The State of Play in Acquisition of Property: *Theophanous v The Commonwealth*

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I want to start by talking about crooked cops and crooked politicians. But the conference organisers would like me to get onto constitutional law and the provision dealing with acquisition of property on just terms: section 51(xxxi). So to give you a preview of the theme for this paper, it's this. There's been a problem of *method* in the way the High Court approaches section 51(xxxi) cases: too much talk about characterisation in narrow legal terms, not enough talk about balancing property rights against the broader public interest and too little attention to uniting a disparate body of doctrine and rules. Despite suggestions the court is throwing off the shackles of legalism a little in the most recent acquisition of property case in 2006, there is no clear sign that the law is moving in the direction of greater transparency, coherence and a more rights-based focus.

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In April 1989, following the investigations carried out by the Fitzgerald Inquiry into corruption, the Queensland Parliament passed a law to sack the Commissioner of Police Sir Terence Lewis.[1] That Act also converted the disgraced Commissioner's superannuation entitlements into a lump sum. He was paid out the personal contributions he had made plus interest. The balance was held pending the resolution of criminal proceedings that might be brought against him. Terry Lewis was subsequently charged with corruption offences and found guilty on several counts. He was sentenced to 14 years gaol and lost not only his super payout, but also his knighthood on the way through.

Queensland already had a *general* law on the books that authorised confiscation of the publicly funded component in a superannuation fund, introduced the previous year. It applied where a judge, MP or public servant was found guilty of corruption.[2] That Act was the first of the 'modern day superannuation confiscation legislation'.[3]

A month after the Queensland Parliament blocked Terry Lewis' superannuation, the Minister for Justice in the Hawke Government, Senator Michael Tate, signalled that the Commonwealth Government would bring in its own confiscation legislation for corrupt officers of the Australian Federal Police.[4] That Bill was soon joined by confiscation legislation that applied to all people employed by the Commonwealth.

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[1] *Commissioner of Police (Vacation of Office) Act 1989* (Qld).
[2] *Public Officers' Superannuation Benefits Recovery Act 1988* (Qld).
[3] Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87 (1999) 321.
[4] Commonwealth of Australia, *Parliamentary Debates*, Senate, 8 May 1989, 1965 (Senator Tate, Minister for Justice).

When, soon after, the Commonwealth enacted its *Crimes (Superannuation Benefits) Act 1989* (which I will refer to as the 1989 Confiscation Act) it was careful to include MPs and Senators in the definition of 'employee'. Attorney-General Lionel Bowen said the extension to parliamentarians was a direct response to revelations before the Fitzgerald inquiry.[5] Perhaps Bowen was also mindful of the advice attributed to Henry Kissinger, that 'corrupt politicians make the other 10 per cent look bad', a comment no doubt far more pertinent to the Nixon White House in which he served, than to Australian politics and politicians.

The Crimes (Superannuation Benefits) Act

The central feature of the 1989 Confiscation Act is that a court can make a superannuation order against an employee of the Commonwealth who has been convicted of a corruption offence and sentenced to 12 months or more imprisonment. Confiscation is a decision for the political arm of government. Once the Minister directs the Commonwealth Director of Public Prosecutions (DPP) to seek a superannuation order, the loss of all publicly-funded superannuation benefits is virtually automatic.

A superannuation order expels the person from the super scheme and the Commonwealth is relieved of any further obligation to pay employer contributions. Employee contributions are paid out with interest to the person who made them.[6] The proportion of any benefits already received that is attributable to employer contributions, plus interest, becomes a debt to the Commonwealth and must be repaid.[7]

[5] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 17 August 1989, 388 (Lionel Bowen, Attorney-General).
[6] *Crimes (Superannuation Benefits) Act 1989* (Cth), s 21.
[7] *Crimes (Superannuation Benefits) Act 1989* (Cth), s 19.

The order takes effect when the period for appeal against conviction or sentence has expired and any appeal proceedings have been concluded.[8]

A superannuation order also brings to an end any contingent rights a dependant has in the event of the employee's death.

To prevent disposal of assets to defeat a future recovery order, the DPP can obtain a restraining order against specified property.[9] These orders can be obtained not only against those already convicted of a corruption offence, but also those who have been charged and even those about to be charged.[10] A restraining order puts a legal charge on the property, that secures payment of the confiscated amount.[11] Disposing of the property in deliberate contravention of a restraining order is a criminal offence and the transaction can be set aside.[12]

The prosecution of Dr Andrew Theophanous

It was under this law that Senator Chris Ellison, the Minister for Justice and Customs, sought a superannuation order against Dr Andrew Theophanous in August 2004. Dr Theophanous was a federal Labor Party MP from Melbourne between 1980 and April 2000, when he resigned from the ALP. He served out his term as an Independent before losing the seat at the 2001 election.

Dr Theophanous was charged with six offences involving corrupt conduct associated with obtaining visas for third parties under the Migration Act.

[8] *Crimes (Superannuation Benefits) Act 1989* (Cth), s 20.
[9] *Crimes (Superannuation Benefits) Act 1989* (Cth), s 25.
[10] *Crimes (Superannuation Benefits) Act 1989* (Cth), s 24.
[11] *Crimes (Superannuation Benefits) Act 1989* (Cth), s 33.
[12] *Crimes (Superannuation Benefits) Act 1989* (Cth), s 35.

This followed an investigation, conducted by the now-defunct National Crime Authority (NCA), in which phone taps were used and Dr Theophanous was recorded making comments about securing visas and accepting money that were used in evidence against him (although it was common ground that some of the intercept warrants were not validly granted).[13] A registered NCA informer wore a wire during meetings with Dr Theophanous and the Agency's active role in facilitating the informer's dealings with the MP meant that, at least arguably, the NCA itself was a conspirator[14] though, as the Victorian Court of Appeal put it, 'the evidence fell far short of demonstrating' that [the informant] had to overcome the resistance and reluctance of Dr Theophanous to enter the conspiracy.

In 2002 Dr Theophanous was found guilty by a jury on four counts including a conspiracy charge. He served 21 months in prison. In June 2003 the Victorian Court of Appeal ordered a re-trial on the conspiracy charge, based on flaws in the judge's direction to the jury. The DPP instead brought fresh charges in 2004, but in November that year Theophanous was granted a permanent stay on those proceedings. The DPP reverted to the conspiracy count but eventually, in September 2006, a County Court Judge dismissed that charge, in a judgment reportedly very critical of the NCA's disclosure of material to both the prosecution and defence. Throughout this entire period Dr Theophanous has maintained his innocence.

Proceedings for a superannuation order commenced in 2004, based on the other three convictions. After losing his seat at the 2001 election,

[13] *R v Theophanous* [2003] VSCA 78 at [112].
[14] An issue debated in the Victorian Court of Appeal proceedings: Ibid at [140].

Theophanous elected to commute half of his superannuation entitlement to a lump sum of about $367 000 and to receive $1575 per fortnight as a pension.[15] An order against him therefore would involve repayment of a large sum and the loss of future entitlements for the former MP and, contingently, his wife. Already, in 2002, the County Court had granted a restraining order under the 1989 Confiscation Act against the family home and another parcel of land.[16]

Dr Theophanous sought to restrain the confiscation proceedings in the High Court by arguing that the 1989 Act effected an unconstitutional acquisition of property other than on just terms.

The vexing problem of section 51(xxxi)

The Constitution undoubtedly creates a tough job for the High Court in this area. The main problem is that section 51(xxxi) has a dual character. It is a positive grant of legislative power and, as such, it attracts ideas and doctrine associated with characterisation. It has also been defined as a guarantee of property rights.[17] Rights guarantees attract a different body of constitutional principles.

Logically that suggests that doctrine for section 51(xxxi) should cater to its unique character and achieve some kind of blend of these two bodies of law. Instead of a smooth blend, we have a rather lumpy mess with unpredictable qualities.

I argue that is partly because the High Court, in its characteristically legalistic approach to constitutional questions, has been drawn to discuss

[15] 'Theophanous Super Case Adjourned', *AAP Bulletins*, 30 August 2006.
[16] Fergus Shiel, 'Theophanous Loses Fight for Super', *Age* (Melbourne), 12 May 2006, 10.
[17] Whether it is properly regarded as an 'express', 'implied' or 'indirect' guarantee of such rights.

characterisation but has tended to shrink from the implications of its own insistence that section 51(xxxi) is also a guarantee of rights. Too much characterisation, too little rights analysis.

The characterisation issue itself has proved a very difficult one to deal with in a unified rather than disparate fashion, and in a way that accords with wider principles of constitutional interpretation. Its disparate nature is demonstrated by an array of rules that seem unconnected to each other. And while constitutional orthodoxy says a law need not artificially have ascribed to it a sole, dominant or exclusive character, the rejection of just terms claims regularly seems to involve breaking that rule. I will come back to this array of 'veto principles' as I call them later and the way in which they exert an exclusive effect from a characterisation point of view.

First I want to explain why characterisation has assumed such central importance in section 51(xxxi) cases. There are three factors at work: text, authority and consequence.

In terms of **text**, the breadth of the terms used in section 51(xxxi) set up potentially enormous coverage. There are few textual devices for cutting back that coverage.

In terms of **authority**, for a long time the notion of 'property' has been very broadly applied to a wide array of valuable legal interests well beyond Daryl Kerrigan's family home. The notion of 'acquisition' is conditioned by a requirement for corresponding 'benefit', so that loss of property must be matched by some gain by another (not necessarily the Commonwealth itself). But that benefit requirement can be satisfied by

the practical operation of very many Commonwealth laws that have a redistributive impact, or simply differential impact, across society.

In short, many Commonwealth laws will prima facie effect an acquisition of property, based on existing notions of those concepts.

The reason that is so vexing – to turn to the third point about **consequence** – is that if a law *properly characterised* as one with respect to the acquisition of property does not provide fair compensation, or just terms, it is invalid. Whole slabs of complex and important Commonwealth law may fall over.

In order to avoid legislative paralysis, a huge amount of pressure is exerted on the area of doctrine which I am calling **characterisation**. To avoid massive invalidity, over time the High Court has strewn across the path of disgruntled divestees seeking just terms from the courts, an untidy array of legal hurdles. These are some of the chief barriers to recovery or invalidity under section 51(xxxi). They mostly involve variations on a theme, the theme being: although this looks like a law with respect to the acquisition of property, it is not. It is properly or relevantly characterised as something else. I am referring here to the term characterisation in that specific section 51(xxxi) sense, rather than its more generic constitutional application.[18]

[18] Ascertaining whether a law concerns 'property' and effects an 'acquisition' is, in the generic application of the term, part of the characterisation process. That is, it addresses the *general* question 'is this a law with respect to the acquisition of property?'. When I use the term here, however, I am referring to a *specific* sub-question that is part of that general inquiry. That is, even if the law concerns 'property' and effects an 'acquisition', is it properly or relevantly characterised as a law with respect to the acquisition of property? The term characterisation, in this specific section 51(xxxi) sense of the word, has appeared in High Court judgments and elsewhere.

The relationship of section 51(xxxi) to other heads of power

The normal rule is that a law can be attributed to more than one head of power. That will not work for section 51(xxxi). Otherwise, the just terms guarantee for property rights could be easily circumvented by relying on other powers. So section 51(xxxi) is exceptional, in that it exerts an *exclusive* influence in respect of constitutional acquisitions of property. That approach causes little difficulty in orthodox constitutional terms and has been convincingly explained by the court.[19]

It is the reverse situation that is much harder to explain and where all the difficulty has arisen – that is, when the court decides to 'veto' the claim that a constitutional acquisition of property has occurred. The ideas, rules and formulations it employs to prevent invalidity – the veto principles as I am calling them – amount to saying that a law should be attributed to another head of power and exclusively so. It looks like it could be an acquisition of property, but it is put beyond the reach of section 51(xxxi) and the just terms guarantee.

Problems with the veto principles

Exclusiveness in that reverse sense is more difficult to reconcile with orthodox constitutional principles. And it is here where I believe that a legalist approach does not help. A doctrinal approach that focuses on characterisation in a narrow sense and finds it difficult to acknowledge the relevance of broader social, political and economic considerations in a consistent rather than fitful way is not well equipped for this challenging task.

[19] See, for example, the discussion in Leslie Zines, *The High Court and the Constitution* (4th ed 1997) 22-26.

And it is also here where it becomes very difficult to predict the doctrinal terrain upon which any given case on section 51(xxxi) will be fought and concluded. The array of veto principles do not seem to have identifiable links to each other. They seem to sit side-by-side in an un-integrated fashion, available to be picked up and used as needed.

And finally, at least sometimes these veto principles do not seem to have been framed in full acknowledgement of the fact that the Constitution contains a property rights guarantee. They can come across therefore as categorical, rather than nuanced by that reality.[20]

As well as being numerous, these rules and formula can become very wordy, so I will not repeat them here. Some of them amount in my view to saying that the law is reasonable commercial or social regulation in the public interest. Some of them are bluntly intuitive: they say that a law will not be a section 51(xxxi) law where the idea of just terms would be 'irrelevant' or 'incongruous' or 'inconsistent'. The High Court has also said that a law without just terms might be validly 'directed to the prevention of a noxious use of proprietary rights'. Alternatively, the rights might be deemed to suffer from an 'inherent susceptibility' to modification or extinguishment. In his leading article on section 51(xxxi) Simon Evans enumerated at least nine different approaches.[21] Many of them can be seen as characterisation approaches in the sense I have been using that term.

[20] That heightened focus does not automatically mean higher protection for private property, as Simon Evans has demonstrated: Simon Evans, 'When is an Acquisition of Property not an Acquisition of Property? The Search for a Principled Approach to section 51(xxxi)' (2000) 11 *Public Law Review* 183.
[21] Ibid.

That is the doctrinal backdrop to *Theophanous v Commonwealth*, which is the first significant section 51(xxxi) decision from the High Court since 2000.

The problem for Theophanous

The problem for Dr Theophanous was that the High Court has consistently seen penalty provisions such as forfeitures and confiscations of property as valid measures to promote compliance with laws that ban smuggling, drug importation and illegal fishing, no matter how harsh those provisions might be and even if they hit hard the innocent owners of property that was used by others to do wrong.

There were statutory features of the 1989 Confiscation Act which counsel for Theophanous drew attention to, in the hope that they might tip the balance the other way.

The pointy end of this case consisted in the following factors:

- the Act in question allows the Government to confiscate someone's deferred pay, the superannuation part of their remuneration package[22]

- the Act pays no regard to how much service the employee may have given before committing the offence (for example, Dr Theophanous was an MP for 21 years, the offences occurred in the

[22] See Arie Freiberg and Michelle Pfeffer, 'The (Deferred) Wages of Sin: Confiscating Superannuation Benefits' (1993) 17 *Criminal Law Journal* 157. Gleeson CJ, relying on *Austin*, accepted that superannuation is 'a well recognised form of remuneration of public office holders': *Theophanous v Commonwealth* [2006] HCA 18 at [7].

last 3 years of that period) or the length of service before the Confiscation Act came into effect in 1989

- there are no discretionary factors governing the making of a superannuation order, once a conviction occurs and the Minister has set the process in train

- the order is in addition to the sentence imposed on the employee after conviction – indeed the sentencing court is forbidden from taking into account the possibility that a superannuation order may be made

- the spouse or dependants lose all rights to the superannuation benefits they would otherwise acquire upon the death of the employee.

The High Court decision – overall

A High Court bench of six unanimously rejected Dr Theophanous' pre-emptive[23] challenge to the validity of superannuation orders under the 1989 Confiscation Act. The decision[24] consists of a five way joint judgment and a separate opinion by Chief Justice Gleeson. In terms of common ground, the decision reduces to this: the notion of just terms is basically incompatible with laws imposing penalties.

[23] An application to the Victorian County Court for a superannuation order against Dr Theophanous was made on 9 December 2004. Following his unsuccessful High Court challenge and the dismissal of the conspiracy count in 2006, the Minister for Justice and Customs agreed to review the decision to seek a confiscation order and the superannuation proceedings remain unresolved.
[24] *Theophanous v Commonwealth* [2006] HCA 18.

The High Court decision – Gleeson CJ

I will address the Chief Justice's decision first. He took a straight line to a result. His strategy was factually, to avoid dwelling on the sometimes arguably harsh impact of superannuation orders on property rights and constitutionally, to use past authority to buy out of the complexity of the characterisation debate altogether (a task made easier in this case because it did not involve the incidental area of a power).[25] The authorities he fell back on, *Burton v Honan* and more recently *Lawler*, said these penalty provisions are very important and if they are supported under another head of power, then they simply stand outside the reach of section 51(xxxi). Categorising a superannuation order as an acquisition of property would weaken or destroy the sanction against abuse of public office.

Politically, the decision minimises the significance of the judiciary's role. The Chief Justice relied on a passage from Chief Justice Dixon, oft-quoted in penalty, forfeiture and confiscation cases. In *Burton v Honan*, Dixon said that where the subject matter is within federal jurisdiction 'the justice and wisdom of the provisions…are matters entirely for the Legislature and not for the Judiciary'.

The Chief Justice's decision offers no particular illumination on section 51(xxxi) doctrine except that he thinks, rather[26] contrary to his colleagues, that 'incongruous or irrelevant' is not an acceptable test for

[25] The legislation, as far as it applies to federal parliamentarians, is supported by sections 48 and 51(xxxvi) of the Constitution.

[26] I say 'rather' because the joint judgment opted not for the formula of 'irrelevant or incongruous' previously favoured by McHugh J, but instead the slightly different phrase adopted by Deane and Gaudron JJ in *Lawler*: 'inconsistent or incongruous'.

resolving the characterisation issue.[27] Penalties supported by a head of power will not come within section 51(xxxi) for a basic policy reason that the courts should not undermine penal sanctions, however harsh they are. That merely confirms that cases like *Burton* and *Lawler* remain good authority, as far as he is concerned. And it suggests that no matter how harsh a confiscation regime our politicians might come up with, the guarantee of property rights in the Australian Constitution will have nothing to say about it, because it will always be a question of characterisation.

The High Court decision – the joint judgment

Turning to the joint judgment, the first feature to emerge from the decision of Justices Gummow, Kirby, Hayne, Heydon and Crennan is the elevation of one characterisation technique to the status of a 'settled proposition'. They said that just terms will not apply where that notion is 'inconsistent or incongruous', relying on the use of that phrase by Deane and Gaudron JJ in *Lawler*. Penalties are a categorical exception and there appears to be no room for the question of proportionality or questions of degree. The idea of just terms is simply seen as 'absurd', to quote the late Justice Gibbs from a 1979 case also relied on in the *Theophanous* joint judgment. Later in the judgment, however, the majority notes that labels like penalty or forfeiture are not conclusive and concedes that there may be room in some cases 'for difference about the characterisation of the exaction and the application of considerations of inconsistency or incongruity'.

[27] Although he seems in substance to apply the essentially intuitive characterisation approach embodied in the 'irrelevant or incongruous' test, he disparages these concepts as falling well short of being decisive constitutional considerations.

They reinforce their legal analysis with a policy-based observation. Their judgment notes that pay for MPs was introduced to prevent them falling prey to corruption. Superannuation orders, therefore, vindicate 'the public interest in denying to those who succumbed to that temptation the benefits provided to encourage probity in legislators'.

What is not clear from the joint judgment is whether, when the next non-penalty case comes along testing section 51(xxxi), the 'inconsistent or incongruous' test will again be centre-stage. Or will it drop back to the pack and sit there amongst many others available to be picked up in future cases. The majority declined to consider the Commonwealth's submission that rights under superannuation legislation are 'inherently defeasible' and therefore do not attract just terms protection.

The final and significant point about the joint judgment is what it says about reasonable proportionality. This way of analysing the question whether a law is supported by the incidental area of a non-purposive head of power has been dying a slow death since soon after it appeared, in the *Nationwide News* decision in 1992. The concluding paragraphs of *Theophanous* drives the stake a few inches closer to the heart. But for some reason it is spared the killer blow that would put it out of the misery of its dreadful unfashionability.

Assessing Theophanous

Theophanous is not a litmus test case. The characterisation debates in section 51(xxxi) can involve a much more contentious rivalry between private property rights and broader community and regulatory interests. The hearing transcript and brief judgment suggest that the Court found the question of whether politicians convicted of corruption should lose

more than what the sentencing judge brings down upon their head a relatively easy question to answer.

But the case offers the latest glimpse into High Court thinking on what distinguishes a law that is invalid for failure to provide just terms from a law that, though it might seem to involve an acquisition of property, stands outside the reach of section 51(xxxi) and finds support elsewhere in the list of Commonwealth legislative powers. The tough thing for the Court to explain is why a law supported by another head of power does not also come within section 51(xxxi).

In the penalty cases, including *Theophanous*, the Court has taken a *categorical* approach – the law cannot come within 51(xxxi) because it would undermine the sanction Parliament has imposed, no matter how harsh the sanction is or which innocents get caught up in it. When the Constitution contains a property guarantee, that looks dogmatic rather than reasoned. In the past that has been compounded by the Court saying plenty about why a law is with respect to some other power and too little about why it is also not a law with respect to the acquisition of property that attracts just terms.

In that respect, perhaps *Theophanous* suggests a small change for the better. Chief Justice Gleeson foregrounds a policy basis for denying just terms. The joint judgment elevates the ‘inconsistent or incongruous’ test from the pack of options available under the doctrinal heading of ‘Characterisation’. Whether that is a step towards a form of reasoning that more explicitly acknowledges the substantive and subjective considerations at stake in 51(xxxi) cases, we will have to await a non-penalty case to see.

But both judgments still convey little sense that our Constitution has a guarantee of property rights within it. Even if High Court judges are selectively[28] breaking the chains of legalism in addressing the characterisation question in section 51(xxxi), that does not necessarily mean that when confronted by a tough borderline case, doctrine will be able to do the job expected of it and do it persuasively and well. What is needed is a singular intellectual framework that transcends sufficiency of connection and can fully accommodate the range of factors and considerations that go into resolving these complex acquisition cases.

Conclusion

Ultimately in my view this is an argument about Australian democracy, fictions and legitimation. What level of overtly acknowledged discretionary judgment by unelected judges are we Australians comfortable with, as part of their task in exercising judicial review of a constitution with no bill of rights and few provisions for the protection of rights and freedoms?

The High Court has been prepared to treat the reference to just terms in section 51(xxxi) as one of those hen's teeth in the Australian Constitution: a guarantee of rights. But it has tended to avoid a natural consequence of that finding. The presence in a constitutional document of a guarantee of private property rights side by side with a series of affirmative propositions about government and legislative power sets up a

[28] I say selectively because alongside his focus on a policy reason for denying just terms, Gleeson CJ reiterates the legalist mantra from Dixon CJ in *Burton* that where the subject matter is within federal jurisdiction 'the justice and wisdom of the provisions…are matters entirely for the Legislature and not for the Judiciary'. The overall picture from *Theophanous* is not of a concerted paradigm shift from the legalist model to a more overtly policy-based balancing approach.

'fundamental tension',[29] a conflict which inevitably draws our ultimate appellate court into substantive questions of distributive justice, morality and political economy as well as law.

And that is a proposition overwhelmingly at odds with the way the High Court has typically defined its place in Australia's democracy. Section 51(xxxi) is inevitably going to be a difficult and spiky area of the law. But in Australia it is also a casualty of legalism and its tendency to obscure rather than illuminate the process of judicial decision making. And as most of the court retreats further into its legalistic shell and increasingly spurns the notion of proportionality, the problem becomes worse.

[29] American Professor Carol Rose, quoted in Donna R Christie, 'A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia and Canada' FSU College of Law, Public Law Research Paper No. 186, September 2006, available at <www.ssrn.com>. I am grateful to Simon Evans, as it was through his blog <www.simonevans.org> that I became aware of this article.