey and Gaudron JJ expressed similar ideas. Toohey J found that *WMC*'s purely statutory right attracted the 'just terms' guarantee because the Commonwealth acquired an 'identifiable benefit or advantage relating to the ownership or use of property': at 30–1, quoting *Mutual Pools* (1994) 179 CLR 155, 185 (Deane and Gaudron JJ). Gaudron J agreed that a purely statutory right may attract the constitutional guarantee where 'some person obtains some consequential advantage or benefit in relation to property' and ordinarily will attract it where '*a law operates to transfer a right to some other person*' or '*a law extinguishes a right of that kind (particularly a monopoly right) and vests a similar right or a right with respect to the same subject-matter in some other person*': *WMC* (1998) 194 CLR 1, 36 (emphasis added). McHugh J expressly disagreed that establishing the existence of a benefit would be sufficient to overcome the inherently defeasible nature of a right dependent for its existence on a federal statute: at 51–2.

a right must have some ‘basis in the general law’ rather than ‘no existence apart from statute’²⁰⁰ in order to avoid the inherent defeasibility doctrine. In *Pevehill*, their Honours expressed the same idea, referring to ‘statutory entitlements ... based on antecedent proprietary rights recognized by the general law’.²⁰¹ After sole support from McHugh J in *WMC*,²⁰² this requirement, though perhaps of continuing relevance in some situations, now appears too restrictive. Kirby J has also contributed some ideas on where the line between ‘inherent defeasibility’ and the potential attraction of the ‘just terms’ guarantee should be drawn. In *WMC*, he suggested that it is a question of whether particular rights ‘so partake of the quality of “property” that the guarantee in s 51(xxxi) is attracted’.²⁰³ He also suggested that the value attached to the rights by the plaintiff company and its costly reliance upon their expected continuation were very relevant to his finding in that case.²⁰⁴

Finally, both Gummow and Kirby JJ in *WMC* indicated that the nature and incidents of the statutory rights and obligations and the degree of permanence expressed or implied by the statute which created them will be critical, although they came to opposite conclusions on the particular facts of that case. For Kirby J, the exclusivity, the lengthy term, the provision for renewal and the necessity of costly reliance on the rights in order to fulfil statutory obligations all combined to offer an assurance to the permittee that the property rights would be ‘guaranteed against arbitrary or discretionary loss’.²⁰⁵ An analysis of ss 5(8) and 28 of the *Petroleum (Submerged Lands) Act 1967* (Cth), under which WMC’s exploration permit was granted, led Gummow J, on the other hand, to conclude that the law ‘was in its original form expressed in terms indicative of subsequent amendment’.²⁰⁶

The third and final aspect of the doctrine of inherent vulnerability is the question of how widely it travels. Does it belong only to the context from which it sprang — that is, the alteration of rights that were *created by statute*? Or is it a principle that lends itself to a wider range of circumstances and can be stated at a higher level of abstraction? Most judgments to date have focused on the specifically statutory character of the rights involved. Gummow J, however, has sought to uncouple the doctrine from its statutory origins and apply it more broadly. Most notably for this article, his Honour has said it applies to the extinguishment of native title by inconsistent grant.²⁰⁷ In *WMC*, he made clear that he intended the doctrine of inherent vulnerability to have a general application that applied beyond rights created under statute: ‘in some circumstances, *of which the statutory rights in this case are an instance*, the nature of the property may be

²⁰⁰ (1994) 179 CLR 297, 306.

²⁰¹ (1994) 179 CLR 226, 237.

²⁰² (1998) 194 CLR 1, 51.

²⁰³ *Ibid* 92.

²⁰⁴ *Ibid* 94.

²⁰⁵ *Ibid*.

²⁰⁶ *Ibid* 69–70.

²⁰⁷ *Newcrest* (1997) 190 CLR 513, 613.

such that its defeasance or abrogation does not occasion any acquisition in the constitutional sense.²⁰⁸

In summary, the doctrine of inherent vulnerability has emerged in the past 10 years as an important doctrinal device for determining the entitlement of plaintiffs to the protection of the 'just terms' guarantee. Conceptually, it is not clear whether a conclusion of inherent defeasibility signifies that a plaintiff has failed on the 'acquisition' issue, the 'property' threshold or indeed the question of characterisation, or even whether such a disaggregated analysis is possible. Several suggestions have been made to distinguish situations where rights are inherently defeasible from those where they are not, but not one of them yet enjoys unanimous judicial support. Finally, although the doctrine has clearly emerged to deal with s 51(xxxi) litigation based on *statutory* rights, Gummow J has suggested a broader doctrine of inherent vulnerability or 'congenital infirmity',²⁰⁹ of which the statutory rights cases are merely an illustration. The last part of this article will focus on Gummow J's proposition in *Newcrest* that the doctrine is appropriately applied to the executive extinguishment of native title. However, it is first necessary to establish whether the extinguishment of native title by inconsistent grant would otherwise satisfy the doctrinal requirements for an 'acquisition' discussed earlier.

C *Extinguishment of Native Title as the 'Acquisition of Property'*

This part considers whether the extinguishment of native title can amount to an 'acquisition' in the constitutional sense. Since the element of acquisition is examined in isolation, this analysis will take for granted that the other requirements of s 51(xxxi) have been established.²¹⁰ Moreover, the analysis will proceed on a basic understanding of the notion of extinguishment that puts to one side some of the unanswered questions surrounding that area of law. It will simply assume that native title can be extinguished by the creation of inconsistent rights in favour of third parties, by the reservation by the Crown of unalienated land and by other legislative and executive acts that evince a clear and plain intention to extinguish native title or are inconsistent with its continued recognition under Australian law.

The conclusion that will be drawn here is that, on the basis of both precedent and wider constitutional and policy considerations, the extinguishment of native title satisfies the description of an 'acquisition' under s 51(xxxi). Regulation or impairment of native title rights and interests that falls short of outright extinguishment would require a more detailed analysis of specific s 51(xxxi) authorities than is possible here.²¹¹

²⁰⁸ (1998) 194 CLR 1, 73 (emphasis added).

²⁰⁹ *Ibid* 75.

²¹⁰ As noted earlier, this includes an assumption that by providing an 'exclusive code' for the extinguishment of native title, the *Native Title Act 1993* (Cth) is a law with respect to the acquisition of property (in its references to extinguishment): see above Part I.

²¹¹ It is my view that in certain circumstances regulation or impairment of native title will meet the doctrinal requirements of 'acquisition' in the constitutional context, but for the purposes of this article that issue will be set to one side.

1 *Observations from the High Court to Date*

Although the issue has yet to come squarely before the courts for decision, various High Court judges have already ventured some provisional thoughts on the question, and a number have indicated that at least some forms of native title extinguishment amount to ‘acquisition’.

In *Mabo [No 2]*, Deane and Gaudron JJ expressed the view that ‘any legislative extinguishment of those rights would constitute an expropriation of property, to the benefit of the underlying estate, for the purposes of s 51(xxxi).’²¹²

Wider High Court opinion on the question was subsequently flushed out in 1997, in advance of any litigation by native title holders, due to Commonwealth submissions in *Newcrest*. In that case, the Commonwealth resisted arguments aimed at overturning the 1969 decision of *Teori Tau v Commonwealth*²¹³ where the High Court had denied the applicability of the ‘just terms’ guarantee in Commonwealth Territories. The Commonwealth included in its submissions the following suggestion:

given that native title is a species of property, the application of s 51(xxxi) to the Northern Territory, contrary to *Teori Tau*, would potentially invalidate every grant of freehold or leasehold title granted by the Commonwealth in the Northern Territory since 1911 to the extent to which any such grant may be inconsistent with the continued existence of native title as recognised at common law.²¹⁴

This argument was premised on the idea that the grant of inconsistent rights in land to third parties entailed, in constitutional terms, an uncompensated constitutional ‘acquisition’ of native title holders’ property.

Gummow J rejected this argument on the basis that native title rights and interests subjected to this form of *executive* extinguishment are not ‘acquired’, because of an ‘inherent susceptibility’ to such legal obliteration. Even his Honour, however, considered that *legislation* ‘directed to the extinguishment’ of native title, and any backdoor methods of achieving the same result by circuitous *legislative* devices, ‘may attract the operation of s 51(xxxi).’²¹⁵ Kirby J was inclined to agree with Gummow J’s rejection of the Commonwealth submission,²¹⁶ although he left the door ajar, presumably to await proper agitation of the issue in a concrete factual situation. Toohey J was ‘not persuaded’ by the Commonwealth’s submission but did not say why.²¹⁷ Gaudron J made no comment.

Amongst the minority in *Newcrest*, Dawson J remarked that the consequences of overturning *Teori Tau* ‘may be severe.’²¹⁸ Brennan CJ went further. He said

²¹² (1992) 175 CLR 1, 111. Toohey J did not express an opinion but, given that he held that the traditional title of the Meriam people ‘may not be extinguished without the payment of compensation or damages to the traditional titleholders of the Islands’ (at 216), it would be surprising if he thought extinguishment fell short of the constitutional mark on the ‘acquisition’ issue.

²¹³ (1969) 119 CLR 564 (*Teori Tau*).

²¹⁴ *Newcrest*, submission on behalf of the respondent, [7.2(6)] (copy on file with author).

²¹⁵ *Newcrest* (1997) 190 CLR 513, 613 (citations omitted).

²¹⁶ *Ibid* 651.

²¹⁷ *Ibid* 560.

²¹⁸ *Ibid* 552.

that allowing the 'just terms' guarantee to apply in the territories exposed any land transaction involving a compulsory acquisition 'to uncertainty if not invalidity'²¹⁹ and called this a 'powerful consideration which tells against the reopening of *Teori Tau*.'²²⁰ Neither Dawson J nor Brennan CJ explicitly mentioned the Commonwealth submission about native title, so we can only speculate as to whether their comments were prompted by it or by more general considerations. If their comments were prompted by the submission, it suggests that both would accept that a constitutional 'acquisition of property' occurred when native title was extinguished in this way. McHugh J, also in the minority, went even further. While he regarded the Commonwealth's submission as 'at least arguable',²²¹ he couched the subsequent s 51(xxxi) analysis in strong and indeed quite unqualified terms:

This is because freehold grants and perhaps many leasehold grants of land in the Territory have extinguished native title rights and conferred a commensurate and identifiable and measurable benefit on the grantees resulting in an acquisition of the property of native title owners. Because the grants depend on statute and have been made in a territory as opposed to a State, those grants could not be constitutionally validated without the payment of compensation or a referendum if *Teori Tau* is overturned.²²²

The following year, in *WMC*, Brennan CJ referred to his discussion of radical title in *Mabo [No 2]* and affirmed that 'the extinguishing of an interest in land above the low water mark necessarily results in the enhancement of the title which was subject to the interest extinguished.'²²³ Thus, extinguishment presumably meets his test of 'benefit'. In a number of places, his Honour had previously referred to native title as an interest in land.²²⁴

However interesting these comments may be as a provisional indication of recent High Court thinking on the compensability question and native title, they must not be afforded too much weight. The Commonwealth's argument in *Newcrest* was put as a brief, isolated paragraph amidst lengthy written submissions and was not subjected to any detailed oral argument. More obviously, the issue was not before the High Court for decision in the instant case with a specific set of facts and applicable law, and there were no parties before the Court advocating the interests of native title holders. In these circumstances the only wise course is to approach the question from first principles, with the aid of existing s 51(xxxi) doctrine on the concept of 'acquisition' as discussed above.²²⁵

²¹⁹ *Ibid* 545.

²²⁰ *Ibid* 544.

²²¹ *Ibid* 576.

²²² *Ibid*.

²²³ *WMC* (1998) 194 CLR 1, 18.

²²⁴ See, eg, *Mabo [No 2]* (1992) 175 CLR 1, 29, 39, 42, 43, 48, 50; *Wik* (1996) 187 CLR 1, 92.

²²⁵ Simon Evans has reviewed the constitutional conventions of the 1890s for discussion of property in a number of different constitutional contexts. He observes that in 'the context of federation, the property rights of Australia's indigenous peoples simply did not feature as an issue': Evans, 'Property and the Drafting of the *Australian Constitution*', above n 77, 149. Only two delegates appear to have mentioned indigenous property rights in debate: Sir George Grey of Western Australia and Captain Russell from New Zealand: at 148.

2 Starting from First Principles

Consistent with the interpretation of s 51(xxxi) as both a legislative head of power and an express guarantee of property holders' rights, the term 'acquisition' is to be given a broad interpretation. In *Dalziel*, Rich J pointed out that the language of s 51(xxxi) 'is perfectly general ... *It is not restricted to acquisition by particular methods or of particular types of interests, or to particular types of property.*'²²⁶ While the question requires further technical analysis, this philosophical starting point discourages 'pedantic' or 'legalistic' distinctions²²⁷ between the acquisition of non-indigenous land titles and the extinguishment of native title, whether by reservation, inconsistent grant or expressions of clear intention. The greater willingness to accommodate different forms of infringements of property rights within the 'just terms' guarantee over the past decade reinforces this point.

The next proposition to note is that s 51(xxxi) is not a 'takings' clause. It is concerned with the 'acquisition of property' and not merely the extinguishment of property rights. Native title holders who suffer extinguishment of their native title cannot rely on this misfortune alone to satisfy the 'acquisition' limb of s 51(xxxi). There must be a demonstrable 'benefit' to the Commonwealth or a third party which flows from the act of extinguishment. At the same time, McHugh J — one of the least enthusiastic supporters of the interpretation of s 51(xxxi) as a constitutional guarantee — was alert in *Mutual Pools* to the danger of taking this distinction too far and subverting the constitutional priority of substance over form. In comments particularly pertinent to the position of native title holders, he remarked that '[w]hat may be regarded as an extinguishment and not an acquisition of property rights under the general law of property may have to be regarded differently in the context of a constitutional guarantee such as s 51(xxxi).'²²⁸

In this slightly more generous constitutional context, does the extinguishment of native title result in some identifiable and measurable benefit or advantage accruing to another person?

3 Does the Extinguishment of Native Title Produce a 'Benefit'?

As discussed earlier, defining this concept of 'benefit' has proved troublesome for a High Court faced in recent years by litigants seeking to stretch the boundaries of 'just terms' coverage. Two grey areas were highlighted. In some cases, it may be a question of how direct or remote the benefit is from the acquisition which gave rise to it. Secondly, and more significantly, the precise legal character of the benefit required by s 51(xxxi) doctrine is unclear. In particular, it is not clear whether the benefit gained by extinguishing native title must itself be proprietary in character.

This article argues that the extinguishment of native title produces a benefit which is both direct and proprietary, sufficient to meet the doctrinal requirements

²²⁶ (1944) 68 CLR 261, 285 (emphasis added).

²²⁷ *Mutual Pools* (1994) 179 CLR 155, 184 (Deane and Gaudron JJ).

²²⁸ *Ibid* 223. See also at 194 (Dawson and Toohey JJ).

of 'benefit' on either the more relaxed or the more exacting interpretation of the term.

Since *Mabo [No 2]*, native title has been described as a burden on the sovereign power of the Crown to deal with land, otherwise known as the Crown's 'radical title': '[o]n common law principles, where native title is extinguished, the Crown's radical title interest expands to full beneficial ownership of land'.²²⁹

As recently as *WMC*, Brennan CJ reminded us that s 51(xxxi) would be

a 'hollow facade' if a law of the Commonwealth which extinguished proprietary rights *in relief of the burden or liability which those rights imposed on the Commonwealth or a third party* were not held to effect an acquisition of property by the Commonwealth or the third party.²³⁰

In *Mabo [No 2]*, Deane and Gaudron JJ said that lifting the burden of native title from land, a burden constituted by 'true legal rights [that] can be vindicated, protected and enforced by proceedings in the ordinary courts'²³¹ and are 'binding on the Crown',²³² materially enhances the position of the Crown. Its radical title is freed from a significant legal encumbrance. Particularly since the passage of the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act 1993* (Cth), that encumbrance constrains the Crown's ability to alter, deal with or dispose of this valuable property. Quintessentially, the extinguishment of native title represents for the Crown an 'identifiable benefit or advantage relating to the ownership or use of property'.²³³ In addition, that benefit flows immediately upon extinguishment — it is a direct outcome in temporal as well as legal terms.²³⁴

As we have seen, it has been long settled that the identification of potential beneficiaries under s 51(xxxi) acquisitions can range far wider than the Commonwealth to include 'a State or ... any other person'.²³⁵ In some cases of native title extinguishment, the acquirer and beneficiary will be the Crown in right of the Commonwealth. Far more often, it will be the Crown in right of a state or territory.²³⁶ In the case of extinguishment by an inconsistent freehold grant to a

²²⁹ Jennifer Clarke, "'Indigenous' People and Constitutional Law' in Peter Hanks and Deborah Cass, *Australian Constitutional Law: Materials and Commentary* (6th ed, 1999) 90.

²³⁰ (1998) 194 CLR 1, 15–16 (emphasis added) (citations omitted). As Deane and Gaudron JJ made clear in *Mabo [No 2]* (1992) 175 CLR 1, '[t]he Crown's property in the lands of the Colony of New South Wales was ... reduced or qualified by the burden of the common law native title of the Aboriginal tribes and clans': at 109.

²³¹ *Mabo [No 2]* (1992) 175 CLR 1, 112 (Deane and Gaudron JJ).

²³² *Ibid* 110 (Deane and Gaudron JJ).

²³³ *Mutual Pools* (1994) 179 CLR 155, 185 (Deane and Gaudron JJ).

²³⁴ In other words, there is no question of the benefit generated from native title's extinguishment being too remote in time or chain of consequence to meet the requirements of s 51(xxxi) doctrine.

²³⁵ *P J Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, 402 (Latham CJ).

²³⁶ The question of whether an extinguishment effected by a state government pursuant to the terms of the *Native Title Act 1993* (Cth) comes within the ambit of s 51(xxxi) relates to the requirement in the placitum for a law of the Commonwealth. That is beyond the scope of this article. Very briefly, on the one hand, the states are clearly not bound by the constitutional guarantee. On the other hand, if a breach is brought about by a cooperative scheme of legislation between Commonwealth and states there is at least a risk of invalidity. The ultimate act of expropriation may be carried out at a state level (see *P J Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382), but it is arguably done 'pursuant to a law of the Commonwealth', which is a phrase found

third party, another obvious beneficiary is the freeholder whose ability to acquire an unencumbered title is an immediate and direct consequence of the legalised dispossession of the native title holding group.²³⁷ Legislation may likewise enhance third party interests — for example, by extinguishing or severely impairing coexisting native title rights in the same land. On this analysis, the extinguishment of native title and the consequential lifting of a legal burden on the radical title of the Crown delivers a straightforward and immediate *proprietary* benefit to the Crown and, in many cases, to third parties as well.

The extinguishment of native title also comfortably satisfies a range of other legal formulae which have been ventured over time in relation to the concept of benefit in land sterilisation²³⁸ and other cases. The ‘relief from the burden’ of native title holders’ rights²³⁹ occasioned by extinguishment corresponds closely to the benefit found by a number of judges in the sterilisation cases. Given the monetary value of land and its enhanced value when freed from legal encumbrances, extinguishment of native title also gives rise to a ‘distinct financial benefit’;²⁴⁰ ‘a financial advantage in association with the extinguishment of a right’.²⁴¹ Enhancement of the Crown’s sovereign rights allows the Commonwealth to grant new rights to different persons in respect of the same area.²⁴² Third party grantees are ‘direct beneficiaries’ in whom is vested upon the dispossession of native title holders ‘a corresponding benefit of commensurate value’.²⁴³

Thus a great deal of recent authority can be marshalled to support the proposition from Deane and Gaudron JJ’s joint judgment in *Mabo [No 2]* that the extinguishment of native title transcends mere deprivation of rights and constitutes ‘an expropriation of property to the benefit of the underlying estate for the purposes of s 51(xxxi)’,²⁴⁴ and that this is so whether the narrower or the more relaxed view of benefit and its proprietary character is employed.

in Brennan CJ’s judgment in *Newcrest* (1997) 190 CLR 513, 543. Clearly, that question will need to be resolved in order to define the precise application of the ‘just terms’ guarantee to native title holders.

²³⁷ Kent McNeil has pointed out to the author that in most cases the Crown will receive a payment from the grantee in return for the land, arguably making it a direct beneficiary in this respect as well.

²³⁸ *Tasmanian Dams Case* (1983) 158 CLR 1; *Newcrest* (1997) 190 CLR 513; *Commonwealth v Western Australia* (1999) 196 CLR 392. The issue is also discussed in the offshore case of *WMC* (1998) 194 CLR 1.

²³⁹ *Newcrest* (1997) 190 CLR 513, 530 (Brennan CJ). See also *Commonwealth v Western Australia* (1999) 196 CLR 392, 459 (Kirby J).

²⁴⁰ *Georgiadis* (1994) 179 CLR 297, 306 (Mason CJ, Deane and Gaudron JJ).

²⁴¹ *Pevevill* (1994) 179 CLR 226, 236 (Mason CJ, Deane and Gaudron JJ).

²⁴² *WMC* (1998) 194 CLR 1, 96 (Kirby J).

²⁴³ *Mutual Pools* (1994) 179 CLR 155, 223 (McHugh J). When legislation is passed explicitly to enhance the position of pastoralists and miners vis-a-vis native title holders, such measures, where they extend to extinguishment and serious impairment, yield not only third party benefits but the kind of policy gains to the Commonwealth that some judges seem inclined to accept as sufficient to constitute an ‘acquisition’. However, it is difficult to see a majority of the High Court adopting this relaxed approach.

²⁴⁴ (1992) 175 CLR 1, 111.

4 *Gummow J on Native Title and Inherent Vulnerability*

It was noted above that Gummow J, who with Black CJ originally identified the inherent vulnerability doctrine in 1993, has recently sought to generalise the doctrine away from its source in cases concerned with purely statutory rights. So far, it is around the concept of native title that Gummow J has attempted to sketch this general doctrine of inherent vulnerability of which the statutory rights that have preoccupied all other judges and litigants to date are in his eyes merely 'an instance'.²⁴⁵ Is native title one of these inherently defeasible rights?

Other judges so far have been content to see rights that arise from the 'general law' as outside the parameters of the inherent vulnerability doctrine.²⁴⁶ Native title is not a creature of the common law. It derives from the observance of the traditional law and custom of a particular indigenous group. But native title is a set of pre-existing rights in relation to land or waters recognised by the common law. In this regard, it seems precisely the kind of right that the joint judgments of Mason CJ, Deane and Gaudron JJ in *Peeverill* and *Georgiadis* insisted were beyond the reach of the inherent vulnerability doctrine. Native title has a 'basis in the general law'²⁴⁷ and rests on 'antecedent proprietary rights recognized by the general law'.²⁴⁸

A less generous view would emphasise that native title rights are not creatures of the common law and have an allegedly 'fragile' character.²⁴⁹ On this view, native title poses a novel question because it is neither a purely statutory right nor a right held by virtue of the common law. Let us accept this less generous interpretation as a starting point for the purposes of argument. Is Gummow J right to assign native title to his category of rights suffering a 'congenital infirmity', so that their 'defeasance or abrogation does not occasion any acquisition in the constitutional sense'?²⁵⁰

It is true that native title is singled out for discriminatory treatment by the common law as against non-indigenous title to land.²⁵¹ The doctrine of executive extinguishment by inconsistent grant suggested in *Mabo [No 2]* and confirmed by the unanimous decision in *Fejo v Northern Territory*²⁵² provides that native title may be extinguished by inconsistent grant without the prior acquisition of the indigenous title. On this basis, it is arguable that scattered words in the brief history of the inherent vulnerability doctrine could be mustered to support

²⁴⁵ *WMC* (1998) 194 CLR 1, 73.

²⁴⁶ *Peeverill* (1994) 179 CLR 226, 237 (Mason CJ, Deane and Gaudron JJ); *Georgiadis* (1994) 179 CLR 297, 306 (Mason CJ, Deane and Gaudron JJ).

²⁴⁷ *Georgiadis* (1994) 179 CLR 297, 306 (emphasis added).

²⁴⁸ *Peeverill* (1994) 179 CLR 226, 237.

²⁴⁹ *Fejo* (1998) 195 CLR 96, 151, 152, 155 (Kirby J). See also the majority joint judgment in *Western Australia v Commonwealth* (1995) 183 CLR 373, 453 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Mabo [No 2]* (1992) 175 CLR 1, 89, 112 (Deane and Gaudron JJ); *Newcrest* (1997) 190 CLR 513, 613 (Gummow J); *Yanner* (1999) 201 CLR 351, 408 (Callinan J).

²⁵⁰ *WMC* (1998) 194 CLR 1, 73.

²⁵¹ However unjust or unsupported by general common law principles that proposition might be: see generally Kent McNeil, 'Racial Discrimination and Unilateral Extinguishment of Native Title' (1996) 1 *Australian Indigenous Law Reporter* 181. See also Brennan, above n 122.

²⁵² (1998) 195 CLR 96.

Gummow J's view that this form of extinguishment fails to attract the status of a constitutional 'acquisition'. McHugh J's dissent in *Georgiadis* included the statement that '[i]f a right against the Commonwealth is subject to alteration or revocation, its alteration or extinguishment does not constitute an acquisition of property',²⁵³ although it should not be forgotten that McHugh J strongly objected to Gummow J's analysis of the native title argument in *Newcrest*.²⁵⁴ Opponents of 'just terms' coverage for native title may also argue that, when the Crown moves to extinguish native title by granting inconsistent rights to third parties, it is simply acting 'in accordance with the terms'²⁵⁵ under which native title was originally recognised by the law — that is, as vulnerable to such extinguishment.

However, to anticipate the concluding parts of this article, such selective quotation would ignore the distinctively *statutory* origins of these statements and the doctrine in general.²⁵⁶ It would also disregard the overwhelming weight of existing common law authority pointing to the opposite conclusion. In virtually all of the formulae devised to date to distinguish between inherently vulnerable rights and those able to attract the 'just terms' guarantee when acquired, native title emerges as properly assigned to the latter, rather than the former category. Wider policy and constitutional considerations also favour the conclusion that native title should be excluded from the reach of the inherent vulnerability doctrine.

Before setting out this array of arguments in detail, it is important to examine Gummow J's comments in *Newcrest* about native title and its allegedly inherently defeasible character:

The Commonwealth and the Director contended that the application of s 51(xxxi) to reduce the content of the legislative power conferred by s 122 'would potentially invalidate every grant of freehold or leasehold title granted by the Commonwealth in the [Territory] since 1911 to the extent to which any such grant may be inconsistent with the continued existence of native title as recognised at common law'. Such apprehensions are not well founded. The characteristics of native title as recognised at common law include an inherent susceptibility to extinguishment or defeasance by *the grant* of freehold or of some lesser estate which is inconsistent with native title rights; this is so whether the grant be supported by the prerogative or by legislation. Secondly, legislation such as that considered in [*Mabo [No 1]*] and *Western Australia v The Commonwealth* ... which is otherwise within power but is directed to the extinguishment of what otherwise would continue as surviving native title (or which creates a 'circuitous device' to acquire indirectly the substance of that title), may attract the operation of s 51(xxxi). However, no legislation of that character, with an operation in the Territory, was pointed to in the submissions in this case.²⁵⁷

The most widespread form of technical extinguishment of native title in Australia has occurred in the dispossession of indigenous people, parcel by parcel, as

²⁵³ (1994) 179 CLR 297, 328.

²⁵⁴ See above n 222 and accompanying text.

²⁵⁵ *Bienke* (1995) 63 FCR 567, 584.

²⁵⁶ *Davey* (1993) 47 FCR 151; *Peeverill* (1994) 179 CLR 226; *ibid.*

²⁵⁷ *Newcrest* (1997) 190 CLR 513, 613 (emphasis in original) (citations omitted).

the Crown has granted freehold, and perhaps leasehold, rights inconsistent with the survival of native title, to third party recipients. Thus, in the space of that one short paragraph, without the benefit of hearing from those who have been dispossessed, on the strength of minimal written and virtually no oral argument, and through an issue only collateral to the question before the Court, Gummow J denied the protection of a constitutional guarantee to indigenous people and their property rights in the situation where it will probably count most. Such a consequence means we must pay close attention to both the terms of Gummow J's brief argument and its doctrinal underpinnings. The following set of propositions can be discerned from the above passage:

- 1 Native title, when confronted by executive extinguishment (even if pursuant to legislative authority), has an inherent characteristic that denies the applicability of s 51(xxxi). Yet, when confronted by purely legislative extinguishment, that inherent defect in the constitutional sense evaporates. This appears to derive from perceived differences in the common law of extinguishment between executive and legislative action.
- 2 Legislation which purports, either directly or by roundabout method, to extinguish native title may attract the protection of the 'just terms' guarantee.
- 3 The Northern Territory Crown lands legislation cannot be interpreted as directed to the extinguishment of native title. It appears that this is because nothing in such legislation provides for the acquisition of native title rights: 'they may be extinguished, but not acquired.'²⁵⁸ A possible alternative interpretation is that this conclusion rests on the absence for constitutional purposes of 'a law' because the connection between such legislation and the executive act of granting land is too remote.
- 4 At common law, native title is validly extinguished by inconsistent grant pursuant to the prerogative.
- 5 Native title is an appropriate candidate for inclusion in the list of 'inherently vulnerable' property rights, putting it beyond the reach of the 'just terms' guarantee.

I contend that only the second of these propositions is correct.

A number of points can be made in relation to the first proposition. It draws a curious distinction for constitutional purposes between legislative and executive extinguishment. If a title is inherently defeasible, the mode of extinguishment should not make a critical difference to whether recovery under the *Constitution* is available. Such a dichotomy finds no basis in existing s 51(xxxi) law. Indeed it suggests an arcane distinction between the different ways indigenous people have their property rights taken away, inappropriate to a constitutional guarantee which has always privileged substance over form. As Rich J said in *Dalziel*, the language of s 51(xxxi) 'is not restricted to acquisition by particular methods';²⁵⁹ Deane and Gaudron JJ too, in *Mutual Pools*, warned against the term acquisition

²⁵⁸ *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636, 653 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ) ('*Ludeke*'). Gummow J cites this page of the judgment without quoting directly from it (ibid 613 fn 321); however, I surmise that these are the words in *Ludeke* to which his Honour refers.

²⁵⁹ (1944) 68 CLR 261, 285.

being ‘pedantically or legalistically restricted’.²⁶⁰ Allowing that at least ‘background’ or authorising legislation is essential,²⁶¹ it is unclear how the same title can attract a ‘just terms’ guarantee or not on the basis of which arm of the state performs the final act of dispossession.

In relation to proposition three, Gummow J, by drawing a contrast between *Mabo [No 1]*-style legislation²⁶² and ‘the grant’²⁶³ of freehold or of some lesser estate, might seem to imply that executive extinguishment by inconsistent grant will not attract s 51(xxxi) because of the absence of a ‘law’. In other words, it might be that Gummow J’s analysis is calling into question whether s 51(xxxi) applies to *executive* action against the background of authorising legislation. If so, such an argument would have to confront precedents for the case-specific invalidation of particular executive acts where they acquire property pursuant to legislative authority. High Court judges have been quite content to leave laws of general application undisturbed while finding that derivative acts by the executive in a particular situation have breached the constitutional guarantee.²⁶⁴ Indeed, Gummow J’s own conclusion that Newcrest was entitled to ‘just terms’ protection relied on a mixture of executive²⁶⁵ and legislative²⁶⁶ action.

Because this seems a weak foundation for proposition three, it may be that Gummow J intended the alternative rationale ventured above: nothing in Crown lands legislation provides for the acquisition of native title rights. The passage is too elliptical to be certain. The possibility arises from Gummow J’s rather cryptic footnote reference to the joint majority judgment in *R v Ludeke; Ex parte Australian Building Construction Employees’ and Builders Labourers’ Federation*.²⁶⁷ The discussion there of s 51(xxxi) is so brief that it is possible to identify with some confidence that it is the quote cited above upon which Gummow J relies. Nothing else in that passage appears relevant to his purposes. The full text reads: ‘there is nothing in the Act that provides for the acquisition of those rights — they may be extinguished, but not acquired.’²⁶⁸

Gummow J seems to regard that proposition as relevant to extinguishment by inconsistent grant. This can surely only be for one of two reasons. First, he may be saying that Crown lands legislation does not *expressly* provide for the acquisition of native title rights. This seems implausible, because in the instant case, Gummow J applied the ‘just terms’ guarantee irrespective of the fact that

²⁶⁰ (1994) 179 CLR 155, 184. See also *Commonwealth v Western Australia* (1999) 196 CLR 392, 457 (Kirby J).

²⁶¹ This is in order to meet the constitutional requirement for ‘a law ... with respect to the acquisition of property’ (emphasis added). That is, s 51(xxxi) does not constrain purely executive action.

²⁶² That is, legislation which specifically singles out native title for extinguishment by Parliament.

²⁶³ *Newcrest* (1997) 190 CLR 513, 613 (Gummow J) (emphasis in original).

²⁶⁴ See, eg, *Dalziel* (1944) 68 CLR 261; *ibid.* The question does not seem to have been raised against a plaintiff in other s 51(xxxi) cases.

²⁶⁵ The proclamations of 13 November 1989 and 21 June 1991 that extended Stage Three of Kakadu National Park: see *Newcrest* (1997) 190 CLR 513, 587–8 (Gummow J).

²⁶⁶ *National Parks and Wildlife Conservation Act 1975* (Cth) s 10(1A) (banning mining in the Kakadu National Park).

²⁶⁷ (1985) 159 CLR 636, 653 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ), cited in *Newcrest* (1997) 190 CLR 513, 613 fn 321.

²⁶⁸ *Ludeke* (1985) 159 CLR 636, 653 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ).

neither the *National Parks and Wildlife Conservation Act 1975* (Cth) nor the proclamation extending Stage Three of Kakadu National Park²⁶⁹ provided expressly for the acquisition of Newcrest's mining rights. The second possibility is that he is drawing attention to the distinction between 'acquisition of property' and the mere deprivation of rights. But we have already seen that native title holders have no difficulty in establishing the requisite 'benefit' that marks off acquisition from mere extinguishment, regardless of how exacting the standard that the High Court ultimately imposes on that aspect of doctrine. And if this was Gummow J's argument, why would *Mabo [No 1]*-style legislation attract s 51(xxxi)?

A detailed treatment of proposition four is beyond the scope of this article and its correctness is relevant but not vital to my argument. I contend that it is not yet established that native title is defeasible by an executive grant to a third party supported *only by the prerogative*.²⁷⁰ Resolution of this issue requires not only a case with specific facts and law to raise the question, but the entrenchment in the common law of Australia by a majority of judges of the High Court of a racially discriminatory proposition of law which contradicts a principle reaching back to *Magna Carta*.²⁷¹ *Non-indigenous* titles cannot be abrogated by the exercise of the prerogative except in situations of national emergency and even then only with the payment of compensation.²⁷²

One presumes that Gummow J's inclusion of a reference to the prerogative was deliberate and relevant, so it is important to try to discern why it is there. Why would a *Mabo [No 1]*-style law, showing a clear and plain intention to extinguish native title, amount to a law with respect to the acquisition of property when a Crown lands Act authorising executive extinguishment would not? His Honour did not appear to explain, but his application of the 'inherent vulnerability' doctrine solely to grants of inconsistent rights suggested that he regarded the

²⁶⁹ See above n 265.

²⁷⁰ For example, Brennan J in *Mabo [No 2]* (1992) 175 CLR 1, 70–1 (Mason CJ and McHugh J agreeing) addressed the general question of extinguishment in the following terms (emphasis added):

These propositions leave for resolution by the general law the question of the validity of any purported exercise by the Crown of the power to alienate or to appropriate to itself waste lands of the Crown. In Queensland, these powers are and at all material times have been exercisable by the Executive Government subject, in the case of the power of alienation, to the statutes of the State in force from time to time. The power of alienation and the power of appropriation vested in the Crown in right of a State are also subject to the valid laws of the Commonwealth, including the *Racial Discrimination Act*. *Where a power has purportedly been exercised as a prerogative power, the validity of the exercise depends on the scope of the prerogative and the authority of the purported repository in the particular case.*

²⁷¹ See, eg, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 230–1 (Williams J) (emphasis added):

But it is clear that at the date of the *Constitution* the King had no power by the exercise of his prerogative to dissolve bodies corporate or unincorporate or forfeit their assets to the Crown or to deprive his subjects of their contractual or proprietary rights. Such action on his part would have been contrary to *Magna Carta* and the subsequent Acts re-affirming *Magna Carta* referred to in *Halsbury's Laws of England*, 2nd ed, vol 6, p 450. Such powers to be valid would have to be conferred upon the Executive by a valid law of the Commonwealth Parliament.

See also McNeil, 'Racial Discrimination and Unilateral Extinguishment of Native Title', above n 251.

²⁷² *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75.

distinction between extinguishment by Parliament and extinguishment by the executive as critical. In other words, he seemed to suggest that the provision of legislative authority for inconsistent grants made no relevant difference because it simply formalised what was already possible under executive extinguishment by Crown prerogative.

As noted above, there are strong arguments of precedent and principle for rejecting the proposition that native title is defeasible by prerogative grant. Yet, even if those arguments are rejected, to deploy that proposition to defeat a s 51(xxxi) argument contradicts constitutional authority. Even if a right to extinguish native title by the exercise of the prerogative could be established, there is no constitutional authority that permits the High Court to disregard the displacement of the prerogative by legislative authority (in this case, the Crown lands legislation). The interpolation of a Commonwealth statute, in the context of s 51(xxxi), counts. For example, the Crown's prerogative right to acquire property exists in the context of either a domestic or external emergency. If legislation made no difference, the High Court would have had no reason to invalidate the seizure of land or goods for defence purposes for breach of the 'just terms' guarantee in wartime cases such as *Dalziel*²⁷³ and *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v Commonwealth*.²⁷⁴

Finally, while it may have some superficial plausibility, the notion in proposition five that native title should join the list of property rights regarded as 'inherently vulnerable' to extinguishment, and therefore outside the ambit of s 51(xxxi), does not withstand critical scrutiny. This notion implies that native title holders should not be grouped with freeholders or lessees for s 51(xxxi) purposes, despite possibly holding rights in land approximating 'full ownership'²⁷⁵ and a 'title' which has been passed down through many, many generations, but rather with Dr Peverill, who sought to maximise the quantum of his monetary benefit under a purely statutory scheme that distributed health services and funding. To analogise, even at the level of general principle, a statutory entitlement to Medicare rebates to land rights arising from generations of traditional law and custom is not convincing, especially when one considers the pedigree and content of the inherent vulnerability doctrine. That doctrine was developed by appellate courts to stem the tide of s 51(xxxi) adventurism which emerged in the early 1990s, based around statutory rights which embodied ad hoc policy adjustments of competing interests. This type of litigation threatens the Commonwealth Parliament's capacity to keep public policy in tune with contemporary circumstances. The type of legislation in question adjusts the distribution of economic rights across society — a distribution which, due to its statutory character, lacks the permanence conventionally associated with notions of property.

In *Peverill*, for example, Mason CJ, Deane and Gaudron JJ treated the legislation in question as a policy adjustment to correct a defect in a statutory scheme

²⁷³ (1944) 68 CLR 261.

²⁷⁴ (1943) 67 CLR 314.

²⁷⁵ See above n 21 and accompanying text.

because payments ‘were thought to be excessive.’²⁷⁶ It was a ‘genuine legislative adjustment of the competing claims made by patients, pathologists ... the Commission and taxpayers’ to head off “windfall” payments.²⁷⁷ By contrast with native title, Medicare benefits are statutory rights ‘not based on antecedent proprietary rights recognised by the general law’.²⁷⁸ Native title rights, while perhaps ‘inherently susceptible’ to extinguishment by inconsistent grant, are not ‘derived purely from statute’.²⁷⁹ Indeed, they flow from the continued observance of traditional law and custom over generations, *and* they enjoy (belated) recognition by the common law.

Likewise, *Davey and Bienenke v Minister for Primary Industries and Energy*²⁸⁰ dealt with legislation effecting ad hoc policy adjustments in a licensing scheme. Statutory fishing quotas were reconfigured by successive parliaments in accordance with the economic and environmental priorities of the day, such as the preservation of a viable fishery. Fishing units were issued pursuant to a Northern Prawn Fishery Management (‘NPF’) Plan which the legislation itself defined ‘to mean the plan “as amended from time to time”’.²⁸¹ The contingent nature of the statutory entitlements had been ‘clear on the face of the legislation since 1985 ... and from the NPF Plan itself.’²⁸²

In short, whether deliberately to head off the possibility of widespread invalidity of Northern Territory land grants²⁸³ or not, it is inappropriate to conflate statutory rights that amount to ad hoc statements of public policy and lack the stamp of permanence with common law native title rights based on continuous connection to land stretching back hundreds and probably thousands of years.

5 *Additional Arguments against Gummow J's Approach*

Wider considerations of precedent, policy and constitutional principle also count strongly against acceptance of Gummow J’s argument. In *Newcrest*, Gummow J denied potential recovery under the *Constitution* to native title holders for their parcel-by-parcel dispossession. There is a certain unhappy irony²⁸⁴ that his Honour did so in the same case where he chose to overrule a

²⁷⁶ (1994) 179 CLR 226, 236.

²⁷⁷ *Ibid* 236–7 (citations omitted).

²⁷⁸ *Ibid* 237 (Mason CJ, Deane and Gaudron JJ). Gummow J himself acknowledged later in his *Newcrest* (1997) 190 CLR 513 judgment that in *Peeverill* ‘what was in issue were rights derived purely from statute and of their very nature inherently susceptible to the variation or extinguishment which had come to pass’: at 634.

²⁷⁹ See the statement of Gummow J in *Newcrest* contained in above n 278.

²⁸⁰ (1995) 63 FCR 567.

²⁸¹ *Davey* (1993) 47 FCR 151, 164 (Black CJ and Gummow J).

²⁸² *Ibid*. The paragraph reads in full as follows:

The units exist in order to regulate prawn trawling within the fishery. They are a convenient measure of fishing capacity. The demands of conservation and economic efficiency, identified in s 5B set out above, necessitate continual adjustments in the regulation of the fishery. It is necessary, therefore, for the administering authority to be able to alter the rights of unit holders. And that this was envisaged has been clear on the face of the legislation since 1985, when s 7B was introduced, and from the NPF Plan itself.

²⁸³ Or rather, in practical likelihood, a large compensation bill arising from ‘validating’ legislation.

²⁸⁴ Given the history of often adversarial relationships between mining companies and Aboriginal people: see, eg, *Milirrpum* (1971) 17 FLR 141; *Corporation of the Director of Aboriginal and Islanders Advancement v Peinkinna* (1978) 17 ALR 129.

unanimous High Court decision²⁸⁵ and allow recovery by a mining company for the sterilisation of certain mining leases. These are pure statutory rights with a comparatively brief 21-year duration, and he did so on the basis that: '[w]here the question at issue relates to an important provision of the *Constitution* which deals with individual rights, such as s 51(xxxi) or s 117, the "Court has a responsibility to set the matter right".'²⁸⁶

If, as Brennan CJ and Kirby J have suggested, the notion of 'property' is the appropriate basis for the inherent vulnerability doctrine, rather than 'acquisition', then Gummow J's approach is again open to question. On this interpretation, Gummow J perhaps implies that the distribution of rights encapsulated in the term 'native title' lacks the requisite degree of permanence or stability. For a title acknowledged as subsisting for centuries, this seems incongruous and unpersuasive.²⁸⁷ The confiscation of such rights by dispossession is no mere ad hoc redistribution of competing claims. Rather, as W E H Stanner points out, it is an occasion of fundamental loss:

When we took what we call 'land' we took what to them meant hearth, home, the source and locus of life, and everlastingness of spirit. At the same time it left each local band bereft of an essential constant that made their plan and code of living intelligible. Particular pieces of territory, each a homeland, formed part of a set of constants without which no affiliation of any person to any other person, no link in the whole network of relationships, no part of the complex structure of social groups any longer had all its co-ordinates. What I describe as 'homelessness', then, means that the Aborigines faced a kind of vertigo in living. They had no stable base of life; every personal affiliation was lamed; every group structure was put out of kilter; no social network had a point of fixture left.²⁸⁸

Likewise, if 'acquisition' is treated as the basis for an inherent vulnerability doctrine, native title again seems a most unlikely candidate. We have seen that the touchstone for distinguishing acquisition from mere extinguishment is 'benefit'. We have also seen that native title extinguishment satisfies even the most exacting tests of benefit. Consigning native title rights to the inherently vulnerable category completely cuts across an analysis of native title extinguishment based on 'benefit', despite the critical place of that concept in 'acquisition' doctrine.

Indeed, it appears that Gummow J's decision to exclude executive extinguishment of native title from the constitutional guarantee in *Newcrest* caused him to overlook the very arguments, strikingly apposite to native title, that he himself deployed in that case to grant the mining company 'just terms' coverage:

The appellants say that, in substance, the Commonwealth and the Director acquired identifiable and measurable advantages. In the case of the Director,

²⁸⁵ *Teori Tau* (1969) 119 CLR 564.

²⁸⁶ *Newcrest* (1997) 190 CLR 513, 613 (citations omitted).

²⁸⁷ In *Mabo [No 2]* (1992) 175 CLR 1, Brennan J, in reciting the arguments put against the Meriam people, referred to the Murray Islands as 'the land they had occupied for centuries past': at 25.

²⁸⁸ W E H Stanner, 'After the Dreaming' in W E H Stanner (ed), *White Man Got No Dreaming: Essays 1938–1973* (1979) 198, 230, quoted in *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 357 (Brennan J).

those advantages were *the acquisition of the land freed from the rights* of Newcrest to occupy and conduct mining operations thereon and, in the case of the Commonwealth, the minerals freed from the rights of Newcrest to mine them. In accordance with the authorities, that is sufficient derivation of an identifiable and measurable advantage to satisfy the constitutional requirement of an acquisition.²⁸⁹

A wider consideration which again counts against Gummow J's argument currently enjoys a toehold but an uncertain status in Australian constitutional law. It relates to the principle of *nondiscrimination*. In *Mabo [No 2]*, Brennan J, with whom Mason CJ and McHugh J agreed, acknowledged that a choice was open to the High Court. It could belatedly recognise native title as part of the common law of Australia or conclude that it was too late in the day to accommodate indigenous rights to land in this manner. In coming to a decision, he stated:

The theory that the indigenous inhabitants of a 'settled' colony had no proprietary interest in the land thus depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs. As the basis of the theory is false in fact and unacceptable in our society, there is a choice of legal principle to be made in the present case.²⁹⁰

Later he continued:

it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination ... The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.²⁹¹

The same powerful arguments could be made when common law judges interpret the express guarantee of property rights in the defining document of our polity, the *Constitution*. A convincing rationale, technical or otherwise, for the inferior treatment at a constitutional level of indigenous property rights is absent from Gummow J's analysis in *Newcrest*. All we have is a brief paragraph which attributes to native title an inherent vulnerability that relieves the rest of the Australian community from constitutional, procedural and financial responsibility for its seizure.

The issue of whether executive extinguishment of native title by inconsistent grant amounts to an 'acquisition of property' is an *open* question. Native title remains a recent arrival on the Australian legal firmament. To date, it still raises more questions than have been answered in the courts. This particular constitutional question was raised in an entirely collateral fashion in *Newcrest*, without argument from native title parties themselves. Patently, opinion was divided amongst the members of the Court. Thus 'a choice of legal principle' remains to be made. The fact that choosing to adopt Gummow J's inherent vulnerability

²⁸⁹ (1997) 190 CLR 513, 634 (emphasis added) (citations omitted).

²⁹⁰ (1992) 175 CLR 1, 40.

²⁹¹ *Ibid* 41–2.

analysis will relegate indigenous property rights to second-rate constitutional treatment by comparison with non-indigenous property rights is a matter of no small significance. Brennan J's observations in *Mabo [No 2]* therefore offer another powerful legal — as well as ethical — reason for choosing otherwise.

This element of the argument, however, involves a still contested area of constitutional interpretation.²⁹² In *Kartinyeri v Commonwealth*,²⁹³ Gummow J (together with Hayne J) accepted that in cases of ambiguity, an interpretation of a statute that accords with the rules of international law is to be preferred over one which does not. He seemed disinclined, however, to extend the rule to interpretation of the *Constitution*, at least when examining the potential scope of a head of legislative power.²⁹⁴ By contrast, Kirby J wrote in the same case:

Where the *Constitution* is ambiguous, this Court should adopt that meaning which conforms to the principles of universal and fundamental rights rather than an interpretation which would involve a departure from such rights ... If there is one subject upon which the international law of fundamental rights resonates with a single voice it is the prohibition of detrimental distinctions on the basis of race.²⁹⁵

Kirby J expressed similar sentiments as part of the majority in *Newcrest*.²⁹⁶

It remains to be seen what influence, if any, the High Court as a whole will allow international law to have in the interpretation of ambiguous constitutional (as opposed to statutory) provisions. This article suggests that the principle against racial discrimination in the law, including the 'basic law' of the *Constitution*, is an argument with strong legal merit and carries with it considerable moral weight. With the question of native title extinguishment and its relationship to notions of 'acquisition of property' an open one, these considerations add to the case against use of the 'inherent vulnerability' doctrine.

The final argument presented here against Gummow J's consignment of native title extinguished by inconsistent grant to the category of inherently vulnerable property rights is that the High Court's more recent consideration of the doctrine itself calls his approach into question. In *WMC*, five of the six judges who heard the case confirmed that even rights that owe their existence purely to statute — that is, the very rights for which the doctrine of inherent vulnerability was developed — may attract the operation of the constitutional guarantee.²⁹⁷ In other words, rights constructed by Parliament may exhibit sufficient permanence and stability to attract 'just terms' protection. Yet, Gummow J's analysis in *Newcrest* suggests that rights arising from traditional law and custom which

²⁹² See generally Amelia Simpson and George Williams, 'International Law and Constitutional Interpretation' (2000) 11 *Public Law Review* 205; Kristen Walker, 'International Law as a Tool of Constitutional Interpretation' (2002) 28 *Monash University Law Review* 85.

²⁹³ (1998) 195 CLR 337.

²⁹⁴ *Ibid* 384–6.

²⁹⁵ *Ibid* 417–18.

²⁹⁶ (1997) 190 CLR 513, 657–61. However, he indicated (in what seems a rather contradictory suggestion) that he was, for the reasons given by Gummow J, 'not convinced' that the native title question raised by the Commonwealth in their written submissions was 'well founded': at 651. He expressly left room to come ultimately to a different conclusion: at 651–2.

²⁹⁷ (1998) 194 CLR 1, 16–17 (Brennan CJ), 29 (Toohy J), 37 (Gaudron J), 70 (Gummow J), 93–4 (Kirby J).

predated the arrival of British colonialism, which have evolved over hundreds and probably thousands of years, which the High Court says were recognised by the common law instantly upon acquisition of British sovereignty and which today are true legal rights enforceable in the common law courts, do not. Once even purely statutory rights can overcome their 'congenital infirmity' and qualify for 'just terms' protection, the conceptual justification for treating indigenous property rights — which exhibit far greater persistence and a much longer legal ancestry — has surely evaporated.

Even if this argument is rejected, the doctrinal lines of demarcation adopted by those five High Court judges in *WMC* to mark off which purely statutory rights attract the guarantee, and which remain afflicted by their inherent defeasibility, are telling. They demonstrate that native title comfortably satisfies their tests of 'compensability', even when they are treated as akin to these more arriviste statutory rights.

Brennan CJ required that a Commonwealth law modified or extinguished 'a reciprocal liability to which the party acquiring the right was subject'²⁹⁸ and observed that 'extinguishing ... an interest in land above the low water mark necessarily results in the enhancement of the title' held by the Crown.²⁹⁹ He also said that 'a Commonwealth law which purported to effect a compulsory transfer of [the respondent's] rights to a third party would be a law for the acquisition of property.'³⁰⁰ Lifting the burden of native title from the Crown's radical title, in the course of making a grant of inconsistent rights to a third party, clearly meets all these formulae. For Toohey J, it is sufficient if the taking away of a purely statutory right generates a benefit relating to the ownership of property.³⁰¹ This article has already demonstrated the ease with which native title extinguishment can satisfy the doctrinal requirements of benefit, however strict an interpretation individual judges may adopt. Similarly, Gaudron J said that a purely statutory basis will ordinarily be transcended, in the s 51(xxxi) context, when modification or extinguishment of the right delivers 'some consequential advantage or benefit in relation to property'. This includes when extinguishment of a right is accompanied by the vesting of a right 'with respect to the same subject matter in some other person.'³⁰² Kirby J also adopted a benefit analysis,³⁰³ but in rebutting the assertion that *WMC* held inherently defeasible rights, his Honour additionally drew attention to the nature and incidents of the rights in question and the 'valuable investments depending upon them.'³⁰⁴ In light of Stanner's depiction of the social, physical, psychological and spiritual 'investment' that Aboriginal people have in land and the degree of loss experienced upon dispossession,³⁰⁵ it would seem harsh and excessively mercantile to put a mining company's

²⁹⁸ *Ibid* 17.

²⁹⁹ *Ibid* 18.

³⁰⁰ *Ibid* 17.

³⁰¹ *Ibid* 30.

³⁰² *Ibid* 36.

³⁰³ *Ibid* 96.

³⁰⁴ *Ibid* 94.

³⁰⁵ See above n 288 and accompanying text.

interests in one category for constitutional purposes, while relegating native title holders' interests to another.

Finally, Gummow J himself agreed that a proposition putting purely statutory rights beyond the reach of s 51(xxxi) is 'too broad'.³⁰⁶ Ultimately, he too seemed to fall back simply on a requirement of benefit — the acquisition of 'something proprietary in nature'.³⁰⁷ He also relied on 'the nature of the property' and a finding that WMC's proprietary rights were 'inherently unstable' to dismiss the resource company's claim.³⁰⁸ Gummow J contrasted rights that attract the guarantee with inherently defeasible 'gratuitous payments' such as pensions and entitlements under 'flexible statutory schemes' like the fisheries management plan in *Davey and Bienke*,³⁰⁹ where an inherent susceptibility to amendment from time to time was evident on the face of the legislation. The inappropriateness of analogising these rights to native title has already been discussed above.

In summary, Gummow J's suggestion that native title, when extinguished by inconsistent grant, is inherently vulnerable to extinguishment or modification and thus beyond the scope of the constitutional guarantee, should be rejected. The passage in *Newcrest* is brief, elliptical and collateral to the instant case. No arguments had been put before the Court by the native title parties who stood to suffer so dramatically from his assertion. The authorities his Honour cited do not all support the propositions to which they are footnoted and in some instances lack any explanation connecting them to his conclusion.

Gummow J drew a distinction at common law between legislative and executive extinguishment which may or may not exist. In any case it is inappropriate in the constitutional context. This is particularly so in light of strong authority about the broad reach of s 51(xxxi). The application to native title of a doctrine designed to stem the flow of 'statutory rights' cases that have peppered the courts since the early 1990s ignores material differences between the rights in question and native title. In particular, native title has a deep ancestry in the observance of law and custom as well as recognition by the common law from the instant that Britain acquired legal sovereignty over Australia. No one except Gummow J has yet suggested that rights other than purely statutory rights may come within the inherent vulnerability doctrine for s 51(xxxi) purposes. Even if his suggestion is adopted more widely, consigning native title to that category looks unconvincing whether the doctrinal basis is 'property' or 'acquisition'. In particular, as to the latter, Gummow J's position on native title in *Newcrest* caused him to disregard an analysis based on 'benefit' despite the critical place of that concept in s 51(xxxi) doctrine. Indeed, he has since confirmed, as did four other judges in *WMC*, that the demonstration of benefit will transcend the 'inherent defeasibility' that property rights may otherwise appear to exhibit. The argument that extinguishment of native title yields a 'benefit' in the constitutional sense is compelling. Similarly, the above analysis demonstrates that, on other formulae which have been ventured to illustrate the dividing line between

³⁰⁶ *WMC* (1998) 194 CLR 1, 70.

³⁰⁷ *Ibid* 71, 72.

³⁰⁸ *Ibid* 73.

³⁰⁹ (1995) 63 FCR 567.

inherently defeasible rights and those which attract s 51(xxxi), the extinguishment of native title falls clearly on the side of the latter.

Finally, if a technical refinement of the law on 'acquisition of property' — the inherent vulnerability doctrine — denies indigenous people the benefit of one of the few express guarantees in the *Constitution*, when the ordinary rights in relation to land held by non-indigenous people continue to enjoy this fundamental level of protection, we would have a racially discriminatory standard entrenched in our basic law. Kirby J has observed that 'curious things sometimes happen when constitutional doctrine is applied to new facts.'³¹⁰ This particularly curious constitutional outcome can and should be avoided.

IV CONCLUSION

Earlier in this article I identified some judicial ambivalence about the precise way to characterise native title, which is an institution not *of* the common law but one recognised by it. Despite this ambivalence, it is evident that, *at common law*, native title enjoys many of the characteristics associated with notions of property. Deriving from the observance of traditional law and custom over many generations, it displays considerable stability and permanence.

The *constitutional* definition of property is even broader than the general legal understanding of the term suggested by *Yanner*. It extends to cover 'innominate and anomalous interests', a phrase which seems well suited to accommodate the complex range of *sui generis* rights that the common law recognises as native title. There seem to be no persuasive grounds for excluding the traditional rights in relation to land or waters of indigenous people from the constitutional category of 'property' and indeed a number of High Court judges have already indicated that they regard native title as property in the constitutional sense.

To analyse official action affecting native title in terms of 'acquisition' requires a clear conception of the law of native title extinguishment. The High Court has begun to flesh out the concepts of extinguishment, partial extinguishment, impairment and regulation that emerged from *Mabo [No 2]*. Many questions remain unanswered, however, and the relationship between these concepts is quite unclear. While in native title law the doctrine of extinguishment has been developing in the last few years, 'acquisition' law has, during the 1990s, borne much of the brunt of adventurous litigation seeking to test the boundaries of s 51(xxxi). For the moment, it too suffers from a lack of judicial consensus on some key issues, such as whether the 'benefit' from depriving someone of their property must itself be proprietary in character, and precisely what distinguishes an 'inherently vulnerable' right from one whose acquisition can attract the constitutional guarantee.

Nonetheless, some matters are settled. The term 'acquisition' will be interpreted broadly. It concerns itself with substance and not form. Plaintiffs must demonstrate that some kind of benefit to the Commonwealth or a third party accrues as a result of their loss. Regulatory and other infringements of property, if sufficiently intrusive or destructive, may amount to constitutional acquisitions.

³¹⁰ *WMC* (1998) 194 CLR 1, 77.

Extinguishing or modifying rights that are inherently susceptible to defeasance or modification will not attract the ‘just terms’ guarantee.³¹¹

A number of High Court judges have already indicated, in passing, that they believe that the *legislative* extinguishment of native title would attract the ‘just terms’ guarantee. No judge has yet denied that proposition. However, Gummow J’s dicta in *Newcrest* indicated that he believes that s 51(xxxi) would not apply where a law authorises the executive to make a Crown grant inconsistent with the survival of native title. Kirby J said he was inclined to agree, although he left open the possibility of being persuaded to the contrary. Other judges in that case seemed inclined to take the opposite view or did not express an opinion. Because the issue was peripheral in *Newcrest*, briefly argued and decided without hearing from native title holding parties, this article has analysed the applicability of the constitutional guarantee to the extinguishment of native title from first principles and on the basis of appellate authority.

The direct outcome of extinguishing native title is to materially enhance the property of the Crown. Its radical title is freed of an encumbrance and expands to full beneficial ownership of land. In the case of extinguishment by Crown grants or some forms of legislation, third parties also obtain a direct proprietary benefit. Thus, the extinguishment of native title meets the constitutional requirements, no matter which one of the many different formulae High Court judges have used in the past decade to describe a ‘benefit’ that signifies a constitutional acquisition is applied.

However, will native title holders seeking the constitutional guarantee of just terms for the extinguishment or impairment of their native title by an inconsistent Crown grant ‘pursuant to a law of the Commonwealth’³¹² fail because, as Gummow J suggests, their right suffers from an inherent vulnerability that denies them the protection of one of the *Constitution*’s few express guarantees?

This article argues that Gummow J’s suggested approach is not well-grounded in constitutional authority. His statement in *Newcrest*, designed for the collateral purpose of defeating an attack on his interpretation of *Teori Tau*, is brief and elliptical. It ignores constitutional authority which cautions against pedantic distinctions and privileging form over substance. It borrows a doctrine from the sphere of purely statutory rights and applies it to an entirely different context: the land rights of indigenous people arising from generations of observance of traditional law and custom, as recognised by the common law from the instant British sovereignty over Australia was acquired. It overlooks the obvious ‘benefit’ that accrues to the Crown and third parties from the extinguishment of native title and it would entrench a racially discriminatory standard in the fundamental law of our polity. For compelling reasons of principle, policy and precedent Gummow J’s proposition about executive extinguishment of native title and the ‘just terms’ guarantee in *Newcrest* should be rejected when the issue

³¹¹ Whether that be because they are not ‘property’, or because there is no ‘acquisition’ in the constitutional sense, or because laws that modify them cannot be properly characterised as laws with respect to the acquisition of property.

³¹² *Newcrest* (1997) 190 CLR 513, 543 (Brennan CJ). Section 51(xxxi) requires the operation of a *Commonwealth* law to activate the ‘just terms’ guarantee.

2004] *Native Title and the 'Acquisition of Property'* 79

comes directly before the High Court. It would be most unfortunate if the past dispossession of indigenous people were compounded by the present-day denial of an otherwise broadly available constitutional right.