IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S140 of 2015**

BETWEEN:

BARRY THOMAS CUNNINGHAM
First Plaintiff

DR ANTHONY HAMILTON LAMB OAM
Second Plaintiff

THE HONOURABLE JOHN COLINTON MOORE AO
Third Plaintiff

THE HONOURABLE BARRY COHEN AM
Fourth Plaintiff

AND:

COMMONWEALTH OF AUSTRALIA
First Defendant

REMUNERATION TRIBUNAL
Second Defendant

PLAINTIFFS' SUBMISSIONS

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Part I: Internet Certification

1. The plaintiffs certify that this submission is suitable for publication on the Internet.

Part II: Statement of issues

2. The Special Case raises important issues concerning the application of s 51(xxxi) of the *Constitution* to Commonwealth statutory superannuation, pension and entitlement schemes such as those that apply to certain members of the Federal Parliament, federal judges and Commonwealth public servants.[1]

3. More specifically, the Special Case concerns the contributory superannuation scheme that operates under the *Parliamentary Contributory Superannuation Act 1948* (Cth) (**Superannuation Act**) in respect of certain members of the Federal Parliament[2] and the "Life Gold Pass" that provides free travel to certain members of the Federal Parliament and their spouses. Two matters arise for determination:

   (a) Whether ss 7(1A), 7(1B), 7(1C) and 7(2A) of the *Remuneration Tribunal Act 1973* (Cth) (**RT Act**), and decisions made by the Remuneration Tribunal pursuant to those provisions, are invalid by reason of s 51(xxxi) of the *Constitution*. As explained below, an effect of the impugned provisions and decisions was that the amount of the plaintiffs' superannuation payable under the Superannuation Act was less than would otherwise have been payable.

   (b) Whether the operation of s 11(2) of the *Members of Parliament (Life Gold Pass) Act 2002* (Cth) (**the 2002 LGP Act**), as enacted and as amended by the *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act 2012* (Cth) (**2012 LGP Act**), resulted in an acquisition of property within the meaning of s 51(xxxi) of the *Constitution*. As explained below, an effect of s 11(2) was to reduce the number of free return domestic trips to which holders of a Life Gold Pass were previously entitled.

4. On the basis of the pleadings, the plaintiffs apprehend that there are two issues in dispute. *First*, whether the plaintiffs' respective entitlements under the Superannuation Act and to the Life Gold Pass are "property" within the meaning of s 51(xxxi).[3]

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[1] See generally *Parliamentary Contributory Superannuation Act 1948* (Cth) (contributory superannuation); *Judges' Pension Act 1968* (Cth) (non-contributory pension); *Superannuation Act 1976* (Cth) (contributory superannuation).

[2] The scheme under the Superannuation Act was closed to new members from 9 October 2004: see *Parliamentary Contributory Superannuation Act 1948* (Cth), Sch 1.

[3] Defence, [41], [62] (SCB 45, 49).

Secondly, whether the impugned provisions and decisions effected any "acquisition of property" by the Commonwealth within the meaning of s 51(xxxi).[4]

Part III: Section 78B certification

5. The plaintiffs certify that they consider that adequate notice has been given under s 78B of the *Judiciary Act 1903* (Cth): see SCB 26.

Part IV: Facts

6. The facts are found in the Special Case[5] and in the Book of Documents filed with it. To understand the balance of the submissions it is convenient to provide a brief overview.

7. Each of the plaintiffs is a former member of the House of Representatives.[6] During their respective periods as members, each of the plaintiffs (other than the third plaintiff) also held one or more parliamentary offices.[7] The third and fourth plaintiffs also held positions as Ministers of State.[8]

Parliamentary allowance, salaries for Ministers and parliamentary office holder allowance

8. During their time as members, each of the plaintiffs, in common with other members of the Parliament, were entitled to receive an annual allowance payable by reason of their membership of the Parliament (**parliamentary allowance**). The legislation conferring such an entitlement is enacted pursuant to ss 48 and 51(xxxvi) of the *Constitution* and has varied over time.[9]

9. For present purposes it is sufficient to note that since the enactment of the *Parliamentary Allowances Act 1907* (Cth), Commonwealth legislation has, either directly or by way of determinations made by the Remuneration Tribunal under the RT Act, provided for members of Parliament to receive an annual allowance payable for the purposes of s 48 of the *Constitution* by reason of their membership of the Parliament (sometimes called "salary" or "basic salary"). Before 1907, the annual allowance was provided for by s 48 of the *Constitution* directly.

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[4] Defence, [41], [62] (SCB 45, 49).
[5] SCB 57-88.
[6] Special Case, [11] (SCB 59).
[7] Special Case, [21]-[23], [42]-[44], [69]-[72] (SCB 60, 62, 66).
[8] Special Case [56]-[58], [75]-[76] (SCB 64, 66).
[9] See BD, Vol 5, p 1828 and Vol 6, p 2338 ff for a summary of the relevant history and see also Special Case [160]-[169] (SCB 79-82).

10. Similarly, as contemplated by s 66 of the *Constitution*, Parliament has made provision for the payment of annual salaries to Ministers of State (**Ministerial salary**).[10] Parliament has also provided for allowances payable to members of Parliament by reason of holding certain parliamentary offices (**parliamentary office holder allowance**).

Retiring allowance under the Superannuation Act

11. Since 1 December 1948, the Superannuation Act has provided for the payment of retiring allowance (howsoever described) to certain members of Parliament who have ceased to be entitled to a parliamentary allowance.[11] Since 12 June 1978, the Superannuation Act has also provided for additional amounts of retiring allowance to certain members who had served as parliamentary office holders or Ministers of State.[12]

12. The details of the scheme under the Superannuation Act are considered in detail later in these submissions. For present purposes, it is sufficient to note that the scheme is contributory: members are obliged to make contributions from their parliamentary allowance, Ministerial salary and parliamentary office holder allowance to the Commonwealth.[13]

Changes to retiring allowance

13. The *Remuneration and Other Legislation Amendment Act 2011* (Cth) (**the 2011 Amendment Act**), which relevantly commenced on 5 August 2011, made significant changes to the retiring allowance under the Superannuation Act.

14. Immediately prior to 5 August 2011, s 18 of the Superannuation Act provided for the payment of retiring allowance by reference to a fixed percentage[14] of the rate of parliamentary allowance for the time being payable to members of Parliament. Also at this time the parliamentary allowance was not determined directly by the Remuneration Tribunal but was an annual allowance, called "salary", determined under cl 1 of Sch 3 to the *Remuneration and Allowances Act 1990* (Cth) (**1990 Allowances Act**) and reg 5 of the *Remuneration and Allowances Regulations 2005* (Cth).[15] The salary was

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[10] See Special Case [170]-[173] (SCB 82-83).
[11] Special Case [175] (SCB 83). Before the enactment of the *Parliamentary and Judicial Retiring Allowances Act 1973* (Cth), the retiring allowance was called a "pension".
[12] Special Case [183], [186] (SCB 84-85).
[13] *Parliamentary Contributory Superannuation Act 1948* (Cth), ss 13, 14. Prior to the enactment of the *Parliamentary and Judicial Retiring Allowances Act 1973* (Cth), contributions were made to a separate Parliamentary Retiring Allowances Fund out of which pensions and other benefits were paid.
[14] The percentage varied depending on the length of the member's service, with a minimum qualifying period of 8 years: see *Parliamentary Contributory Superannuation Act 1948* (Cth), s 18(6). Members who did not satisfy the minimum qualifying period were entitled, at a minimum, to a refund of their contributions: see ss 18(2), (4).
[15] Special Case [86], [97] (SCB 68, 70).

"Reference Salary A" (being the salary of a specified position in the Public Service) less $5,470, which was equal to $140,910.[16]

15. The 2011 Amendment Act repealed cl 1 of Sch 3 of the 1990 Allowances Act and conferred a power on the Remuneration Tribunal to determine the "parliamentary base salary" of members of Parliament. A definition of "parliamentary base salary" was inserted in s 3(1) of the RT Act as follows:[17]

> ***parliamentary base salary*** means so much of the allowances determined under subsection 7(1) as:
> (a) represents the annual allowance payable for the purposes of section 48 of the Constitution; and
> (b) is identified in the determination as base salary.

16. The 2011 Amendment Act also inserted a new s 7(1A) to the RT Act empowering the Remuneration Tribunal to determine that "a portion" of parliamentary base salary is not parliamentary allowance for the purposes of the Superannuation Act.[18] The definition of parliamentary allowance in the Superannuation Act was amended to exclude any portion of parliamentary base salary determined under s 7(1A).[19]

17. The result of the amendments, if valid, was that the retiring allowance payable to retired members of Parliament was no longer a fixed percentage of the annual allowance payable to members of Parliament, but a fixed percentage of some potentially lesser amount as fixed by the Remuneration Tribunal.

18. On 6 March 2012, the 2012 LGP Act made similar amendments in relation to the additional retiring allowance payable to former Ministers of State and parliamentary office holders.[20] Prior to those amendments, the additional retiring allowance was a fixed percentage of the salary payable for the time being to a Minister of State or of the allowance payable for the time being to the relevant parliamentary office holder.[21]

19. On 15 March 2012, by Determination 2012/02 the Remuneration Tribunal determined that "parliamentary base salary" should be set at $185,000.[22] As noted above, the annual salary payable to members of Parliament immediately prior to that time was $140,910.[23] The increase was as a result of a work value assessment of parliamentary

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[16] See Remuneration Tribunal, Review of the Remuneration of Members of Parliament Initial Report, December 2011 (BD, Vol 5, pp 1828-1829). See also Special Case [97] (SCB 70).
[17] *Remuneration and Other Legislation Amendment Act 2011* (Cth), Sch 2, item 16A.
[18] *Remuneration and Other Legislation Amendment Act 2011* (Cth), Sch 2, item 17A.
[19] *Remuneration and Other Legislation Amendment Act 2011* (Cth), Sch 2, item 1.
[20] *Members of Parliament (Life Gold Pass) and other Legislation Amendment Act 2012* (Cth), Sch 2, items 1, 2, 5 and 6.
[21] Special Case [89] (SCB 69).
[22] Special Case [99] (SCB 71).
[23] Special Case [97] (SCB 70).

remuneration.[24] The review was the first comprehensive review of the remuneration of members of the Parliament by the Remuneration Tribunal for approximately 25 years.[25] By way of comparison, in the late 1960s and early 1970s the parliamentary annual salary was approximately 2.7–2.9 times average male wages.[26] During the late 1970s and 1980s the base salary fell both in real terms and with reference to average male wages, declining to 1.9 times average male wages in 1988.[27] During the 1990s and prior to the increase in 2011, the base salary was approximately 2.2–2.3 times average male wages. The increase to the base salary in 2011 restored the base salary to 2.8 times average male wages.[28]

20. Determination 2012/02 also determined that the portion of the parliamentary base salary that was not parliamentary allowance for the purposes of the Superannuation Act was $38,620, or in other words that the parliamentary allowance for the purposes of the Superannuation Act was $146,380.[29] The Remuneration Tribunal determined the excluded portion by setting the parliamentary allowance for the purposes of the Superannuation Act as equal to Reference Salary A.[30] The Remuneration Tribunal also determined that 20% of Ministerial salary and 20% of parliamentary office holder allowance was not to be counted for the purposes of the Superannuation Act.[31]

21. At the date of the commencement of this proceeding, the extant determination was Determination 2015/06.[32] Under that determination, the parliamentary base salary was $195,130 and the portion of base salary that was not parliamentary allowance for the purposes of the Superannuation Act was $40,730. 20% of Ministerial salary and additional parliamentary office holder allowance was not counted for the purposes of the Superannuation Act.[33]

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[24] Remuneration Tribunal, Review of the Remuneration of Members of Parliament Initial Report, December 2011 (BD, Vol 5, pp 1835-1839).
[25] Remuneration Tribunal, Review of the Remuneration of Members of Parliament Initial Report, December 2011 (BD, Vol 5, p 1815).
[26] See L Manthorpe et al, "The base salary for Senators and Members" (Research Paper 2013-14, Parliamentary Library, 2013): BD, Vol 5, pp 2342-2345.
[27] See L Manthorpe et al, "The base salary for Senators and Members" (Research Paper 2013-14, Parliamentary Library, 2013): BD, Vol 5, pp 2342-2345.
[28] See L Manthorpe et al, "The base salary for Senators and Members" (Research Paper 2013-14, Parliamentary Library, 2013): BD, Vol 5, pp 2342-2345.
[29] Special Case [99] (SCB 71).
[30] See Remuneration Tribunal, Review of the Remuneration of Members of Parliament Initial Report, December 2011 (BD, Vol 5, p 1850).
[31] Determination 2012/03: see Special Case [102] (SCB 71).
[32] Special Case [95] (SCB 70).
[33] See Determination 2015/06 (BD, Vol 2, pp 523-525).

Life Gold Pass

22. Prior to 1976, there were a range of executive arrangements for the issue to certain former members of Parliament of travel passes providing travel privileges. These passes were known by various names over time but by at least 1955 were commonly described as "Life Gold Passes". Those passes did not include air travel. The history of these arrangements is explained in the Special Case.[34] Until 1976, the arrangements varied considerably and were supported only by the Executive power of the Commonwealth. The Life Gold Pass as now known was a creature of statute and finds its origin in the issue of Determination 1976/6 by the Remuneration Tribunal, which was not disapproved by either House of Parliament.[35] It was supported by ss 48 and 51(xxxvi) of the *Constitution*.

23. Relevantly, Determination 1976/6 entitled persons who satisfied certain eligibility criteria to a Life Gold Pass, which pass entitled that person "at official expense" to travel on various modes of transport within Australia for non-commercial purposes including air, rail and coach. The pass was "a special reward for long and faithful service and for holding the highest elected offices in Australia" and also recognised "the residual demands involving time and travel placed on such public figures after they cease to hold office."[36] Pursuant to s 7(9)(b) of the RT Act, the "remuneration or allowances" provided for by the Determination were, whilst the Determination subsisted, required to be paid out of the Consolidated Revenue Fund, notwithstanding any other law.

24. In the period after the coming into force of Determination 1976/6 until 1 January 1994, the Remuneration Tribunal issued determinations altering aspects of the original determination.[37] However, at all times the holders of a Life Gold Pass were permitted to travel at official expense for non-commercial purposes within Australia on the prescribed modes of transport.[38] The determinations also dealt with incidental matters.

25. By Determination 1993/18, the Remuneration Tribunal determined that an annual cap of 25 trips should apply to members to whom a Life Gold Pass had been issued on or after 1 January 1994.[39]

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[34] See Special Case [103]-[145] (SCB 71-77).
[35] A copy of the Determination can be found at BD, Vol 2, pp 337-338.
[36] Commonwealth, *Remuneration Tribunal 1976 Review Statement*, Parliamentary Paper No 219/1976, p 29 (BD, Vol 3, p 569).
[37] See Special Case [150] (SCB 78).
[38] Special Case [152]-[153] (SCB 78).
[39] See Determination 1993/18 (BD, Vol 2, p 437 ff).

26. In 2002, Parliament enacted the 2002 LGP Act. Relevantly, s 11(2) purported to restrict *all* holders of a Life Gold Pass, other than a former Prime Minister, to a maximum of 25 domestic return trips per year.[40] The 2002 LGP Act also contained an "historic shipwrecks" clause. In summary, s 32 provided that if the operation of the 2002 Act would result in an acquisition of property other than on just terms, and the acquisition would not be valid apart from s 32 because a particular person has not been compensated, the Commonwealth is liable to pay a reasonable amount of compensation to the person.

27. In 2012, the 2012 LGP Act relevantly amended s 11(2) of the 2002 Act by omitting 25 domestic return trips and substituting 10 domestic return trips.[41]

28. The fourth plaintiff, who upon his retirement from Parliament on 19 February 1990 became eligible for the issue of a Life Gold Pass,[42] claims that both the 2002 LGP Act and the 2012 LGP Act resulted in an acquisition of his property other than on just terms. The third plaintiff, who upon his retirement from Parliament on 5 February 2001 became eligible for the issue of a Life Gold Pass,[43] claims that the 2012 LGP Act resulted in an acquisition of his property other than on just terms.

Part V: Argument

29. This section of the submissions is divided into three parts. The first addresses general principles concerning s 51(xxxi). The second addresses the application of those principles in relation to retiring allowances payable under the Superannuation Act. The third deals with the Life Gold Pass.

General principles

Operation of s 51(xxxi)

30. It is well established that s 51(xxxi) implicitly operates as a constitutional guarantee[44] that property is not to be acquired by the Commonwealth other than on just terms, and

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[40] A former Prime Minister was restricted to 40 domestic return trips per year: s 10.
[41] That Act also contained an "historic shipwrecks" clause: *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act 2012* (Cth), Sch 1, item 10.
[42] Special Case [84] (SCB 68).
[43] Special Case [67] (SCB 66).
[44] See, eg, *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 202 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; *ICM Agriculture v The Commonwealth* (2009) 240 CLR 140 at [43] per French CJ, Gummow and Crennan JJ, [131] per Hayne, Kiefel and Bell JJ. A list of the many cases describing s 51(xxxi) as effecting a "guarantee" can be found in *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at [185] per Heydon J.

accordingly s 51(xxxi) "is to be given the liberal construction appropriate to such a constitutional provision".[45]

31. The guarantee is effected by the principle of construction that:[46]

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

The operation of that principle of construction is commonly expressed in shorthand by saying that s 51(xxxi) "abstracts" the power of acquisition from the other heads of Commonwealth legislative power, including those found outside s 51.[47]

32. However, it is also established that the guarantee of acquisition of property on just terms, being the consequence of a principle of interpretation, is not absolute. There is no clear test for when the principle of interpretation will be displaced, but in general terms it will not apply to the extent that the nature and subject matter of a law supported by another head of power is necessarily "incongruous" or "incompatible" with the provision of just terms.[48]

Meaning of "property"

33. Consistently with the broad construction to be given to s 51(xxxi), the cases establish that "property" in s 51(xxxi) is to be given a broad meaning. It extends to "every species of valuable right and interest"[49] and to "innominate and anomalous interests".[50]

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[45] *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 202 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ.
[46] *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371-372 per Dixon CJ (Fullagar, Kitto, Taylor and Windeyer JJ agreeing). See also *New South Wales v The Commonwealth* (2006) 229 CLR 1 at [219]-[220] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.
[47] *Trade Practices Commission v Tooth & Co* (1979) 142 CLR 397 at 445 per Aickin J; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at [186] per Gummow and Hayne JJ; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at [135] per Hayne, Kiefel and Bell JJ.
[48] See *Theophanous v The Commonwealth* (2006) 225 CLR 101 at [55]-[60] per Gummow, Kirby, Hayne, Heydon and Crennan JJ; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [77] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.
[49] *Minister for the Army v Dalziel* (1944) 68 CLR 261 at 290 per Starke J; *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at [49] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at [131] per Hayne, Kiefel and Bell JJ.
[50] *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349 per Dixon J; *JT International SA v The Commonwealth* (2012) 250 CLR 1 at [41] per French CJ, [263] per Crennan J.

It includes money and the right to receive a payment of money.[51] It includes a chose in action more generally.[52] It includes statutory rights and interests.[53]

Meaning of "acquisition"

34. Since the decision in *Australian Tape Manufacturers Association Ltd v The Commonwealth*[54] it has been generally accepted that for there to be an "acquisition" of property it is not sufficient merely that legislation affects or extinguishes existing property. A majority of the Court in *JT International SA v The Commonwealth*[55] held that for there to be an acquisition it was necessary that the Commonwealth or another person obtain an identifiable advantage of a proprietary kind. There is, however, no requirement of precise correspondence between what is taken and what is received.[56]

35. At first glance the reasoning in *JT International SA v The Commonwealth* is difficult to reconcile with what was decided in each of the Court's previous decisions in *Georgiadis v Australian & Overseas Telecommunications Corporation*,[57] *The Commonwealth v Mewett*[58] and *Smith v ANL Ltd*[59] – decisions that have been approved on numerous occasions.[60] In each of those three cases legislation that extinguished, either wholly or *pro tanto*, a cause of action for damages maintainable against the Commonwealth or another person was held to infringe s 51(xxxi). At general law, a liability to pay damages is not property in the hands of the obligor and the release of a liability to pay damages confers no property on the obligor.

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[51] *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509 per Mason CJ, Brennan, Deane and Gaudron JJ; *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303-304 per Mason CJ, Deane and Gaudron JJ.

[52] *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297; *The Commonwealth v Mewett* (1997) 191 CLR 471; *Smith v ANL Ltd* (2000) 204 CLR 493; *ICM Agriculture Ltd v The Commonwealth* (2009) 240 CLR 140 at [83] per French CJ, Gummow and Crennan JJ; *JT International SA v The Commonwealth* (2012) 250 CLR 1 at [263] per Crennan J and the cases cited there.

[53] *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 225 per Mason CJ, Deane and Gaudron JJ, 249 per Dawson J, 256 per Toohey J, 263-264 per McHugh J; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513; *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at [24] per Gleeson CJ, Gummow, Hayne and Crennan JJ; *Telstra Corporation v The Commonwealth* (2008) 234 CLR 210 at [49] per curiam.

[54] (1993) 176 CLR 480 at 499-500 per Mason CJ, Brennan, Deane and Gaudron JJ.

[55] See *JT International SA v The Commonwealth* (2012) 250 CLR 1 at [42] per French CJ, [118], [131]-[132], [143]-[144] per Gummow J, [169] per Hayne and Bell JJ, [305] per Crennan J, [365] per Kiefel J.

[56] See *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 304-305 per Mason CJ, Deane and Gaudron JJ; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 634 per Gummow J (Toohey and Gaudron JJ agreeing); *JT International SA v The Commonwealth* (2012) 250 CLR 1 at [136] per Gummow J, [297] per Crennan J, [336] per Kiefel J.

[57] (1994) 179 CLR 297.

[58] (1997) 191 CLR 471.

[59] (2000) 204 CLR 493.

[60] See, eg, *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at [21] per Gleeson CJ, Gummow, Hayne and Crennan JJ; *ICM Agriculture Ltd v The Commonwealth* (2009) 240 CLR 140 at [83] per French CJ, Gummow and Crennan JJ.

36. However, in the plaintiffs' submission, there is no inconsistency. The reasons of Gummow J and Hayne and Bell JJ in *JT International SA v The Commonwealth* discuss *Georgiadis v Australian & Overseas Telecommunications Corporation* and *Smith v ANL Ltd* with approval.[61] The reconciliation is achieved having regard to the breadth of "property" in s 51(xxxi), which extends beyond property at general law.[62] Accordingly, it should be accepted that the benefit obtained from the release of a liability to perform an obligation is property within the meaning of s 51(xxxi) where the right to performance of the obligation is itself property within s 51(xxxi).

37. Importantly, a law need not entirely extinguish a cause of action to amount to an acquisition of property other than on just terms; it will be sufficient if there is a modification in circumstances where a corresponding advantage (of a proprietary character in the sense explained in the previous paragraph) accrues to the person against whom action may be brought.[63] Thus, legislation reducing, albeit not extinguishing, the Commonwealth's liability as a debtor would, subject to the discussion in the next section, amount to an acquisition of property.

Acquisition of statutory property rights "inherently susceptible" to variation

38. There are a number of cases in which it has been said or held that there was no acquisition of a statutory property right because the right was said to be "inherently susceptible" to variation, extinguishment or modification.[64] However, a number of those cases yield no ratio,[65] and taken as a whole only two clear statements of principle emerge from them, namely:

    (a) property does not lie outside the protection of s 51(xxxi) merely on account of the fact that the property has its source in statute; and

    (b) in each case it is necessary to closely examine the statutory rights in question.[66]

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[61] (2012) 250 CLR 1 at [133]-[136] per Gummow J, [174] per Hayne and Bell JJ.
[62] See *JT International SA v The Commonwealth* (2012) 250 CLR 1 at [366]-[367] per Kiefel J.
[63] *Smith v ANL Ltd* (2000) 204 CLR 493 at [7] per Gleeson CJ, [21]-[23] per Gaudron and Gummow JJ, [89]-[91] per Kirby J, [194] per Callinan J; *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at [21] per Gleeson CJ, Gummow, Hayne and Crennan JJ; *ICM Agriculture Ltd v The Commonwealth* (2009) 240 CLR 140 at [83] per French CJ, Gummow and Crennan JJ.
[64] See *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 237 per Mason CJ, Deane and Gaudron JJ; *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at [13]-[17] per Brennan CJ, [78]-[79] per Gaudron J, at [134] per McHugh J, at [182]-[185], [196]-[198] per Gummow J; *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651; *Telstra Corporation v The Commonwealth* (2008) 234 CLR 210. For a summary see *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at [363]-[364] per Crennan J.
[65] *Health Insurance Commission v Peverill* (1994) 179 CLR 226; *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1.
[66] *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at [24] per Gleeson CJ, Gummow, Hayne and Crennan JJ; *Telstra Corporation v The Commonwealth* (2008) 234 CLR 210 at [49] per curiam. See also *Wurridjal v The*

39. In the plaintiffs' submission, the language of statutory property rights "inherently susceptible" to variation, extinguishment or modification is apt to mislead, is circular and is inconsistent with the text of s 51(xxxi). The language should be deprecated. As explained below, there is no special principle that applies to the acquisition of statutory property rights as compared to the acquisition of non-statutory property rights.

40. It is apt to mislead because *all* statutory rights are "inherently susceptible" to valid amendment or repeal. It is also apt to mislead because there are significant differences between "variation", "extinguishment" or "modification". It is circular because whether a statutory right is capable of valid amendment or repeal is subject to the operation of s 51(xxxi). It is inconsistent with the text of s 51(xxxi) because that section draws no distinction between statutory property and non-statutory property.[67] Property in s 51(xxxi) is indivisible.

41. Rather, the question that must be addressed in all cases is whether the property in question is subject to an express or necessarily implied condition permitting variation or extinguishment *of the kind enacted by the impugned law*. The operation of a condition attached to property effects no acquisition of the property because the owner never had property that was free of the condition.[68]

42. Where the property right is non-statutory the question posed will turn on the interpretation of the instrument or dealing creating the right. Where the property right is statutory the question will turn on the interpretation of the statute creating the right. In the latter case, the text, context (including the nature and scope of the right created) and the statutory purpose reflected in the character of such rights will all be relevant.[69]

43. The italicised words in paragraph 41 are important. The fact that property may be subject to some kinds of condition does not mean that it is subject to all conditions.[70] So, for example, Commonwealth legislation that acquired a fee simple defeasible if the land ceases to be used as a school would still involve an acquisition notwithstanding that the land was subject to the specified condition as to use. The acquisition would not be the operation or fulfillment of the condition.

Commonwealth (2009) 237 CLR 309 at [363]-[364] per Crennan J; *JT International SA v The Commonwealth* (2012) 250 CLR 1 at [29]-[30] per French CJ, [102] per Gummow J. McHugh J's view that all Commonwealth statutory rights lie outside the scope of s 51(xxxi) has not been followed.

[67] This is not insignificant having regard to the fact that most interests in land in Australia are a form of statutory property. The Torrens system was well known in 1900.

[68] See *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at [30] per Gleeson CJ, Gummow, Hayne and Crennan JJ; *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at [52]-[53] per curiam.

[69] See, eg, *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at [59]-[66] per Heydon J; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at [363]-[364] per Crennan J; *JT International SA v The Commonwealth* (2012) 250 CLR 1 at [29]-[30] per French CJ.

[70] See the reasoning in *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at [363]-[364], [441], [443] per Crennan J.

Other limitations on s 51(xxxi)

44. For completeness, certain other limitations that have been asserted on the scope of s 51(xxxi) should be mentioned. For example, it has been said that a law will not infringe the guarantee implicitly created by s 51(xxxi) unless the law is a law "with respect" to the acquisition of property.[71] It has also been said that a law which is concerned with the adjustment of competing rights, claims or obligations of persons in a particular relationship or area of activity is unlikely to satisfy that test.[72]

45. The plaintiffs do not apprehend that those limitations could have any application in this case, for the simple reason that the laws in question were directed solely to the acquisition of property for the financial benefit of the Commonwealth. In the event that the Commonwealth seeks to rely on those limitations, the plaintiffs will deal with them in reply. Needless to say, the supposed limitations have significant difficulties as a matter of constitutional interpretation.

Retiring allowances under Superannuation Act

Theophanous v The Commonwealth

46. The application of s 51(xxxi) to retiring allowances payable under the Superannuation Act was considered in *Theophanous v The Commonwealth*.[73] The Court held that provisions of the *Crimes (Superannuation Benefits) Act 1989* (Cth) that authorised a court to make a superannuation order, an effect of which forfeited a member's entitlement under the Superannuation Act, were not laws for an acquisition of property for which s 51(xxxi) required the provision of just terms. The reasoning of all members of the Court was based on the concept that laws forfeiting property are outside the scope of s 51(xxxi).[74]

47. The plurality also considered the history of s 48 of the *Constitution* and identified that the Superannuation Act is supported by s 51(xxxvi) of the *Constitution* read with s 48.[75]

48. Only Gleeson CJ touched on the issue for determination in this case, namely whether, outside the context of forfeiture, s 51(xxxi) is capable of applying to the benefits payable under the Superannuation Act. His Honour noted:[76]

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[71] See, eg, *Georgiadis v Australian & Overseas Telecommunications Commission* (1994) 179 CLR 297 at 307 per Mason CJ, Deane and Gaudron JJ.
[72] See, eg, *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 510 per Mason CJ, Brennan, Deane and Gaudron JJ; *Georgiadis v Australian & Overseas Telecommunications Commission* (1994) 179 CLR 297 at 307 per Mason CJ, Deane and Gaudron JJ.
[73] (2006) 225 CLR 101.
[74] See (2006) 225 CLR 101 at [11]-[14] per Gleeson CJ, [60]-[71] per Gummow, Kirby, Hayne, Heydon and Crennan JJ.
[75] See (2006) 225 CLR 101 at [30]-[37].

> "If Parliament legislated to modify or take away accrued entitlements simply for the purpose of saving money, or because it was decided as a matter of policy that they were too generous, then the case may fall within s 51(xxxi). It is unnecessary to decide that question. As at present advised, I would not accept that statutory superannuation or pension benefits are inherently defeasible and that, on that account alone, their modification or withdrawal could never constitute an acquisition of property."

Existence of property

49. In the plaintiffs' submission there can be no doubt that from at least the date of retirement each of the plaintiffs held property within the meaning of s 51(xxxi), being a chose in action.

50. Upon ceasing to be a member of Parliament, each became entitled to receive a benefit, payable fortnightly by the Commonwealth during the plaintiffs' lifetimes.[77] The benefit included:

    (a) retiring allowance, being a specified percentage of the rate of parliamentary allowance *for the time being* payable to a member of Parliament;[78] and

    (b) additional retiring allowance, being a specified percentage of the rate of Ministerial salary or parliamentary officer holder allowance *for the time being* payable.[79]

The reference to the "parliamentary allowance" was to the annual allowance payable to members of the Parliament by reason of their membership of the Parliament.

51. Each plaintiff had, from the time of retirement, a statutory right to receive money from the Commonwealth, payable in fortnightly installments. That right is a presently existing debt. In *Health Insurance Commission v Peverill*,[80] all but one member of the Court accepted that a statutory right to payment from the Commonwealth was property within s 51(xxxi). The Commonwealth could be sued for unpaid instalments.

52. Further, the plaintiffs also had a vested chose in action at the time they entered Parliament and began to make contributions to the Commonwealth, or at least once they had satisfied the minimum qualifying period of service necessary to entitle each to receive a retiring allowance. At all times since 1 December 1948, retiring allowance has not been payable to a retired parliamentarian who has not completed a minimum

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[76] (2006) 225 CLR 101 at [8].
[77] *Parliamentary Contributory Superannuation Act 1948* (Cth), ss 14A, 18, 24B(1).
[78] *Parliamentary Contributory Superannuation Act 1948* (Cth), ss 18(1), (1B), (6).
[79] *Parliamentary Contributory Superannuation Act 1948* (Cth), s 18(9).
[80] *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 225 per Mason CJ, Deane and Gaudron JJ, 249 per Dawson J, 256 per Toohey J, 263-264 per McHugh J.

period of service. However, a parliamentarian who does not qualify for retiring allowance has always been entitled to a refund of their contributions.[81] This is what traditionally distinguishes contributory superannuation from a non-contributory pension. At all times members of Parliament making contributions to the Commonwealth have had a vested right to obtain a sum of money from the Commonwealth. Until retirement, the benefit of the right is postponed and the value of the right is subject to a number of contingencies. However, this does not detract from the existence of a vested right to take action against the Commonwealth to recover a sum of money.[82] That chose in action, which matures into a debt upon retirement, is property for the purposes of s 51(xxxi).

Prima facie acquisition of property

53. As explained in paragraphs 13–21 above, the impugned provisions of the RT Act – namely ss 7(1A), 7(1B), 7(1C) and 7(2A) – and the relevant determinations of the Remuneration Tribunal, had the effect of reducing the Commonwealth's liability to pay the plaintiffs' retiring allowance and additional retiring allowance.

54. The powers conferred by ss 7(1A), 7(1B) and 7(2A) respectively allow the Remuneration Tribunal to exclude a "portion" of parliamentary allowance, parliamentary office holder allowance and Ministerial salary for the purposes of determining the retiring allowances payable under the Superannuation Act. Section 7(1C) makes clear that the portion determined under s 7(1B) may be a portion equal to 100%. It is not clear whether that construction also applies to ss 7(1A) and 7(2A). However, on any view, those sections authorise the Remuneration Tribunal to determine a portion that for all practical purposes would extinguish the entitlement to retiring allowance under the Superannuation Act (e.g. setting the excluded portion equal to 99.99% of the parliamentary base salary).

55. The impugned determinations did not extinguish completely the plaintiffs' choses in action. However, they effected a substantial modification by reducing the quantum of the benefit payable to the plaintiffs at the same time as providing a corresponding advantage to the Commonwealth of a proprietary nature within the meaning of s 51(xxxi).

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[81] Special Case [180] (SCB 84).

[82] An analogy may be drawn with a reversion or vested remainder. In such cases the benefit of the interest is postponed until the determination of the prior estate. However, at the time of grant it is certain that the prior estate will determine and the land will pass to the reversioner or remainderman. So too here it is certain that the member (or spouse in the case of the member's death whilst in Parliament: see *Parliamentary Contributory Superannuation Act 1948* (Cth), s 19) will be entitled to a sum from the Commonwealth.

56. Having regard to the authorities discussed in paragraphs 35–37, *prima facie* the impugned provisions authorised, and the impugned decisions of the Remuneration Tribunal resulted in, an acquisition of the plaintiffs' choses in action by the Commonwealth.

Property not subject to a relevant condition

57. The plaintiffs apprehend from the Commonwealth's defence that the Commonwealth seeks to rely on a number of aspects of the Superannuation Act to deny that there was an acquisition of property.[83] As the plaintiffs are not aware of the precise way the Commonwealth puts the argument, the plaintiffs' submissions on this point are necessarily somewhat general. To the extent necessary, the plaintiffs will deal with the details of the Commonwealth's argument in reply.

58. *First*, an important aspect of the scheme in question is that it is contributory. In *Health Insurance Commission v Peverill* and *Commonwealth v WMC Resources Ltd*, McHugh J, drawing on United States authority, expressed the view that *gratuitous* statutory entitlements, such as pensions,[84] could be validly withdrawn by the Commonwealth.[85] Whether or not that view is correct, the benefits payable under the Superannuation Act are not mere gratuities. The benefits paid are the *quid quo pro* for the contributions received from the former member of Parliament and services rendered as a member of Parliament for the relevant period.

59. In the plaintiffs' submission, the contributory nature of the scheme in question points strongly against any conclusion that the rights conferred on members by the legislation were subject to a condition that the Commonwealth could withdraw the rights at any time, or amend those rights so as to reduce a member's total overall benefit. The retiring allowance was part of a member's remuneration and the provisions made for it are akin to those frequently made under the genera law: cf paragraph 63(a) below.

60. *Secondly*, any reliance on the fact that, as found by this Court in *Theophanous v The Commonwealth*,[86] the *Crimes (Superannuation Benefits) Act 1989* (Cth) is capable of validity forfeiting benefits under the Superannuation Act is misplaced. Commonwealth laws forfeiting property are outside the scope of s 51(xxxi). The fact that certain property may be validly forfeited does not mean that the benefits are in Gleeson CJ's words "inherently defeasible".

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[83] See Defence, [41], referring to, in particular, ss 18, 21B, 22, 22T and 24 of the Superannuation Act and the *Crimes (Superannuation Benefits) Act 1989* (Cth) (SCB 41):
[84] This would include judicial pensions as they are not protected by s 72(iii) of the *Constitution*.
[85] *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 260-262; *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at [137]-[138]; see also [197] per Gummow J.
[86] (2006) 225 CLR 101.

61. *Thirdly*, as was sought to be explained in paragraphs 38–43 above, the fact that a property right is subject to one or more conditions does not determine whether it is subject to other conditions. The issue is whether, as a matter of the proper construction of the legislation, the plaintiffs' rights are subject to a condition that those rights may be varied on the terms contemplated by the impugned provisions. Those provisions contemplate a complete, or at least very substantial, diminution of the plaintiffs' retiring allowance. For the reasons above, the contributory nature of the scheme is inconsistent with such a construction.

62. In relation to specific matters that appear to be relied upon by the Commonwealth:

(a) The opening words of s 18 – "Subject to this Part" – do not evince an intention that retiring allowance is subject to a condition that it may be withdrawn or reduced in value. "Subject to this Part" and other similar phrases merely make express what would otherwise be implied, namely the relationship between s 18 and other parts of the legislation (e.g. the provisions concerning commutation). If the words "subject to this Part" (or similar words) were determinative few if any statutory rights could be subject to the protection of s 51(xxxi) because those words will be implied necessarily in all but the simplest of legislation creating a statutory right. In *Attorney-General (NT) v Chaffey*,[87] in construing the relevant statute the plurality had regard to the fact that the relevant statutory obligation to make payments was "subject to" and "in accordance with" the relevant part and was to provide "such compensation as is prescribed". However, in the plaintiffs' submission, the critical feature there was not the words "subject to this Part", but the fact that the amounts payable were to be prescribed by regulation which, subject to some contrary indication, naturally suggests that the amounts were liable to change over time.

(b) Sections 21 and 21B, which in broad terms have the effect of reducing a retiring allowance if the retired member is in receipt of another benefit, do not assist the Commonwealth. Those sections do not reduce the total benefits payable to a member below what would otherwise be payable under s 18 of the Superannuation Act. In effect, they are directed to preventing "double dipping". They provide no basis to conclude that the entitlement of a retired member, who is not in receipt of other relevant remuneration, is subject to a condition permitting the reduction of the amount of the retiring allowance.

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[87] (2007) 231 CLR 651.

(c) Likewise in respect of s 22 of the Superannuation Act. In effect, that section conditions the receipt of a retiring allowance on a condition that the retired member is of good behavior. It provides no assistance in the present case.

(d) Far from assisting the Commonwealth, s 22T of the Superannuation Act (which commenced on 2 March 1996) which protects retired parliamentarians from the effect of *decreases* in the rate of parliamentary allowance, supports the plaintiffs' construction.

63. Further, the fact that there have been amendments to s 18 over its history does not support the Commonwealth's position. The salient history of s 18 of the Superannuation Act is as follows:

(a) When the Superannuation Act was enacted in 1948, s 9 established the "Parliamentary Retiring Allowances Fund" which was vested in and managed by the Parliamentary Retiring Allowances Trust. Members of Parliament made contributions to the Fund, which along with contributions by the Commonwealth and income from investments, was used to fund the payment of benefits specified in the Superannuation Act.[88] At the time of enactment, the maximum pension payable under s 18 was £8 per week.[89] The creation of a dedicated trust fund is an indication that the members' entitlements were not regarded as being "inherently susceptible" of defeat.

(b) The amount of the fixed pension payable under s 18 was increased from time to time up until 1959 when the maximum pension payable was £21 per week for a person aged 65 or over.[90]

(c) Section 18 was amended by the *Parliamentary Retiring Allowances Act 1964* (Cth) which fixed the rate of retiring allowance (then called "pension") as a percentage of the parliamentary allowance to which the relevant retired parliamentarian was entitled immediately before he or she became entitled to a retiring allowance. The percentage was calculated on the basis of the member's age at the date of retirement, the minimum percentage being 30% (for a person aged 40 at the time of becoming entitled to the pension) and the maximum being 50% (for a person aged 45 or more).[91] At that time, the parliamentary allowance

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[88] *Parliamentary Retiring Allowances Act 1948* (Cth), s 9 (BD, Vol 1, pp 208-209).
[89] *Parliamentary Retiring Allowances Act 1948* (Cth), s 18 (BD, Vol 1, pp 211-212).
[90] See *Parliamentary Retiring Allowances Act 1952* (Cth); *Parliamentary Retiring Allowances Act 1955* (Cth); *Parliamentary Retiring Allowances Act 1959* (Cth), s 7.
[91] *Parliamentary Retiring Allowances Act 1964* (Cth), s 10 (BD, Vol 1, pp 220-221).

was £3,500 per annum.[92] Thus, the *minimum* pension payable was just over £20 per week, whereas the maximum pension was more than £33 per week. The amendments were therefore highly beneficial to current members of Parliament.[93]

(d) From 8 June 1973, the *Parliamentary and Judicial Retiring Allowances Act 1973* (Cth) amended s 18 to fix the rate of retiring allowance by reference to a percentage of the parliamentary allowance payable to serving parliamentarians from time to time. The percentage was calculated on the basis of years of service with a minimum rate of 50% and a maximum rate of 75%. Further, transitional provisions ensured that no person who was a member of the Parliament immediately before the amendments would be worse off as a result of the amendments.[94] The legislation also dismantled the previous Parliamentary Retiring Allowances Fund which was liable to pay benefits, instead placing the obligation directly on the Commonwealth.[95]

(e) From 12 June 1978, the *Parliamentary Contributory Superannuation Act 1978* (Cth) amended s 18 to provide for the payment of additional amounts of retiring allowance to certain persons who had served as Ministers of State or as parliamentary office holders. The amount was determined in accordance with a formula that had regard to the amount of salary or additional allowance they had received. From 1 July 1980, the *Parliamentary Contributory Superannuation Amendment Act 1981* (Cth) amended s 18 to provide for the payment of additional retiring allowance at a percentage of the salary for the time being payable to a Minister or parliamentary office holder. Again, transitional provisions operated so that no member was worse off as a result of the amendments.[96]

64. Amendments to *increase* the benefits payable under s 18 do not involve an acquisition of property other than on just terms. Nor do they provide any basis for concluding that s 18 was subject to a condition permitting complete or partial extinguishment of the kind authorised by the impugned provisions.

65. For the reasons above, it should be concluded that as a matter of statutory construction the plaintiffs' rights under the Superannuation Act were not subject to a condition permitting extinguishment or modification of those rights in the manner contemplated by ss 7(1A), 7(1B), 7(1C) and 7(2A) of the RT Act. Accordingly, the Court should

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[92] *Parliamentary Allowances Act 1964* (Cth), Sch (BD, Vol 1, p 120). The statement at Special Case [163(c)] that the parliamentary allowance was £3,000 is a mistake.
[93] Subsequently, there were increases to pensions in 1967 and 1971: see *Parliamentary Retiring Allowances (Increases) Act 1967* (Cth) and *Parliamentary Retiring Allowances (Increases) Act 1971* (Cth).
[94] See *Parliamentary and Judicial Retiring Allowances Act 1973* (Cth), s 15(4) (BD, Vol 1, p 270).
[95] *Parliamentary and Judicial Retiring Allowances Act 1973* (Cth), s 9 (BD, Vol 1, p 268).
[96] *Parliamentary Contributory Superannuation Amendment Act 1981* (Cth), s 15 (BD, Vol 1, pp 300-301).

conclude that those provisions authorised an acquisition of the plaintiffs' property by the Commonwealth. There being no doubt that just terms were not provided, it follows that ss 7(1A), 7(1B), 7(1C) and 7(2A) of the RT Act are invalid, as are the paragraphs of the Determinations identified in Questions 1(f)–(k) of the Special Case.

Life Gold Pass

66. In the plaintiffs' submission, the effect of s 7(9) of the RT Act is that upon becoming eligible for the issue of a Life Gold Pass, the holder had a vested right (or bundle of rights) to the benefits specified in the relevant determinations of the Remuneration Tribunal concerning the Life Gold Pass. The exercise of these rights was suspended until a member or Senator retired from Parliament. Relevantly, prior to the enactment of the 2002 LGP Act, a person (such as the fourth plaintiff) who was a holder of a Life Gold Pass before 1 January 1994 was entitled to travel at official expense for an unlimited number of qualifying domestic return trips. The Commonwealth was required to pay or reimburse the holder for the cost of the relevant travel. The holder's correlative right was a chose in action and was property within the meaning of s 51(xxxi). A similar analysis applies in respect of a person who became entitled to a Life Gold Pass after 1 January 1994, but in that case the holder was limited to a maximum of 25 trips per year.

67. For similar reasons to those in relation to the Superannuation Act (see paragraphs 53–56) the purpose, object and effect of the 2002 LGP Act and the 2012 LGP Act was to acquire the third and fourth plaintiffs' property. Those Acts effected a *pro tanto* extinguishment of the third and fourth plaintiffs' rights at the same as conferring on the Commonwealth a correlative benefit of a proprietary kind within the meaning of s 51(xxxi). Thus, there was an acquisition of property by the Commonwealth.

68. Further, the property was not subject to a condition permitting defeasance. The Life Gold Pass was a reward for long and distinguished service, not a gratuity. Upon vesting, the right conferred on the Life Gold Pass holder could not be acquired by the Commonwealth without the provision of just terms.

69. Having regard to the presence of s 32 of the 2002 LGP Act and a similar provision in the 2012 LGP Act, the authorities establish that s 11(2) of the LGP Act (as enacted and amended) is not invalid.[97] However, appropriate declarations as sought in the Statement of Claim should be made.

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[97] *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at [104] per French CJ, [196]-[197] per Gummow and Hayne JJ, [321]-[339] per Heydon J, [461]-[466] per Kiefel J.

Part VI: Relevant constitutional and legislative provisions

70. The relevant constitutional and legislative provisions are set out in the Annexure.

Part VII: Orders

71. The questions stated should be answered as follows:

Question 1: Sections 7(1A), 7(1B), 7(1C) and 7(2A) of the *Remuneration Tribunal Act 1973* (Cth) authorise an acquisition of property otherwise than on just terms, and are invalid. Accordingly, the paragraphs of the Determinations identified in paragraphs (f)–(k) of Question 1 are void and of no effect.

Section 11(2) of the *Members of Parliament (Life Gold Pass) Act 2002* (Cth), as originally enacted, constituted an acquisition of the fourth plaintiff's property otherwise than on just terms, insofar as it reduced the number of domestic return trips to which the fourth plaintiff as the holder of a Life Gold Pass was entitled. Section 3 of the *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act 2012* (Cth) (insofar as it made the amendments and repeals provided for in Sch 1, item 6) constituted an acquisition of the third and fourth plaintiff's property otherwise than on just terms, insofar as it reduced the number of domestic return trips to which the third and fourth plaintiffs as the holders of Life Gold Passes were entitled.

Question 2: The justice disposing of the action should grant the plaintiffs such declaratory relief as appears appropriate in light of the answer to Question 1.

Question 3: The first defendant.

Part VIII: Estimate of time

72. The plaintiffs estimate that they will require 4 ½ hours for oral argument.

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