Unjust Enrichment As A Principle of Australian Constitutionalism

By Brian F Fitzgerald[1]

The Australian *Constitution*, amongst other things, divides the legislative powers of the Australian federal system between the Commonwealth (central) and State (regional) governments. Section 51 *Constitution* provides that the Commonwealth Parliament shall have power to make laws for the peace, order, and good government of the Commonwealth with respect to an enumerated list of powers. One of the enumerated legislative powers of the Commonwealth is the power to make laws with respect to the "acquisition of property on just terms from any State or person ...".[2] The provision operates firstly to give the Commonwealth power to acquire property and secondly as an individual right or guarantee of just terms[3]; that is as a constitutional protection of the right to private property.[4]

The guarantee of just terms (or the right to private property) is not absolute. If another head of power in s 51 displays, by words or content, an intention to allow acquisition without just terms or if the acquisition is of a type that is not susceptible to just terms, the guarantee or right is not operative.[5] Therefore statutes imposing taxation, penalties by way of forfeiture of property or a bankruptcy scheme are not seen as infringing the guarantee of or right to private property secondarily protected by s 51 (31).[6]

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[2] Section 51 (31) confers a power on the Commonwealth Parliament to legislate with respect to:

(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

[3] For a recent restatement of this view see: *Mutual Pools & Staff Ltd v The Commonwealth* (1994) 179 CLR 155; *Georgiadis v AOTC* (1994) 179 CLR 297.

[4] On the right to private property see: B. Ziff, *Principles of Property Law* (1993) Carswell Toronto 6-27.

[5] *Mutual Pools supra n 3* per Mason CJ at 169-171; per Brennan J at 177-181; per Deane and Gaudron JJ at 186-189; per McHugh J at 219-222.

[6] Ibid.

The Australian *Constitution* like any other statute is interpreted against a backdrop of principles, themes and contextual determinants. Any provision could be interpreted in a variety of ways; the interesting issue being why the High Court has chosen a particular interpretation? In searching for an answer to such an inquiry one is drawn to an examination of the principles underpinning the Court's interpretation. At times these principles are explained in the judgment but more often than not they are hidden "between the lines".

In looking closely at the High Court's approach to s 51 (31) in recent cases, it becomes obvious that a majority of judges are using the principle of unjust enrichment to give definition to s 51 (31). Unjust enrichment has become a principle of Australian constitutionalism and is implemented through the rule in s 51 (31).

In entering the public (constitutional) domain (as opposed to the private sphere of civil obligations) the Birksian approach to unjust enrichment[7] needs slight modification. In the public domain at a constitutional level the strict operation of unjust enrichment must be balanced against the rule of law[8] and the functioning of a democratic order.[9] This has become apparent in the application of the unjust factor of *ultra vires* at a constitutional level.[10]

The purpose of this note is to explain how in recent case law unjust enrichment as a principle of law (of Australian constitutionalism) has come to inform the interpretation of section 51 (31).

Unjust Enrichment and Australian Constitutional Law

In order to explain how section 51 (31) is being interpreted in a discourse of unjust enrichment one needs to describe unjust enrichment to constitutional lawyers and constitutional law to unjust enrichment lawyers.

A) Unjust Enrichment

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[7] PBH Birks, *An Introduction To The Law Of Restitution* Oxford, Oxford University Press, 1989, Chapter I.

[8] *Re Language Rights under Manitoba Act 1870* (1985) 19 DLR (4th) 1 at 19-37; BF Fitzgerald "When Should Unconstitutionality Mean Void Ab Initio?" (1995) 2 *Canberra LR* 43.

[9] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *ACTV Pty Ltd v Commonwealth (1992) 177 CLR 106; Cunliffe v Commonwealth* (1994) 68 ALJR 791; (1994) 124 ALR 120. For example see Deane and Toohey JJ in *Nationwide* at 77 where they talk about balancing rights against objectives aimed at the 'preservation of an ordered society or for the protection or vindication of legitimate claims of individuals to live peacefully and with dignity in such a society'.

[10] BF Fitzgerald, "Ultra Vires as an Unjust Factor in the Law of Unjust Enrichment" (1993) 2 *Griffith Law Review* 1.

According to the Birksian formula a plaintiff can sue for restitution where there has been:

1) an enrichment
2) of the defendant
3) at the expense of the plaintiff
4) in unjust circumstances.

Enrichment occurs where the loss of value to the plaintiff is gained by the defendant. Unjust circumstances as evidenced by the cases group together in categories labelled unjust factors.[11]

A central thesis of Birks approach is that enrichment can result from the transfer of value as opposed to a proprietary interest.[12] Value replaces the notion of proprietary interest in the Birks scheme because it is a much more flexible and realistic concept. Therefore the plaintiff in an unjust enrichment action does not have to prove that the defendant received the plaintiff's proprietary interest in property, all the plaintiff has to show is that the defendant gained the value of the plaintiff's proprietary interest. Value supersedes the need to consider the technical rules of the passing of property and in so doing makes unjust enrichment applicable in cases where a proprietary interest has in fact passed to the defendant or in cases where no proprietary interest has passed.[13] It is the receipt of the value of the plaintiff's property that is crucial not receipt of a proprietary interest.

To summarise: Unjust enrichment remedies the acquisition of value by the defendant at the expense of the plaintiff in unjust circumstances.[14]

B) Constitutional Law: Section 51 (31)

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[11] Birks *supra n 7 Chapter I*. On the adoption of this approach in Australia see: *Pavey Matthews v Paul* (1987) 162 CLR 221; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; *Baltic Shipping v Dillon* (1993) 176 CLR 344; *Commissioner of State Revenue v Royal Insurance Australia Limited* (1994) 126 ALR 1.

[12] Birks *supra n* 7 Chapter I.

[13] For an expanded analysis of how value informs unjust enrichment see: BF Fitzgerald "Ownership as the Proximity or Privity Principle in Unjust Enrichment Law" forthcoming (1995) 18 *University of Queensland LJ*. See also Fitzgerald B., "Tracing at Law, The Exchange Product Theory and Ignorance as an Unjust Factor in the Law of Unjust Enrichment" (1994) 13 *University of Tasmania LR* 116.

[14] In this sense unjust enrichment is like an action for the conversion of value. Note though the actual rules for the passing of value as opposed to property have never been articulated by Birks. At a more theoretical level it can be said that unjust enrichment is premised on a theory of "transactional justice" see: J Coleman 'Intellectual Property and Corrective Justice' (1992) 78 *Virginia LR* 283 at 287-88; BF Fitzgerald *supra n.* 10; BF Fitzgerald "Ownership .." *supra n 13*.

There are three issues to consider when examining whether s 51 (31) has been satisfied. Has *property* been *acquired* on other than *just terms*? The three elements then are:

1) property;
2) acquisition;
3) just terms.

(i) Property

In the context of s 51 (31) property is said to be "the most comprehensive term that can be used"[15] and is defined liberally to include "every species of valuable right and interest including real and personal property, incorporeal hereditaments .. and choses in action"[16] and other "innominate and anomalous" interests.[17] For the purposes of linking unjust enrichment and s 51 (31) it is important to determine whether value is encompassed by the term property. Do you acquire property for the purposes of s 51 (31) by simply acquiring the value of a pre-existing proprietary interest in property? As this question indicates, at the margins the distinction between the issues of "property" and "acquisition" is murky as the two concepts tend to merge. In this way the focus turns to the notion of "acquisition of property" as a unitary concept.

(ii) Acquisition (of Property)

The recent cases show that a transfer of value is encompassed in the notion of acquisition of property. This is not surprising as in *Minister of State for the Army v Dalziel* in the context of land Rich J explained:

> Property, in relation to land, is a bundle of rights exercisable with respect to land. The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle. But there is nothing in the placitum [51(31)] to suggest that the legislature was intended to be at liberty to free itself from the restrictive provisions of the placitum by taking care to seize something short of the whole bundle owned by the person whom it was expropriating.[18]

However there can be no doubt that the recent (re)development of unjust enrichment has influenced the current interpretation of s51 (31). An interpretation that activates s 51 (31) where value is acquired; not only where formal legal title is acquired. In this sense the right to private property guaranteed by s 51 (31) has a much more realistic or substantive effect.

The Recent Cases

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[15] *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509

[16] *Minister for Army v Dalziel* (1944) 68 CLR 261 at 290.

[17] *Bank Nationalisation Case* (1948) 76 CLR 1 at 349.

[18] *Supra n* 16 at 285.

a) Mutual Pools & Staff Ltd v The Commonwealth[19]

Mutual Pools and Staff Pty Ltd claimed to be entitled to a refund of sales tax levied on the basis of swimming pool construction. The tax had been levied in a form that was unconstitutional in that it was in contravention of the requirements of s 55 *Constitution.*

In 1992 the High Court declared the sales tax to have been unconstitutionally levied in that it failed to satisfy the requirements of s 55.[20] The Court was not asked in this initial litigation to adjudicate on the Commissioner's liability to refund the tax because in the interim, and as a consequence of the litigation, the Commissioner and an organisation representing pool builders (SPASA), had come to an agreement pursuant to which the tax was to be paid and then repaid to the pool builder if the legislation was declared to be unconstitutional. After this agreement was reached Mutual Pools in consequence of constructing a pool paid to the Commissioner $1522 as sales tax which was passed on by the pool builder to the pool purchaser in the price of the pool.

Following the 1992 High Court decision declaring the tax unconstitutional the Commonwealth parliament proceeded to enact the *Swimming Pools Refund Act* 1992 (Cth) (hereafter called the *Refund Act*) which prevented a refund of the tax where the it had been *passed on* to the pool purchaser.[21] This legislation on its face seemed to stand in the way of Mutual Pools's claim for a recovery of the sales tax. The Commissioner refused to refund the tax thereby forcing Mutual Pools to challenge the validity of the *Refund Act.*

Two questions were reserved by the case stated for consideration of the Full Court of the High Court:

1. If the $1522 was paid pursuant to the SPASA agreement, was the Defendant legally obliged, before the *Refund Act* was enacted to repay the said amount to the Plaintiff?

This question was disposed of very quickly as the parties agreed that this question should be answered in the affirmative.

The second question was:

2. Is the *Refund Act* invalid in its application to the circumstances of this case?

The first issue was whether the Refund Act could be supported as a general principle of constitutional law. If the original taxing statute was invalid how did the *Refund Act* attain constitutionality and prevent

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[19] *Supra n 3*

[20] *Mutual Pools and Staff Pty Ltd v FCT* (1992) 173 CLR 450.

[21] See in particular s 4.

a refund. All of the judges made the point that if the Commonwealth had no power under the constitution to levy the primary tax they had no power to validate its collection in a later Act.[22] But in this case the unconstitutionality arose from the form of the legislation rather than from the substantive nature of the legislation. In other words the form of the Act contravened s 55 *Constitution* but the substance of the Act, taxation, was within power. Therefore if the Commonwealth could levy the tax lawfully in the proper form it was constitutional for them to validate the collection of the tax. If the Commonwealth had no substantive power to start with the tax would not have been able to be legitimated.

The second issue was whether the *Refund Act* contravened s 51 (31).

The fundamental question was whether the *Refund Act*, which sought to deny recovery of the tax where it had been passed on to the pool purchaser, had unconstitutionally extinguished the chose in action which Mutual Pools held in relation to the Commonwealth. Mason CJ, Brennan Deane Gaudron and McHugh JJ held for constitutional reasons that s 51 (31) was not applicable in this instance; that the guarantee of just terms (of restitution for unjust enrichment) had to give way in the face of societal demands necessary for the good ordering of society.

However in the course of their judgments each judge expressed a view as to whether the extinguishment of a chose in action against the Commonwealth, by the Commonwealth, amounted to an acquisition of property for the purposes of s 51 (31). As no proprietary interest in the right to sue itself could be acquired by the Commonwealth the issue resolved into whether the Commonwealth had acquired the benefit or value of the chose in action and whether this was an acquisition of property for the purposes of s 51(31)?

Chief Justice Mason explained that in some circumstances "the extinguishment of a chose in action against the Commonwealth would amount to an acquisition of property."[23]

During the course of his judgment Brennan J asked: "can the extinguishment of a debt be an acquisition of property?"[24] He made it clear he considered the tax owed by the Commonwealth to the pool builder as a debt recoverable pursuant to the common law under the contract or in restitution.[25] Brennan J referred to this as a "common law chose in action vested in the plaintiff".[26] Brennan J went

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[22] They relied on *Commissioner for Motor Transport v Antill Ranger and Co. Pty Ltd* [1956] AC 527; *Werrin v Commonwealth* (1938) 59 CLR 150; and the Canadian case, *Amax Potash Ltd v Government of Saskatchewan* [1971] 2 SCR 576 but did not (except for McHugh J) mention *Air Canada v British Columbia* (1989) 59 DLR (4th) 161.

[23] *Supra n* 3 at 173.

[24] Ibid at 176.

[25] Ibid. at 176.

[26] Ibid. at 176.

on to say that the extinguishment of this chose in action (a proprietary right) generated an acquisition property. He said:

> The Commonwealth thus received a benefit precisely corresponding with the plaintiff's loss of its property.[27]

This statement displays a strong link to Birksian styled unjust enrichment in highlighting the equivalence of loss and gain of value in the act of extinguishment.

Deane and Gaudron JJ said that the word 'property' in 51(31) is to be given its widest possible meaning and that similarly:

> the word "acquisition" is not to be taken to be pedantically or legalistically restricted to a physical taking of title or possession. Once it is appreciated that "property" in s 51 (31) extends to all types of "innominate and anomalous interests" it is apparent that the meaning of the phrase "acquisition of property" is not to be confined by reference to traditional conveyancing principles and procedures.[28]

This reasoning very clearly displays an intention to make unjust enrichment (premised on the transfer of value) the defining principle of 51 (31). Deane and Gaudron JJ eschew any notion of proprietary interest from the equation and resort to a discourse of value in much the same way as Birks does with unjust enrichment. It is the transfer of value not formal title that is relevant to determining whether there has been an acquisition of property.

Deane and Gaudron JJ explained that money was personal property and if the government imposed an obligation to pay money and conferred a chose in action on the creditor this in some circumstances could be an acquisition of property by the creditor.[29] They said:

> For there to be an acquisition of property there must be an obtaining of at least some identifiable benefit or advantage relating to ownership of the property. On the other hand, it is possible to envisage circumstances in which an extinguishment, modification or deprivation of the proprietary rights of one person would involve an acquisition of property by another by reason of some identifiable and measurable countervailing benefit or advantage accruing to that other person as a result.[30]

But technical notions of title and possession were not required for there to be an acquisition. They

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[27] Ibid. at 176.

[28] Ibid. at 184-5

[29] Ibid. at 184 citing *Australian Tape Manufacturers Association Ltd v The Commonwealth (1993) 176 CLR at 509-10.*.

[30] Ibid. at 185.

said:

> Indeed 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.[31]

This approach shows support for an unjust enrichment inspired interpretation of s 51 (31) that sees the acquisition of value as being encompassed by the term acquisition of property.

Justice McHugh also acknowledged that the extinguishment of the chose acted to enrich the Commonwealth at the expense of Mutual Pools.[32]

On the other side Dawson and Toohey JJ looked generally at the distinction between extinguishment and acquisition saying that extinguishment was not equivalent to acquisition of the chose. They cited Mason J (as he then was) in *Bone v Commissioner of Stamp Duties (NSW)* [33]to that effect. They also cited Mason J (as he then was) in the *Commonwealth v Tasmania (Tasmanian Dams Case)*[34] saying that the termination of a pre-existing right is not *per se* an acquisition, there must also be acquisition by the Commonwealth or another of an interest in property.[35]

Justices Dawson and Toohey said that for 51(31) to operate it *may* be necessary that the property acquired must be the same as the property divested.[36] They explained, if that was the test to be applied, the Commonwealth, in the case at hand, did not receive the chose, so section 51 (31) would not apply. But even taking a broader view there were problems. The argument that the Commonwealth *in effect* acquired the plaintiff's money stumbled on the point that the Commonwealth needed to acquire property.[37]

They said:

> Not every benefit which flows to another when a right is extinguished amounts to the acquisition of property by that other. That is so where the benefit consists only of a financial or monetary advantage.[38] ...

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[31] Ibid at 185.

[32] Ibid at 223

[33] (1974) 132 CLR 38 at 56.

[34] (1983) 158 CLR 1 at 145.

[35] *Supra n* 3 at 194-5.

[36] Ibid. at 195.

[37] Ibid. at 195.

[38] Ibid at 195.

The distinction between the transfer of value and the acquisition of property is well established and is not dependent upon considerations of a constitutional nature.[39]

This view they claim was clearly envisaged at the time the *Constitution* was drafted and suggests the acquisition of physical property, in particular land, and not the transfer of value.

They continued:

Value cannot constitute property within the meaning of s 51(31) because the phrase "acquisition of property on just terms" presupposes that the property acquired can be valued, whatever else the expression may entail, and it is meaningless to speak of the value of value.[40]

This is why, they explained, the raising of a chose against a citizen pursuant to raising taxes is not acquisition of property; the government is simply acquiring value and value has no "just terms value". All money represents is value and if you take value you are not acquiring property because it is meaningless to speak of paying just terms for acquiring value.[41] In response it might be said that value can be valued and that this is the premise of the modern law of unjust enrichment, which both judges have endorsed.[42]

The motivation behind the judgment of Dawson and Toohey JJ seems to be to constrain the operation of 51 (31) in deference to the power of parliament to affect economic interests in the name of social welfare. Their approach also demarcates much more clearly the types of acquisitions that s 51 (31) will cover.

The majority though have clearly embraced an unjust enrichment inspired interpretation of s 51 (31) that requires the acquisition of value to be paid for.

(b) Georgiadis v AOTC[43].

Georgiadis an employee of Telecom had two (current) causes of action to sue for employment related negligence and common law damages. In 1988 the Commonwealth set up a new scheme for employment related compensation and thereby abolished in some instances the right to sue for common law damages. The new scheme covered causes of action arising before and after 1988. Georgiadis sued on his pre 1988 causes of action at common law but was met with the defence by

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[39] Ibid. at 196.

[40] Ibid at 196.

[41] Ibid at 197.

[42] *Supra n* 11.

[43] (1994) 179 CLR 297.

Telecom that the new *Commonwealth Employees' Rehabilitation and Compensation Act* 1988 (Cth) extinguished the common law causes of action. Georgiadis responded saying that the Act was unconstitutional because it enacted an acquisition of his property, the chose in action to sue for damages, without just terms in contravention of s 51(31).

Mason CJ Deane and Gaudron JJ, in a judgement which in large part restates the propositions these judges put forward in *Mutual Pools* held that there had been an acquisition of property without just terms. They noted with some emphasis the distinction between an acquisition and a taking. A taking directs attention to the person who is losing the property while an acquisition directs attention to whether something is or will be received. They said:

> If there is a receipt there is no reason why it should correspond precisely with what was taken. Thus the fact that neither Telecom nor anyone else has the cause of action which was previously vested in Mr Georgiadis is not conclusive of the question whether there has been an acquisition of property for the purposes of par (xxxi).[44]

They continued on to say that an acquisition extends to the extinguishment of a cause of action at least where extinguishment confers a benefit or gain (like having liability extinguished) and the cause of action is one founded at common law.[45] If the cause of action is statutory then it susceptible to modification as it is created by statute and thus can be taken away without effecting an acquisition. [46]

They concluded that the law could be characterised as one with respect to acquisition for the purpose of s 51(31) and in so doing rejected the argument that the Act was merely a law imposing time limitations on causes of action. It was in effect a law imposing a ban on actions not time limits.[47] They held s 44 of the Act to be unconstitutional and inoperative as a defence to the Georgiadis action. They suggested that if s 44 had appeared in legislation creating a general scheme applying to employers and employees generally then maybe 51 (31) would not have applied.[48]

Brennan J came to the same conclusion holding there had been an acquisition without just terms. He held that a chose in action was property for the purposes of 51(31) and that extinguishment effected an acquisition of property. The fact that the right to sue the Commonwealth for tort had been created by sections 56 and 64 *Judiciary Act* 1903 (Cth) did not mean that the Commonwealth could take away a person's common law cause of action in tort without compensation.[49]

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[44] Ibid. at 304-5.

[45] Ibid at 305.

[46] Ibid. at 305-6.

[47] Ibid. at 307.

[48] Ibid. at 308.

[49] Ibid at 311-12.

Dawson J in dissent held there was no acquisition of property. While he was not prepared to finally determine the issue he said he would assume that plaintiffs bare right to sue was property for the purposes of s 51(31) as it was a guarantee against 'unjust appropriation'. [50] But for Dawson J there was no acquisition as mere receipt of a financial benefit is not the acquisition of property. He said:

Property's worth is not the same thing as property ...[51]

Following on he said that the extinguishment had created a benefit in that liability was reduced but that was not an acquisition.[52]

Toohey J held like Dawson J that there had been no acquisition. A benefit had accrued through extinguishment but this was not acquisition.[53]

McHugh J held that the right to sue the Commonwealth was given by Commonwealth statute and could be taken away by statute without there being an acquisition on just terms. He explained, if you only have a right because the Commonwealth gives it to you, you are not losing property if they modify your right; they are simply redefining the right.[54]

In summary, in this decision a majority of judges endorse an unjust enrichment inspired interpretation of s 51 (31) which sees "acquisition of property" encompassing "acquisition of value".

(iii) Health Insurance Commission v Peverill[55]

The *Health Insurance Act* 1973 (Cth) was amended retrospectively so as to reduce the medicare benefit available on a particular pathology test. Dr Peverill having taken an assignment of the patients medicare benefit in lieu of payment under s 20A of the Act stood to lose much if his right was reduced from $34.50 to $17.20 on each claim. He argued that the retrospective alteration of his rights was an acquisition of property for the purposes of s 51 (31).

Mason CJ Deane and Gaudron JJ held that the right to receive the benefit was property but there was no suggestion here that it had been acquired by the government. They said rights under a welfare scheme like medicare which are statutory are susceptible to modification because it is the Commonwealth that gives them and it is the Commonwealth that can take them away. These statutory

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[50] Ibid. at 314.

[51] Ibid at 315.

[52] Ibid at 315-6.

[53] Ibid. at 320-1.

[54] Ibid. at 326-30.

[55] (1994) 179 CLR 226.

rights that are only given life by the statute are paid for out of public funds for the public interest, they must be capable of modification retrospectively or prospectively.[56] This could not be characterised as a law for the acquisition of property - it was in effect a law defining the extent of the privilege the government was bestowing.

Brennan J likewise held there was no acquisition but because there was no property to be acquired. What the Act created was not a debt due by the Commonwealth but a gratuitous payment. All that the Act gave was an expectation that the benefit would be paid - it did not create a civil obligation to pay it - a debt - it was a gratuity.[57] It was at all times subject to the will of parliament as to its gratuitous nature.

Dawson J held that Peverill had acquired a chose in action but that its extinguishment by the Commonwealth had not effected an acquisition of property.[58] Toohey reasoned in similar fashion that there had been no acquisition.[59]

McHugh J held that the right was a chose in action and property but that it was a statutory entitlement and as such always liable to alteration and modification. Peverill's chose in action was in substance a right to sue for the statutory benefit however parliament could define that to be existent or non existent.[60] He said a right to a payment created by federal law can be abolished at any time without contravening 51(31). Until the right has been transformed into a debt currently owing the property is subject to redefinition. Once the debt arises the property is defined and no longer depends on federal law for its definition; and then the Commonwealth's actions would come within 51 (31).[61]

Note Brennan J is the only judge that suggests that Peverill held no "property" for the purpose of activating s 51 (31). This is of relevance to an unjust enrichment styled interpretation of s 51 (31). Before the principle of unjust enrichment can operate (at least to this point in time) ownership in property must exist.[62] *Peverill* suggests that some types of property by definition are not susceptible to claims based on unjust enrichment/acquisition.

(iv) Australian Tape Manufacturers Association Ltd v The Commonwealth of Australia.[63]

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[56] Ibid. at 236-7.

[57] Ibid at 242-5.

[58] Ibid. at 251.

[59] Ibid. at 256.

[60] Ibid. at 260-8.

[61] Ibid. at 266.

[62] *Supra n* 13.

[63] (1993) 177 CLR 480.

Much of the reasoning in *Mutual Pools* has its roots in *Australian Tape Manufacturers Association Ltd v The Commonwealth of Australia.*[64] The Commonwealth had amended the *Copyright Act* 1968 (Cth) in order to remedy the widespread practice of breaching copyright perpetrated by taping sound recordings for domestic and private use. The amendments set up a scheme whereby a royalty would be paid by the vendor each time a blank tape was sold and then that royalty would be distributed to the copyright holders. The scheme deemed the making of these private recordings lawful, primarily because a royalty was now being imposed on sale of blank tapes.

The tape manufacturers were not happy with such a scheme and challenged the validity of the amendments. One limb of the challenge was based on 51(31). It was argued that the payer of the royalty was having property acquired other than on just terms. Mason CJ Brennan Deane and Gaudron JJ held that the royalty was a tax. A tax they said by its very nature does not anticipate any *quid pro quo* and is not within the ambit of 51(31).

If it had not been a tax though they would have held the legislation to contravene 51(31).[65] They explained that property in 51 (31) was to be given a wide meaning and that it included money and the right to be paid money. If it did not then Parliament could take money or the right to be paid money and thereby make 51 (31)'s protection illusory.[66] They said:

> A law that provided for a person to pay an amount equal to the total value of their property would effect a 51(31) acquisition even though it merely imposed an obligation to pay money and did not directly expropriate specific notes or coins.[67]

They explained 51(31) could not be circumvented by technical devices which in substance breach the purport of the section.[68] They said if the blank tapes levy was not a tax it would be an acquisition of property on other than just terms.[69] The fact that the property was to be acquired by a non government third party did not make any difference.[70]

Dawson and Toohey JJ (McHugh J concurring on the 51(31) issue) addressed two arguments relating to just terms. Firstly was the property of the payer of the royalty acquired on other than just terms and secondly was the property of the copyright holder acquired on other than just terms.[71] The first

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[64] Ibid.

[65] Ibid. at 509.

[66] Ibid. at 509.

[67] Ibid. at 509-10.

[68] Ibid at 510.

[69] Ibid. at 511.

[70] Ibid. at 510-11.

[71] Ibid. at 526.

argument was not sustainable as the royalty was a tax and a tax has never been thought of as an acquisition of property. They said the imposition of a tax creates a debt (a chose in action) but does not involve the acquisition of property nor does the satisfaction of the debt by money, which is not transferred in specie, but as the medium of exchange.[72]

They held the second argument to be no stronger for the privilege to tape record for private use did not transfer copyright from the copyright holder to the tape recorder. No proprietary right was acquired by the tape recorder and thus no acquisition of property occurred.[73] They said:

> the mere extinction or diminution of a proprietary right residing in one person does not necessarily result in acquisition of a proprietary right by another.[74]

The four cases listed above show clearly that the principle of unjust enrichment has generated an interpretation of s 51 (31) that sees the acquisition of value as covered by the section. The anti value approach of Dawson and Toohey JJ while technically precise and beneficial to the government, is at odds with their adoption of the unjust transfer of value as the premise of the modern law of unjust enrichment, and the protection of the right to private property. Dawson and Toohey JJ's argument that value has no objective value, and that money is merely a medium of exchange, privileges form over substance, and is unpersuasive in a society in which the transfer of value is so pervasive.

Loss/Gain

S 51 (31) implies that the acquisition will be at the expense of the property owner/plaintiff however there is no requirement that the benefit be acquired by the Commonwealth Government, it may be acquired by a third party. In the situation where a third party is the beneficiary the unjust enrichment analysis requiring a loss/gain equivalence may appear an awkward fit. However loss never occurs unless the Commonwealth Parliament enacts legislation transferring the value, and the legislation must be for a purpose for which the Commonwealth can make laws. In substance, though not in form, the value acquired flows through the Commonwealth to the third party beneficiary. For without the legislative act the transfer of value would not result.[75]

(iii) Just Terms

The interpretation of the requirement of "just terms" also seems to be influenced by the principle of unjust enrichment. "Just terms" has been described as what is fair in the circumstances[76], however

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[72] Ibid. at 527.

[73] Ibid. at 527.

[74] Ibid at 528.

[75] Note that the scope of the third party beneficiary rule is uncertain, see: *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 68 ALJR 537 per Dawson J at 551ff.

[76] *Nelungaloo v Commonwealth* (1948) 75 CLR 495 at 541-2, 569 cf. 547-8.

Brennan J rejects this notion saying its requires full compensation for the loss. This seems to be correct. If we apply unjust enrichment strictly then the restitution must equate to the loss and cannot be modified for circumstantial reasons.

In determining the issue of just terms, the Court does not attempt a balancing of the interests of the dispossessed owner against the interests of the community at large. The purpose of the guarantee of just terms is to ensure that the owners of property compulsorily acquired by government presumable in the interests of the community at large are not required to sacrifice their property for less than its worth. Unless it be shown that what is gained is full compensation for what is lost, the terms cannot be found to be just. [77]

The Unjust Factor

Even if we can say that the extinguishment of the chose is an enrichment to the Commonwealth (an acquisition of value), can we say it is an unjust enrichment? What unjust factor is operative in these circumstances?

As s 51 (31) appears to only apply to compulsory acquisition[78], the unjustness of the situation is generated by the constraints placed upon the choices of the plaintiff in dealing with private property through the legislative demand. In the context of s 51 (31) the unjust factor is the vitiated intent of the plaintiff to transfer the value caused by the compulsion enacted in the legislation.[79]

Political Constraints on a Strict Application Of Unjust Enrichment

While the circumstances or context are irrelevant to the determination of just terms they may be relevant in deciding whether unjust enrichment should be strictly applied in the first place; that is in deciding whether the s 51 (31) guarantee is operational in the instance at hand. The basic test here is whether a strict application of unjust enrichment would endanger the workings of our free and democratic society.[80]

Conclusion: Constitutional Guarantee of Unjust Enrichment

Recent case law suggests that s 51 (31) should be seen as a constitutional guarantee of restitution for unjust enrichment and in this sense guarantees the right to private property.[81] The guarantee operates,

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[77] Georgiadis *supra n* 3 at 310-1.

[78] *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 416-7: Dawson J in *Peverill supra n* 55 at 250.

[79] On the notion of unjust factors based on vitiated intent to transfer value see Birks *supra n 7* Chapter VI.

[80] *Supra n 9.*

[81] For support of this view consider by way of analogy the role

as in unjust enrichment, where value is transferred at the expense of the plaintiff in unjust circumstances. The unjust enrichment formula of enrichment of the defendant at the expense of the plaintiff in unjust circumstances demands restitution becomes: acquisition of property by the Commonwealth (enrichment at the expense of the property owner) through compulsory acquisition (unjust circumstances) demands just terms (restitution).

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of unjust enrichment in international law dealing with nationalisation and expropriation: W Friedmann *The Changing Structure of International Law* (1964) 372.