

WHEN DOES PROPERTY BECOME TERRITORY? NUCLEAR WASTE, FEDERAL LAND ACQUISITION AND CONSTITUTIONAL REQUIREMENTS FOR STATE CONSENT

ABSTRACT

In any federal system, the ability of State governments to retain their territory represents a basic constitutional assumption. When Australia's federal government seeks to compulsorily acquire State land under s 51(xxxi) of the *Constitution*, important principles are aroused. Are there enforceable limits on a national government's ability to acquire the land of a State against its will? If not, what would prevent a government from acquiring as much of the land of a State as it wished, in fulfilment of a national legislative purpose; or indeed all the lands of a State; or all lands of all States? This article explores these questions using the *Nuclear Waste Dump* case, heard first by the late Justice Brad Selway, where he identified the key question of how federal principle was to be reconciled with the Commonwealth's acquisitive powers. Traditionally, federalism has been reconciled with these powers through the principle that federal acquisition of land as 'property' involves only minimum interference with State jurisdiction or 'territory'. In Australia, however, that principle has become steadily more fictitious, particularly under the prevailing reading of s 52(i) of the *Constitution* (exclusive Commonwealth power to legislate with respect to acquired places). The fundamental conclusion is that as it stands, at least some forced Commonwealth acquisitions should properly be seen as going beyond mere property dealings and instead as alterations of territory. The question becomes whether they therefore breach express limits on Commonwealth power under provisions such as 123 of the *Constitution*. The true extent of Commonwealth power in this area has a direct bearing on future reform of Australia's federal system.

INTRODUCTION

In a federal system, the power of state governments to retain their territory – their own physical jurisdiction – represents a basic constitutional assumption. After all, it is through their territorial existence that state governments are historically and politically defined. Following the principles of modern federalism negotiated in the United States in the 1780s, Australia accords subnational governments their own continuing identity and 'legal life'.¹ Therefore,

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when a national government seeks to compulsorily acquire State territory, important principles are automatically aroused. Are there enforceable limits on a national government's ability to acquire the territory of a State against its will? If not, what would ultimately prevent a national government from compulsorily acquiring all the territory of a State, or indeed *all* the territory of *all* the States, and thereby abolish the federal system in its entirety?

This article brings these questions into relief using the *Nuclear Waste Dump* case² – ultimately determined by a Full Federal Court consisting of Branson, Finn and Finkelstein JJ, but heard at first instance by the late Justice Brad Selway. In that case, the Australian Government failed in its attempt to compulsorily acquire part of a State-owned pastoral lease under the *Lands Acquisition Act 1989* (Cth), empowered by s 51(xxxi) of the *Constitution*. The Commonwealth failed because it did not follow proper procedure, seeking to use an 'urgency' procedure under s 24 of the Act to acquire the property before the South Australian government could declare it a public park. The Full Court found this to be an improper purpose for the exercise of s 24, and to have been done in a way that also denied natural justice to the South Australian government.

At first instance, however, Selway J found no invalidity in the Commonwealth's actions. Elsewhere in this volume, the Commonwealth Solicitor-General, David Bennett QC, also maintains that the grounds for overturning Selway J were weak. Yet clearly, there was an odiousness to the Commonwealth's actions. Can it be correct, in a functioning federation, that had the Commonwealth simply followed a semblance of proper procedure, the government and people of South Australia would have had no constitutional protection against such a significant loss of their own property, against their will, on such a far-reaching issue?

The first part of the article examines the outcomes of the *Nuclear Waste Dump* case, for what was both said and left unsaid on this issue. In effect, perhaps *both* Selway J and the Full Court were right – Selway J because he correctly decided the case on the administrative law issues placed before him, and the Full Court because, less correctly, but still responsibly, it decided the case with greater apparent sensitivity to the constitutional conflict embedded in the case. The second part of the article explores this conflict in greater depth. It exposes a deep uncertainty in Australian jurisprudence over the constitutional effect when the Commonwealth exercises its powers of acquisition against the will of a State, given not only s 51(xxxi) of the *Constitution* but the exclusive jurisdiction enjoyed by the Commonwealth over acquired places by virtue of current interpretations of s 52(i). A first conclusion reached is that current interpretations of s 52(i) may in fact be wrong, when regard is had to fundamental constitutional principles, which in Australia have become steadily more fictitious. However an even more basic

¹ N Blomley, *Law, Space and the Geographies of Power* (1994) 114.

² *State of South Australia v Honourable Peter Slipper MP* [2003] FCA 1414 (Selway J); (2004) 136 FCR 164 (Branson, Finn and Finkelstein JJ).

conclusion is that under the current readings of ss 51(xxxi) and 52(i), taken together, at least some forced Commonwealth acquisitions go beyond mere property dealings and should be squarely seen as alterations of territory.

The third part of the article examines the implications of this, given that if this is right, such acquisitions should also properly trigger some further express limits on Commonwealth power, which have so far lain forgotten and untested in Australian constitutional history. These include requirements for State and popular consent before the Commonwealth is entitled to act in a manner that would ‘increase, diminish or otherwise alter’ the territorial limits of a State (*Constitution*, s 123). A historical reading of this provision helps confirm its applicability to at least some of the types of territorial alteration that might otherwise appear to be available to the Commonwealth using s 51(xxxvi), including acquisitions such as in the *Nuclear Waste Dump case*.

In conclusion, it is suggested that these are more than academic issues, given the scope that otherwise appears to exist for the Commonwealth’s use of its acquisitive powers. The *Nuclear Waste Dump case* provides but one example of the many ways in which, over recent decades, Commonwealth governments have sought to use subconstitutional methods to reform the basic structure of federal-state relations. With reform momentum undiminished, the question of fundamental limits on the Commonwealth’s various powers is likely to have continued importance. As long as reform remains collaborative, then the consent of the States to the transfer of functions, powers, personnel and property may allow such questions to sleep. However, if or when the Commonwealth resumes a coercive approach to such restructuring – for example, in difficult policy fields such as water or health – the reality may again be exposed that, if federal principles are to mean anything, the Commonwealth may remain subject to deeper constitutional limits than many policymakers might wish to see.

I ‘STARTLING’ PROPOSITIONS: THE NUCLEAR WASTE DUMP CASE

The fact that the *Nuclear Waste Dump* case was really a constitutional case – one deserving to be fought as a set-piece Waterloo rather than a guerrilla-style clash over procedural fairness – was apparent early in the matter, and was recognised by Selway J. The Commonwealth government’s search for a site for a national waste repository had commenced as an exercise in collaborative federalism. Following recommendations of the Commonwealth/State Consultative Committee on Radioactive Waste Management in 1985 and 1992, officials had, by 1998, selected the central-north region of South Australia as a preferred location. However, in early 2000 the politics changed, and South Australia’s Liberal Government withdrew support for storage within its borders of anything but low-level and short-lived intermediate nuclear waste. This withdrawal of support was legislated in the *Nuclear Waste Storage Facility (Prohibition) Act 2000* (SA). It was also bipartisan,

with the incoming Rann Labor Government further strengthening the State's opposition from February 2002.

Faced with the State's withdrawal from the previous agreements, the Commonwealth pursued coercively that which had commenced collaboratively. In July 2002, the Commonwealth continued with the release of a draft Environmental Impact Statement (EIS) for the proposed repository, and in May 2003 announced the proposed site on the Arcoona pastoral lease. This was not only still within South Australia's boundaries, but was itself State-owned land. How could the Commonwealth not only plan to operate a facility that had been specifically outlawed by the South Australian parliament, but secure land for this purpose that was owned by the very Government that opposed its plans?

Prevailing interpretations of the *Constitution* mean that in respect of both these issues, the Commonwealth faced few major barriers. On the first question, as found by Selway J, there was 'no issue of high constitutional principle' involved in the fact that under s 109 of the *Constitution*, valid Commonwealth legislation with respect to the creation of such a facility would override any inconsistent State legislation on the subject.³ In this case, the *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth) explicitly licensed that which the South Australian legislation otherwise prohibited, irrespective of to whom the Commonwealth might grant such a licence.

On the second question, the Commonwealth's determination to acquire the land for itself, rather than just override the South Australian ban, provides the heart of both the administrative and constitutional issues raised by the case. Section 52(i) of the *Constitution* affords the federal parliament 'exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to – (i) ... all places acquired by the Commonwealth for public purposes'. If the Commonwealth could acquire the land, then under the prevailing interpretation of s 52(i), its legislative power over such a place would operate to the total exclusion of *any* State law, completely overcoming whatever others forms of legal opposition the South Australian government might throw in its way. This interpretation was not discussed in the *Nuclear Waste Dump* case, being apparently firmly established, but will be critically analysed further below.

The Commonwealth's ability to acquire the site, even from a bitterly opposed State government, flowed from the legislative power granted to it by s 51(xxxi) with respect to 'the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'. Like its predecessor legislation, the *Lands Acquisition Act 1989* (Cth), under which the Commonwealth moved to compulsorily acquire the site, had long been held to be

³ *State of South Australia v Honourable Peter Slipper MP* [2003] FCA 1414, 34-6 (Selway J).

valid. The administrative law issues placed before Selway J – natural justice and improper purpose – stemmed from the manner in which the Commonwealth chose to proceed with the acquisition.

The only substantive protection available to the State, under s 42 of the *Lands Acquisition Act*, was a prohibition on the Commonwealth from acquiring any ‘interest in land that consists of, or is in, a public park unless the Government of the State or Territory in which the land is situated has consented to the acquisition of the interest’. In June 2003, one month after the Commonwealth announced the proposed site, the South Australian government sought to avail itself of this protection by introducing legislation to convert key parts into a park.⁴ However on 7 July 2003, a week before the South Australian Parliament was due to resume and pass this Bill, the Commonwealth proceeded to declare its acquisition of the property.⁵ In so doing, the Commonwealth departed from the normal statutory procedure, which involved issuing a pre-acquisition declaration followed by opportunities for administrative review. Instead it proceeded directly to full acquisition using an ‘urgency’ procedure available under s 24. The immediate question was whether the Commonwealth’s action was a lawful exercise of its powers under the Act.

A Natural Justice

The South Australian government’s first claim was that the Commonwealth had unlawfully denied it natural justice, by proceeding to an ‘urgent’ acquisition without the customary opportunities for the State to be heard and perhaps seek administrative review. In fact, the State had twice written to the Commonwealth asking to be heard on any proposal to acquire the land, but received only a perfunctory response prior to the purported acquisition. However, Selway J did not find the Commonwealth’s actions to involve an impermissible denial of natural justice. He effectively rejected the Commonwealth’s claim that any effort to give the State a hearing on the acquisition would simply have ensured rapid passage of the Park Bill, and therefore have been futile. He also rejected the related claim that the introduction of the Park Bill itself created sufficient ‘urgency’, leaving no time for the State to be heard.⁶ Nevertheless, he concluded that the Commonwealth was entitled to proceed without any further hearing, because the Parliament had explicitly provided the s 24 ‘urgency’ procedure as an alternative to the normal schema of natural justice, and the Commonwealth had simply followed that alternative procedure. The statutory tests to be met by the Commonwealth Minister in using this procedure, under sub-s 24(1), were very wide. According to Selway J, the reasonableness of the Minister’s satisfaction that there was an ‘urgent necessity’ might well remain politically questionable, but was not questionable at law.

⁴ *Public Park Bill 2003* (SA).

⁵ See [2003] FCA 1414 [9-12] (Selway J).

⁶ [2003] FCA 1414 [25] (Selway J).

In the Full Court, a different result prevailed. Finn J (with whom the rest of the Court agreed) disagreed that the Parliament had intended the alternative procedure under s 24 to exclude any and all other requirements for satisfying natural justice.⁷ Hence, there was a valid issue as to whether the Commonwealth's actions satisfied the minimum requirements of procedural fairness under the circumstances. However, this was certainly not a neat result. As Bennett notes in this volume, Finn J recognised that even if the Commonwealth had acted more honourably and provided some kind of hearing, the likely result would have been immediate resumption of State parliament and passage of the Park Bill. In that case, according to Finn J, the Commonwealth would still have been entitled to use the s 24 'urgency' procedure to acquire the property without further discussion, before the Park Bill passed. In other words, it was still valid for the Commonwealth to see the State's Park Bill as creating an 'urgent necessity'. The political circumstances being an inevitable descent into a race between the Park Bill and the acquisition, Finn J tended to concede that any effort to extend natural justice would actually have been futile.

B *Improper Purpose*

Underlying the issue of natural justice was the deeper question, of whether the Commonwealth exercised its 'urgency' power for an improper purpose – that is, not because there was any real 'urgent necessity' to proceed quickly, but because it wished to defeat South Australia's intention to legislate to create the public park. According to Selway J, the fact the Commonwealth was moving to defeat that intention did not make its actions invalid, because it was not trying to defeat the park's creation for any reason unrelated to acquisition of the land. Accordingly he found it no less valid for the Commonwealth to act to acquire the land before it could be declared as park, than it was for the Commonwealth to head off any other "extraneous" factual or legal circumstance' that might otherwise frustrate or render pointless an intended acquisition.⁸

The Full Court again disagreed, led on this issue by Branson J. It is here that the case begins to ascend into questions that would have been better addressed as constitutional issues, from the outset, rather than ones of administrative integrity. According to Branson J, it was impermissible for the Commonwealth to use s 24 to defeat the creation of a public park in order to then acquire the land. To do so was inconsistent with the Commonwealth Parliament's recognition, in s 42 of the same Act, that public parks were not available for acquisition without consent. Branson J found it to be a 'startling' proposition that a Commonwealth Minister should be entitled to find there was urgent necessity for an acquisition 'where the only ground of urgency is a desire in the Minister to avoid the application of a restriction placed

⁷ *State of South Australia v Honourable Peter Slipper MP* (2004) 136 FCR 164, 284 [110] (Finn J).

⁸ [2003] FCA 1414 [64] (Selway J).

on the Minister's power of acquisition'.⁹ In other words, something more was required to justify the use of the urgency procedure, than a simple race to preempt a person's exercise of an entitlement that would then legitimately protect them from an acquisition.

While the Full Court decision helpfully bolsters the rights of those on the receiving end of Commonwealth compulsory acquisitions, its reasoning does not translate easily to the political circumstances of this case. The entity on the receiving end was not an individual citizen, but a fellow government engaged in a naked constitutional conflict. Pivotal to the result was Branson J's rejection of the idea that a Minister could be validly satisfied that it would be contrary to the public interest for an acquisition to be delayed 'where the only relevant consequence of the delay' was that someone would lawfully put the land beyond the reach of the Act.¹⁰ However in the real world occupied by Selway J, it was almost unthinkable that a diligent Minister, convinced that their actions were in the public interest, would ever be satisfied otherwise. While citizens might be entitled to so protect themselves, there is little reason to believe that the Commonwealth Parliament intended its statutory protection of public parks to be used by State governments to frustrate the very purpose of the acquisition legislation. In fact, contrary suggestions arise from the history of the 1989 Act.¹¹

The Full Court's reasoning might be more persuasive had it more explicitly recognised that the stand-off was not between the Commonwealth and a typical private landowner, but the Commonwealth and another government. In these circumstances, as in any federal system, legitimate authority became a 'chicken and egg' question – the conclusion as to who was frustrating the valid political will of whom, depended on whether one saw the issue nationally or as a citizen of the State. Indeed, as Brad Selway had written elsewhere, one's whole perspective of the federal system 'is likely to be affected by one's position in it.'¹² It was valid for the Commonwealth to compulsorily acquire the land. It was valid for South Australia to turn it into park. While South Australia was only doing so to ensure it was not used for a radioactive waste facility, its assessment that a public park was a better use than a nuclear dump was one to which it was perfectly entitled. The Commonwealth

⁹ (2004) 136 FCR 164, 273-4 [58] (Branson J).

¹⁰ Ibid.

¹¹ See Australian Law Reform Commission (ALRC) No. 14, *Lands Acquisition and Compensation* (1980), 136-139. Public parks had received special mention ever since the original 1906 acquisition legislation, and under s 8(2) of the previous *Lands Acquisition Act 1955* (Cth) could not be acquired by the Commonwealth under any circumstances, even with the agreement of the State. The apparent effect was that the State could not 'sell' such land as property, but rather only 'surrender' it to the Commonwealth as territory, under s 111 of the *Constitution*. The 1989 Act had therefore liberalised this position.

¹² B Selway, 'The Federation – What Makes it Work and What Should We Be Thinking About for the Future' (2001) 60 *Australian Journal of Public Administration* 116, 122.

was only acting to acquire the land ‘urgently’ because it took the opposite view – also politically and constitutionally valid. The real issue was a constitutional one, because at administrative law, each party’s purposes were proper.

In fact, this was the position recognised by Selway J, when he originally considered – somewhat more directly than Branson J – the circumstances in which the executive’s use of the s 24 urgency procedure might invalidly frustrate the intentions of *either* the Commonwealth parliament *or any other* parliament under the Constitution. Selway J found it plain that the Commonwealth government could not have used the urgency procedure to preempt anything that the Commonwealth parliament might do to circumvent an acquisition under its own laws. However, he could see nothing that afforded the same privilege to a State parliament:

There may well be a necessary implication that certain purposes do not fall within s 24 LAA. For example, if the Minister issued a s 24 certificate in order to effect an acquisition before legislation was enacted by the Commonwealth Parliament preventing such an acquisition, then it might be arguable that the power in s 24 LAA should be read down so that the word ‘urgency’ did not include the processes of the Commonwealth Parliament by reason of the implication of responsible government within the Constitution. *But I can see no reason to make any such implication in relation to legislation introduced into a State Parliament. The only relevant constitutional implication in that context would be an implication in relation to federalism.* On the face of it, such an implication is denied by the terms of s 109 of the Constitution which expressly provides for what happens in the case of inconsistency between Commonwealth and State laws.¹³

Perhaps Selway J’s reference to ‘an implication in relation to federalism’ can be read as something of a lament that South Australia had not offered a stronger constitutional argument. Certainly it is regrettable that he was not given greater opportunity to explore the real issues of federalism involved. Earlier he had taken it upon himself to consider how s 109 would apply to the conflict between the State prohibition Act and the Commonwealth licensing Act, but the case failed to provoke detailed analysis of the best way to reconcile the deeper conflict over acquisition of the land. In effect, the real question exposed by Selway J was left unanswered.

What then is the answer? Surely, as a matter of federal principle, a State government should not have to rely on discovering some improper purpose by the Commonwealth – acting on its own view of the national interest – before being entitled to defend its legislative authority over its own territory in such a case? In a federal system, why *shouldn’t* legislation validly introduced into a State parliament, in and of itself, amount to a bar on the Commonwealth proceeding further with any such acquisition, at least until the nature of the State parliamentary will had been

¹³ [2003] FCA 1414 [59] (Selway J), emphasis added.

determined? Certainly, s 51(xxxi) of the *Constitution* expressly includes the States as entities from which the Commonwealth or others might compulsorily acquire property. But should it even be necessary for a State to reduce itself to the type of tactics used by South Australia to defend against unwanted acquisition of its own land, before being able to argue that such acquisition raised more serious issues? These questions become the focus of this article.

II FEDERAL ACQUISITION OF STATE PROPERTY IN AUSTRALIA: SOME NON-FEDERAL PRINCIPLES

Where *do* the limits lie on the Commonwealth Parliament's capacity to legislate for the forced acquisition of State property or territory, against the will of the State? As suggested by the lack of clearer constitutional argument in the South Australian case, the prevailing feeling is that the limits are remote. There is little recent support for the idea that state governments possess territory that is legally 'inviolable' by the Commonwealth, implying as that would that a State still possesses some degree of sovereignty independently of the national government. Although this concept of 'dual sovereignty' caused no difficulty to a majority of Australia's federal founders, and remains celebrated by federal theorists,¹⁴ it was largely negated in constitutional jurisprudence in the famous *Engineers case*.¹⁵

In fact, it is not often understood that in *Engineers*, the relative position of the Commonwealth and states was resolved not using federal concepts of 'dual' or shared sovereignty, but explicitly through a reassertion of unitary principles as if Australians had never adopted a federal Constitution. This is clearly visible in the emphasis placed in the joint judgment on 'the common sovereignty of all parts of the British Empire' and 'indivisibility of the Crown'.¹⁶ Under such principles, the mere fact that the powers of government might be 'exercisable by different agents in different localities, or in respect of different purposes in the same locality' did not mean that the 'political organisms called States' stood in any special position vis-a-vis the Commonwealth.¹⁷ The effect was to declare the States to be bound by valid Commonwealth laws just as much as any other subjects of the realm, with no separate sovereignty of their own.

Since the *Engineers* case, the States' only protection from unwanted interference has lain in the much-reduced principle of intergovernmental immunity enunciated by Dixon J in *Melbourne Corporation*.¹⁸ This provides that notwithstanding 'the complete overthrow of the general doctrine of reciprocal immunity' that existed

¹⁴ See generally Brian Galligan, *A Federal Republic* (1995).

¹⁵ *Amalgamated Society of Engineers v The Adelaide Steamship Company Limited and Others* (1920) 28 CLR 129 (Knox CJ, Isaacs, Rich and Starke JJ (delivered by Isaacs J)).

¹⁶ (1920) 28 CLR 129, 146-7 (Knox CJ, Isaacs, Rich and Starke JJ).

¹⁷ (1920) 28 CLR 129, 152-3 (Knox CJ, Isaacs, Rich and Starke JJ).

¹⁸ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

prior to *Engineers*, the legislative powers of one government cannot be used ‘in order directly to deprive another government of powers or authority committed to it or restrict that government in their exercise.’¹⁹ Accordingly, whatever its reach, a Commonwealth law may not inhibit or impair the continued ability and capacity of a State government to function. After all, the *Constitution* guarantees the existence of each original State, as a political entity, unless or until a majority of its citizens vote it out of existence under s 128. Despite its sparing use, the *Melbourne Corporation* principle remains conceptually vital to the survival of a federal system in Australia, and has its parallels in American federalism, albeit there strengthened by the Tenth Amendment’s limitations on the ability of the US Congress to legislate coercively against the states.²⁰ Coincidentally, in 1992, it was this limitation that saw the US Supreme Court strike down a federal attempt to compel state governments to participate in joint nuclear waste disposal, by trying to force them to legislate consistently with federal guidelines.²¹

Is there a point at which the *Melbourne Corporation* principle would limit the ability of the Commonwealth to compulsorily acquire State property? Clearly, on its surface, federal acquisition of a small area of State-owned property would be unlikely to inhibit or impair the continued capacity of the State to function. But what if the area was larger? In 1983, the Commonwealth initiated the acquisition of large areas of New South Wales for defence training areas, including over 20,000 square kilometres of State-owned Western Division leasehold land around Cobar – an area ten times the size of the Australian Capital Territory, and over a quarter of the size of the state of Tasmania. The proposal was dropped in 1986, after a political debate as to whether the necessity of the acquisition was such as to justify its impact on the State and individual landholders.²² Had this large acquisition proceeded, its constitutionality would have been a ripe issue for litigation.

Moreover, the question of impact is presumably not limited to the size of the area but also the use to which it will be put. On one view, the health and safety risks associated with a nuclear waste repository could indeed threaten the very survival of the people of a State. If this seems fanciful, it is worth remembering those parts

¹⁹ (1947) 74 CLR 31, 81 (Dixon J).

²⁰ The Tenth Amendment, the quintessential statement of ‘States’ rights’ *not* found in the Australian Constitution, reads simply: ‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.’

²¹ *New York v United States* 505 U.S. ___, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992); see J Nowak and R Rotunda, *Constitutional Law* (1995) 160-170; W Rich, ‘Constitutional Law in the United States and Australia: Finding Common Ground’ (1995) 35 *Washburn Law Journal* 1-36, 5, n56.

²² See ‘Farmers wait for seven-year-old-law’ *Sydney Morning Herald* 11 May 1987; Department of the Senate, *Senate Legislative and General Purpose Standing Committees, the First 20 Years 1970-1990* (1990), 4; <http://www.aph.gov.au/senate/committee/history/first_20_years/fdt.htm> (accessed 5 March 2008).

of South Australia that are already radioactive, as a result of the nuclear weapons tests sanctioned by past federal governments.

Questions as to the permissible extent or scale of acquisition, or allowable social and economic impacts, are ones to which the article will return in conclusion. An issue of more direct importance, in the calculation of constitutional limits, is the *legal* effect of acquisition upon the existing powers and entitlements of the State from or within which such property is acquired. In the terms of the *Melbourne Corporation* principle, is there a point at which the forced transfer of land might, in and of itself, 'directly deprive a State government of powers or authority committed to it or restrict that government in their exercise',²³ in an impermissible way? Another way of asking the same question might be: is there a point at which the forced transfer of land extends beyond interference with property interests, to interference with the State as a defined political territory?

This distinction between 'property' and 'territory' is, in fact, fundamental to the way in which the Commonwealth's acquisition powers came to be expressed in the *Constitution*. Clearly, s 51(xxxi) authorises legislation with respect to the acquisition of 'property' from any State or person, but not legislation with respect to acquisition of State 'territory'. As will be shown, the latter is governed by a number of apparently separate provisions, in which State consent is a more prominent obstacle. However the need to distinguish between the taking of property and impacts on State territory was central to the original meaning of s 51(xxxi) in Australia's Federation Debates.

In 1898, it was agreed that such a power of acquisition should be made express, rather than left for discovery either within the incidental power in line with existing British constitutional principles, or as an implied power to 'take private property for public uses when needed to execute the powers conferred by the Constitution', as had occurred in America.²⁴ Not surprisingly, this American experience also pointed to the manner in which federal political philosophy was to be reconciled with an express power for Commonwealth acquisition of property, given that acquisition might well include land within the existing states. Isaacs explained that, as in America, the Commonwealth's acquisition power would flow inevitably from 'its

²³ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 81 (Dixon J).

²⁴ *Fort Leavenworth Railroad Co v Lowe* 114 US 525 (1885) 531, as quoted in *Paliflex Pty Ltd v Chief Commissioner of State Revenue* (2003) 78 ALJR 87, 42. *Fort Leavenworth* followed on *Kohl v United States* 91 US 367 (1875), establishing the US government's 'right of eminent domain' for acquisition purposes, which was the case quoted by Isaacs in the Melbourne Convention: Melbourne Convention (1898) *Official Record of the Debates of the Australasian Federal Convention. Third Session. Melbourne, 20th January to 17th March 1898* 260; see S Evans, 'Property and the Drafting of the Australian Constitution', (2001) 29 *Federal Law Review* 121, n 78.

sovereign power of eminent domain, that is, [as] the highest dominion'.²⁵ However, as the US Supreme Court had found when defining the implied power, the general principle was that federal acquisition could not and should not have the effect of displacing the State's own sovereignty over that land, to any extent beyond that strictly necessary, unless the State surrendered it voluntarily. Isaacs thus helped allay fears regarding the impact of the power on the legal position of the States, by articulating the principle that whenever the national government took land 'compulsorily or by purchase, in a state', it would hold that land not 'as a sovereign', but merely as a 'proprietor', like any other person.²⁶ This was an accurate summation of the applicable US precedent, which reassuringly stated that federal acquisition of property did not entail a loss of 'political jurisdiction and dominion' by the State, but rather meant 'lands so acquired remained within the territorial jurisdiction of the State concerned and the rights of the United States in the land were no more than those of a proprietor, subject only to the right of the United States to legislate to protect its own property'.²⁷

This conceptual separation of property and territory was thus accepted in Australia, as a vital precondition for the recognition of a Commonwealth acquisition power. The High Court has routinely given that power a wide meaning, such that the 'property' acquired by the Commonwealth from individuals or the States under s 51(xxxi) may extend to 'every species of valuable and interest', including not only land and objects but intangible legal rights and interests.²⁸ However, for obvious reasons, it remains inconceivable that the power would extend to compulsory acquisition of a State's legal rights and interests *as a State* under the Constitution itself, else the entire federal arrangement would collapse. Thus the High Court has been at pains to at least maintain lip service to the principle that the property and territorial interests of the States remain distinct and separable concepts. In *Svikert v Stewart* (1994),²⁹ the Court reiterated the recognised principle that the Commonwealth's ownership of places acquired under s 51(xxxi) did not confer any additional 'territorial sovereignty' upon the Commonwealth at the expense of the State, because when the Constitution was drafted, it had been deemed 'sufficient that acquisition of property should carry with it legislative authority without political dominion'.

The problem with this principle is that, in practice, it has been reduced to a fiction. As noted by Selway J, even were the principle taken seriously, there would remain many ways in which compulsory acquisition of land by the Commonwealth can

²⁵ Isaacs, 1898, Ibid.

²⁶ Isaacs, 1898, Ibid.

²⁷ *Leavenworth* (1885), 531, as cited in *Worthing v Rowell* (1970) 123 CLR 89, 99 (Barwick CJ).

²⁸ *Minister for Army v Dalziel* (1944) 68 CLR 261, 290; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

²⁹ *Svikert v Stewart* (1994) 181 CLR 548 (Mason CJ, Deane, Dawson and McHugh JJ); see also Evans, above n 24.

function to displace or override the legislative role of the State, simply by virtue of the operation of s 109 of the *Constitution*. Nevertheless, the notion that the State's legal interests and powers remain intact on Commonwealth-acquired land, other than to the degree necessary for the Commonwealth to carry out the purposes for which it was acquired, represents a fundamental 'in principle' brake on the extent to which the Commonwealth might use acquisition to transfer areas of land out from under State political control, and into its own control. Yet, in the *Nuclear Waste Dump* case, this was clearly one of the intentions behind the acquisition attempt.

The fictional state of the conceptual separation between property and territory which is meant to underpin s 51(xxxi) of the *Constitution*, is revealed by the directly conflicting result reached in the parallel line of High Court decisions dealing with s 52(i). As already mentioned, s 52(i) affords the federal parliament 'exclusive' legislative power with respect to 'all places acquired by the Commonwealth for public purposes'. The Commonwealth's expectation that it can, by acquiring any place, totally displace any and all State control over it, rests on apparently solid High Court authority flowing from *Worthing v Rowell* (1970).³⁰ To understand the extent to which this prevailing interpretation offends the same basic principle that supposedly continues to enliven s 51(xxxi), it is necessary to probe the history and the logic of this decision.

Prior to *Worthing v Rowell*, in fact, the same fundamental distinction between property and territory continued to legitimate both constitutional provisions. The key principle was that the Commonwealth should not, simply by acquiring land from or within a State, whether compulsorily or by purchase, then be able to constitute that land as if it was some form of legal 'excision', 'enclave' or small Commonwealth Territory, within the State concerned. Thus in *R v Bamford* (1901)³¹, the NSW Supreme Court declared that NSW criminal law still applied in the Armidale Post Office, which had been recently transferred from the NSW government to the new Commonwealth. This was because to decide otherwise was to treat its acquisition as 'the excision of that place from the territory of the State' – indeed, something akin to creating 'a territory of the Commonwealth' under s 122 of the *Constitution* – when plainly, 'the area occupied by the post office did not cease to be part of the territory of the State of New South Wales.'

No appeal was attempted from *Bamford* or like decisions, presumably because the principle was clear. Although this gave the High Court few opportunities to squarely define s 52(i) prior to 1970, whenever discussion arose it was to like effect. In *Commonwealth v New South Wales* (1923),³² Higgins J was attracted to the idea that the provision simply meant that the Commonwealth had exclusive legislative power over its own Territories, because to regard the Commonwealth's

³⁰ *Worthing v Rowell* (1970) 123 CLR 89.

³¹ *R v Bamford* (1901) 1 SR (NSW) 337, as paraphrased in *Worthing v Rowell* (1970) 123 CLR 89, 99 (Barwick CJ).

³² *Commonwealth v New South Wales* (1923) 33 CLR 1.

power over all acquired places as automatically excluding State power would be to constitute them as legal ‘excisions’ or ‘enclaves’: ‘it is only the *property* in the lands (at most) that passes to the Commonwealth; the pieces of land acquired are not Alsacias for Jack Sheppards.’³³ Importantly, this case also allowed Isaacs J to express a view, reaffirming the principle he had articulated in 1898. In fact, in 1898 Isaacs had articulated the relevant principle not only in relation to s 51(xxxi), but also in the discussion of s 52(i), and had opposed its final wording for that very reason. Isaacs believed it should always have been made clearer that ‘exclusive’ Commonwealth jurisdiction over acquired places was limited to those acquired by consent, as occurred in America.³⁴ In 1923, while acknowledging that the poor wording instead carried ‘an inevitable inference’ that ‘proprietorship and the sovereignty were intended to go together’, Isaacs articulated what he saw as being the only workable interpretation which could also maintain the fundamental principle: that Commonwealth places were indeed ‘entirely free from State jurisdiction’ but only in respect of ‘the purpose for which the land was transferred’.³⁵ Otherwise, the general State law continued to run on such places, further reinforced by its express preservation under s 108 of the *Constitution*. In his view, anything else would result in the ‘anarchy’ of a general displacement of State law whenever the Commonwealth acquired land, which would be clearly both unintended and undesirable.³⁶

This approach prevailed without difficulty for the next half-century. In 1938, when the NSW Supreme Court determined that state laws of negligence applied to an action arising from the management and control of an aeroplane at the Commonwealth’s Kingsford Smith Aerodrome, the High Court declined an application to intervene.³⁷ In 1965, a challenge to the appointment of a judicial officer in the Australian Capital Territory gave two justices of the High Court the opportunity to express dicta, in line with Isaacs’ 1923 position.³⁸ Kitto J was confident that s 52(i) must be read as only granting exclusive Commonwealth power over ‘the specific subject of places fulfilling the given description’, that is, ‘the seat of government as such, and places acquired, etc., as such’,³⁹ and not automatic exclusion of all State power. According to Taylor J, ‘the contrary conclusion would mean that whenever the Commonwealth acquired a parcel of land for public purposes it would thereby acquire an exclusive legislative power to make

³³ *Commonwealth v New South Wales* (1923) 33 CLR 1, 60 (Higgins J).

³⁴ Melbourne Convention, 4 March 1898, 1874. See Evans, above n 24, text accompanying nn 35, 78-80.

³⁵ *Commonwealth v New South Wales* (1923) 33 CLR 1, text accompanying n. 47 and page 46.

³⁶ *Commonwealth v New South Wales* (1923) 33 CLR 1, 46 (Isaacs J). See also Evans, above n 24, text accompanying nn 35, 78-80.

³⁷ *Kingsford Smith Air Services Ltd v Garrisson* (1938) 55 WN (NSW) 122, as cited in *Worthing*, 116-7 (Menzies J).

³⁸ *Spratt v Hermes* (1965) 114 CLR 226.

³⁹ *Spratt v Hermes* at 257-8 (Kitto J).

general laws for the government of such places⁴⁰ – a conclusion that would offend the important distinction between property and legislative sovereignty. Finally, in the same year, Professor Zelman Cowen argued that the position suggested by Isaacs, Kitto and Taylor JJ should be accepted as the preferred interpretation.⁴¹

Until *Worthing v Rowell* (1970), therefore, it seemed clear that the Commonwealth might acquire a property, but could not, simply by acquisition, also displace all State power over that part of its territory. It was assumed that s 52(i) meant only that the States were excluded from legislating with respect to Commonwealth places *as places*, whether directly (e.g. in any way ‘targeted’ on any such place) or through legislative provision that indirectly frustrated the Commonwealth purpose for which the place had been acquired. Otherwise, provided they were not inconsistent with the Commonwealth’s purposes for a given place, State laws continued to apply.

However, *Worthing v Rowell* (1970)⁴² reversed this position in a dramatic fashion, with a 4-3 majority of the High Court adopting exactly the position against which all previous obiter had expressly warned. The Court determined that NSW building regulations did not apply as a matter of principle to any activities on the Commonwealth’s Richmond RAAF Base, irrespective of whether the Commonwealth had put in place its own building regulations or there was any actual inconsistency between the regulations and the base activities. In other words, there was no substantive reason why a worker on the base should not receive the protection of the local building regulations, but a literal reading of s 52(i) was used to relieve the Commonwealth from any liability. The obvious impracticality of this and later decisions was only alleviated, as Barwick CJ in *Worthing* suggested it should be, by passage of the *Commonwealth Places (Application of Laws) Act 1970* (Cth). This provided that all laws of the State surrounding a Commonwealth place were to be taken as applying to that place, unless the Commonwealth legislated to the contrary. In fact, had the Court simply adopted the interpretation proposed by Isaacs, Kitto, Taylor and Cowen, this legislation would not have been necessary.

The constitutional effect of *Worthing* was that any place acquired by the Commonwealth should now be regarded as ‘excised from a State so that the sole source of authority is federal’.⁴³ It is only federal legislation, not the *Constitution*, that preserves State law in acquired places. In the event of disagreement, the States are powerless to regulate anything to do with a Commonwealth place, even things

⁴⁰ *Spratt v Hermes* at 263 (Taylor J).

⁴¹ Z Cowen, ‘Alsatis for Jack Sheppards? The Law in Federal Enclaves in Australia’ in Cowen, *Sir John Latham and Other Papers* (1965) 171, 188-191.

⁴² *Worthing v Rowell* (1970) 123 CLR 89. A similar result was obtained in *Attorney-General (NSW) v Stocks and Holdings (Constructors) Pty Ltd* (1970) 124 CLR 262.

⁴³ See *Allders International Pty Ltd v Commissioner of State Revenue* (1996) 186 CLR 630, n 129 (McHugh, Gummow and Kirby JJ), paraphrasing this interpretive option as recognised but rejected by Cowen in ‘Alsatis for Jack Sheppards?’, n 41 above.

that have everything to do with valid State activities and nothing to do with Commonwealth ones. Even when acting solely as proprietor, the Commonwealth (and its lessees and licensees) are exempt from all state and local regulation applying to landowners on either side. The resulting planning conflicts are particularly visible at airports, on which the federal government now routinely licenses operators to build developments with no direct link to the airport itself, but which are exempt from all state and local planning laws and considerations.⁴⁴

There are reasons to regard *Worthing* as having been wrongly decided.⁴⁵ It is a decision that has been adhered to, but not without disquiet.⁴⁶ It was a conspicuously literalist decision, taken without regard to the insights available from the Federation Debates.⁴⁷ Most importantly, leading the majority, Barwick CJ relied heavily on Isaacs in *Commonwealth v New South Wales* (1923) in a manner that suggests that rather than simply disagreeing with him, he actually misunderstood him.⁴⁸ It may be that Barwick CJ simply assumed that Isaacs J, the architect of the decision in *Engineers*, would have supported an extension of Commonwealth immunity. In fact, in 1923, Isaacs had indicated that while his general preference was for ‘unlimited’ Commonwealth power,⁴⁹ even for him there were limits, and this was one.

⁴⁴ See Professor Geoff Lindell, ‘A Possible Limit on the Use of Commonwealth Places for “Non-Federal” Purposes: From Airports to Shopping Malls’; and Henry Burmester QC, ‘Comment on Lindell on the Use of Commonwealth Places’ (2004) 15 *Public Law Review* 265, 269 and 275 respectively.

⁴⁵ Note Burmester’s reply to Lindell, *Ibid*, pp. 276-7 that *Worthing* would need to be revisited if Lindell’s proposed limit on the use of Commonwealth places was to succeed.

⁴⁶ See e.g. *Svikert v Stewart* (1994) 181 CLR 548, 557 and 576-7 (Gaudron J); *Allders International Pty Ltd v Commissioner of State Revenue* (1996) 186 CLR 630, n 41 (Dawson J).

⁴⁷ For example, not only were Isaacs’ contributions to the Federal Conventions not used to illuminate the history of s 52(i), but nor were others – such as Barton’s belief that the clause was ‘not intended to confer powers at all’, or John Glynn’s view that it would allow the Commonwealth to exercise ‘exclusive power’ over territory acquired from the states, but *not* ‘exclusive jurisdiction’: Melbourne Convention, 25 January 1898, 152 (Glynn); 153 (Barton).

⁴⁸ Specifically, at (1970) 123 CLR 95, Barwick CJ omits some of Isaacs’ key qualifying phrases at (1923) 33 CLR 46, and calls in aid some irrelevant conclusions by Isaacs on unrelated issues at (1923) 33 CLR 54-55. By contrast, McTiernan J’s dissent in *Worthing* reads Isaacs more correctly: ‘(I think that the word “sovereignty” here does not mean total sovereignty.) ... I would not take the view that Isaacs J considered that s. 52(i) extended further than to empower the federal Parliament to make laws with respect to the subject matter which is included in this provision, within the federal system. There is no basis for the view that acquisition of land under a law authorized by s. 51(xxxi) results in taking the land completely out of the jurisdiction of the State inside the boundaries of which the land is’: (1970) 123 CLR 89, 106.

⁴⁹ See *Commonwealth v. New South Wales* (1923) 33 CLR 1, n 38 (Isaacs J).

The dubiousness of *Worthing* is reinforced by the result reached shortly after, by a different 4-3 majority, in *R v Phillips* (1970).⁵⁰ In that case, the Court followed *Worthing* to declare that the WA Criminal Code did not apply as a matter of principle to allegedly indecent behaviour on the Commonwealth's Pearce Aerodrome, again irrespective of actual inconsistency or any equivalent federal law. However, were it not for the doctrine of precedent, this case would have corrected rather than affirmed the *Worthing* approach. Both Windeyer and Walsh JJ defected from the *Worthing* majority and instead reasoned in the opposite direction; it was only because McTiernan and Owen JJ did the reverse, and elected to follow the *Worthing* precedent they had just opposed, that the interpretation in *Worthing* was maintained.

More importantly, the reasoning in *Phillips* also belatedly engaged with the underlying principles in a way that tended to confirm the mistake. In *Worthing* Barwick CJ initially appeared to have no difficulty with the idea that Commonwealth acquisition equated to the total excision of such a place from state territory, but in *Phillips* he became sensitive to the implications. Inconsistently with his own position in *Worthing*, he tried to refute that the effect of acquisition was 'to remove that place from the territory of the State in which it physically exists and to make it a territory, or in some sense the equivalent of a territory, of the Commonwealth'.⁵¹ Instead he claimed, unconvincingly, that 'the grant of exclusive jurisdiction, does not require or involve any transfer of so-called territorial sovereignty or political dominion from the State to the Commonwealth'.⁵² How else it could be explained was not clear.⁵³ Turning against him, Windeyer J was emphatic in his rejection of Barwick's claim that exclusive power could mean exclusive jurisdiction without this also impacting on the constitutional position of the State:

When the Commonwealth acquires, for public purposes, a place that is within a State, that place does not cease to be part of the State. In short, a place within a State that is acquired by the Commonwealth for public purposes is not like a territory surrendered to the Commonwealth by the State. A place

⁵⁰ *R v Phillips* (1970) 125 CLR 93.

⁵¹ *R v Phillips* (1970) 125 CLR 93, 100-101 (Barwick CJ).

⁵² *Ibid.* Barwick CJ also tried to support his view with the fact that technically, neither the Colonies or the States ever possessed any 'sovereignty' to start with, so none could be transferred, but this missed the point; and nor did a second erroneous reading of *Isaacs J* assist him – see *R v Phillips* (1970) 125 CLR 93, 101 (Barwick CJ).

⁵³ Nor has it become clearer since: in *Svikert*, Brennan J suggested the difference between the Commonwealth's 'exclusive power' to legislate for places and its 'exclusive jurisdiction' over territories might lie in the fact that the former excluded only State legislative power, while the latter also excluded State executive and judicial power. Yet quite what executive or judicial power remains once all legislative power is excluded, is something of a mystery. *Svikert v Stewart* (1994) 181 CLR 548, 566 (Brennan J).

acquired becomes, it has been said, vested in the Commonwealth by way of proprietorship rather than sovereignty: and that is a convenient description of the fundamental distinction between such places and Commonwealth territories: but the description must not be allowed to beg the question. Places within a State that the Commonwealth holds for its purposes it holds not as a private landowner but as the Commonwealth of Australia. The effect of s 52 is not to be read from labels.⁵⁴

Whether or not *Worthing* is correct, it identifies the point at which the ‘in principle’ separation of property and territory effectively fell out of Australian constitutional jurisprudence. In the terms expressed by Barwick CJ, the Commonwealth’s ‘exclusive jurisdiction’ over acquired places – even those acquired against the express opposition of a State – clearly carried with it a transfer of political dominion, in terms of which governments were entitled to legislate over the land. Now, only the Commonwealth could legislate in respect of any person or thing touching that land – never again the State, notwithstanding the fictional idea that it remained part of the State’s territory. This history demonstrates that long before the *Nuclear Waste Dump* case, there had been progressive atrophy in the extent to which federal principles were informing constitutional interpretation of the relationship between State property and territory.

What does the Commonwealth’s exclusive position mean for its power to acquire property under s 51(xxxi)? Contrary to Barwick CJ and the frequent reassertion of the theoretical distinction between property and territory, that distinction is now effectively chimerical. In reality, with the acquisition of property creating a Commonwealth place or places within a State, goes *all* the legislative competence associated with that place as political territory. This result was not only unintended by Australia’s founders, but is repugnant to federal principles generally. The conjunction of interpretations applying to ss 51(xxxi) and 52(i) gives the Commonwealth an almost unlimited power to erode the authority of the States, not just through clashes of competing legislative authority, but through withdrawals of parts of their physical territory. Is there truly nothing in the *Constitution* standing in the way of such a result?

III TERRITORIAL ALTERATION IN AUSTRALIA: REDISCOVERING THE CONSTITUTIONAL REQUIREMENT FOR STATE CONSENT

The answer to the question just posed, is that the territorial division of sovereignty at the heart of the federal system is not easily deleted from the *Constitution*, even when successive High Courts demonstrate a decreasing recollection of the fundamental principles on which it was based.

Had it not been for the principle that the Commonwealth could not, by compulsorily acquiring property, unnecessarily displace the authority of the State, it is certain that

⁵⁴ *R v Phillips* (1970) 125 CLR 93, 112 (Windeyer J).

the federal founders would have inserted additional safeguards into the acquisition power in s 51(xxxi). More than likely, this would have taken the form of an express proviso of the kind that Isaacs observed in American jurisprudence, ensuring such a *de facto* transfer of territorial authority could not take place without State consent. However, as it stands, the *Constitution* still achieves the same result in another way. If the effect of Commonwealth acquisition of land is an ‘excision’ or ‘enclave’ of *de facto* Commonwealth territory, which also ceases to be part of the legislative province of the State, it is difficult to escape the legal consequence that the territorial limits of the State have in fact been altered. This is a subject on which the *Constitution* says a great deal, even if not in terms that have been frequently discussed or judicially tested.

The most obvious relevant provision, mentioned in several cases dealing with s 52(i), is s 122 giving the Commonwealth power to legislate ‘for the government of any territory’ surrendered by a State, given by the Queen or ‘otherwise acquired’. Related to this, s 111 provides that ‘any part’ of a State surrendered to and accepted by the federal government ‘shall become subject to the exclusive jurisdiction of the Commonwealth’. Together these provisions confirm that the Commonwealth was indeed intended to be able to hold territory in its own right, relieved of the legislative authority or political dominion of whichever State might surrender such territory to it. Indeed, the history of s 111 further confirms the degree of attention given to the matter by the founders, because this was a uniquely Australian provision. While s 122 had a direct antecedent in the 1787 US Constitution⁵⁵ and *British North America Act 1871* (UK),⁵⁶ neither precedent contained a provision similar to s 111. It first appeared in the draft constitution of Andrew Inglis Clark in 1891, where it referred not to ‘surrender’ but ‘cession’ of State territory to the Commonwealth, for the express purpose of allowing the Commonwealth to constitute its own ‘Territory’ in a formal political sense.⁵⁷ The present wording emerged from the 1891 Sydney Convention, and remained thereafter.

This reference to formal ‘cession’ and reconstitution of federal territory emphasises that the federal founders had no intention of leaving such questions to historical accident. Territorial change was not a theoretical issue, but a live political question

⁵⁵ Article IV, section 3: ‘The Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in the Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.’

⁵⁶ Section 4: ‘The Parliament of Canada may from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any Province’.

⁵⁷ Clark’s constitution draft, 1891: ‘77. The Parliament of any Province may at any time cede any portion of the Province to the Federal Dominion of Australasia, and thereupon such portion of the Province shall become a Territory of the Federal Dominion of Australasia and be subject to the exclusive jurisdiction of the Federal Parliament.’ See J Reynolds, ‘A I Clark’s American Sympathies and his Influence on Australian Federation’ (1958) 32 *Australian Law Journal* 62.

associated with a long-running debate as to how Australian federalism might achieve the type of territorial subdivision that followed Federation in both Canada and the United States, with their increased number of provinces and states. After hearing Queensland's John Macrossan on this subject in the 1890 Melbourne Conference, Henry Parkes pushed the desirability of new states to the forefront of the 1891 Convention, convinced that 'as a matter of reason and logical forecast' Australia should have 'double the number of present colonies.'⁵⁸ In addition to South Australia's desire to pass over the Northern Territory, active movements for the separation of new states were present in central and north Queensland, the goldfields of Western Australia, and regions such as New England and the Riverina. The issue was made salient by the fact that 'New Staters' or 'separationists' were also often strongly in favour of Federation, and therefore more likely to support the *Constitution* if it dealt with these issues – as some referendum results eventually demonstrated.⁵⁹

The result is that, when it comes to the relative strengths of the Commonwealth and the States in respect of changes in legislative command over territory, the *Constitution* is far from silent; nor are the relevant provisions mere blind copies. The first lesson of s 111 lies in the purposes for which State relinquishment of territory was considered potentially desirable. Some relinquishments of property had been directly negotiated as a part of the creation of the Commonwealth under s 85, including post offices and custom houses. However these were not envisaged as involving any territorial surrender. Rather, the primary purpose for surrender of territory was, as Clark had foreshadowed, the establishment of 'provisional administration and government' on such lands.⁶⁰ The words 'provisional administration' confirmed the intention that such territories were to be '“provisional” states', as termed in 1891;⁶¹ or, later, as 'districts... in a transition' to statehood,⁶² 'probational' states,⁶³ or 'embryo states'.⁶⁴ Once ready, these could then be admitted as new states under s 121. The term 'provisional' was eventually dropped in February 1898 when it was recognised that some territories 'might not

⁵⁸ Henry Parkes, *Fifty Years in the Making of Australian History* (1892) 609-10.

⁵⁹ See A J Brown, 'Inside the Magical Room: Queensland, Regionalism and Constitution-Making 1896-99' (2001) 8 *New Federalist* 41-53.

⁶⁰ 1891 Draft Constitution, Ch VI, s 3: 'The Parliament may make such laws as it thinks fit for the provisional administration and government of any territory surrendered by a State to and accepted by the Commonwealth and may in any such case allow the representation of such territory in either House of Parliament to such extent and on such terms as it thinks fit.'

⁶¹ See J La Nauze, *The Making of the Australian Constitution* (1972) 46, 298, 302.

⁶² Adelaide Convention (1897), *Official Report of the National Australasian Convention Debates. Adelaide, March 22 to May 5 1897*, 1015 (Barton).

⁶³ Sydney Convention (1897), *Official Record of the Debates of the Australasian Federal Convention. Second Session. Sydney, 2nd to 24th September, 1897*, 405 (McMillan).

⁶⁴ *Melbourne Convention 1898*, 257 (Deakin).

for many years, if at all, become states'.⁶⁵ However, the primary intention remained clear, and again followed American constitutional history. If territory was to be relinquished to the Commonwealth, it was not because any enlargement of direct federal control over territory was desirable; rather, the main aim should be to allow the Commonwealth to help propagate more subnational units as Territories and/or new States.

The second lesson of s 111 lies in the original word 'cession' and the later word 'surrender'. Both confirm that the only means by which the founders contemplated the vacation of State legislative jurisdiction in favour of Commonwealth control, was voluntarily. This is irrespective of whether, due to s 52(i), places compulsorily acquired by the Commonwealth are also now best regarded as small Commonwealth 'Territories' under s 122 – a result that Barwick CJ in *Phillips* continued to contest. The provision is a powerful reminder that alterations in the geographic extent of State jurisdiction were never envisaged to be something that could be forced by the Commonwealth, whether under s 111, s 51(xxxi) or any other provision.

In addition to these reminders of intentions, the provisions dealing with territorial change also place express limits on how the Commonwealth may become involved with such change. For the creation of new states, s 124 requires that any such state can only be formed from territory separated from an existing State 'with the consent of the Parliament thereof'. While imported from the US Constitution, this provision was still debated extensively by Australia's founders.⁶⁶ For present purposes, this provision helps reinforce the general principle that the *Constitution* only allows voluntary territorial surrenders, even though the types of Commonwealth acquisition attempted in the modern day are unlikely to be for the formation of new states, but rather for other Commonwealth purposes as suggested by the *Nuclear Waste Dump case*.

With these other provisions as a context, there is also one section of the *Constitution* which acts as an express safeguard against attempts by the Commonwealth to interfere with the territory of a State, irrespective of purpose. Section 123 provides that:

The Parliament may, with the consent of the Parliament of a State, and the approval of a majority of the electors of the State voting upon the question, increase, diminish or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make

⁶⁵ *Melbourne Convention 1898*: 8 February 1898, 698 (Barton).

⁶⁶ In the 1890 Conference and 1891 Sydney Convention, the principles behind the provisions were addressed by a total of 23 delegates, of whom 17 were explicitly or implicitly in favour, four ambivalent or disinterested, and only two against: see Sydney Convention (1891), *Official Report of the National Australasian Convention Debates. Sydney, 2 March to 9 April, 1891*, particularly 9, 11 and 13 March.

provision respecting the effect and the operation of any such increase or diminution or alteration of territory in relation to any State affected.

Based not on the US Constitution but s 3 of the *British North America Act 1871*, this provision acts as an express prohibition against actions that would alter the territorial limits of a state, other than with State government and popular consent. The basic provision was included in Clark's first draft of the Australian Constitution, the 1891 Sydney Convention draft, and every draft thereafter. It was also significantly strengthened in 1899 through the addition of the italicised words, alongside the requirements in s 128 for popular referenda. This late change was agreed in the 'secret' Premiers' Conference of February 1899, as one of the NSW government's final conditions for participation in Federation.⁶⁷

Importantly, this late strengthening helps identify the types of territorial change against which the founders sought to guard. In particular, they were not concerned simply with creating a mechanism for minor boundary adjustments, which is how the provision might otherwise be read. Given the history of territorial change, NSW politicians sought to ensure that the new federal parliament could not act as the British government had done in the 1850s, and unilaterally reapportion entire colonies by, for example, reallocating the entirety of the Riverina to Victoria, or the entirety of New England to Queensland. The breadth of such concerns thus reinforces the directness and the comprehensiveness of the language used in the provision. Under s 123 of the *Constitution*, no Commonwealth action that would result in the alteration of the limits of a State is permissible, without State consent and a referendum. Of necessity, this includes compulsory acquisition by the Commonwealth of land within a State, as long as the effect of such an acquisition is the creation of an exclusively federal 'excision' or 'enclave' and corresponding reduction in the physical territory subject to the legislative authority of the State.

Under exactly what circumstances would the compulsory acquisition of land by the Commonwealth, in a State, constitute a territorial alteration of this kind? As a matter of convenience, it might be argued that very small acquisitions cannot realistically be described as taking on this character. Using the *Melbourne Corporation* test, it might be argued that the point at which a forced alteration should be seen as impermissible, is the point at which the acquisition begins to inhibit or impair the continued ability and capacity of that State to function. Yet on one analysis, the fundamentality of territory to the political existence of a State is such that any withdrawal of its land has this effect, because the State is then prevented from functioning *at all*, as a State, in respect of that portion of its

⁶⁷ See Alfred Deakin, *The Federal Story: The Inner History of the Federal Cause 1880-1900*, Melbourne University Press, (1963 edition) 102; La Nauze (1972), above n 61 244-6. On references to the NSW motivation, see the *Sydney Bulletin* (1899) as quoted in *Queensland Parliamentary Debates: Special Session - Federation Enabling Bill*, Vol. 81, 1899, p.342; and V. C. Thompson (ed.) (1922), *New State Magazine*, Vol 1, No. 8, 2; Mitchell Library, Sydney.

territory. Further, attempting to set the bar of impermissibility according to some areal threshold, denies the reality that the loss of territory by a State might just as easily be imposed in the form of death by a thousand cuts, as one fell swoop. Certainly, s 123 does not distinguish between small alterations and large ones.

A final, further consideration reinforces the applicability of the requirements in s 123 to the excision of Commonwealth places from State jurisdiction, and strengthens the argument that these requirements constrain the acquisition power in s 51(xxxi). Before it can be said that there is no scope for finding any such constraints implied in s 51(xxxi), it should be recalled that its final wording was never debated, so that the extent to which it adequately reflected the founders' intention – for example, the principle stated by Isaacs – is itself unclear.⁶⁸

But taking the *Constitution* as a whole, it is nevertheless clear that nowhere does it provide any legitimate basis for unilateral Commonwealth action that would directly diminish a State government's domain in a spatial or areal sense, save with that State's consent. On the contrary, all the evidence suggests that any such action, including any operation of s 51(xxxi) with that effect, is properly to be regarded as repugnant to the *Constitution*. The express requirements for state consent found in ss 123 and 124, perhaps assumed to relate only to remote constitutional possibilities, are in fact mirrored in many places where the *Constitution* touches subjects relating to the States' legislative competence over their physical territory. This should not be surprising, in a federal constitution, but given the present quandary it deserves some emphasis. Similar express requirement for State consent can be found in s 51(xxxiii), requiring the consent of the State before the Commonwealth may acquire State railways, and s 51(xxxiv) requiring State consent before the Commonwealth may even *construct* a railway. The founders included such requirements not because railways were sacrosanct in and of themselves, but because they were, for each State, 'the greatest factor of all in the progress and development of its territory.'⁶⁹ The majority in the Conventions accepted the axiom that:

The lands belong to the state, and the railways go with the land. So I say also of the waters to some extent.⁷⁰

Consequently the same assumption regarding state consent ran through the debates over Commonwealth power in respect of public lands and rivers (especially irrigation). Indeed, the idea of a Commonwealth power over national water resources, even limited by requirements for state consent, was so intrinsically anathematic to state territorial interests as to be rejected altogether. Taking the provisions and debates as a whole, the *Constitution* should be read as leaving no room for the Commonwealth to legislate in a manner that amounts to *de facto*

⁶⁸ See Evans, above n 24.

⁶⁹ *Melbourne Convention*, 25 January 1898, 177 (Sir John Forrest).

⁷⁰ *Melbourne Convention*, 25 January 1898, 161 (Simon Fraser).

acquisition of state territory, any more than a *de jure* acquisition, without triggering a requirement for state consent. Leading the rejection of a federal rivers power, Barton demonstrated the ultimate truth – that any other interpretation at the time would have meant no Federation, and no *Constitution*. He stated:

We do not propose to federalize the lands of the state. It is a question of hands off, and the territory of any of the states is not to be touched, except so far as it may be necessary to carry out a constitutional power given under this instrument. ... We have met to frame a Federal Constitution. We have not met to make an amalgamation. Our purpose is to leave the various provinces in the first instance their territory, because that is the very kernel of the question. To take away their territory is to amalgamate. To leave them their territory is to federate, provided that you unite in all matters beyond that. The position taken up is this. We have met for the purpose of making a Federation which involves the retention of the soil by the individual states. ... Honourable members will absolve me from making threats to the Convention. I have never been one of those who have said – ‘You must give us this or we shall have to go away, and it is no use going any further.’ I do not propose to say anything of that kind now; I simply propose to state what I know to be the facts of the case, leaving the rest to the judgment of the Convention. If you say that you are not going to take away our soil, any colony whose soil it was proposed to take in any degree would at once retire from this Convention.⁷¹

IV CONCLUSION: ANSWERING SELWAY’S LAMENT?

This article commenced by asking whether, under the Australian federal system, there are enforceable limits on a national government’s ability to acquire the territory of a State against its will. The conclusion reached is yes, the *Constitution* makes express provision that while a State may surrender territory on a voluntary basis, the Commonwealth may not exercise its powers so as to ‘increase, diminish, or otherwise alter the limits’ of a State, without the consent of the State parliament as well as a majority vote in a State referendum. Indeed, this requirement for state consent on matters going directly to the territory of a State can be seen as implicit throughout the *Constitution*. These express and implied limitations on Commonwealth power are in addition to, or represent an extension of, the entitlement of State governments to their own self-preservation according to the principles established in *Melbourne Corporation*.

The real question traversed, in getting to this point, is whether these limitations on Commonwealth power extend to the power to acquire property under s 51(xxxi). Especially in circumstances where s 52(i) is read as extending an exclusive Commonwealth legislative domain over any land or places so acquired, it has been argued that such acquisitions may frequently be properly characterised as not only affecting property within or belonging to a State, but as a territorial alteration, in which the land concerned is in effect excised from the State and transferred to the

⁷¹ *Melbourne Convention*, 25 January 1898, 149-150.

Commonwealth. In these circumstances, property may well become territory, and the Commonwealth's attempts to deal with it may well attract constitutional limitations that have not previously been identified as applying.

In practice, the bulk of Commonwealth acquisitions of property under s 51(xxxi) undoubtedly occur with the tacit consent of the State governments within whose jurisdiction the property falls. In such circumstances, it might also be argued that any territorial interests of the State have also been voluntarily surrendered in the terms of s 111 of the Constitution, such that the additional requirements of s 123 need not apply. However whenever an acquisition of property amounting to territory is expressly opposed by a State – as occurred in the *Nuclear Waste Dump* case – then it no longer seems safe to assume, as it was there, that the position of the State government is no different to that of any other citizen, or that the Commonwealth's desires are not subject to larger constitutional constraints. At least as long as current interpretations of s 52(i) prevail, the requirements of s 123 necessarily seem to apply to any such contested transfer of territorial control. Despite the evidence of declining understanding of the federal principles that underpin it, such limitations are written somewhat immovably into the text of *Constitution*. When he asked whether introduction of the *Public Park Bill 2003* (SA) raised any 'implication in relation to federalism' that might constrain the Commonwealth, Selway J was asking the right question.

The import of this analysis lies in its implications for whether or how Australian federalism needs to evolve, to better overcome the types of stand-off that such a result would imply. Irrespective of whether he agreed with it, Selway J would not have welcomed this result. In the *Nuclear Waste Dump* case, his own personal view of the federal-state contest most likely aligned with his initial decision, because he saw Australia's federal system as having evolved to the point where it was simply no longer the constitutional role of State governments to second-guess, or frustrate, major national policy decisions of the kind being pursued by the Commonwealth.⁷² However he would have been equally unimpressed that neither the Commonwealth nor the State could find the kind of collaborative or cooperative solution that he himself espoused. Herein lie some of the major ongoing implications of this case, and the deeper constitutional issues that it exposes.

The *Nuclear Waste Dump case* provides but one example of the many ways in which, over recent decades, Commonwealth governments have sought to use subconstitutional methods to reform the basic structure of federal-state relations. Since then, the tide has again turned away from the type of coercive methods attempted by the Commonwealth, to more cooperative approaches of which Selway J would have clearly approved. As shown above, as long as reform remains collaborative, then anything is possible – the consent of the States to the transfer of

⁷² B Selway, 'The Federation – What Makes it Work and What Should We Be Thinking About for the Future', above n 12.

functions, powers, personnel and property may allow such questions to sleep. At some point, however, it is reasonable to assume that a Commonwealth government may resume a coercive approach – for example, in difficult policy fields such as water or health. For that reason the question of fundamental limits on the Commonwealth’s various powers is only likely to grow in importance.

The problem for those concerned to see productive reform of Australia’s federal system, is that whichever view one takes of the issues here, the present constitutional text remains problematic. If significant deductions of State territory by the Commonwealth under s 51(xxxi) face no such fundamental limits, then there is good reason to further question just how ‘federal’ Australia’s constitutional arrangements remain. Unrestrained centralists might see promise in the potential for the Commonwealth to assume exclusive responsibility for territory previously assumed to be an inviolable part of the States. For example, should cooperation again falter in the bid to control water use in the Murray-Darling Basin, it might be more simple for the Commonwealth to compulsorily acquire the Basin in its entirety, compensate the relevant States and unsustainable private land users for interests lost, and itself legislate to reinstate those private interests it considers sustainable. All this could now be done through unilateral federal action, notwithstanding the founders’ explicit rejection of a federal rivers power in 1898.

Of course, if fundamental limits such as suggested by s 123 *would* constrain such a use of s 51(xxxi), then Australian federalism continues to experience an equal and opposite problem. As articulated by Selway J, the modern constitutional roles of the States are such that the rediscovery of such archaic protections is unlikely to be conducive to improved governance. A loyal South Australian, he was ‘all in favour of the states fighting to preserve such powers as they have, because that preserves their negotiating position’; but at the end of the day, he reminded us that ‘the states never were sovereign’.⁷³ On that analysis, the type of territorial inflexibility suggested by s 123 can only serve to frustrate the sensible evolution of Australian federalism. In either case, the *Constitution* provides an increasingly creaky framework for resolving fundamental tensions in federal and State power, or dealing with the political and policy pressures that have contributed to the progressive decline of the States. Federalism remains Australia’s answer in principle, but achieving an effective federal system appears to require substantial renewal, including textual renewal, in practice.

⁷³

Ibid 121 and 120.