

IS A CAUSE OF ACTION A CASTLE? STATUTORY CHOSSES IN ACTION AS PROPERTY AND S 51(XXXI) OF THE CONSTITUTION

MICHAEL J DUFFY*

New laws often involve the creation of new private rights of action for breach of those laws. The chosse in action in the form of the statutory right to civil compensation is a type of right that has multiplied over the last 50 years. The increase in rights has led to greater litigation and one reaction is the occasional complaint that society has become too litigious. 'Reining in' such litigation might occasionally suggest the statutory modification of rights of action; however, a question then arises as to the status of such chosses in action as a form of private property. In particular, would intervention by the legislature to diminish such rights constitute an acquisition of property within s 51(xxxii) of the Commonwealth Constitution requiring the provision of just terms? The article examines the nature of, and justification for, private property protection and plots a connection to statutory chosses in action. It then analyses the relevant jurisprudence on s 51(xxxii) and assesses in some detail how far that section may apply to a legislative diminution of private statutory causes of action.

CONTENTS

I	Introduction.....	2
II	The Nature of and Justification for Private Property.....	3
	A What Is Private Property?	3
	B Philosophical Justifications.....	5
	1 Human Rights and Freedoms.....	5
	2 Utilitarian and Economic Arguments.....	7
	3 Fundamental Private Property — the Dwelling as a Castle.....	9
	4 Property in the Minds of the Framers.....	10
	C Private Property and the State.....	11
	D Private Property and Chosses in Action.....	12

* BCom, LLB, LLM (Melb), PhD (Monash); Senior Lecturer and Researcher in Law, Director, Corporate Law, Organisation and Litigation Research Group ('CLOL'), Monash Business School, Monash University. The author wishes to thank the anonymous referees for their helpful comments.

III	Choses in Action	13
	A Choses in Action as Property	13
	B New Statutory Rights	14
	C Reaction to Litigation Involving New Statutory Rights	15
IV	Section 51(xxxi) of the <i>Constitution</i>	17
	A 'Property' in s 51(xxxi) of the <i>Constitution</i>	17
	B Assignability as a Criteria of Property	18
	C 'Acquisition' of Choses in Action	20
	1 Causes of Action — <i>Georgiadis</i>	20
	2 Other Statutory Rights	22
	3 General Law Origins of Rights and Accrued Rights	30
	4 'Acquisition' by or to the Benefit of a Third Party	30
	5 The Relationship between Loss and Gain in an Acquisition	34
	6 Characterisation	37
	7 Genuine Adjustment Formula	41
	D Summary	44
V	Conclusion	46

I INTRODUCTION

Over the last fifty years, the Commonwealth has created a considerable number of new causes of action or litigation rights. The survey of rights in Table A appended to this article identifies over 70 rights of action for pecuniary relief brought into existence since 1966. Some of these are codifications or modifications of earlier rights, but some are quite new. The enforcement of such rights necessarily involves more litigation and the intervention of courts to effectively redistribute property. This trend meets occasional resistance and calls to limit the amount of litigation. But once created, can such rights be curtailed? The High Court has found that accrued rights of action (as choses in action) may be property and thus subject to the potential application of s 51(xxxi) of the *Commonwealth Constitution* ('*Constitution*'). If so, the curtailment of such rights may require the provision of just terms which may include compensation.

How far does s 51(xxxi) protect causes of action from curtailment by the legislature? In examining this issue, this article will move from the general (private property rights in principle and the philosophy of these rights) to the particular (private choses in action in the form of accrued statutory causes of action).

The generalist analysis in Part II will give background to the constitutional protection and may shed some light on why the framers of the *Constitution*

believed in private property rights and the need for some constitutional protection of these. It will also seek to provide a theoretical link between the nature of private property and the nature of choses in action through a consideration of the role of the state and the 'social contract'.

In Part III, there will be a short discussion of choses in action and some mention of the types of private federal law statutory rights which have been created over the past 50 years, a selection of which are set out in Table A.

Part IV will conclude with an analysis of the relevant High Court authority on s 51(xxxi) and how it might apply to any abolition or modification of statutory rights. The section will conclude with a short summary of the s 51(xxxi) doctrine and how it applies to private statutory choses in action, as well as some commentary on the background framework and linking theory.

The article concludes by suggesting that certain accrued private statutory choses in action are protected by s 51(xxxi) as property, though subject to exceptions which are not completely certain.

II THE NATURE OF AND JUSTIFICATION FOR PRIVATE PROPERTY

In this section, I will examine the right of private property, its nature and its justification. This will provide background for the later discussion of statutory choses in action and their treatment in the High Court. The analysis will seek to identify links between private property generally, which is partly protected by s 51(xxxi), and statutory choses in action. Though such connections may not be readily apparent on their face, the argument will be developed to show how the nature of state power (and to a lesser extent, the issue of assignability) can provide frameworks to link the two.

A *What Is Private Property?*

There is no universally agreed nor understood definition of private property.¹ One definition of property is 'that which is capable of ownership'.² Ownership, in turn, has been defined as the 'right to the exclusive enjoyment of a thing'³ as well as the right recognised by law to exercise rights with respect to property against all persons.⁴

¹ See Robert Chambers, *An Introduction to Property Law in Australia* (Lawbook, 3rd ed, 2013) 5–6.

² Mick Woodley (ed), *Osborn's Concise Law Dictionary* (12th ed, 2013) 'property'.

³ *Ibid* 'ownership'.

⁴ Peter Butt (ed), *Butterworths Concise Australian Legal Dictionary* (3rd ed, 2004) 'ownership'.

A popular conception is the ‘bundle of rights’ theory under which ownership is treated as a bundle of rights vis-à-vis others, rather than rights to the thing itself.⁵ This notion also explains how ownership can be divided and how it can apply to both tangible and intangible property.⁶ This approach, originally developed by Hohfeld⁷ and later by Cohen,⁸ suggested that property was really a collection of rights such as the rights to use, exclude others, and sell or assign. The ‘bundle’ approach is pervasive in American legal scholarship,⁹ and has seen the development of the concept of ‘regulatory takings’ whereby regulation of property rights can be argued to be a ‘taking’ or acquisition of such rights if it goes ‘too far’¹⁰ (the ‘takings’ infringing the Fifth Amendment to the *United States Constitution*).¹¹ In Australia, the High Court has stated (unanimously) that

[i]n many cases, including at least some cases concerning s 51(xxxi), it may be helpful to speak of property as a ‘bundle of rights’. At other times it may be more useful to identify property as ‘a legally endorsed concentration of power over things and resources.’ Seldom will it be useful to use the word ‘property’ as referring only to the subject matter of that legally endorsed concentration of power.¹²

Property rights are also tied up to a degree with the power of the state, since it is the recognition of those rights by the law of the state or polity that makes them generally enforceable in that polity.¹³ The power of the state in its

⁵ Denise R Johnson, ‘Reflections on the Bundle of Rights’ (2007) 32(2) *Vermont Law Review* 247, 247.

⁶ *Ibid.*

⁷ Wesley Newcomb Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23(1) *Yale Law Journal* 16.

⁸ Felix S Cohen, ‘Dialogue on Private Property’ (1954) 9(2) *Rutgers Law Review* 357, 361–3, 378–9.

⁹ Pamela O’Connor, ‘The Changing Paradigm of Property and the Framing of Regulation as a “Taking”’ (2010) 36(2) *Monash University Law Review* 50, 56, citing Bruce A Ackerman, *Private Property and the Constitution* (Yale University Press, 1977) 26–9.

¹⁰ *Pennsylvania Coal Co v Mahon*, 260 US 393, 415 (1922). See the excellent discussion in O’Connor (n 9) 56–7.

¹¹ *United States Constitution* amend V: ‘nor shall private property be taken for public use, without just compensation.’

¹² *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210, 230–1 [44] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ) (*‘Telstra’*), quoting Kevin Gray, ‘Property in Thin Air’ (1991) 50(2) *Cambridge Law Journal* 252, 299.

¹³ Law is also associated with the power of the state though transcending the latter in the conception of the ‘rule of law’ and the subjection of the state itself to law. The association of

legislative and judicial arms is relevant to the discussion in this article in a number of ways that can interrelate:

- 1 the ability of the legislature to create statutory rights;
- 2 the judiciary's ability to impact on proprietary rights by redistributing property in the course of enforcement of rights of action;¹⁴ and
- 3 certain courts' ability to rule on the constitutionality of modification or removal of statutory rights by the legislature.

B Philosophical Justifications

As will be seen, the theoretical justifications for private property do not form a substantial part of the jurisprudence on s 51(xxxi). Though described as 'a very great constitutional safeguard',¹⁵ the High Court has rarely been required to go behind that safeguard to ascertain its justification.¹⁶ Nevertheless, this analysis would be incomplete without a brief consideration of the justifications for private property which underlie its protection in s 51(xxxi).

1 Human Rights and Freedoms

Normative arguments for private property tend to focus on innate human rights and freedoms.¹⁷ At a fairly high level of abstraction, Hegel suggested

law and property has been noted by Jeremy Bentham: 'Property and law are born and must die together. Before the laws, there was no property: take away the laws, all property ceases.': see Jeremy Bentham, 'Chapter VIII: Of Property' in John Bowring (ed), *The Works of Jeremy Bentham* (William Tait, 1843) vol 1, 308, 309. Charles Reich has explored the relationship between private property and the increasingly powerful state, concluding: 'More than ever the individual needs to possess, in whatever form, a small but sovereign island of his [or her] own.': see Charles A Reich, 'The New Property' (1964) 73(5) *Yale Law Journal* 733, 774.

¹⁴ As to the reluctance of the courts to do this in the absence of clear statutory mandate, 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(3) *Public Law Review* 183, 200.

¹⁵ *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, 403 (Barwick CJ) ('Tooth').

¹⁶ Though the High Court jurisprudence is not entirely silent on this, and some relevant passages will be noted in the footnotes to this section.

¹⁷ Historically, 'rights based' arguments had some resort to 'natural law', however, the latter had a somewhat religious flavour, which is less fashionable in the modern world: see Bertrand Russell, *History of Western Philosophy* (Routledge, 1991) 605–6. Legal rights seem to have their early origins in this natural law conception. In Sir William Blackstone, *Commentaries on the Laws of England in Four Books* (JB Lippincott, 1893) vol 1 bk 1, Sir Blackstone spoke of the absolute rights of individuals as those which are so primary and strict as would belong to

that '[i]n order that a person be a fully developed and independent organism, it is necessary that he [or she] find or make some external sphere for his [or her] freedom.'¹⁸ Private property is said to give an external objectivity to human will, which is otherwise subjective.¹⁹ Hegel stated: 'As a person, I have the right to put my will into everything, which thereby becomes mine.'²⁰

The argument has been developed to suggest that this effect is lost if others try to work on the same object for their purposes, which provides the defence for the exclusive control provided by private property and the critique of communal ownership.²¹

In more modern times, noting the issue of strong state power as a potential limiter of freedom, Reich has described how property draws a boundary between public and private power by creating a 'circle' of freedom around individuals. Outside the circle, individuals must justify their actions and show their authority, whereas within the circle they are master and it is the state which must justify any interference.²²

Other moral justifications to justify the legal right of private property have focused on the individual's right to improve their own material wellbeing through the acquisition of things: food, water and shelter.²³ Private property is also founded upon the concepts of industry and personal exertion. This reflects Locke's conception that, by law of nature, things belong to those who

persons 'merely in a state of nature, and which every [person] is entitled to enjoy, whether out of society or in it': at 122; and are 'denominated the natural liberty of [humankind]': at 125. Sir Blackstone identified only three absolute rights, being the right of personal security, the right of personal liberty, and the right of private property: at 128. Despite some decline in favour of natural law theory, the idea of innate human rights is today widely accepted: see Jeremy Waldron, *The Right to Private Property* (Clarendon Press, 1988) 13. This appears to be based upon (1) secular ethics: Russell (n 17) 606; (2) 'self-evident' truths: American Declaration of Independence 1776; (3) social contract: see below Part II(C); or (4) consensus (which might be argued to have a contractualist or majoritarian contractualist basis): see, eg, *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 (10 December 1948).

¹⁸ George Wilhelm Friedrich Hegel, 'Philosophy of Right and Law, or Natural Law and Political Science Outlined' tr JM Strerrett and Carl J Friedrich in Carl J Friedrich (ed), *The Philosophy of Hegel* (Modern Library, 1954) 221, 241 [41].

¹⁹ Ibid 241–2 [41]–[42].

²⁰ Ibid 242 [44].

²¹ Waldron (n 17) 374.

²² Reich (n 13) 771.

²³ CB Macpherson, 'The Meaning of Property' in CB Macpherson (ed), *Property: Mainstream and Critical Positions* (University of Toronto Press, 1978) 1, 11–12, quoted in MA Neave, CJ Rossiter and MA Stone, *Sackville and Neave Property Law: Cases and Materials* (Butterworths, 6th ed, 1999) 12–13 [1.2.3E].

make them.²⁴ Locke argued that the Earth's resources were common to all people, but that a person had unique property in his or her own person and the labour of their body and hands.²⁵ Thus, if removed from the state of nature and mixed with labour, a person added something to that common resource (ie their labour) that was unquestionably their own, and thereby made it their property.²⁶ Locke argued that this was an interest that the state must respect.²⁷

Another normative justification for private property was the argument that discoverers of truly unclaimed property who take possession should have rights of ownership of the property.²⁸

2 *Utilitarian and Economic Arguments*

Somewhat unsurprisingly, many early utilitarian²⁹ philosophical justifications for private property focused heavily on land.³⁰ These go as far back as Aristotle, who asked: 'What is the proper system of property for citizens who are to live under an ideal constitution?'³¹ Anticipating 20th century political experiments in property ownership, he compared private property and communal ownership, noting difficulties with the latter such as that '[t]hose who do more work [on the land] ... will be bound to raise complaints against those who get a large recompense and do little work.'³² Social disharmony could be avoided, Aristotle reasoned, if each person was the exclusive owner of the plot of land that the person worked upon. He added the utilitarian argument that the net product of privately owned land would likely be greater

²⁴ See Richard Schlatter, *Private Property: The History of an Idea* (George Allen & Unwin, 1951) 151–2. See generally John Locke, *The Works of John Locke* (Routledge/Thoemmes Press, 9th ed, 1997) vol 4 bk 2, ch 5.

²⁵ Locke (n 24) 353–4 [27].

²⁶ *Ibid.* Interestingly, Locke added the social proviso that these concepts only applied 'where there is enough, and as good, left in common for others': at 354 [27].

²⁷ Waldron (n 17) 3–4. It is not entirely clear whether Locke's approach is 'natural rights based' in the manner of Hegel's or is really utilitarian: see Russell (n 17) 604; Waldron (n 17) 202.

²⁸ Samantha J Hepburn, *Principles of Property Law* (Routledge Cavendish, 3rd ed, 2006) 12. This notion may also, in part, be present in laws giving rights based upon, inter alia, uncontested possession adverse to another: see, eg, *Transfer of Land Act 1958* (Vic) s 60.

²⁹ That is, an argument based upon society's good or at least the greatest good or happiness for the greatest number: see Russell (n 17) 741–2.

³⁰ Though some valuable chattels such as livestock existed in pre-industrial times, the expansion of personal property and intangible property is mainly a modern phenomenon.

³¹ Aristotle, *The Politics of Aristotle*, tr Ernest Barker (Oxford University Press, 1968) 48, quoted in Waldron (n 17) 6.

³² Aristotle (n 31) 49, quoted in Waldron (n 17) 6.

than that of commonly owned land. Privately-owned land avoided quarrels, because each person felt they were applying themselves to what was their own.³³ Posner, in the late 20th century, supplemented these views by postulating a society without private property rights where a farmer who plants and fertilises corn sees his or her neighbour appropriate and sell the corn.³⁴ With no legal remedy, the farmer has little incentive to keep planting corn every year to see it stolen. He or she quickly reverts to hunting and gathering, and the economy reverts to subsistence.³⁵ Posner concluded that incentives to undertake improvements to maximise the value of land are created by proprietary ownership, and this model works best when all land is owned by someone.³⁶

In a similar vein, Demestz has argued that common ownership of land or resources will lead to increased externalities (costs to the community) as each user will have little incentive to conserve, for instance, the stock of game, resulting in a level of (over) hunting above the long-term interests of all.³⁷

Other utilitarian arguments for private property have also been made in recent times in relation to privatisation of business entities formerly owned by the state. These have focused on economic schools of thought, suggesting greater efficiency and productivity of private over government businesses.³⁸

³³ Aristotle (n 31) 49, quoted in Waldron (n 17) 6.

³⁴ Richard A Posner, *Economic Analysis of Law* (Aspen, 5th ed, 1998) 36.

³⁵ *Ibid.* A similar point is made in relation to investment in productive capital generally in the noteworthy dissent of Heydon J in *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 209 [178] (citations omitted) ('*ICM*'), where his Honour states:

The threat that legislatures will acquire property without just compensation will result in people electing not to generate property by saving, or developing their property to less than optimal levels, or seeking a greater rate of return to meet the risk of acquisition, or pursuing investment opportunities in jurisdictions which do provide compensation for compulsory acquisition. The threat of acquisition without compensation thus damages incentives to invest.

³⁶ Posner (n 34) 36.

³⁷ Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57(2) *American Economic Review* 347, 354. This theme has also been taken up in Hardin's classic essay on the commons: see Garrett Hardin, 'The Tragedy of the Commons' (1968) 162(3859) *Science* 1243. Hardin theorised that utilisation by all members of a group of common resources for their own gain with no regard for others would lead to all resources being eventually depleted: at 1244. He also argued that personal conscience could not effectively police commons, as this would be sabotaged by selfish individuals — free riders — whose interests would then prevail over those who are more altruistic: at 1246.

³⁸ See, eg, William L Megginson and Jeffrey M Netter, 'From State to Market: A Survey of Empirical Studies on Privatization' (2001) 39(2) *Journal of Economic Literature* 321. Not all commentators accept that private ownership will in all circumstances be superior. Though

It is also the case that free market economic systems characterised by widespread self-interested buying and selling are substantially characterised by, and seem to be predicated on, widespread private property rights — elementally, actors cannot engage in widespread trade of that which they do not own.³⁹ Such market systems appear to have been remarkably successful at increasing aggregate wealth.⁴⁰

3 Fundamental Private Property — the Dwelling as a Castle

Somewhat related to real property — which, as has been seen, is the subject of strong utilitarian and economic arguments for private ownership — is a seemingly strong affection for private property in dwellings or the home. This is linked with freedom in the traditional concern of English law with the rights of occupants and owners and, in particular laws, limiting arbitrary intrusion by the state into private dwellings. The principle appears in Sir Edward Coke's statement in his case report of *Semayne's Case* in 1604 that the house was a 'castle and fortress' for 'defence against injury and violence' and for 'repose'.⁴¹ Thus, the security and integrity of a person's home and possessions are, and have been, fundamental rights under the common law and

the failure of command economies in the Soviet Union and old Eastern Bloc may have appeared to settle the matter, there is the current phenomenon of some apparent success of state owned enterprises in China: see, eg, David A Ralston et al, 'Today's State-Owned Enterprises of China: Are They Dying Dinosaurs or Dynamic Dynamos?' (2006) 27(9) *Strategic Management Journal* 825.

³⁹ See generally Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed Edwin Cannan (University of Chicago Press, 1976).

⁴⁰ The High Court jurisprudence has touched upon the utility of markets in creating wealth. In *ICM* (n 35), Heydon J noted how the protection of property rights preserves 'a dynamically efficient economy in which incentives to invest improve long-term social welfare by creating an optimal level and allocation of investment resources': at 209 [178]. In *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 ('WMC'), Kirby J held that the constitutional guarantee of just terms where property interests of investors are acquired under federal law is '[o]ne of the institutional strengths of the Australian economy' and investors would draw 'their inferences' from any departure from this by the Court: at 102 [259]. This was approved by Callinan J in *Smith v ANL Ltd* (2000) 204 CLR 493, 554 [188] ('ANL'). At a sociopolitical level, acknowledgment of the utility of private enterprise and free market systems in increasing aggregate wealth does not of course forswear critical analysis of the ultimate distribution of such wealth — an issue of perennial debate through the economic and political system.

⁴¹ (1604) 5 Co Rep 91; 77 ER 194, 195. The same sentiments appear in a speech by William Pitt to the Commons in 1763, who noted that '[t]he poorest man may in his cottage bid defiance to all the forces of the Crown' and that 'the King of England cannot enter! — all his force dares not cross the threshold': United Kingdom, *Cobbett's Parliamentary History of England*, 1763, vol 15 col 1308, quoted in Lord Henry Brougham, *Historical Sketches of Statesmen Who Flourished in the Time of George III* (Richard Griffin & Co, 1855) vol 1, 42.

cannot be violated without compelling reasons.⁴² This principle was also secured by the doctrine that an unauthorised invasion of property is a trespass.⁴³

It is notable that the doctrine draws little distinction between freehold and leasehold interests of dwellers. This might provide a basis for suggesting that once an interest is proprietary, the law will accord it a special status and the fragmentation of proprietary interests — into leasehold, equitable, mortgage, easement, chose in action and so on — will have little effect.

Further, the concept of the private zone of ownership inherent in the dwelling has been argued to be extendable, by analogy, to ownership of ‘divisible portion[s] of social capital’ in general,⁴⁴ so that here too the individual has ‘a zone of unchecked discretionary action that others, whether private citizens or government officials, may not invade.’⁴⁵

4 *Property in the Minds of the Framers*

It is not clear how far the above issues weighed on the minds of the framers of the *Constitution*. The evidence appears to suggest that such issues were far from being at the forefront of debate.⁴⁶ However, it may also be the case that the arguments were present in an unconscious sense in the habits of mind of the framers, who, as educated middle class lawyers of the late 19th century, probably tended toward belief systems which, for various reasons, likely held the virtues of private property in high regard.⁴⁷

⁴² Keith Tronc, Cliff Crawford and Doug Smith, *Search and Seizure in Australia and New Zealand* (LBC Information Services, 1996) 1.

⁴³ See generally RP Balkin and JLR Davis, *Law of Torts* (Butterworths, 2nd ed, 1996) ch 2. Though the inviolability principle has been eroded somewhat in allowing some state entry to combat crime, the public interest exception remains subject to strict rules which still recognise the fundamentals of privacy and security — effectively the fundamental importance of private property in the form of the private dwelling: see *ibid* 4–11.

⁴⁴ Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Harvard University Press, 1986) 37–8, quoted in Paul Babie, ‘Private Property Suffuses Life’ (2017) 39(1) *Sydney Law Review* 135, 137.

⁴⁵ Unger (n 44) 38.

⁴⁶ See Simon Evans, ‘Property and the Drafting of the Australian Constitution’ (2001) 29(2) *Federal Law Review* 121, 150.

⁴⁷ In *ICM* (n 35) 211 [183] (citations omitted), Heydon J noted:

So deeply was the age of federation steeped in respect for property rights that Sir George Turner, Premier of Victoria, told the Third Session of the Convention at Melbourne on 25 January 1898, with all the innocent naiveté of someone who could not foresee how far twentieth century governments all over the world were to go in seeking to make property

C *Private Property and the State*

As noted above, there is a significant link between private property and the role of the state. The latter, through legislation and the judicial arm, acts as a guarantor of property rights. Thus, though property may be a bundle of rights, such rights will not be meaningful unless ultimately enforceable, and enforceability, when voluntary compliance fails, requires the power of the state.⁴⁸ Property is also, in a significant sense, a creation of law,⁴⁹ enforced through the power of the courts and other institutions within the state.⁵⁰

This relationship between the private citizen, property, law and the state can be seen, in a wider sense, as part of the conception of the ‘social contract’. On this view, property rights are guaranteed pursuant to the ‘social contract’ under which citizens agree to surrender some of their freedoms and submit to the authority of the state in exchange for protection of their remaining rights — including their rights of private property.⁵¹ It follows that a breach of the ‘social contract’ can lead to some level of forfeiture of property rights. Consistent with this vein of thought, Sir William Blackstone stated:

[A]ll property is derived from society, being one of those civil privileges or rights which are conferred upon individuals, in exchange for that degree of natural freedom which every [person] must sacrifice when [she or he] enters into social communities. If therefore a member of any national community violates the fundamental contract of [their] association, by transgressing the municipal law, [she or he] forfeits [his or her] right to such privileges as [she or he]

rights precarious, that the proposed provision for just terms was unnecessary: ‘We assume that the Federal Parliament will act strictly on the lines of justice’.

See also *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 25 January 1898, 153 (Sir George Turner).

⁴⁸ As well as police forces enforcing the criminal laws against theft through investigation and prosecution, this also includes enforceability of pecuniary court orders through the sheriff as well as government and authorised private officers enforcing corporate and personal insolvency laws.

⁴⁹ Reich (n 13) 739.

⁵⁰ One irony of this is that ‘free markets’ are actually premised on a level of state intervention/protection to ensure that property is acquired by trade but not by theft as might occur in a fully deregulated ‘state of nature’.

⁵¹ See generally Thomas Hobbes, *Leviathan* (Penguin Classics, 1985); John Locke, *Two Treatises of Government and a Letter Concerning Toleration* (Yale University Press, 2003); Jean-Jacques Rousseau, *Basic Political Writings*, tr ed Donald A Cress (Hackett Publishing, 1987).

claims by that contract; and the state may very justly resume that portion of property, or any part of it, which the laws have before assigned [him or her].⁵²

Sir Blackstone speaks of ‘the municipal law’, suggesting domestic law as opposed to international law. It is not completely clear whether he is limiting transgressions to the criminal law or whether he is also thinking of civil law breaches. If the latter, this may provide a link to the nature of choses in action as discussed under the next subheading.

D *Private Property and Choses in Action*

Private property rights have thus been justified based upon application of the owner’s labour to resources, the economic utility of private ownership of land and other divisible capital, and the sanctity of the home. All of these are, admittedly, somewhat distant arguments for private property existing in choses in action, which are in some ways an unusual form of private property. On the other hand, a possible connection with the ‘free market’ utilitarian justifications for private property might be drawn to the extent that such choses in action are property that might be traded in such a market (though some limitations on their assignability restrict this connection).⁵³

Another connection between some choses in action and private property has been noted in connection with the role of the state in enforcing and protecting certain rights to private property. Adopting a ‘social contract’ view and consistent with Sir Blackstone’s argument above, where there is a breach of the civil law, it might be argued that the state — through civil courts — in a sense ‘resumes’ private property it would otherwise protect and reallocates it to the victims of breaches of relevant laws. It does so by creating rights of action against those who breach the law. Thus, a chose in action in the form of a right of civil action might often be seen as representing a right to the worth of a thing when that thing has been unjustifiably ‘taken’ by another. This can be seen in economic rights to compensation for loss of intellectual or other property rights, but also in loss of commercial or economic value or opportunities. In the case of discrimination or personal injury, the thing taken is presumably the health or right of personal (subjective) wellbeing which, to

⁵² Sir William Blackstone, ‘Civil Liberty and Civil Rights’ in Henry Winthrop Ballantine (ed), *Blackstone’s Commentaries* (Blackstone Institute, 1915) vol 15, 455, 468.

⁵³ The author does not necessarily advocate for such full tradability, though the issues are interestingly discussed in Vicki Waye, *Trading in Legal Claims: Law, Policy & Future Directions in Australia, UK & US* (Presidian, 2008).

Locke, may have been a form of ‘property in his [or her] own person.’⁵⁴ The remedying of this owes something to the Aristotelian notion of corrective justice,⁵⁵ in restoring the citizen’s original ‘property’ or its worth.

III CHOSSES IN ACTION

A Choses in Action as Property

Property includes things both tangible (corporeal), which can be physically possessed (such as land and chattels) and intangible (incorporeal), which cannot necessarily be physically possessed.⁵⁶ A personal property right to an intangible thing is a chose in action, which includes a legally enforceable right to recover pecuniary relief for a legal wrong.⁵⁷ This personal property right extends to ‘rights to debts of all kinds’, ‘rights of action on a contract or a right to damages for its breach’ and ‘rights arising by reason of the commission of tort or other wrong.’⁵⁸ A chose in action also includes purely personal rights such as a bank account or other rights to receive a payment of money.⁵⁹ Choses in action often derive from the common law, however it appears that statutory rights may also sometimes be choses in action, as indicated in the cases to be examined. The statutory rights identified in Table A are focused mainly on private rights to damages or compensation, although other types of statutory rights have appeared in the cases in the context of s 51(xxxi).

There does not appear to be any doubt that a chose in action is proprietary,⁶⁰ even though many claims (especially statutory claims) for compensation or damages will be effectively claims for an interest in money only (and not in any specific property). Whether this makes the latter less than truly ‘proprietary’ for the purposes of s 51(xxxi) seems doubtful. Certainly, there has been a process by which common law and even some purely statutory rights of action of a purely personal character sounding in damages only

⁵⁴ Locke (n 24) vol 4 bk 2, 353 [27].

⁵⁵ Whereby damages ‘correct’ the ‘injustice’ by restoring the just position through *diorthōtikos* or ‘making straight’: Richard A Posner, ‘The Concept of Corrective Justice in Recent Theories of Tort Law’ (1981) 10(1) *Journal of Legal Studies* 187, 189.

⁵⁶ Chambers (n 1) 47 [5.25].

⁵⁷ Hepburn (n 28) 18.

⁵⁸ WS Holdsworth, ‘The History of the Treatment of “Choses” in Action by the Common Law’ (1920) 33(8) *Harvard Law Review* 997, 997–8.

⁵⁹ Chambers (n 1) 47 [5.25].

⁶⁰ This is recognised by the High Court in *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 290 (Starke J) (*‘Dalziel’*).

(rather than claims to identifiable property) appear to have gradually assumed the status of property themselves. One possible reason for this may be due to a level of assignability of some of those rights.⁶¹ Yet, as well as the distinction between rights created by statute and general law rights, there is also a traditional distinction between rights of action *in personam* (against a person) and rights *in rem* (arising from property and/or against that property). It is not completely clear whether or how far this distinction could limit proprietary rights in causes of action. It may be, for instance, that there is a distinction between, on the one hand, compensation rights based on proprietary interests created by statute such as intellectual property rights and, on the other, choses in action based on statutory rights to compensation alone (this issue is noted in Part IV(C)(2) below).

It has also been suggested that a different treatment of statutory choses in action from general law choses could be justified on the basis of parliamentary sovereignty — the power to both make and unmake laws.⁶² However, against this is the view that the power to make laws is not unlimited but is subject to the Constitution so that the power to unmake them is also not unlimited and is subject to the Constitution including s 51(xxxi).⁶³

B *New Statutory Rights*

Legislative reform establishing new rights has often provided for concomitant rights of action for compensation for their infringement. Since the late 1960s, there has been a large amount of such Commonwealth legislation, a selection of which (including rights of action for breach) is set out in Table A. The legislation reflects, *inter alia*, the emergence of new economic law jurisdictions (trade practices, competition law and consumer credit law); the extensive codification of company law and development of a wide range of corporate law and investor relief; the expansion of intellectual property law and evolution of bankruptcy laws; new social law jurisdictions outlawing discrimination on the basis of various personal or social attributes; the development of environmental law; and greater remedies in industrial law. In some cases, this legislation has codified, developed or supplanted earlier legislative or common law remedies. In other cases, it has provided for entirely new forms of relief.

⁶¹ Holdsworth (n 58) 1029.

⁶² Margaret Brock, 'When is Property Inherently Defeasible for the Purposes of s 51(xxxi)?' (2012) 21(2) *Australian Property Law Journal* 180, 183.

⁶³ *Ibid.*

C Reaction to Litigation Involving New Statutory Rights

The expansion of these various rights of action for compensation or other property (which ripen into choses in action given the appropriate factual context) indicates that the question posed in this article — whether legislative repeal or modification of any such rights can breach the *Constitution* — may not be an issue of merely theoretical interest. This is so given evidence of waves of reaction to the inevitable increase in litigation and insurance costs when new statutory rights are enforced. Waves of reaction to increased litigation occurred in the United States ('US') in the 1980s and 1990s,⁶⁴ resulting in some restriction of some rights (eg the US *Private Securities Litigation Reform Act 1995*).⁶⁵ This also occurred in Australia in the early 2000s during what was referred to as the 'insurance crisis'.⁶⁶ The legislature winding back rights of action is not common,⁶⁷ but in 2002, at least at the state level, statutory curtailment of choses in action was very much on the agenda. The terms of reference for the *Review of the Law of Negligence* ('*Ipp Report*') in 2002 contained the following statements set by the federal government of the day:

The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.⁶⁸

After that report, there followed a curtailment of some common law rights of action by state legislatures and also modification of some federal rights through the introduction of the proportionate liability regime.⁶⁹

Pressure on legislatures to limit litigation remains a force in Australia and internationally. New causes of action are not always seen as an unalloyed virtue in all quarters, and the brave new world of litigation and enforcement

⁶⁴ See, eg, Austin Sarat, 'The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions' (1985) 37(2) *Rutgers Law Review* 319.

⁶⁵ 15 USC § 78u-4 (1995).

⁶⁶ *Review of the Law of Negligence* (Final Report, September 2002) 27 [1.16] ('*Ipp Report*').

⁶⁷ However, there are several instances of private causes of action that were previously enforced through courts being replaced by no fault compensation schemes administered through quasi-public or administrative bodies: see, eg, *Transport Accident Act 1986* (Vic).

⁶⁸ *Ipp Report* (n 66) ix.

⁶⁹ See, eg, Barbara McDonald, 'Proportionate Liability in Australia: The Devil in the Detail' (2005) 26(1) *Australian Bar Review* 29.

of rights is not without its discontents. Besides concerns about insurance costs, there is occasional colourful criticism of the pursuit of litigation in many areas, with few jurisdictions being immune.⁷⁰

Whilst practitioners and the court system undoubtedly strive to be fair and these complaints tend to be about exceptional cases, it remains that governments occasionally speak of reining in litigation.⁷¹ This may necessarily involve the pruning of rights of action, although some of the complaints relate to elements of the process of enforcement of rights rather than the rights themselves. Therefore, this article explores the legality of any such pruning in terms of s 51(xxxi) of the *Constitution* and the remainder of the article will analyse this in terms of the High Court's treatment of that section.

⁷⁰ A selection of such criticisms includes references to: (1) 'patent and copyright trolls' in intellectual property: Sujitha Subramanian, 'Patent Trolls in Thickets: Who is Fishing under the Bridge?' (2008) 30(5) *European Intellectual Property Review* 182; (2) 'ambulance-chasing' class actions: Michael Pascoe, 'Commonwealth Bank Class Action Would Hurt Everyone but the Lawyers', *The Age* (online, 24 August 2017) <<http://www.theage.com.au/business/comment-and-analysis/commonwealth-bank-class-action-would-hurt-everyone-but-the-lawyers-20170823-gy2v7d.html>>; (3) 'legal blackmail' suits in discrimination law: 'QUT Racism Case "Legal Blackmail": Senator', *Brisbane Times* (online, 19 April 2016) <<http://www.brisbanetimes.com.au/queensland/qut-racism-case-legal-blackmail-senator-20160419-go9yf7.html>>; (4) 'trading in [and stirring up of] litigation' by third party litigation funders: Justice PA Keane, 'Access to Justice and Other Shibboleths' (Speech, Judicial Conference of Australia Colloquium, 10 October 2009) 2; see also the minority judgment of Callinan and Heydon JJ in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 487–8 [266] ('*Campbells*'); (5) 'stretching out legal disputes' by liquidators and bankruptcy trustees: Michael West, "'Corporate Undertaker": The New Hip Career?', *The Sydney Morning Herald* (online, 29 October 2012) <<http://www.smh.com.au/business/corporate-undertaker-the-new-hip-career-20121029-28flz.html>>; (6) 'frivolous' unfair dismissal claims: Max Newnham, 'Unfair Dismissal Claims Impose a Heavy Burden on Proprietors', *The Age* (online, 7 April 2003) <<http://www.theage.com.au/articles/2003/04/06/1049567565900.html>>; (7) 'vexatious' environmental litigation: Jared Owens, 'Environment Groups Importing US-Style Vexatious Litigation: Frydenberg', *The Australian* (online, 25 October 2016) <<http://www.theaustralian.com.au/business/mining-energy/environment-groups-importing-usstyle-vexatious-litigation-frydenberg/news-story/c2b3ec1f4cf998239d061059ef0e3ef0>>; and (8) 'unfair[ness]' in family law: Jess Hill, 'Suffer the Children: Trouble in the Family Court', *The Monthly* (online, November 2015) <<https://www.themonthly.com.au/issue/2015/november/1446296400/jess-hill/suffer-children>>, archived at <<https://perma.cc/LRE2-MSNB>>. See also Peter Chapman, 'Opinion: Is the Family Law Court Unfair to Men?', *The Queensland Times* (online, 29 July 2015) <<https://www.qt.com.au/news/is-the-family-law-court-unfair-to-men/2721434/>>, archived at <<https://perma.cc/4EB6-GU4A>>.

⁷¹ Chris Merritt, 'Brandis Takes Aim at Litigation Funders', *The Australian* (online, 19 July 2013) <<http://www.theaustralian.com.au/business/legal-affairs/brandis-takes-aim-at-litigation-funders/news-story/8ae14748b1264760337f80becedecfa0>>.

IV SECTION 51(xxxi) OF THE CONSTITUTION

A 'Property' in s 51(xxxi) of the Constitution

As noted above, the High Court has approved the bundle of rights definition of property as helpful in 'at least some cases concerning s 51(xxxi)'.⁷² There is also some support in the High Court for the suggestion that each right in that bundle is itself property capable of acquisition by the state.⁷³

The High Court has tended to take an expansive view of what constitutes 'property' in interpreting s 51(xxxi), describing it as 'a general term' which 'means any tangible or intangible thing which the law protects under the name of property'.⁷⁴

In *Minister of State for the Army v Dalziel* ('*Dalziel*') in 1944, Starke J held:

Property ... extends to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action. And to acquire any such right is rightly described as an 'acquisition of property'.⁷⁵

According to Dixon J in 1948, in *Bank of New South Wales v Commonwealth* ('*Bank Nationalisation Case*'), s 51(xxxi) was 'not to be confined pedantically' and extended to 'innominate and anomalous interests' in property.⁷⁶

By the same token, some definitions have also tried to sharpen the definition of property. Lord Wilberforce's judgment in *National Provincial Bank Ltd v Ainsworth*⁷⁷ has been quoted a number of times in the High Court⁷⁸ in relation to property:

Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties,

⁷² *Telstra* (n 12) 230 [44].

⁷³ *Commonwealth v Western Australia* (1999) 196 CLR 392, 489 [284] (Callinan J dissenting) quoting RL Hamilton, 'Some Aspects of the Acquisition Power of the Commonwealth' (1973) 5(2) *Federal Law Review* 265, 291.

⁷⁴ *Dalziel* (n 60) 295 (McTiernan J).

⁷⁵ *Ibid* 290.

⁷⁶ (1948) 76 CLR 1, 349 (Dixon J) ('*Bank Nationalisation Case*').

⁷⁷ [1965] AC 1175 ('*Ainsworth*').

⁷⁸ See, eg, *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 342 (Mason J) ('*Meneling*'); *ICM* (n 35) 218 [197] (Heydon J); *ANL* (n 40) 554–5 [190] (Callinan J).

capable in its nature of assumption by third parties, and have some degree of permanence or stability.⁷⁹

B Assignability as a Criteria of Property

In *Dalziel*, Starke J noted that ‘a mere personal licence such as is not assignable would not be rightly described as property.’⁸⁰

In *R v Toohey; Ex parte Meneling Station Pty Ltd*, by contrast, Mason J held that ‘[a]ssignability is not in all circumstances an essential characteristic of a right of property’ because ‘[b]y statute some forms of property are expressed to be inalienable.’⁸¹ His Honour went on to note that ‘[n]onetheless, it is generally correct to say ... that a proprietary right must be “capable in its nature of assumption by third parties”’.⁸² Lack of assignability of a right was considered to be a factor mitigating against an interest being property in *Australian Capital Television Pty Ltd v Commonwealth*.⁸³ In that case, broadcasters were forced by law to make certain free time available to political parties for election broadcasts. Their right to free time was not assignable.⁸⁴ Assignability may have been an indicium of property in *Health Insurance Commission v Peverill* (*‘Peverill’*).⁸⁵ The statutory right to receive a Medicare benefit was found to be assignable by Dr Peverill’s patients to him under statute,⁸⁶ but not assignable by Dr Peverill to anyone else,⁸⁷ which appears to have affected Brennan J’s conclusion that it was not property.⁸⁸ Similarly, assignability was a factor in favour of statutory rights to bore licences being property (at least according to three Justices) in *ICM Agriculture Pty Ltd v Commonwealth* (*‘ICM’*).⁸⁹

⁷⁹ *Ainsworth* (n 77) 1247–8 (Lord Wilberforce).

⁸⁰ *Dalziel* (n 60) 290.

⁸¹ *Meneling* (n 78) 342.

⁸² *Ibid* 342–3, quoting *Ainsworth* (n 77) 1247–8 (Lord Wilberforce).

⁸³ (1992) 177 CLR 106, 166 (Brennan J).

⁸⁴ *Ibid*.

⁸⁵ (1994) 179 CLR 226 (*‘Peverill’*).

⁸⁶ *Ibid* 235 (Mason CJ, Deane and Gaudron JJ).

⁸⁷ *Ibid* 241–2 (Brennan J).

⁸⁸ *Ibid* 245. His Honour found that the assignee practitioner acquired a statutory right, which, as between the practitioner and the Commonwealth, was a ‘gratuity’.

⁸⁹ *ICM* (n 35) 201 [147] (Hayne, Kiefel and Bell JJ). French CJ, Gummow and Crennan JJ appeared to agree, although they held it was unnecessary to determine whether the bore licenses were proprietary rights: ‘It often has been remarked that the facility given by statute

The rules governing assignability of a cause of action are somewhat detailed. A chose in action constituted by a cause of action is not generally assignable at common law. Choses in action may be assignable in equity, but a bare right of action is generally not assignable, as this is likely to amount to maintenance.⁹⁰ However, the doctrine of maintenance is now more tenuous following its abolition as a crime and tort in most Australian states and the High Court's decision in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*.⁹¹ However, such an assignment will be unobjectionable if the assignee had a sufficient interest in the cause of action,⁹² which might occur if the assignee also received a right of property to which the right of action is annexed.⁹³ Further, there are statutory provisions providing for assignments of legal choses in action.⁹⁴

In any event, the assignability of a statutory cause of action is said to depend upon the terms of the statute,⁹⁵ and a cause of action for damages under s 82 of the former *Trade Practices Act 1974* (Cth), for example, has been held not to be assignable.⁹⁶

In *Georgiadis v Australian and Overseas Telecommunications Corporation* ('*Georgiadis*'), Brennan J (in the majority), in finding that a chose in action for damages for negligence was property, commented that assignability was not the test given that its non-assignability was to do with public policy rather than the nature of the claim.⁹⁷ Dawson J (in the minority), commented that as 'a personal right which is not capable of assignment at law or in equity', the chose 'would, in other contexts, not be regarded as property', though his

for the transfer of rights created by or pursuant to that statute is an indication that for the general purposes of the law the rights may be classified as proprietary in nature.' at 178 [76].

⁹⁰ That is, the support of an action by a person who has no interest in it: see *Glegg v Bromley* [1912] 3 KB 474, 489–90 (Parker J).

⁹¹ *Campbells* (n 70) 425–33 [66]–[86] (Gummow, Hayne and Crennan JJ).

⁹² Though there may be a slight divergence between the modern House of Lords approach in *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 and the earlier High Court authority of *Poulton v Commonwealth* (1953) 89 CLR 540.

⁹³ JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 293 [6-480].

⁹⁴ See, eg, *Property Law Act 1958* (Vic) s 134.

⁹⁵ Heydon, Leeming and Turner (n 93) 295 [6-480].

⁹⁶ See, eg, *Park v Allied Mortgage Corporation Ltd* [1993] ATPR (Digest) ¶46-105, 53,469. See also the cases cited in Heydon, Leeming and Turner (n 93) 295 [6-480] nn 570–1.

⁹⁷ (1994) 179 CLR 297, 311 ('*Georgiadis*').

Honour found it unnecessary to decide whether the ‘bare right of action’ was property in that case.⁹⁸

As noted above, assignability (implying the ability to assign for consideration) might have some relevance to the ‘private free market’ philosophical justification for property though, given the various above limits to assignability of choses, this is not completely clear.

C ‘Acquisition’ of Choses in Action

1 Causes of Action — Georgiadis

The leading case on acquisition by the Commonwealth of a private cause of action is *Georgiadis*. In that case, the plaintiff challenged s 44(1) of the *Commonwealth Employees Rehabilitation and Compensation Act 1988* (Cth), which had barred his common law right to damages. The prior legislation, the *Compensation (Commonwealth Employees) Act 1971* (Cth), had set up a scheme for workers compensation payments but had preserved the right to recover at common law assuming there was negligence.⁹⁹ The cause of action was therefore statutory in the sense that it relied upon the 1971 Act, but arguably not statutory to the extent that the 1971 Act merely preserved the common law. Section 45 of the 1988 Act barred such common law actions unless the action had already been commenced. Mr Georgiadis’ relevant injuries occurred in 1985 and 1986 and he had not commenced actions. He asserted that the later Act was invalid by reason that it effected an acquisition of his property, namely his right to bring an action for common law damages.¹⁰⁰ The majority found that the Commonwealth had acquired a distinct benefit or financial gain in the form of a release from liability for damages.¹⁰¹ The effect of the Commonwealth law was to ‘extinguish a vested cause of action that arose under the general law’ even if ‘the right to proceed against the Commonwealth [was] properly identified as a statutory right’¹⁰²

The majority found that the effect of the extinguishment of the right was to confer a distinct financial benefit on the Commonwealth and its agencies in

⁹⁸ Ibid 314.

⁹⁹ Ibid 301–2 (Mason CJ, Deane and Gaudron JJ).

¹⁰⁰ Ibid 303 (Mason CJ, Deane and Gaudron JJ).

¹⁰¹ Ibid 306 (Mason CJ, Deane and Gaudron JJ), 311 (Brennan J).

¹⁰² Ibid 306 (Mason CJ, Deane and Gaudron JJ). The ‘statutory right’ was apparently a reference to s 56 and s 64 of the *Judiciary Act 1903* (Cth), which removed the general immunity of the Crown in tort and thus allowed an action such as Mr Georgiadis’s to proceed: ibid 312 (Brennan J).

respect of their pre-existing liability for employment injuries and was ‘no different from that involved in the extinguishment of a vested cause of action against the Commonwealth for goods sold and delivered.’¹⁰³ It was found that Mr Georgiadis provided labour ‘on the basis that [he was] entitled to damages at common law as well as workers’ compensation benefits if injured as a result of [his employer’s] negligence.’¹⁰⁴ Thus, s 44 was, in substance, ‘a law for the acquisition of causes of action ... which vested in employees before s 44 came into operation’¹⁰⁵

The majority did note however that

[t]he position may be different in a case involving the extinguishment or modification of a right that has no existence apart from statute. That is because, prima facie at least and in the absence of a recognized legal relationship giving rise to some like right, a right which has no existence apart from statute is one that, of its nature, is susceptible of modification or extinguishment. There is no acquisition of property involved in the modification or extinguishment of a right which has no basis in the general law and which, of its nature, is susceptible to that course. A law which effected the modification or extinguishment of a right of that kind would not have the character of a law with respect to the acquisition of property within s 51(xxxi) of the *Constitution*.¹⁰⁶

One of the dissenting judges, McHugh J, found that the plaintiff’s right to bring his action was dependent upon federal law and was always liable to be revoked by federal law. Looking at the matter as partly one of characterisation,¹⁰⁷ his Honour noted that if a right was dependent upon a ‘federal law enacted under a power other than s 51(xxxi)’, and could be extinguished under that power, then that extinguishment would not fall within the terms of s 51(xxxi).¹⁰⁸

Shortly after, in *Commonwealth v Mewett* (*‘Mewett’*), in similar factual circumstances, the Commonwealth argued that *Georgiadis* was wrongly decided and urged the High Court to reopen the decision and adopt the

¹⁰³ *Georgiadis* (n 97) 306 (Mason CJ, Deane and Gaudron JJ).

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid* 305–6 (Mason CJ, Deane and Gaudron JJ) (citations omitted).

¹⁰⁷ See below Part IV(C)(6).

¹⁰⁸ *Ibid* 325 (McHugh J).

dissent of McHugh J in *Georgiadis*.¹⁰⁹ The judges in *Mewett* rejected the view that *Georgiadis* should be reopened.¹¹⁰

In *Smith v ANL Ltd* ('ANL'), there was no argument that *Georgiadis* or *Mewett* were incorrectly decided, but there was argument whether imposing a six-month limitation period on bringing the action in that case was, unlike the bar to action in *Georgiadis*, not an acquisition.¹¹¹ Gleeson CJ found the modification to be an acquisition,¹¹² as did Kirby J and Callinan J.¹¹³ Gaudron and Gummow JJ found that it did more than 'impair the enjoyment' of the property and 'impeached' the chose in action causing 'a correlative and significant benefit' to the defendant.¹¹⁴ Hayne J and McHugh J dissented, finding that to provide a six-month limitation period was not an acquisition.¹¹⁵ There was also an argument that the right of action of Mr Smith arose entirely under statute — the *ANL (Conversion into Public Company) Act 1988* (Cth) — which changed the nature of the entity against which the plaintiff's action lay from the Commonwealth to ANL. Gaudron and Gummow JJ appeared to reject the argument, finding that the causes of action were created at common law.¹¹⁶ Kirby J addressed that argument by finding that the only effect of the statute was to ensure that the common law right of the plaintiff survived against ANL 'in its reconstituted form', but did not 'convert the right into a mere creature of federal legislation'.¹¹⁷

2 Other Statutory Rights

Other cases have dealt with other statutory rights or other causes of action for wrongs.

Peverill, in 1994, dealt with rights to payments from consolidated revenue under the Medicare scheme. Though accepted as choses in action by most of the judges,¹¹⁸ Mason CJ, Deane and Gaudron JJ noted that 'statutory entitle-

¹⁰⁹ (1997) 191 CLR 471, 495 (Dawson J).

¹¹⁰ *Ibid* 503 (Dawson J), 512 (Toohey J), 532 (McHugh J), 552 (Gummow and Kirby JJ, Brennan CJ agreeing at 491, Gaudron J agreeing at 531).

¹¹¹ *ANL* (n 40) 499 [4]–[5] (Gleeson CJ).

¹¹² *Ibid* 500 [7].

¹¹³ *Ibid* 530 [108] (Kirby J), 556 [195] (Callinan J).

¹¹⁴ *Ibid* 512 [46].

¹¹⁵ *Ibid* 536 [130] (Hayne J, McHugh J agreeing at 515 [56]).

¹¹⁶ *Ibid* 502 [16].

¹¹⁷ *Ibid* 523 [83].

¹¹⁸ *Peverill* (n 85) 235 (Mason CJ, Deane and Gaudron JJ), 249 (Dawson J), 253 (Toohey J), 263 (McHugh J). Brennan J found that the right did not constitute property: at 243–4.

ments to receive payments from consolidated revenue which were not based on antecedent proprietary rights recognized by the general law' were rights which, as a general rule, were 'inherently susceptible of variation'.¹¹⁹

In 1998, in *Commonwealth v WMC Resources Ltd* ('WMC'), there was no talk of the right being a chose in action, though there was a statutory permit to explore for petroleum granted to WMC in an area of disputed sovereignty between Australia and Indonesia.¹²⁰ After negotiations produced a treaty on the matter, a law giving effect to that treaty was enacted reducing the area covered by the permit. WMC claimed an acquisition of its property not on just terms. The majority did not find such an acquisition.¹²¹

Brennan CJ found no acquisition of property at all. His Honour stated that 'a purely statutory right is by nature susceptible of modification or extinguishment', so that 'its modification or extinguishment works no acquisition of property'.¹²² His Honour went on to hold, however, that it did not follow that a Commonwealth law that extinguished purely statutory rights and had 'no basis in the general law' could never effect an 'acquisition of property' within s 51(xxxi). His Honour suggested that if statutory proprietary rights were conferred on A, and a reciprocal liability imposed on B, a law which extinguished A's rights could effect an acquisition of property by B.¹²³

Gaudron J noted that if a law 'modifie[d] or extinguishe[d] a statutory right which ha[d] no basis in the general law in circumstances in which some person obtain[ed] some consequential advantage or benefit in relation to property', that law would 'ordinarily effect an acquisition'.¹²⁴ Her Honour found, however, that the Act 'simply modified a statutory right' of WMC, which 'had no basis in the general law and which was inherently susceptible to that course and, thus, did not effect an acquisition of property'.¹²⁵

¹¹⁹ Ibid 237.

¹²⁰ *WMC* (n 40) 9 [1] (Brennan CJ).

¹²¹ Ibid 20 [24] (Brennan CJ), 38 [86] (Gaudron J), 58 [149]–[150] (McHugh J), 75 [203] (Gummow J).

¹²² Ibid 16 [16].

¹²³ Ibid 16–17 [16].

¹²⁴ Ibid 36 [79].

¹²⁵ Ibid 38 [86].

McHugh J also noted that the power to make laws with respect to a subject described in s 51 carried with it the power to amend or repeal a law made on that subject:

A property interest that is created by federal legislation, where no property interest previously existed, is necessarily of an inherently determinable character and is always liable to modification or extinguishment by a subsequent federal enactment. Section 51(xxxi) therefore does not ordinarily withdraw from the Parliament the authority to use another s 51 power to revoke or amend legislation that has been passed under that power, even when the legislation has created a property right.¹²⁶

Unlike Brennan CJ and Gaudron J, McHugh J found no exception to this where a benefit was conferred by the statute modifying the right. His Honour held that the ‘fact that the Commonwealth or some other person might be viewed as benefiting from that alteration or revocation [was] irrelevant’.¹²⁷

Along the same lines as Brennan CJ and Gaudron J, Gummow J also found that the Commonwealth’s submission that ‘any right which has no existence apart from a law of the Commonwealth “is inherently subject to modification or diminution by later Commonwealth statute”’ was ‘too broad’.¹²⁸ His Honour made reference to intellectual property rights created by federal statutes and noted that such ‘species of exclusive right’ could constitute property to which s 51(xxxi) may apply.¹²⁹ This view was to be developed in *Attorney-General (NT) v Chaffey* (*‘Chaffey’*), referred to below.¹³⁰

Kirby J distinguished interests that are ‘ephemeral, prone to ready variation or dependent upon benefits paid out of the consolidated revenue’ with interests that were ‘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

¹²⁶ Ibid 51 [134].

¹²⁷ Ibid 51–52 [134].

¹²⁸ Ibid 70 [182].

¹²⁹ Ibid 70 [184]. This might be a reference to the rights of intellectual property themselves rather than the choses in action rights that might arise from their infringement. In any event, it can also be noted that some intellectual property rights do not arise solely under the *Copyright Act 1968* (Cth) but may be part of the ‘general law’. Some appear to date back to 15th century England as well as the *Copyright Act 1710*, 8 Anne, c 21 (*‘Statute of Anne’*): see Staniforth Ricketson, *The Law of Intellectual Property* (Law Book, 1984) 49 [3.2].

¹³⁰ (2007) 231 CLR 651, 664 [23]–[24] (Gleeson CJ, Gummow, Hayne and Crennan JJ) (*‘Chaffey’*).

law'.¹³¹ His Honour noted that the creation of new property interests by federal legislation could 'scarcely be a consideration' putting such interests 'beyond the protection of s 51(xxxi)', as the Commonwealth could ordinarily only create property interests by legislation.¹³²

In 2007, *Chaffey* dealt with a guarantee under the *Northern Territory (Self-Government) Act 1978* (effectively the constitution of the Northern Territory) that was similar to s 51(xxxi) of the *Constitution* in requiring just terms for acquisition of property.¹³³ Mr Chaffey was an injured worker and calculation of his compensation under the relevant statute was by reference to his 'remuneration'. During his employment, Mr Chaffey had received superannuation contributions of 10% of salary. Mr Chaffey was injured in 2003, but in 2004, the Northern Territory government enacted a law excluding superannuation payments from 'remuneration', which, in effect, operated retrospectively.¹³⁴ Mr Chaffey claimed this had the effect of reducing the amount of his pre-existing right to compensation and was thus an acquisition of his property.¹³⁵

Effectively adopting the position of Gummow J in *WMC*,¹³⁶ the majority found that

[w]here the asserted 'property' has no existence apart from statute further analysis is imperative.

It is too broad a proposition ... that the contingency of subsequent legislative modification or extinguishment removes all statutory rights and interests from the scope of s 51(xxxi).¹³⁷

The majority thus appeared to agree with Gummow J's view in *WMC* that intellectual property rights, for instance, may be intended to subsist permanently, although the statutory licensing scheme for off-shore petroleum exploration in *WMC* was 'constructed so as to subject the scope and incidents of licences to the form of the legislation from time to time'.¹³⁸ Thus, 'by express legislative stipulation in existence at the time of the creation of the

¹³¹ *Ibid* 99 [253].

¹³² *Ibid*.

¹³³ *Chaffey* (n 130).

¹³⁴ *Ibid* 659–61 [5]–[13] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

¹³⁵ *Ibid* 663 [19] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

¹³⁶ *WMC* (n 40) 58–75 [152]–[205] (Gummow J).

¹³⁷ *Ibid* 664 [23]–[24] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

¹³⁸ *Ibid* 664 [25] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

statutory “right”, its continued and fixed content depended upon the will from time to time of the legislature which created that “right”¹³⁹

In *Wurridjal v Commonwealth* (*‘Wurridjal’*), the Minister for Families, Community Services and Indigenous Affairs had introduced various Bills designed to support what he described as an emergency response by the Commonwealth Government to deal with alleged sexual abuse of Aboriginal children in the Northern Territory.¹⁴⁰ The Minister said that the Commonwealth Government had decided to use the “territories power available under the *Constitution*” to make laws for the Northern Territory’ and that the government ‘had a need to “control the land in the townships for a short period”¹⁴¹ The measures applied to Northern Territory Aboriginal communities on land scheduled under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and five-year leases were to be created on that land in favour of the Commonwealth. The Minister described the ‘acquisition’ of the leases as ‘crucial’ to improving living conditions.¹⁴² ‘Underlying ownership by traditional owners’ was to be preserved and ‘compensation, “when required by the *Constitution*”, would be paid.¹⁴³

The land rights in question arose partly under an Act, so there was some debate about statutory rights being of their nature susceptible to extinguishment. However, it seems that the Court did not consider the rights as purely statutory. Gummow and Hayne JJ spoke of statutory rights whose ‘continued and fixed content depended upon the will from time to time of the legislature’ and found that ‘the registered fee simple owned by the Land Trust [was] not of that character.¹⁴⁴ Kirby J found that the rights in question were not susceptible to ‘abolition or modification’, as at least some of those rights ‘derived from long-standing Aboriginal tradition’ and were enforced by the courts under the general law.¹⁴⁵

¹³⁹ Ibid.

¹⁴⁰ (2009) 237 CLR 309, 333 [1] (French CJ) (*‘Wurridjal’*).

¹⁴¹ Ibid 333–4 [3]–[4] (French CJ) (citations omitted), quoting Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 10–11 (Mal Brough).

¹⁴² *Wurridjal* (n 140) 334 [5] (French CJ) (citations omitted), quoting Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 13 (Mal Brough).

¹⁴³ *Wurridjal* (n 140) 334 [5] (French CJ) (citations omitted), quoting Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 14 (Mal Brough).

¹⁴⁴ *Wurridjal* (n 140) 383 [172].

¹⁴⁵ Ibid 422–3 [299] (Kirby J).

Crennan J, who was in the minority, nevertheless gave a useful summary of the law relating to acquisition of statutory rights,¹⁴⁶ which had no existence apart from statute. Some were said to be of their nature ‘susceptible to modification’, but ‘the contingency of subsequent legislative modification or extinguishment does not automatically remove a statutory right from the scope of s 51(xxxi)’.¹⁴⁷ Her Honour held:

[T]he extent to which a right created by statute may be modified by subsequent legislation without amounting to an acquisition of property under s 51(xxxi) must depend upon the nature of the right created by statute. It may be evident in the express terms of the statute that the right is subject to subsequent statutory variation. It may be clear from the scope of the rights conferred by the statute that what appears to be a new impingement on the rights was in fact always a limitation inherent in those rights. The statutory right may also be a part of a scheme of statutory entitlements which will inevitably require modification over time.¹⁴⁸

In *ICM*, the rights in question were rights to drill for bore water which originally arose under New South Wales (‘NSW’) legislation from 1912.¹⁴⁹ Though a reduction in rights through a NSW amendment of NSW legislation could not directly infringe the *Constitution*, it was argued that the Commonwealth’s role in granting funding to NSW as part of a scheme for this purpose did constitute conduct infringing s 51(xxxi).¹⁵⁰ There was some discussion as to whether bore rights were inherently susceptible of variation in that they were subject to restriction or suspension during periods of water shortage (and cancellation for failure to comply).¹⁵¹ French CJ, Gummow and Crennan JJ did not decide the point,¹⁵² but Hayne, Kiefel and Bell JJ found

¹⁴⁶ Ibid 437–40 [356]–[365]. Crennan J found no acquisition of property: at 465 [446]. The majority did find an acquisition of property from the relevant Land Trust: at 365 [107] (French CJ), 389 [195] (Gummow and Hayne JJ), 423 [302] (Kirby J), 467 [452] (Kiefel J). However, French CJ, Gummow and Hayne JJ (Crennan J agreeing) and Kiefel J found no acquisition of the plaintiffs’ entitlements under s 71 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth): at 367 [115] (French CJ), 383 [174] (Gummow and Hayne JJ), Crennan J agreeing at 456 [408]), 468 [455] (Kiefel J).

¹⁴⁷ *Wurridjal* (n 140) 439–40 [363] (citations omitted).

¹⁴⁸ Ibid 440 [364] (citations omitted).

¹⁴⁹ *ICM* (n 35) 182 [92] (Hayne, Kiefel and Bell JJ).

¹⁵⁰ Ibid 160 [7] (French CJ, Gummow and Crennan JJ).

¹⁵¹ Ibid 178–9 [77]–[78] (French CJ, Gummow and Crennan JJ).

¹⁵² Ibid 179 [80].

that the bore licences, though property,¹⁵³ were solely creatures of statute and ‘were inherently susceptible to change or termination’.¹⁵⁴

In a notable dissent, Heydon J found that the bore rights were property arising under statute rather than common law,¹⁵⁵ but indicated that other characteristics were relevant to the enquiry of whether the rights of the licensees granted as permits under a statutory power were inherently susceptible to modification.¹⁵⁶ These other factors (seemingly impacting the nature of the statutory right) included the permittees’ significant expense in obtaining, holding or exploiting the permit, and the substantial investment and significant obligations that had been imposed on the licensee as holder of the permit.¹⁵⁷ His Honour noted that the breadth of state powers under the original legislation to affect the bore rights ‘might affect the value of the property, but they were not so broad as to prevent it being categorised as property’.¹⁵⁸ Finally, his Honour held that unlike in *WMC*, nothing in the formula of the NSW legislation itself indicated the possibility of amendment.¹⁵⁹

In its most recent consideration of the subject, the High Court gave strong support for the general doctrine that rights created solely by statute were by their nature inherently liable to variation. In *Cunningham v Commonwealth*, the plaintiffs were former members of federal Parliament who were entitled to retiring allowances and a Life Gold Pass for domestic travel.¹⁶⁰ They claimed that legislative changes made to those rights and determinations of the Remuneration Tribunal constituted acquisitions of their property otherwise than on just terms.¹⁶¹

French CJ, Kiefel and Bell JJ found that the rights to retiring allowances were not ‘of a fixed and certain kind’¹⁶² and were subject to the relevant Act and the ‘form which it may take from time to time’.¹⁶³ Their Honours held

¹⁵³ Ibid 201 [147].

¹⁵⁴ Ibid 200 [144] (citations omitted).

¹⁵⁵ Ibid 218 [197]. His Honour also noted that the rights ‘rested on a statute which did have a basis in the general law in the sense that it derived from and modified it’: at 223–4 [211].

¹⁵⁶ Ibid 221–2 [207].

¹⁵⁷ Ibid quoting *ANL* (n 40) 544 [163] (Callinan J) and *WMC* (n 40) 99 [253] (Kirby J).

¹⁵⁸ *ICM* (n 35) 222 [208].

¹⁵⁹ Ibid 223–4 [211].

¹⁶⁰ (2016) 259 CLR 536, 545 [3] (French CJ, Kiefel and Bell JJ).

¹⁶¹ Ibid 545–6 [4] (French CJ, Kiefel and Bell JJ).

¹⁶² Ibid 553 [36].

¹⁶³ Ibid 554 [39] (citations omitted).

that an entitlement to a retiring allowance was ‘inherently variable’,¹⁶⁴ as was the Life Gold Pass.¹⁶⁵ Their Honours held:

Rights which have only a statutory basis are more liable to variation than others ... There are, however, some statutory rights which, having regard to their character and the context and purpose of the statute creating them, can be regarded as inherently variable.¹⁶⁶

Gageler J found that the legislative changes ‘did not reduce the amount’ of the retiring allowance,¹⁶⁷ but found on the other hand that alterations to the Life Gold Pass diminished statutory rights to the financial benefit of the Commonwealth.¹⁶⁸ His Honour held that this did effect an acquisition of property.¹⁶⁹

Keane J agreed that the rights were, ‘by reason of the terms in which they were created, susceptible to alteration as the Parliament [saw] fit’.¹⁷⁰ They were not proprietary in character, had ‘no existence apart from statute’,¹⁷¹ and were not analogous to proprietary rights recognised under statute, such as copy-right and patents.¹⁷² The plaintiffs’ right to a retiring allowance was not a vested right or cause of action earned by virtue of their service because parliamentarians were not employees of the Commonwealth and the rights were not analogous to contractual rights recognised under general law.¹⁷³

Nettle J found ‘the continued existence and content of each plaintiff’s right to be paid a retiring allowance was, by the statutory terms by which it was created, subjected to the will from time to time of the legislature which created it’.¹⁷⁴ However, his Honour held that whether or not an allowance was

¹⁶⁴ Ibid 556 [43].

¹⁶⁵ Ibid 557–8 [51].

¹⁶⁶ Ibid 555–6 [43].

¹⁶⁷ Ibid 572 [103].

¹⁶⁸ Ibid 575 [114].

¹⁶⁹ Ibid 576 [117].

¹⁷⁰ Ibid 577 [124].

¹⁷¹ Ibid 584 [153].

¹⁷² Ibid 584 [155]. In that regard, his Honour noted a distinction between rights to receipts and rights that exist independently of the receipts they may generate. This may have echoes of the old distinction between rights *in personam* and rights *in rem* discussed in Part III(A) above. This may also raise the question of whether there is any meaningful distinction for these purposes between intellectual property rights created by statute as property, and remedies for infringement of intellectual property rights created by statute as property.

¹⁷³ Ibid 588–9 [170]–[172] (Keane J).

¹⁷⁴ Ibid 602 [222].

‘inherently defeasible’ depended upon the kind of allowance it was and the terms of the statute creating it.¹⁷⁵

Gordon J found that the right to a retiring allowance was a right created by statute and was inherently liable to variation, and was ‘at best, a right to receive whatever level of benefit was provided from time to time.’¹⁷⁶ Her Honour made similar findings in relation to the Life Gold Pass which was even more ‘inherently unstable.’¹⁷⁷

3 *General Law Origins of Rights and Accrued Rights*

Other issues need mention. The first, as touched upon in *Georgiadis*, is the question of statutory rights that replace general law rights, codify general law rights or otherwise have their origins in earlier general law rights.¹⁷⁸ In some cases, the origins of statutory rights may be murky as they emerge from early cases or statutes and undergo evolution in successive statutory incarnations. Some of the rights in Table A may be seen as new creations of statute (eg damages for discrimination) but not many. In some cases, new rights, such as the right to damages for misleading and deceptive conduct for instance, are apparently new and separate but have conceptual origins in older doctrines (such as contractual misrepresentation and tortious deceit). A finding that a right of action is a purely statutory creation might thus be reasonably rare.

A second issue, which was also noted in *Georgiadis*, was the relevance of a right being accrued or vested. A chose in action in the form of a cause of action cannot be said to exist or to be proprietary until that cause has accrued. That is, there must be a factual matrix — events — that gives rise to the remedy. Things are different if the facts are yet to exist. Removing a right to sue in relation to events that have not yet occurred cannot be an acquisition of property. The consequences of this observation may be that such rights may be liable to be removed over the longer term provided any extant accrued claims (but not future claims) are compensated.

4 *‘Acquisition’ by or to the Benefit of a Third Party*

Some laws for regulatory or other purposes which restrict or deprive one person of property rights often have the effect of giving another person an

¹⁷⁵ Ibid 602 [223].

¹⁷⁶ Ibid 611 [252].

¹⁷⁷ Ibid 612 [253].

¹⁷⁸ *Georgiadis* (n 97) 305–6 (Mason CJ, Deane and Gaudron JJ).

advantage. This would clearly be the case with legislative reductions in the content of a cause of action which will tend to enhance the position of the potential defendant to such action. Unless the Commonwealth happens to be the defendant (as in *Georgiadis*), then it does not ‘acquire’ the property (or benefit), yet someone else does, through the effect of the Commonwealth law. Does s 51(xxxi) apply to acquisitions by the Commonwealth to the benefit of third parties?

The suggestion that it does goes back to *McClintock v Commonwealth* (*McClintock*) in 1947.¹⁷⁹ That case involved a wartime requisitioning by the Commonwealth of pineapples from a grower, Mr McClintock, under national security regulations. The plaintiff was paid a price which he later claimed to be less than the true value of the goods. The growers were required to forward a certain proportion of their crop to the loaders of the Committee of Direction of Fruit Marketing (‘COD’) at the nearest railhead to be delivered to canneries, so that the canneries could supply the needs of the armed forces.¹⁸⁰ One issue in the case was that of who was actually acquiring the pineapples — the Commonwealth, the COD or the canneries.

Latham CJ found no need to decide the constitutional issue, as he found that the price that had been agreed to by Mr McClintock was fair so that reasonable compensation was paid.¹⁸¹

Starke J found that the constitutional power to make laws for the acquisition of property on just terms was ‘not confined to laws for the acquisition of property by the Commonwealth alone’, as was contended in the case.¹⁸² His Honour noted that ‘[a]uthorities, independent of the Commonwealth, may be set up for various purposes under the constitutional powers of the Commonwealth and endowed with authority to acquire property.’¹⁸³

Williams J noted that some of the directions given ‘did not purport to requisition the pineapples on behalf of the Commonwealth’ but acted to ‘compel the growers to deliver a certain proportion of their pineapples to the canneries and to compel the canneries to pay the growers certain prices for these pineapples.’¹⁸⁴ The Commonwealth purported to control such output of the canneries as was required for the armed forces and paid prices to the

¹⁷⁹ (1947) 75 CLR 1 (*McClintock*).

¹⁸⁰ *Ibid* 34 (Williams J).

¹⁸¹ *Ibid* 20.

¹⁸² *Ibid* 23.

¹⁸³ *Ibid*.

¹⁸⁴ *Ibid* 35.

canneries sufficient to enable them to pay the growers government-set prices and to make a profit.¹⁸⁵

His Honour found that ‘an order compelling particular persons to deliver specific food to the Commonwealth or to some other body or person’ was legislation for the compulsory acquisition of that food by the Commonwealth or another body or person within s 51(xxxi).¹⁸⁶ Accordingly, the pineapples were acquired compulsorily either by the Commonwealth or the canneries. His Honour went on to hold that it was unnecessary to decide whether the acquisition was by the Commonwealth or the canneries because it was necessary that the legislation should provide just terms for the acquisition, regardless of whether the pineapples were compulsorily acquired by either.¹⁸⁷

PJ Magennis Pty Ltd v Commonwealth (‘*Magennis*’) in 1949 involved provision of funds by the Commonwealth for New South Wales to acquire land (so that the Commonwealth itself did not acquire the land).¹⁸⁸ Latham CJ held:

The constitutional provision is not limited in terms to laws providing for the acquisition of property by the Commonwealth itself. The words are general — ‘with respect to the acquisition of property.’ It is obvious that the constitutional provision could readily be evaded if it did not apply to acquisition by a corporation constituted by the Commonwealth or by an individual person authorized by a Commonwealth statute to acquire property.¹⁸⁹

This view was favoured in *Trade Practices Commission v Tooth & Co Ltd* in 1979, which involved a law affecting landlords who punished tenants who sold products of the landlord’s competitor.¹⁹⁰ The law made it illegal for the landlord to refuse to renew leases of such tenants. It was argued that the law operated to result in the acquisition of the landlord’s property. Gibbs J noted that s 51(xxxi) was ‘not limited to acquisitions by the Commonwealth’¹⁹¹ and Mason J agreed that s 51(xxxi) ‘extend[ed] to laws for the acquisition of

¹⁸⁵ Ibid.

¹⁸⁶ Ibid 36.

¹⁸⁷ Ibid.

¹⁸⁸ (1949) 80 CLR 382 (‘*Magennis*’).

¹⁸⁹ Ibid 401.

¹⁹⁰ *Tooth* (n 15).

¹⁹¹ Ibid 407–8, citing *McClintock* (n 179), *Bank Nationalisation Case* (n 76) and *Magennis* (n 188).

property by persons other than the Commonwealth or an agency of the Commonwealth.¹⁹²

In a lengthy consideration of the issue, Stephen J noted a divergence of views as to whether s 51(xxxi) applied to acquisitions by persons other than the Commonwealth.¹⁹³ His Honour observed that on one hand, there were passages in *McClintock*, *Jenkins v Commonwealth*, *Bank Nationalisation Case* and *Magennis* suggesting that it did.¹⁹⁴ On the other hand, there was scepticism from Sir Owen Dixon in *Andrews v Howell* (treating s 51(xxxi) as contemplating the acquisition of property ‘for purposes of the Executive Government’ and doubting whether it applied at all where that Executive had no interest in the property or in its future use)¹⁹⁵ and *WH Blakeley & Co Pty Ltd v Commonwealth* (where the seven members of the Court observed that ‘acquisition by the Commonwealth itself is at the centre of the legislative power’).¹⁹⁶ Stephen J noted finally the case of *Attorney-General v Schmidt* (‘*Schmidt*’), where Dixon CJ spoke of the scope of s 51(xxxi) as ‘pointed at the acquisition of property by the Commonwealth’ and not affecting ‘anything which lies outside the very general conception expressed by the phrase “use and service of the Crown”’.¹⁹⁷ Having noted the divergence of views, Stephen J did not decide the question.¹⁹⁸

In 1993, in *Australian Tape Manufacturers Association Ltd v Commonwealth* (‘*Australian Tape Manufacturers*’),¹⁹⁹ Mason CJ, Brennan, Deane and Gaudron JJ found that the fact that the obligation imposed by the statute in that case was to pay the levy to an entity other than the Commonwealth did not preclude the imposition of the obligation to pay the levy from being an ‘acquisition of property’ for the purposes of s 51(xxxi).²⁰⁰ Dawson and Toohey JJ also found that ‘it is now settled that the paragraph may apply

¹⁹² Ibid 427, citing *Jenkins v Commonwealth* (1947) 74 CLR 400 (‘*Jenkins*’), *McClintock* (n 179), *Magennis* (n 188) and *Real Estate Institute of New South Wales v Blair* (1946) 73 CLR 213.

¹⁹³ *Tooth* (n 15) 423–5.

¹⁹⁴ Ibid 424, citing *McClintock* (n 179), *Jenkins* (n 192), *Bank Nationalisation Case* (n 76) and *Magennis* (n 188).

¹⁹⁵ (1941) 65 CLR 255, 281–2 (Dixon J), quoted in *Tooth* (n 15) 424 (Stephen J).

¹⁹⁶ (1953) 87 CLR 501, 521 (Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ), quoted in *Tooth* (n 15) 425 (Stephen J).

¹⁹⁷ *Tooth* (n 15) 425 (Stephen J), quoting *A-G v Schmidt* (1961) 105 CLR 361, 372–3 (Dixon CJ) (‘*Schmidt*’).

¹⁹⁸ *Tooth* (n 15) 425.

¹⁹⁹ (1993) 176 CLR 480 (‘*Australian Tape Manufacturers*’).

²⁰⁰ Ibid 510.

where the compulsory acquisition of property is by some person other than the Commonwealth or an agency of the Commonwealth.²⁰¹

In 2000, in *ANL*, the Court found that a statutory change in the nature of the entity against which the plaintiff's action lay from the Commonwealth to ANL did not affect the constitutional guarantee, as acquisition referred to in that provision was 'not limited to acquisition by the Commonwealth or an agency of the Commonwealth'.²⁰² In *ICM*, the conception that s 51(xxxi) applied to acquisitions by 'another' was approved by four Justices.²⁰³

Despite such statements, it may not be completely clear that acquisitions benefitting third parties rather than the Commonwealth will always be acquisitions. There is still a lingering echo of Dixon CJ's suggestion that s 51(xxxi) applies only to acquisitions for use and service of the Crown,²⁰⁴ and the 'genuine adjustment' formula²⁰⁵ might provide another basis to suggest that it does not apply to acquisitions to the benefit of third parties.²⁰⁶ Certainly, the question of fairness that arises is why the Commonwealth should compensate citizens where the Commonwealth receives no benefit but a third party does. This then may also tie in with the 'loss and gain' issue, which will be discussed next.

5 *The Relationship between Loss and Gain in an Acquisition*

Given that at least one strand of authority suggests that statutory rights that give a benefit to the Commonwealth or, possibly, someone else may be 'property' the subject of the constitutional protection, it is useful to briefly consider what a 'benefit' may be. This is also connected with the interpretation of an 'acquisition'.

A statutory modification to a cause of action having the effect of limiting or reducing a claim or cause of action can clearly be seen to produce a corresponding benefit in the potential defendant who is wholly or partly released from liability. Though the constitutional protection safeguards 'property' and it is property that must be acquired or taken away, it is less clear whether this means that it is 'property' that must be received by the acquirer. The nature of the 'acquisition' may, in some cases, give less to the

²⁰¹ Ibid 526.

²⁰² *ANL* (n 40) 506 [27] (Gaudron and Gummow JJ) (citations omitted).

²⁰³ *ICM* (n 35) 196 [133] (Hayne, Kiefel and Bell JJ), 215 [190] (Heydon J).

²⁰⁴ *Schmidt* (n 197) 373.

²⁰⁵ See below Part IV(C)(7).

²⁰⁶ Tom Allen, 'The Acquisition of Property on Just Terms' (2000) 22(3) *Sydney Law Review* 351, 378–9.

acquirer than is taken from the original owner. The cases on this issue tend to focus on a gain by the Commonwealth, though their logic might be applicable to gain by someone else.

Commonwealth v Tasmania ('*Tasmanian Dam Case*')²⁰⁷ and *Newcrest Mining (WA) Ltd v Commonwealth* ('*Newcrest*')²⁰⁸ both concerned Commonwealth action to 'sterilize' land effectively as national parkland 'dedicated' for Commonwealth purposes.²⁰⁹ The Justices in *Tasmanian Dam Case* took differing views as to whether, in these circumstances, the Commonwealth or anyone else acquired a proprietary interest.²¹⁰

There was also discussion distinguishing measures which impaired an owner's exercise of proprietary rights (which would not involve an acquisition) and far-reaching restrictions upon the use of property (which may in appropriate circumstances involve an acquisition).²¹¹

In *Newcrest*, it was suggested that the Commonwealth's interest was 'enhanced by the sterilisation' and the property acquired was the 'benefit of relief from the burden of Newcrest's rights to carry on "operations for the recovery of minerals"'²¹² or the advantage of 'the acquisition of the land freed from the rights of Newcrest to occupy and conduct mining operations thereon.'²¹³ This was 'an identifiable and measurable advantage' relating to the ownership or use of property to 'satisfy the constitutional requirement of an acquisition.'²¹⁴ Gummow J held that there was no reason why this advantage 'should correspond precisely to that which was taken.'²¹⁵ Conversely, McHugh J found that 'even if there was effectively a diminution or extinguishment of all or part of Newcrest's interests,' there was no gain by the Commonwealth, which 'obtained nothing which it did not already have.'²¹⁶

Of more relevance to chuses was the observation of Brennan CJ in *WMC* that where a law of the Commonwealth creates a right, statutory modification

²⁰⁷ (1983) 158 CLR 1 ('*Tasmanian Dam Case*').

²⁰⁸ (1997) 190 CLR 513 ('*Newcrest*').

²⁰⁹ *Tasmanian Dam Case* (n 207) 145–6 (Mason J); *ibid* 530 (Brennan CJ).

²¹⁰ Mason J, Murphy J, and Brennan J found that the Commonwealth had not acquired any property: *Tasmanian Dam Case* (n 207) 146 (Mason J), 182 (Murphy J), 248 (Brennan J). Cf Deane J, who found that there was a purported acquisition: at 287.

²¹¹ *Ibid* 284 (Deane J) quoting *Tooth* (n 15) 414–15 (Stephen J).

²¹² *Newcrest* (n 208) 530 (Brennan CJ).

²¹³ *Ibid* 634 (Gummow J).

²¹⁴ *Ibid*.

²¹⁵ *Ibid* (citations omitted).

²¹⁶ *Ibid* 573 (McHugh J).

or extinguishment of that right effects its acquisition, but only if it ‘modifies or extinguishes a reciprocal liability to which the party acquiring the right was subject.’²¹⁷

In *Australian Tape Manufacturers*, Dawson and Toohey JJ held that for s 51(xxxi) to apply, ‘it must be possible to identify an acquisition of something of a proprietary nature’ and that ‘[t]he mere extinction or diminution of a proprietary right residing in one person does not necessarily result in the acquisition of a proprietary right by another.’²¹⁸

Mutual Pools & Staff Pty Ltd v Commonwealth (*‘Mutual Pools’*) in 1994 involved the Commonwealth’s obligation to refund sales tax to pool builders, which was received by the Commonwealth under an invalid tax law.²¹⁹ The Commonwealth law provided that it would not refund tax to pool builders where they had passed the tax onto their customers. A builder claimed an acquisition of his property.²²⁰ Deane and Gaudron JJ stated that the extinguishment of ‘rights in relation to property does not of itself constitute an acquisition of property’ unless there was ‘some identifiable and measurable countervailing benefit or advantage accruing to [the] other person as a result.’²²¹ They noted that ‘the extinguishment of a chose in action could, depending upon the circumstances, assume the substance of an acquisition of the chose in action by the obligee.’²²²

More recently, in 2012, in *JT International SA v Commonwealth* (a case involving the banning by Commonwealth law of branded tobacco packaging and the mandating of plain packaging), French CJ commented on the meaning of ‘acquisition’ as follows:

Taking involves deprivation of property seen from the perspective of its owner. Acquisition involves receipt of something seen from the perspective of the acquirer. Acquisition is therefore not made out by mere extinguishment of rights.²²³

French CJ, Gummow J, Hayne and Bell JJ and Kiefel J (Heydon J dissenting) all delivered judgments suggesting that though a benefit might have been

²¹⁷ *WMC* (n 40) 17 [17].

²¹⁸ *Australian Tape Manufacturers* (n 199) 528.

²¹⁹ (1994) 179 CLR 155 (*‘Mutual Pools’*).

²²⁰ *Ibid* 167–8 (Mason CJ).

²²¹ *Ibid* 185.

²²² *Ibid*.

²²³ (2012) 250 CLR 1, 33 [42] (citations omitted).

acquired by the Commonwealth, this benefit was not sufficiently proprietary in nature to infringe s 51(xxxi).²²⁴

Some commentators suggest that, in fact, the Court will find a ‘gain’ if the loss is large enough, so that the Court is driven as much by losses as by gains.²²⁵

Certainly, as has been noted in the context of winding back statutory causes of action, there is likely to be a gain to the potential defendant. This may not itself be proprietary, but providing there is sufficient benefit to the defendant, it is not necessarily clear that the former is required. In some cases, the benefit might even be characterised as proprietary given that the defendant might not lose property that she or he could otherwise have lost in an action against him or her.

6 Characterisation

Characterisation is likely to be an issue in relation to any variation of statutory choses in action. It involves identifying the head of constitutional power under which the amending law and/or the original enactment is made. Though a single law may possess more than one character,²²⁶ every law that may appear to involve an acquisition of property will not necessarily be a law that s 51(xxxi) applies to. An example is a law with respect to taxation. Though such laws may appear to involve acquisition of property, if a law can properly be characterised as a law with respect to taxation then it appears that its very nature will generally prevent it amounting to a law with respect to the acquisition of property.²²⁷ A reason for this is said to be the relationship between the taxation power in s 51(ii) and the power in s 51(xxxi), which

necessarily involves antinomy between what constitutes ‘taxation’ ... and what constitutes an ‘acquisition of property’ ... ‘taxation’ presupposes the absence of

²²⁴ Ibid 34 [42], 34–5 [44] (French CJ), 62 [147], 64 [154] (Gummow J), 73 [189] (Hayne and Bell JJ) 132 [372] (Kiefel J).

²²⁵ Duane L Ostler, ‘Gain as Loss: The High Court’s “Gain” Approach in Regulatory Acquisition Cases’ (2014) 26(1) *Bond Law Review* 66, 68.

²²⁶ See, eg, *Tasmanian Dam Case* (n 207) 270 (Deane J).

²²⁷ *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, 638 (Gibbs CJ, Wilson, Deane and Dawson JJ). See also *Federal Commissioner of Taxation v Clyne* (1958) 100 CLR 246, 263 (Dixon CJ) (‘Clyne’); *Federal Commissioner of Taxation v Barnes* (1975) 133 CLR 483, 494–5 (Barwick CJ, Mason and Jacobs JJ); *Tooth* (n 15) 408 (Gibbs J).

the kind of direct quid pro quo involved in the ‘just terms’ prescribed by s 51(xxxi).²²⁸

In *Australian Tape Manufacturers*, a scheme inserted into the *Copyright Act 1968* (Cth) for compensating the owners of copyrights for the private taping of sound recordings required vendors to pay a ‘royalty’ on blank tapes sold or hired in Australia. The Court found no unconstitutional acquisition of property on other than just terms, as the royalty was characterised by a majority (Mason CJ, Brennan, Deane and Gaudron JJ) as a tax.²²⁹

In *Mutual Pools*, the Commonwealth law provided that it would not refund tax to pool builders where they had passed the tax onto their customers. Mason CJ found this to be authorised under the s 51(ii) (taxation) power or the s 51(xxxix) (incidental) power in conjunction with the s 61 (executive government) power. His Honour held that

because the purpose served by an exercise of the taxation power conferred by s 51(ii) is compulsorily to acquire money for public purposes, a law that relates to the imposition of taxation will rarely, if ever, amount at the same time to a law with respect to the acquisition of property within the meaning of s 51(xxxi).²³⁰

Later, in *Nintendo Co Ltd v Centronics Systems Pty Ltd* in 1994, the law in question was characterised as a law with respect to intellectual property rights under s 51(xviii) of the *Constitution*.²³¹ In that case, the *Circuit Layouts Act 1989* (Cth) removed certain copyright protections for integrated circuit layouts and replaced them with a new scheme for protection of rights. When Centronics was sued under that regime for infringement of such rights, it raised several defences, including that the Act had effected an acquisition of its property on other than just terms (it was argued that the Act operated to confer on Nintendo the exclusive right to exploit certain circuits which were owned by Centronics).²³² The majority noted that the grant of Commonwealth legislative power which sustained the Act was that contained in s 51(xviii) and that it was the ‘essence’ of that grant of legislative power that it authorised ‘the making of laws which create, confer, and provide for the

²²⁸ *Australian Tape Manufacturers* (n 199) 508–9 (Mason CJ, Brennan, Deane and Gaudron JJ) (citations omitted). See also *Clyne* (n 227) 263 (Dixon CJ).

²²⁹ *Australian Tape Manufacturers* (n 199) 507.

²³⁰ *Mutual Pools* (n 219) 170–1 (citations omitted).

²³¹ (1994) 181 CLR 134, 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

²³² *Ibid* 164 (Dawson J).

enforcement of intellectual property rights in original compositions, inventions, designs and trademarks. It was also ‘the nature of such laws’ that they conversely limited and detracted from ‘the proprietary rights which would otherwise be enjoyed by the owners of affected property.’²³³ Thus, the majority held:

To the extent that such laws involve an acquisition of property from those adversely affected by the intellectual property rights which they create and confer, the grant of legislative power contained in s 51(xviii) manifests a contrary intention which precludes the operation of s 51(xxxi).²³⁴

In the same year in *Re DPP; Ex parte Lawler* (*Lawler*), a fishing boat had been forfeited to the Commonwealth under the *Fisheries Management Act 1991* (Cth).²³⁵ The law was found to be a law incidental to the fisheries power in s 51(x).²³⁶ Deane and Gaudron JJ noted that s 51(xxxi) applied ‘only to acquisitions of a kind that permit of just terms,’²³⁷ and was not

concerned with laws in connexion with which ‘just terms’ is an inconsistent or incongruous notion. Thus, it is not concerned with a law imposing a fine or penalty, including by way of forfeiture, or a law effecting or authorizing seizure of the property of enemy aliens or the condemnation of prize. Laws of that kind do not involve acquisitions that permit of just terms and, thus, they are not laws with respect to ‘acquisition of property’ ...²³⁸

In 2006, in *Theophanous v Commonwealth*, a law sought to reduce a former parliamentarian’s rights to parliamentary superannuation following his conviction of a corruption offence.²³⁹ The majority followed *Lawler*, holding that to characterise certain exactions of government such as taxation, fines, penalties, forfeitures or enforcement of a statutory lien as an acquisition of property would be ‘incompatible with the very nature of the exaction.’²⁴⁰

²³³ Ibid 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

²³⁴ Ibid 160–1 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

²³⁵ (1994) 179 CLR 270.

²³⁶ Ibid 286 (Deane and Gaudron JJ).

²³⁷ Ibid 285.

²³⁸ Ibid.

²³⁹ (2006) 225 CLR 101.

²⁴⁰ Ibid 126 [60] (Gummow, Kirby, Hayne, Heydon and Crennan JJ). It has been commented that the result of this finding is that ‘[i]ronically ... the most *obvious* compulsory acquisitions are precisely the ones to which the “constitutional guarantee” does not apply’: Paulina Fish-

Finally, in 2014, in *Attorney-General (NT) v Emmerson*, Northern Territory laws provided for the forfeiture of the property of thrice convicted drug traffickers.²⁴¹ It was accepted that a substantial amount of Emmerson's property subject to restraining orders (in excess of \$850,000) had been acquired through legitimate means and had no connection with any criminal offence. Emmerson claimed a breach of s 51(xxxi). The majority found no acquisition, holding that characterising the provisions as an acquisition of property without provision of just terms was erroneous, as the requirement of just terms was 'incompatible with the very nature of the exaction', being a punishment for crime.²⁴²

It is tempting to say, generally, that an acquisition under another head of constitutional power will not attract s 51(xxxi); however, this would be a misleading simplification. Section 51(xxxi) contemplates laws under that section that are made 'for any purpose in respect of which the Parliament has power to make laws'. In that sense, the section contemplates its own utilisation to make laws under other powers in s 51. Characterisation then appears to involve an analysis of the nature of a law and whether its purpose is in antinomy with the concept of just terms or a quid pro quo. If so, then it cannot be characterised as a law under s 51(xxxi), but if not, it might be a law under s 51(xxxi) notwithstanding that it is a law for the purpose of another power in s 51 or elsewhere.

There certainly appears to be something of a balancing act between the idea that s 51(xxxi) should not be able to be easily evaded and the principle that some laws of their nature fall outside the protection. This duality is illustrated by a passage from Dixon CJ in *Schmidt*:

It is hardly necessary to say that when you have, as you do in par. (xxx), an express power, subject to a safeguard, restriction or qualification, to legislate on a particular subject or to a particular effect, it is in accordance with the soundest principles of interpretation to treat that as inconsistent with any construction of other powers conferred in the context which would mean that they included the same subject or produced the same effect and so authorized the same kind of legislation but without the safeguard, restriction or qualification. But two ob-

man, 'Section 51(xxxi): A "Constitutional Guarantee" to Disappoint Property Owners' (2016) 6(1) *Property Law Review* 27, 36–7 (emphasis in original).

²⁴¹ (2014) 253 CLR 393.

²⁴² Ibid 438 [84] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), quoting *Theophanous v Commonwealth* (2006) 225 CLR 101, 126 [60] (Gummow, Kirby, Hayne, Heydon and Crennan JJ). An alternative analysis might be that they were acquisitions, but by performing the function of punishment for offences, they were 'just' and thus made on just terms.

servations must be made. First, it is necessary to take care against an application of this doctrine to the various powers contained in s 51 in a too sweeping and indiscriminating way. For it cannot have much to do with some of the subject matters of power upon the very terms in which they are conferred. The other observation is that the principle does not apply except with respect to the ground actually covered by par. (xxxi) of s 51.²⁴³

His Honour went on to give the example of laws with respect to bankruptcy allowing property to be sequestrated and vested in the Official Receiver with s 51(xxix) having no bearing on such laws.²⁴⁴

A law limiting or abrogating a cause of action such as any of those listed in Table A would certainly be a law with respect to the various powers under which those enactments were made. Whether it is also a law under s 51(xxix) might depend upon an analysis of the nature of the law itself, and whether it is in antinomy with the idea that just terms be provided on its abrogation. That, of course, may be a somewhat circular exercise and may bring the analysis back to the issues of whether statutory rights are of their nature liable to be removed or modified as discussed above.

7 *Genuine Adjustment Formula*

The genuine adjustment doctrine has some interrelationship with the issues of: (1) modification or extinguishment of purely statutory rights;²⁴⁵ (2) acquisition of property by a third party;²⁴⁶ (3) gain (benefit) and loss;²⁴⁷ and (4) characterisation.²⁴⁸ Yet, it also appears to be a doctrine that stands on its own. In *Tasmanian Dam Case*, Deane J noted in relation to laws causing benefits to flow to the Commonwealth or elsewhere:

Where the benefit involved represents no more than the adjustment of competing claims between citizens in a field which needs to be regulated in the com-

²⁴³ *Schmidt* (n 197) 371–2.

²⁴⁴ *Ibid* 372.

²⁴⁵ Whereby statutory entitlements not based on antecedent proprietary rights recognised by law may be adjusted, as discussed above Part IV(C)(2): see *Peeverill* (n 85) 237 (Mason CJ, Deane and Gaudron JJ); Patrick Keyzer, Christopher Goff and Asaf Fisher, *Principles of Australian Constitutional Law* (LexisNexis Butterworths, 5th ed, 2017) 286.

²⁴⁶ See *Allen* (n 206) 378–9.

²⁴⁷ Deane J analyses the ‘benefit’ to the Commonwealth in this manner in *Tasmanian Dam Case* (n 207) 283.

²⁴⁸ See Rosalind Dixon, ‘Overriding Guarantee of Just Terms or Supplementary Source of Power?: Rethinking s 51(xxix) of the Constitution’ (2005) 27(4) *Sydney Law Review* 639, 648–50.

mon interest, such as zoning under a local government statute, it will be apparent that no question of acquisition of property for a purpose of the Commonwealth is involved.²⁴⁹

In *Australian Tape Manufacturers*, Mason CJ, Brennan, Deane and Gaudron JJ also indicated that

where an obligation to make a payment is imposed as ... a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity, it is unlikely that there will be any question of an 'acquisition of property' within s 51(xxxi) of the *Constitution*.²⁵⁰

In *Mutual Pools*, Mason CJ discussed cases in which the relevant statute provided a 'means of resolving or adjusting competing claims, obligations or property rights of individuals as an incident of the regulation of their relationship'.²⁵¹ His Honour gave as examples the relationship between 'a bankrupt and the creditors in the bankruptcy, between the Crown and the person who brings in prohibited imports, and between the Crown and an enemy alien with respect to enemy property'.²⁵² His Honour held that 'in a context in which the law resolves or adjusts competing claims, obligations or property rights, it is not possible to regard the law as a law for the acquisition of property within the meaning of s 51(xxxi)'.²⁵³

In that case, his Honour found that because the relevant Act could be supported as a law that related to 'the imposition of taxation' and as a law that involved 'the adjustment of competing claims and obligations of individuals', it followed that it stood 'outside the constitutional conception of a law with respect to the acquisition of property'.²⁵⁴ Though most of the judges appeared to decide the matter mainly by reference to characterisation of the law as taxation, Deane and Gaudron JJ noted that some laws that incidentally acquired property in the course of regulation in the common interest would not attract the constitutional provision.²⁵⁵

²⁴⁹ *Tasmanian Dam Case* (n 207) 283.

²⁵⁰ *Australian Tape Manufacturers* (n 199) 510 (Mason CJ, Brennan, Deane and Gaudron JJ).

²⁵¹ *Mutual Pools* (n 219) 171; see also at 168–72.

²⁵² *Ibid* 171.

²⁵³ *Ibid*.

²⁵⁴ *Ibid* 172.

²⁵⁵ *Ibid* 189–90. Their Honours stated:

It is possible to identify in general terms some categories of laws which are unlikely to bear the character of a law with respect to the acquisition of property notwithstanding

The ‘adjustment’ formula was again applied later in the same year in *Peeverill*, where it was held that

the extinguishment of the earlier right to receive payment [from Medicare] of a larger amount has been effected not only by way of genuine adjustment of competing claims, rights and obligations in the common interests between parties who stand in a particular relationship but also as an element in a regulatory scheme for the provision of welfare benefits from public funds.²⁵⁶

However, the doctrine has been criticised for reflecting circular reasoning. In *Airservices Australia v Canadian Airlines International Ltd*, Gummow J noted that the doctrine relied upon public interest arguments about regulatory control by the state of private property,²⁵⁷ and pointed out that ‘many laws which affect property rights are in some sense made by the legislature in an attempt to resolve competing claims with respect to that property and its use.’²⁵⁸ The result was that

it may not be easy to draw a line between a law to which s 51(xxxi) applies and one which resolves competing claims or specifies criteria for some general regulation of conduct which is ‘needed’ in the sense used in *Australian Tape Manufacturers*.²⁵⁹

His Honour nevertheless found in that case that statutory lien provisions over aircraft securing payments to the Commonwealth Civil Aviation Authority for services were part of the regulatory scheme for civil aviation safety.²⁶⁰ They were said to ‘adjust the respective interests of those who own, lease or operate the aircraft and of the provider of services necessary for commercial operations of the aircraft in Australia.’²⁶¹

The doctrine was also criticised by Callinan J in *ANL* in 2000, who considered that modification of rights as an incident of regulation in the common interest should not be permitted to subvert the constitutional guarantee,

the fact that an acquisition of property may be an incident of their operation or application. One such category consists of laws which provide for the creation, modification, extinguishment or transfer of rights and liabilities as an incident of, or a means for enforcing, some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest.

²⁵⁶ *Peeverill* (n 85) 236 (Mason CJ, Deane and Gaudron JJ).

²⁵⁷ (1999) 202 CLR 133, 299 [498].

²⁵⁸ *Ibid* 299 [500].

²⁵⁹ *Ibid* 299–300 [500] (Gummow J).

²⁶⁰ *Ibid* 300 [501].

²⁶¹ *Ibid*.

lest the Commonwealth 'be able to achieve indirectly what it may not do directly'.²⁶² His Honour posited:

Why, it might be asked, should the legislation, which destroyed Dr Peverill's chose in action against the Commonwealth, be any more or less an adjustment of rights in the common interest than the deprivation of Mr Georgiadis' cause of action against his employer in circumstances in which a scheme of compensation without fault was to be substituted for common law rights?²⁶³

Certainly, an exception based upon regulation in the public interest may be problematic given the possible variety of views about what is in the 'public interest' and whose rights may be curtailed to secure that public interest. Notwithstanding criticism, the doctrine remains good law and was cited with approval by French CJ in *Wurridjal*:

A law which is not directed to the acquisition of property as such, but which is concerned with the adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity, is unlikely to be susceptible of legitimate characterisation as a law with respect to the acquisition of property for the purposes of s 51(xxxi).²⁶⁴

Interestingly, the doctrine does not appear in *Telstra Corporation Ltd v Commonwealth*,²⁶⁵ even though the forcing of Telstra to allow competitors to use its network might be argued to be a classic acquisition of property for the regulatory purpose of promoting competition in the public interest. That case was, however, decided on other grounds relating to just terms having been provided and findings against Telstra's view of how far its property rights extended.²⁶⁶

D Summary

It is thus possible to tentatively identify a number of propositions and their application to the modification of statutory causes of action:

- 1 Choses in action based on statutory rights of action that have ripened into a cause of action by the occurrence of relevant facts may be property with-

²⁶² *ANL* (n 40) 551 [180].

²⁶³ *Ibid* 551–2 [181].

²⁶⁴ *Wurridjal* (n 140) 361 [91].

²⁶⁵ *Telstra* (n 12).

²⁶⁶ *Ibid* 233–4 [52] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

in the meaning of s 51(xxxi). Causes of action that have not yet arisen or accrued will not be property (so that statutory rights are clearly susceptible of variation in the long term).

- 2 There is some authority that purely statutory rights (though probably not rights that have a pre-existing basis in general law) may be modified or removed without constituting an acquisition of property, though this will depend upon the nature of the right and the express terms of the statute creating it.
- 3 There is authority that modification or removal of a statutory right of action that benefits a defendant who is not the Commonwealth or a Commonwealth agency might still be an acquisition within s 51(xxxi), though there is some dissent on this. It is not clear whether such a 'benefit' must be proprietary in nature.
- 4 Enactments in certain areas will not attract the operation of s 51(xxxi) if the law can be characterised as coming under a head of power or possessing a nature that involves antinomy with the concept of acquisition of property on just terms. This includes taxation, fines and penalties. There is some authority that it also includes intellectual property laws that impact on pre-existing property rights and bankruptcy laws that sequester property. On the other hand, there is other authority that s 51(xxxi) does protect intellectual property rights even if created by statute.
- 5 There is a general doctrine that genuine adjustments of competing rights, claims or obligations of persons in a particular relationship or activity will not constitute an acquisition of property under s 51(xxxi). This doctrine may be based upon a general power to regulate in the public interest — presumably in particular areas where the Commonwealth has a head of power. Removal of compensation rights might then not be an acquisition of property if it involved regulation in the public interest.

In terms of the theoretical discussion at the commencement of this paper, recognition of choses in the form of rights of action as property can be justified as affirmations of the 'social contract' approach, where the courts have power to deprive citizens and entities of the fruits of their wrongdoing and/or compensate the victims for their wrongdoing (though this can only be enforced through judicial power). The redistribution of property by courts takes place under implied 'consents' given under the same 'social contract'. This may be seen as a 'just' acquisition of private property through the courts. At the same time, s 51(xxxi) is part of the same 'social contract' and will generally prevent the state 'unjustly' acquiring private property.

However, where the choses are statutory causes of action, it is noted that the legislature might, in some cases, modify these without necessarily being seen to acquire property. This may be an echo of older non-proprietary conceptions of some choses in action and might also be linked with notions of parliamentary sovereignty.

V CONCLUSION

The bundle of rights comprising private property can be justified normatively as a basic human right while also being supported by utilitarian and economic arguments as to its effects on overall wellbeing. The latter makes a particularly strong case in simple examples of small enterprises. The notion of the private dwelling as ‘castle’ is also relevant in indicating both the popularity of, and the associated utility of, private property. The role of the state as guarantor of private property has been analysed in various ways, but Locke’s ‘social contract’ analysis remains powerful. It demonstrates how law as the guarantor of the bundle of rights in private property may also, in enforcing statutory rights, act judicially to remove rights and redistribute that property, albeit as an attempt to ‘restore’ the just position.

At the same time, removal of property rights by the legislature can only occur on just terms, which is a principle embodied in s 51(xxxi) of the *Constitution*.

Further, the legislature periodically creates rights of action for breaches of law that, given relevant events, ripen into accrued causes of action. As choses in action, these rights are a form of property that s 51(xxxi) of the *Constitution* may protect. The process of enforcing those new rights can involve both increased litigation and increased costs for the people or organisations sued. This in turn occasionally leads to pressure for the legislature to curtail or modify the pursuit of such causes of action. The High Court cases that address the issue of such curtailment mainly involve the Commonwealth or its agencies as defendants. Yet, curtailment of rights generally may affect and benefit private parties who are not the Commonwealth or its agencies; there is some authority that this may also infringe s 51(xxxi).

On the other hand, the cases suggest that causes of action that have not yet arisen or accrued will not be property, and purely statutory rights might be modified without constituting an acquisition of property, depending upon the nature of the right and the terms of the statute creating it. Modifying rights in areas involving antinomy with the concept of acquisition of property on just terms (such as taxation, fines and penalties) will not be an acquisition. A genuine adjustment of competing rights, claims or obligations of persons in a

particular relationship or activity as part of regulating in the public interest will also not constitute an acquisition of property under s 51(xxxi). However, this doctrine may occasionally collide with the other principles, and it involves identifying a public interest that overrides the private interests affected.

Thus, the authorities can be seen as establishing a general protection for certain accrued statutory causes of action, albeit with exceptions — the application of which are not completely certain.

Moreover, the principles established are not inconsistent with — and can be justified under — a ‘social contract’ analysis, as has been seen. The role of the state under this approach provides a link between the nature of property generally, and choses in action and the circumstances under which the latter can be modified.

A cause of action may well be a castle, but a castle that is not entirely safe from breach nor siege.

Table 1: A Selection of Federal Private Statutory Rights of Action Enacted since 1966 *

Year	Commonwealth Act	Conduct	Private Right of Action for Financial Compensation
1966	<i>Bankruptcy Act</i>	Making of void dispositions	s 116 action to recover property divisible among creditors including s 120 undervalued transactions, s 121 transfers to defeat creditors and s 122 preferences
1968	<i>Copyright Act</i>	Infringement of copyright Infringement of technological and electronics rights Infringement of moral rights Unauthorised use of performance	s 115 action for damages or an account of profits s 116AQ and s 116D action for damages or an account of profits s 195AZA and s 195AZGC damages s 248J damages
1971	<i>Compensation (Commonwealth Employees) Act</i>	Personal injury arising out of or in the course of employment with the Commonwealth	s 27 compensation in respect of the injury

Year	Commonwealth Act	Conduct	Private Right of Action for Financial Compensation
1973	<i>Insurance Act</i>	Victimisation of whistleblowers	s 38B compensation
1974	<i>Trade Practices Act</i>	Restrictive trade practices	
		Unconscionable conduct	s 82 action for damages
		Contravention of industry codes	
		Consumer protection	
1975	<i>Racial Discrimination Act</i>	Breach of competition rule	s 151CC action for damages
		Discrimination on grounds of race	s 46PO(4)(d) <i>Australian Human Rights Commission Act 1986</i> (Cth) compensation
1975	<i>Family Law Act</i>	Spousal maintenance on separation	s 74 order for maintenance
		Alteration of property on separation	s 79 order altering interests

Year	Commonwealth Act	Conduct	Private Right of Action for Financial Compensation
1984	<i>Sex Discrimination Act</i>	Discrimination on grounds of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, breastfeeding, family responsibilities	s 46PO(4)(d) <i>Australian Human Rights Commission Act 1986</i> (Cth) compensation
1990	<i>Patents Act</i>	Harassment	s 122 action for damages or account of profit
1992	<i>Disability Discrimination Act</i>	Discrimination on grounds of disability	s 46PO(4)(d) <i>Australian Human Rights Commission Act 1986</i> (Cth) compensation
1999	<i>Environment Protection and Biodiversity Conservation Act</i>	Damage to the environment in breach of the Act	s 500 action for loss or damage

Year	Commonwealth Act	Conduct	Private Right of Action for Financial Compensation
		Loss by debenture holders	s 283F damages
		Recovery of compensation or property for creditors	s 588FF property recovery
		Loss from insolvent trading	s 588W compensation
2001	<i>Corporations Act</i>	Employee compensation	s 596AF compensation
		Damages from responsible entity	s 601MA compensation
		Damages for not going through with a takeover bid	s 670E compensation
		Failure to disclose substantial holding or relevant interest	s 671C and s 672F compensation

Year	Commonwealth Act	Conduct	Private Right of Action for Financial Compensation
		Misleading prospectus	s 729 compensation
		Financial services disclosure and best interests	s 953B, s 961M, s 1020AL and s 1022B compensation
		Market misconduct	s 1041I compensation
		Victimisation of whistleblowers	s 1317D compensation
2001	<i>Corporations Act</i>	Breach of financial services civil penalty provisions: Continuous disclosure provisions: ss 674(2), 674(2A), 675(2)–675(2A) Financial services provisions: s 963E(1)–(2), s 963F, s 963G, s 963J, s 963K, s 964A(1), ss 964D(1)–(2), s 964E(1), s 965, s 985E(1), s 985H(1), s 985J(1), s 985J(2), s 985J(4), s 985K(1), s 985L, s 985M(1), s 985M(2)	s 1317J(3A) compensation

Year	Commonwealth Act	Conduct	Private Right of Action for Financial Compensation
		Market provisions:	
		s 1041A market manipulation	
		s 1041B(1) false trading and market rigging — creating a false or misleading appearance of active trading	
2001	<i>Corporations Act</i>	s 1041C(1) false trading and market rigging — artificially maintaining trading price	s 1317J(3A) compensation
		s 1041D dissemination of information about illegal transactions	
		ss 1043A(1)–(2) insider trading	
2003	<i>Designs Act</i>	Infringement of registered design rights	s 75 damages or an account of profits
2004	<i>Age Discrimination Act</i>	Discrimination on the grounds of age	s 46PO(4)(d) <i>Australian Human Rights Commission Act 1986</i> (Cth) compensation

Year	Commonwealth Act	Conduct	Private Right of Action for Financial Compensation
2009	<i>Fair Work Act</i>	Unfair dismissal Various breaches of the Act	s 392 compensation s 539 civil remedy orders
2009	<i>Fair Work (Registered Organisations) Act</i>	Financial mismanagement of organisations and duties in relation to orders and directions Reprisals against whistleblowers	s 307 compensation orders s 337 civil compensation
2009	<i>National Consumer Credit Protection Act</i>	Breach of Act in relation to the giving of credit	s 178 compensation orders

* Though some of these rights have been codified from rights that existed in earlier statutory or common law forms.