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Abstract
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Keywords
regulatory acquisition, s 51(xxxi), Australian Constitution, gain approach

GAIN AS LOSS: THE HIGH COURT'S 'GAIN' APPROACH IN REGULATORY ACQUISITION CASES

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ABSTRACT

Since 1983 the High Court has professed to follow a 'gain' approach in regulatory acquisition cases under s 51(xxxi) of the Australian Constitution. *That is, government or some independent party must gain something — although not necessarily something physical — for a compensable regulatory acquisition to be found. This approach is very different from the 'loss' approach used by the United States Supreme Court in takings cases, in which the extent of a claimant's loss determines whether a regulatory taking has occurred. The United States Supreme Court uses ad hoc balancing in making this determination. However, a review of Australian High Court acquisition cases reveals that the approach in both countries is little different. Whether an acquisition is found in Australia is often determined based on the extent of harm or loss to the claimant when balanced against the gain, rather than solely on any alleged gain by government or a private party. In short, a 'gain' (and therefore an acquisition) is often found if the loss is great enough after balancing. The cases suggest that when the loss is trivial as balanced against the gain, then usually there is no 'gain' found, and therefore no acquisition. In short, it would almost appear that the High Court is driven as much by losses as gains when it comes to acquisitions, in spite of its claims to the contrary.*

The increase in intangible property interests in recent years has correspondingly increased the number of suits in which a 'regulatory' acquisition or expropriation is at issue. A 'regulatory' acquisition occurs when parliamentary action causes harm to someone, even though physical property is not taken. As early as 1948, the Australian High Court ruled that the Commonwealth Acquisition Clause (s 51xxxi of the *Constitution*) may be invoked to compel compensation in regulatory acquisition cases.[1] However, since the 1980s the Australian High Court has stated that there

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1 *Bank of New South Wales v Commonwealth,* (1948) 76 CLR 1. In this case Dixon J said that 's. 51 (xxxi.) is not to be confined pedantically to the taking of title by the Commonwealth to some specific estate or interest in land recognized at law or in equity and to some specific form of property in a chattel or chose in action similarly recognized, but that it extends to innominate and anomalous interests and includes the assumption and indefinite

must be a gain of some kind, by the government or some independent party — although not necessarily a gain of physical property — in order for a compensable regulatory acquisition to be found.[2] The nature of this gain is sometimes identified as a 'proprietary' or ownership gain of some sort, such that the Commonwealth or an individual owns something more after the acquisition than it did before. Under this reasoning, no matter how much loss a claimant has suffered, he or she will receive no compensation unless there was some independent gain by government or some other party.

This approach is in stark contrast with that of the United States, where the Supreme Court applies the same 'loss' orientation to regulatory takings cases as it does to physical takings cases. That is, regulatory takings in the United States are found based on the loss by a claimant due to governmental action, regardless of whether there has been any gain by anyone. This loss orientation is best articulated in the 1984 case of *Ruckelshaus v Monsanto*,[3] in which the court said:

> It has never been the rule that only governmental acquisition or destruction of the property of an individual constitutes a taking, for 'courts have held that the deprivation of the former owner rather than the accretion of a right of interest to the sovereign constitutes the taking.[4]

The United States Supreme Court openly admitted in the 1978 case of *Penn Central Transportation Co v New York* that it engages in 'ad hoc factual inquiries' in regulatory takings cases, in which 'relevant considerations' make the difference as to whether a taking is found.[5] In other words, the gravity or seriousness of the loss is weighed to see if compensation is justified. The reason for this balancing of losses was articulated in the 1922 case of *Pennsylvania Coal v Mahon*,[6] in which Holmes J stated that 'while property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking.'[7] Hence, losses that go 'too far' which are caused by the government should be compensated as takings. However, not every loss is compensable since government 'hardly could go on if to some extent values incident

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continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property.' Ibid 349.

2 As discussed more fully below, this trend started with the case of *Commonwealth v Tasmania* (1983) 158 CLR 1, and has been perpetuated by virtually every acquisition case since then.

3 467 U S 986 (1984).

4 Ibid 1004-05, citing *United States v General Motors Corp*, 323 US 373, 378 (1945).

5 438 U S 104, 124 (1978).

6 260 U S 393 (1922).

7 Ibid 415 (emphasis added).

to property could not be diminished without paying for every such change in the general law'.[8]

This acknowledgement by the United States Supreme Court, that finding a regulatory taking is determined in an ad hoc fashion in which balancing occurs, has been repeated in many other cases.[9] Hence, the American approach to these types of cases involves a subjective decision by the courts, based on the degree of egregiousness of the loss.

As the cases in this article demonstrate, the Australian approach in such cases also appears to be based on an ad hoc balancing of losses compared to gains, in spite of repeated statements by the High Court that an acquisition under s 51(xxxi) of the *Constitution* will only be found if something is 'acquired' or 'gained'. In other words, it appears that both countries engage in balancing involving the egregiousness of losses when faced with an expropriation. As the cases discussed below will demonstrate, whether an acquisition is found in Australia is often determined based on the extent of harm or loss to the claimant when balanced against the gain, rather than solely on any alleged gain by government or a private party as is asserted. A 'gain' (and therefore an acquisition) is often found if the loss is considered great enough after balancing. When the loss is perceived to be less than the gain, then usually there is no 'gain' found, and therefore no acquisition. Of course, quantification of 'losses' and 'gains' is a challenge in itself, and this ad hoc balancing is usually based on subjective criteria in the minds of the judges.

In short, the cases discussed below suggest that the High Court is driven as much by losses as gains when it comes to acquisitions, in spite of all claims to the contrary. While some scholars have noted that the balancing used by the High Court in acquisition cases, none have looked exclusively at the 'gain' v 'loss' distinction that underlies the entire acquisition dynamic.[10]

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8 Ibid 413.

9 See eg *Loretto v Teleprompter Manhattan CATV Corp*, 458 U S 419, 426, 444 (1982); *Keystone Bituminous Coal v DeBenedictis*, 480 US 470, 494–5 (1987); *Lucas v S C Coastal Council*, 505 U S 1003, 1071 (1992); *Palazzolo v Rhode Island*, 533 U.S. 606, 617 (2001). Many books have been written by American scholars on regulatory takings. See e.g Steven J Eagle, Regulatory Takings (LexisNexis, 2005); William A Fischel, Regulatory Takings: Law, Economics and Politics (Harvard University Press, 1995); N; Bruce L Benson, Property Rights: Eminent Domain and Regulatory Takings (Palgrave MacMillan, 2010).

10 A number of scholars have discussed the High Court's acquisition jurisprudence in recent years, but without focusing on gain/loss. See, eg, Rosalind Dixon, 'Overiding Guarantee of Just Terms or Supplementary Source of Power? Rethinking s. 51(xxxi)' (2005) 27(4) *Sydney Law Review* 639; Simon Evans, 'When is an Acquisition of Property not an

Part one will review the development of the 'gain' or 'acquisition' orientation in the High Court over the last 30 years. Part two will discuss the ramifications and policy implications of the 'gain' approach purported to be followed by the High Court, and will contrast it with the 'loss' approach. It should be noted that what is presented here is in the nature of a broad overview, since the cases are numerous and the detailed specifics and nuances are too extensive to recite in full. The goal is to take a step back and show trends from a broader perspective, so that we are not trapped in the manner of the old adage, 'can't see the forest for the trees.'

I THE DEVELOPMENT OF THE 'GAIN' OR 'ACQUISITION' ORIENTATION

In 1983, the Australian High Court ruled that a regulatory acquisition can only be found if some gain has occurred, regardless of any loss suffered by the claimant. This occurred in the case of *Commonwealth v Tasmania* (the '*Tasmanian Dam Case*').[11] In this case, the State wanted to build a dam in south western Tasmania. However, the Commonwealth opposed the dam, fearing that it would damage a valuable wilderness area and aboriginal archaeological sites. The Commonwealth Parliament therefore enacted *The World Heritage Properties Conservation Act 1983* (Cth), which effectively halted the entire project. Tasmania then brought suit alleging, among other things, that the Commonwealth action constituted an acquisition contrary to just terms, in violation of s 51(xxxi) of the *Constitution*.

At issue then was a Commonwealth desire to protect valuable environmental and archaeological sites, in contrast with a state desire to obtain electric power. No physical property was taken. The state of course lost its ability to control its property and use that property to generate power. The Commonwealth Parliament by its action clearly felt the gain of environmental protection outweighed such a loss by the state, and that the state could obtain its power another way. Indeed, The Bureau of the World Heritage Committee named the area where the dam was to be built part of the World Heritage List of properties to preserve, and then put pressure on the Australian government to stop construction of the dam.[12]

With these weighty, quasi-political positions in the background, a majority of the High Court justices ruled that no violation of s 51(xxxi) occurred. Mason J provided the reason as follows:

> To bring the constitutional provision into play it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in

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Acquisition of Property?'(2000) 11 *Public Law Review* 198; Tom Allen, 'The Acquisition of Property on Just Terms' (2000) 22 *Sydney Law Review* 351.

11 (1983) 158 CLR 1.

12 Ibid 62–3.

> relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.[13]

Accordingly, no matter how much the State of Tasmania said it had lost from not being able to build its dam, the fact that the federal government or anyone else had supposedly failed to gain anything was determinative. Completely ignored was the valuable gain to the Commonwealth of the preserved environmental and archaeological sites. Deane J wrote a strong dissent, noting that the Commonwealth's power to prevent a proposed state project of this kind 'can constitute a valuable asset.'[14] He then said that

> [T]he Commonwealth has … obtained the benefit of a prohibition, which the Commonwealth alone can lift … the practical effect of the benefit obtained by the Commonwealth is that the Commonwealth can ensure, by proceedings for penalties and injunctive relief if necessary, that the land remains in the condition which the Commonwealth, for its own purposes, desires to have conserved. In these circumstances, the obtaining by the Commonwealth of the benefit acquired under the Regulations is properly to be seen as a purported acquisition of property for a purpose in respect of which the Parliament has power to make laws.[15]

Hence, while the majority found that there had been no gain of any 'proprietary right,' Deane J noted that there was, nonetheless, a clear gain to the Commonwealth sufficient to invoke s 51(xxxi). Indeed, he pointed out the rather obvious fact that if a government takes an action to limit a property owner's rights, there must obviously have been some motivation — or gain — in doing so. It therefore was not appropriate to ignore this gain and characterize it as something other than what it was. This is especially true when considering both the monetary and non-monetary value of the sites that the Commonwealth wanted to preserve and which were only preserved — and therefore gained back from destruction — by Commonwealth action. Hence, from the very beginning, one of the greatest challenges of the 'gain' orientation toward finding an acquisition was brought to light.

The next regulatory acquisition case in which the court had the opportunity to review this new 'gain/loss' perspective was the 1985 case of *R v Ludeke; Ex Parte Australian Building Construction and Builders Labourers Federation* ('*Ludeke*')[16] One of the disputes in this case was whether certain provisions of the *Building Industry Act 1985* (Cth)

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13 Ibid 145.

14 Ibid 287.

15 Ibid.

16 (1985) 159 CLR 636.

constituted an acquisition without providing just terms under s 51(xxxi). The sections complained of allowed the Minister for Employment and Industrial Relations to remove an officer of the Builders' Federation as part of an effort by the government to settle an industrial dispute, 'and thus terminate existing contractual rights.'[17] Other provisions of the Act terminated member rights in the Builders' Federation (thereby resulting in lost membership fees for the Federation). Hence, the loss in this case mostly pertained to the ability of the Federation to maintain and control its members. The gain to the government pertained to better control of labour disputes. Neither can be easily quantified.

The court acknowledged the loss that had been alleged, but stated that 'even if that be so, there is nothing in the Act that provides for the acquisition of those rights — they may be extinguished, but not acquired.'[18] Hence, notwithstanding the added control over labour disputes provided by the new law, there was supposedly no gain because the Act merely extinguished rights and the government acquired nothing. The term 'proprietary' was not even mentioned in the case.

In short, when the gain to the government of better control over labour disputes was weighed against the loss to labour of fully controlling its members, the gain won. The loss to labour was simply not great enough when compared to the gain to the government. But because acquisitions were now to be found only when a gain occurred, it was necessary to deny that any gain had happened. The easiest way to do this was to create the image that labour's rights were merely 'extinguished' without being correspondingly gained by anyone. While this was technically true, it completely ignored the broader reality that the government did indeed gain a great deal by the law. However, its gain was not of the same nature as that which was lost.

Several years passed before another regulatory acquisition case came before the High Court. The next time the 'gain/loss' question was discussed was in the 1992 case of *Australian Capital Television v Commonwealth* ('*Capital TV*').[19] The *Political Broadcasting and Political Disclosures Act 1991* (Cth) included a requirement that free broadcast time be given to certain political parties. Television and radio broadcasting companies complained that this requirement essentially amounted to an acquisition of their property, contrary to just terms. Most of the justices bypassed this issue in their discussion, focusing instead on the free communication aspects of the legislation.

However, Brennan J did discuss the acquisition aspect of the case, noting his comments from the *Tasmanian Dam Case* that a 'proprietary right' must be acquired in

17 Ibid 653.

18 Ibid.

19 (1992) 177 CLR 106.

order for s 51(xxxi) to be invoked. He briefly discussed the disagreement that exists over how to identify such a right, noting that in 1982 Mason J, quoting Lord Wilberforce, had 'said that a proprietary right must be 'capable in its nature of assumption by third parties,' while Isaacs J in 1929 said that 'assignability is a consequence, not a test' of a proprietary right.'[20] Notwithstanding this ambiguity regarding assignability and whether it could be used to identify a valid gain, Brennan J found that the free broadcasting that was lost was not an acquired proprietary right because it could not be assigned. Once again, the nature of the government's gain was not precisely correspondent to the nature of the broadcaster's loss. It was easy therefore to merely say that what was lost was not gained by anyone.

The following year, the High Court again spoke to some extent regarding the loss/gain question, even though the case was once more resolved on other grounds. In the 1993 case of *Australian Tape Manufacturers Association v Commonwealth ('Australian Tape)'*,[21] the majority determined that a newly enacted fee on the sale of all blank cassette tapes was a tax, not an acquisition. The fee was levied in order to compensate copyright holders whose works were frequently copied by the public on blank tapes. The competing interests then were losses experienced by consumers and tape sellers in the form of higher tape costs, contrasted with gains of money to pay copyright holders. Notably, the new Act mandating the fee did *not* attempt to remedy copyright violations — it merely acknowledged them, and sought to compensate for them. Those receiving the benefit of the fees were song and movie artists.

While the case was determined on other grounds, the justices discussed the acquisition aspects of the case anyway. A majority of the justices felt that the fee was gained by those who received it, and therefore would have constituted a violation if the fee had not been found to be a tax. In contrast, Dawson and Toohey JJ disagreed, once again using 'proprietary' language, noting that 'the mere extinction or diminution of a proprietary right residing in one person does not necessarily result in the acquisition of a proprietary right by another.'[22] It is interesting that s 51(xiii) was completely sidestepped in this case, by identifying the fee as a tax. As we will see in later cases, the High Court has sidestepped s 51(xiii) on other occasions when the monetary nature of the gain made it impossible to deny an acquisition. Dixon has noted, regarding such evasions of s 51(xiii), that 'historically, the Court has tended to

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20 Ibid 165–6, quoting *In Reg v Toohey; Ex Parte Meneling Station* (1982) 158 CLR 327, 342–3; and *Commissioner of Stamp Duties v Yeend* (1929) 43 CLR 235, 245.

21 (1993) 176 CLR 480.

22 Ibid 528.

identify these circumstances on a strongly case-by-case basis,'[23] which strongly suggests a balancing or weighing element.

In 1994, the High Court handed down four acquisition decisions on the same day, and extensively discussed the 'gain' and 'loss' perspectives. Three of the cases involved loss of a 'chose in action' (right to bring a claim) as the property loss that was said to have caused the acquisition, while the fourth case was one of forfeiture of property used in a crime. The 'chose in action' cases suggest more compellingly than any prior to that time that there appears to be some 'balancing' undertaken by the High Court in respect to 'loss' and 'gain' in these types of cases. In two of these cases, no acquisition was found; but in the third case, it was. Significant efforts were made by the various justices to justify the distinction between the results. Interestingly, however, the one case in which an acquisition was found was the one that undeniably had the greatest hardship to the claimant (i.e., his loss). In the other two 'chose in action' cases, the loss was not as compelling.

The four cases were: *Georgiadis v Australian and Overseas Telecommunications Corporation* ('*Georgiadis*');[24] *Mutual Pools & Staff Pty Ltd v Commonwealth* ('*Mutual Pools*');[25] *Health Insurance Commission v Peverill* ('*Peverill*') ,[26] and *Re Director of Public Prosecutions; Ex Parte Lawler* ('*Ex Parte Lawler*').[27] The first three of these were the 'chose in action' cases. In *Georgiadis*, the *Commonwealth Employees' Rehabilitation and Compensation Act 1988* (Cth) essentially terminated a worker's pre-existing right to bring a common law negligence claim against his former employer, the government. In *Peverill*, the *Health Insurance (Pathology Services) Amendment Act 1991* (Cth) reduced, but did not terminate, the amount a doctor would be paid under pre-existing assignments for payment given by his patients. Hence, while the doctor clearly lost, his loss was not total as in *Georgiadis*. In *Mutual Pools, the Swimming Pools Tax Refund Act 1992 (Cth)* terminated a pool maker's right to claim a refund under a pre-existing agreement. It should be noted that the pool maker stood to gain a windfall if it received the refund, since it had already received the refund amount from the pool buyer. Hence, there really was no loss to speak of. In *Ex Parte Lawler*, a unanimous court upheld forfeiture to the government of a fishing vessel that violated the *Fisheries Management Act 1991* (Cth), even though the vessel was leased and the owners claimed to know nothing of the illegal use their lessor had made of their craft. There was no real discussion of gain/loss. This case clearly differed from the others

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23 Rosalind Dixon, 'Overiding Guarantee of Just Terms or Supplementary Source of Power? Rethinking s. 51(xxxi)' above n 10, 645.

24 (1994) 179 CLR 297.

25 (1994) 179 CLR 155.

26 (1994) 179 CLR 226.

27 (1994) 179 CLR 270.

inasmuch as physical property was at issue but no acquisition was found because the transfer of the property was considered to be within the forfeiture exception to s 51(xxxi).

In all three of the 'chose in action' cases, the High Court justices debated at length whether a 'proprietary right' of the kind identified in the *Tasmanian Dam Case* had been gained by anyone. The Commonwealth naturally asserted that there was no gain and therefore no compensable acquisition, since the right to sue in all three cases had merely been 'extinguished,' just as in *Ludeke*. For this and other reasons, Dawson, and McHugh JJ ruled in all three cases that there was no acquisition. The remaining justices all agreed that there was no acquisition in *Mutual Pools* and *Peverill*, but that there was an acquisition in *Georgiadis*. The 'gain' they found in *Georgiadis* was the money the government would have (potentially) had to pay in a common law negligence suit if the right to bring one had not been terminated.

Three of the justices in *Georgiadis* (Mason, Deane and Gaudron JJ) sought to justify the ruling by distinguishing the Australian acquisition clause from the 'taking' language of the US Fifth Amendment, particularly since each clause used a different word to convey its message. This point goes to the heart of the loss/gain debate. They stated:

> 'Taking' directs attention to whether there has been a divesting, a question which is answered by looking to the position of the person who claims that he has been deprived of his property. On the other hand, 'acquisition' directs attention to whether something is or will be received. If there is a receipt, there is no reason why it should correspond precisely with what was taken. That is particularly so with 'innominate and anomalous interests.'[28]

The reference to 'innominate and anomalous interests' is taken from Dixon J's statement in the 1948 case of *Bank of New South Wales v Commonwealth*,[29] which was the first High Court case to recognize regulatory takings. This focus on the words 'take' and 'acquire' tends to highlight the point from Deane J in the *Tasmanian Dam Case*,[30] that the gain/loss dichotomy is largely a matter of semantics.

Interestingly, the same three justices in *Georgiadis* acknowledged that this semantic interpretation was largely subjective and involved weighing or balancing of interests. They stated:

> One consequence of s. 51(xxxi)'s operation through characterization and concern with substance is that there will inevitably be borderline cases in

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28 *Georgiadis v Australian and Overseas Telecommunications Corp* (1994) 179 CLR 297, 304–5.

29 (1948) 76 CLR 1, 349.

30 See above, text accompanying n 15-16.

> which the question whether a law bears the distinct character of a law with respect to the acquisition of property … is finely balanced. The present is such a case. *On balance*, we have reached the conclusion that [this case] does possess such a distinct character.[31]

On the other hand, Brennan J in the same case specifically denied that any balancing was taking place: 'In determining the issue of just terms, the Court does not attempt a balancing of the interests of the dispossessed owner against the interests of the community at large.'[32] Notwithstanding this, he was one of four justices who found an acquisition in *Georgiadis*, but not in *Mutual Pools* or *Peverill*.

In contrast, Toohey J (in dissent) did not hesitate to point out in *Georgiadis* the fine line that had been adopted by the majority, and how tenuous a line it was:

> No doubt the defendant has benefited from the operation of s.44 of the Act in that a person in the position of the plaintiff can no longer recover damages for non-economic loss. But that falls far short of saying that there was an acquisition of property by the defendant. The dichotomy between extinguishment and acquisition cannot be pressed too far; the two are not necessarily incompatible.[33]

It is much harder to distinguish *Peverill* from *Georgiadis* than it is to distinguish *Mutual Pools* from *Georgiadis*. At least in *Mutual Pools* the pool provider was paid the value of the pool already, and therefore suffered no loss, which suggests that there simply was no acquisition to begin with. The doctors in *Peverill,* on the other hand, were not completely paid, and clearly lost when the amount of pay they could receive was reduced. The government therefore gained what it otherwise would have had to pay the doctors, just as in *Georgiadis* the government gained what it might otherwise have had to pay in damages. Callinan J noted this anomaly years later in *Airservices Australia v Canadian Airlines*.[34] The difference, of course, is a matter of degree. In *Georgiadis,* the claimant's loss was total, whereas in *Peverill* it was partial. When the loss and gain were weighed against each other, therefore, it was easier to let the heavier loss in *Georgiadis* justify the acquisition, while the lighter loss in *Peverill* was not sufficient. It is therefore hard to escape the conclusion that losses, not gains, were driving these decisions. However, because the High Court continued to characterize such cases as solely dealing with gains, their decisions and

31 (1994) 179 CLR 297, 308 (emphasis added).

32 Ibid 310.

33 (1994) 179 CLR 297, 321 (emphasis added).

34 (1999) 202 CLR 133.

pronouncements continued to be, as Simon Evans noted, 'confused and unsatisfactory.'[35]

The next significant acquisition case to address the loss/gain issue was the 1997 case of *Newcrest Mining v Commonwealth* ('*Newcrest Mining*').[36] *The National Parks and Wildlife Conservation Act 1975* (Cth) effectively terminated mining rights in a national park in the Northern Territory. Newcrest Mining had a lease to mine, and quickly filed suit under s 51(xxxi). Just as in *Georgiadis*, the Commonwealth argued that there was no gain and therefore no acquisition:

> [T]he prohibition produced no benefit of a proprietary nature for the Commonwealth or the Director. The proclamations may have prevented Newcrest from mining the land but neither the Commonwealth nor the Director received any corresponding advantage.[37]

Thus, at issue once more was environmental protection as the governmental objective, similar to the *Tasmanian Dam Case*. Such a thing is hard to quantify. However, this time the opinion makes no mention of any pressure from international organizations for environmental preservation. Furthermore, the loss involved a clear property right – a lease pertaining to real property. The decision was a close one, and was a difficult one to weigh. As Tom Allen has stated, although 'all judges agree that it is substance, rather than form, which should govern analysis, there is no clear consensus on how acquisitions differ, in substance, from mere deprivations of property.'[38] In the end, a majority ruled that an acquisition had indeed occurred, requiring just terms.

Once more the justices were split on the semantics, and how to justify the decision by using the 'gain' or 'something acquired' approach. McHugh J was in the minority, and argued that

> [E]ven if there was effectively a diminution or extinguishment of all or part of Newcrest's interests, there was no gain by the Commonwealth … Both as a matter of substance and of form, the Commonwealth obtained nothing which it did not already have. In colloquial terms, Newcrest lost but the Commonwealth did not gain"[39]

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35 Simon Evans, 'When is an Acquisition of Property not an Acquisition of Property?' above n 10, 184.

36 (1997) 190 CLR 513.

37 Ibid 572.

38 Tom Allen, 'The Acquisition of Property on Just Terms', above n 10, 357.

39 (1997) 190 CLR 573.

Conversely, Brennan J nonetheless asserted that the Commonwealth had indeed experienced a gain, noting that what 'was acquired was the benefit of the extinguishment of Newcrest's rights to carry on operations for the recovery of minerals.'[40] Gummow J acknowledged that what was gained was 'an identifiable and measurable advantage'[41] to the Commonwealth of preserving the parks free of mining. This reference to an 'identifiable and measurable advantage' was to surface again in later cases. This term clearly involved more than money, and was an acknowledgement of the overwhelmingly obvious reality that anytime government acts in a way that hurts someone, it does so in order to gain something. As the cases discussed so far indicate, however, whether this 'societal gain' is recognized as such, and an acquisition is therefore found, depends largely on the size of the loss to the claimant.

The High Court had another opportunity to discuss the gain/loss issue that same year in the case of *Commonwealth v Mewitt* ('*Mewitt*').[42] At issue in this case was whether loss of a right to bring a tort claim against the government was an acquisition, just as in *Georgiadis*. A majority of the court again said that it was. Once again, the government stood to gain by way of money saved from a claim it would not have to pay. In contrast, the claimant's loss of his claim was total. Hence, the loss appeared far greater than the gain. In a fascinating admission, Dawson J acknowledged that the finding of a gain in *Georgiadis* was based largely on which opinion prevailed with a majority of the court, based on their balancing approach:

> The difference between the majority and the minority [in *Georgiadis*] went not so much to principle as to its application in the particular circumstances, the majority preferring a broader approach than the minority in determining what amounts to an acquisition of property within the meaning of s. 51(xxxi).[43]

In 1998, the loss/gain issue was faced again by the High Court in *Commonwealth v WMC Resources* ('*WMC Resources*').[44] A new Commonwealth law terminated a permit for offshore seabed mining held by a private company. Once again, environmental protection was the purpose of the law, with the added complication that sovereignty over the permitted area of seabed for mining purposes was the subject of a dispute with Indonesia. The law at issue was enacted in accordance with an earlier treaty

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40 Ibid 533.

41 Ibid 634.

42 (1997) 191 CLR 471.

43 Ibid 503.

44 There were two such cases. In the first in 1996, the Federal Court of Australia, General Division, found an acquisition. See *Commonwealth v WMC Resources* (1996) 67 FCR 153. This decision was then appealed to the High Court, which reversed in 1998. See *Commonwealth v WMC Resources* (1998) 194 CLR 1.

between the two disputing countries regarding seabed mining. Hence, international relations were once more brought into play, as in the *Tasmanian Dam Case*. While no one disputed that the mining company had suffered a significant loss due to its being prohibited from mining, four out of six justices ruled that no gain had occurred,[45] and that there would therefore be no compensation for an acquisition. This conclusion completely ignored the reality that the nature of Australia's proprietary ownership claim in the disputed seabed was clearly enhanced by the decision. Accordingly, the environmental and sovereignty gains by the government outweighed the mining company's losses. McHugh J noted the contrast between Australia's gain orientation compared to the loss orientation used by the US Supreme Court: 'If s 51(xxxi) of the Australian Constitution was a guarantee of property rights in the way that the Fifth Amendment to the United States Constitution is a guarantee of property rights, the result of this case might well be different.'[46]

The next case to deal with the 'gain' question was the 1999 case of *Airservices Australia v Canadian Airlines* ('*Airservices Australia*').[47] In this case, an airline that leased its aircraft from other airlines went bankrupt. Several liens had been placed on the aircraft pursuant to the *Civil Aviation Act* 1988 (Cth), which set fees on the airlines for airport services. In order to get back their aircraft, the leasing airlines were forced to pay off the liens, which they did under protest. They then brought suit alleging an acquisition without providing just terms. At issue then were governmental goals of charging fees to keep airports safe and operational, versus money the airlines did not want to pay. There was clearly money on both sides of the ledger.

The majority of justices found no acquisition, not because there was no gain—which would have been impossible to deny because of the money involved—but on the basis that the Act in question was said for some reason to be completely outside the scope of s 51(xxxi), similar to *Australia Tape* and *Ex Parte Lawler*. Airport safety clearly weighed heavier than lost airline profits, but because of the monetary nature of the losses and gains it was nearly impossible to say there was no acquisition on the basis that nothing had been gained. It was therefore necessary to characterize the entire affair under a different heading. As Gaudron J stated, 'the liens provisions are, in my view, properly to be characterized as laws adjusting the competing rights and claims

45 Those ruling against an acquisition were Brennan CJ, Gaudron, McHugh and Gummow JJ. Toohey and Kirby JJ felt an acquisition had occurred. See *Commonwealth v WMC Resources* (1998) 194 CLR 1.

46 *Commonwealth v WMC Resources* (1998) 194 CLR 1, 57–8.

47 (1999) 202 CLR 133.

of their existing and future creditors, rather than laws 'directed towards the acquisition of property as such.'[48]

Reference was made to other circumstances in which property was taken but s 51(xxxi) was not invoked. In separate judgments, McHugh, Callinan JJ disagreed with this characterization, both finding that something clearly had been acquired in this case and that s 51(xxxi) was, therefore, invoked. McHugh J stated that:

> [T]he Authority obtained an 'identifiable and measurable advantage' by the vesting of the lien because the Authority was given rights of control in that it could refuse to approve the removal of the aircraft by the respondents until the outstanding charges were paid. Accordingly, in my opinion, the liens provisions effected an 'acquisition of property,' notwithstanding that there was no seizure or sale of the aircraft.'[49]

Callinan J bluntly stated that 'to call an acquisition a forfeiture cannot alter the nature and substance of what is in truth an acquisition.'[50] He traced the history of acquisition cases, openly disagreeing with many of them. Using *Peverill* as an example (where the doctor's Medicare payment claims he had received from clients were reduced by a new law), his Honour stated that

> With respect, for myself, I would have thought that the second holding which accepted that the medical practitioner's claim was a chose in action contradicted any notion that he did not own property, the property being the debt payable by the Commission, and that, by reducing the value of that debt (by statute) there was effectively an acquisition of property by the Commission to the extent of the amount of the reduction of the debt.[51]

Callinan J concluded by noting that there 'is no doubt that there has been an acquisition of property here to the extent that the lien purports to operate to reduce the value of the aeroplanes owned by the respondents.'[52]

As the cases above have demonstrated, by this point in time the High Court had adopted a number of different approaches to the gain/loss problem. Commenting on *Airservices Australia*, Simon Evans noted that the 'multiplicity of approaches to s 51(xxxi) is problematic in itself. It increases uncertainty and decreases the ability of governments, legislators and legal advisors to predict confidently how the High

48 Ibid 196.
49 Ibid 245.
50 Ibid 312.
51 Ibid 317.
52 Ibid 318.

Court will respond to proposed or enacted legislation. However, the prospects of a return to unanimity seem slight.'[53]

Government action that restricted the right to bring a claim was considered by the High Court for a third time in *Smith v ANL Ltd* ('*ANL*').[54] Similar to *Peverill* — and in contrast with *Georgiadis* — the claimant did not utterly lose his right to bring a claim. Rather, a shorter six month time limit was mandated in which it could be brought. It was a close balancing act once more, but no doubt due to the binding nature of *Georgiadis* and *Mewitt*, a majority once again ruled that an acquisition had occurred. Gleeson J noted that 'the appellant's pre-existing common law right was modified; and [therefore] a corresponding benefit was conferred on the respondent.'[55] This benefit or gain was freeing the government from claims after the six month time limit passed. This gain weighed less heavily than the total loss to a claimant once the six month time passed. As we have seen above, however, there have been other times that the gain to the government could easily be calculated in monetary or ownership terms, but no acquisition was found.

In *ANL*, Gleeson J also noted another rather troubling complication that could arise as a result of the gain orientation taken by the High Court. He stated that even a common law 'guarantee protecting rights of private property could be rendered worthless by the adoption of a drafting technique that would produce, for the citizen affected, a result having no practical difference from the result of extinguishment.'[56] Hence, in enacting regulatory laws that impacted property rights, creative draftsmen could potentially write the law in such a way that any 'gain' was carefully avoided.

Two justices in *ANL* discussed some of the problems and logical difficulties with the 'gain' approach. Kirby J observed that it is possible to find 'something gained' in almost any circumstance: 'Not infrequently, property rights are acquired under federal law for the precise purpose of extinguishing them, that being the very object of the acquisition.'[57] He also recognized the challenge of finding a proper way to decide these types of cases: 'Finding a touchstone to distinguish legislation which falls within, and that which falls outside, the requirements of s 51(xxxi) is not easy. No verbal formula provides a universal criterion.'[58] This echoes the US Supreme Court's admission in *Penn Central* that questions of this kind are difficult, and must

53 Simon Evans, above n 10, 186.
54 (2000) 204 CLR 493.
55 Ibid 500.
56 Ibid.
57 Ibid 521.
58 Ibid 528–9.

be determined on an ad hoc, case-by-case basis, using a balancing or weighing approach.[59] Callinan J made similar comments. He noted that

> what has been acquired may often be without any analogue in the law of property and incapable of characterization according to any established principles of property law. The powers of the State to take and effect property are far reaching and the means by which this may be done are almost innumerable.[60]

Callinan J then took issue with the perceived difference between the 'gain' and 'loss' orientation:

> There are also statements in some of the cases which place significance on a shade of perceived difference in meaning between the word 'taken' in the Fifth Amendment to the United States Constitution and 'acquisition' in s 51(xxxi) of the Australian Constitution … In my opinion there is little or no significance to be attached to any apparent shade of difference in meaning between the two words, 'take' and 'acquire.'[61]

But this was not all. Callinan J then observed that acquisition cases came to the courts on the basis that someone's proprietary right had been lost, which was then decided by the court on the basis of whether there was *something gained* by an entirely different party. Then, if an acquisition was found, the court flipped back to the loss orientation to find the measure of damages. He noted that if the 'gain' orientation truly was the best method to follow, then logically the damages to the property owner should be valued on what was gained, not what was lost.[62] Indeed, when one thinks about it, why should the claimant's loss have any bearing on gain if gain is truly the deciding factor? On that basis, any proprietary gain would result in an acquisition, regardless of whether that gain had any relationship to the loss of the claimant.

Finally, Callinan J noted that in acquisition cases that had been addressed recently by the High Court 'it is not difficult to see how the Commonwealth, or somebody else did derive some form of benefit.'[63] This highlights once again the reality that societal gain is not always monetary, and is not always directly correspondent to what was lost. Accordingly, he agreed with Kirby J that the determination was ultimately based

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59 *Penn Central Transportation Co v New York*, 438 US 104, 124 (1978).

60 Ibid 542–3.

61 Ibid 545, 546.

62 Ibid 546–7.

63 Ibid 548.

on the mere opinions of the different justices, and '[any] distinction may be very much in the eyes of the beholder.'[64]

The gain/loss issue surfaced again in the 2007 case of *AG for the Northern Territory v Chaffey* ('*Chaffey*').[65] A change to a Northern Territory statute regarding worker's compensation eliminated the superannuation portion of compensation that Chaffey had been receiving.[66] Applying s 51(xxxi) to the territory, all members of the court ruled that there was no acquisition since workers compensation was based on a defeasible statutory grant and the statute could always be adjusted. Hence, the claimed property right at issue appeared to differ from the common law rights at issue in *Georgiadis*, *Mewitt* and *ANL*. Four of the justices maintained that the issue did 'not turn upon the notion of 'acquisition' ... [but depended] upon the identification of the 'property' at issue in the case.[67] However, they also noted that if 'property' were to be defined to include the superannuation at issue, there would have been an acquisition.[68]

Once again, Kirby and Callinan JJ noted their dissatisfaction with the uncertain state of the law on these issues, even though they agreed with the holding. Callinan J's comments were brief; he mainly noted that under the narrow facts of this case it was not necessary 'to attempt to resolve the unsatisfactory state of the conflicting authorities and pronouncements.'[69] Kirby J acknowledged that in:

> recent times, members of this Court and academic commentators have noted what they have perceived to be inconsistencies or overly-fine distinctions that present difficulties for later courts and for other decision-makers seeking to apply the Court's doctrine.[70]

He then noted, frankly, that no 'formula of universal application can be expressed'[71] in these types of cases, and that 'this may be another illustration of the fact that, in legal reasoning and in constitutional elaboration especially, a point may ultimately be reached where the decision is sustained by considerations of impression and

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64 Ibid 550, citing Kirby J in *Commonwealth v WMC Resources* (1998) 194 CLR 1, 90–1.

65 [2007] HCA 34.

66 *Northern Territory (Self Government) Act 1978* (Cth) ss 5, 6, 50. While the individual Australian states are not subject to the Commonwealth takings clause (*NSW v Commonwealth* (1915) 20 CLR 55, 78), the territories are.

67 [2007] HCA 34 [21].

68 Ibid.

69 Ibid [56].

70 Ibid [36].

71 Ibid [40].

judgment.'[72] In other words, the result of each case boiled down to a subjective judgment call based on balancing or weighing gains and losses, often without much that could be offered to distinguish one case from another.

The next case to deal with the issue was the 2008 case of *Telstra Corporation v Commonwealth* ('*Telstra*').[73] Telstra argued in this case that laws mandating it to allow competitors to use its lines constituted an acquisition without providing just terms. A unanimous court found no acquisition, primarily because Telstra's lines had previously belonged exclusively to the Commonwealth, and when Telstra acquired them it did so with the proviso that competitors would use the lines. In short, Telstra had lost nothing, nor had anyone gained anything that they did not already have. The fact that there was no loss was the death knell for Telstra's legal argument. The majority defined property very broadly, noting that sometimes 'it may be more useful to identify property as 'a legally endorsed concentration of power over things and resources.'[74] Clearly, such a broad definition of property could result in an acquisition anytime 'power over things' could be said to have been transferred. The court also noted that parties in these types of cases often seek to 'invoke particular elements of the long line of cases in this Court in which s 51(xxxi) has been considered ... as if discrete exceptions to the application of s 51(xxxi) can be identified as established in those decisions.'[75] The justices noted that such an approach 'may invite error,'[76] even though it was based on the normal tradition of stare decisis and was the usual method of judicial interpretation. In short, once more the balancing nature of these types of cases was acknowledged.

In 2009, the High Court once again addressed the gain/loss issue in *ICM Agriculture v Commonwealth* ('*ICM*').[77] A new law effectively terminated groundwater bore licenses, creating new licensing requirements which limited the amount of groundwater that could be removed. Three of the justices (French CJ, Gummow and Crennan JJ) quoted *Mutual Pools* (outline above)[78] in a statement acknowledging the difficulty of the 'something gained' analysis:

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72 Ibid [44].

73 (2008) 234 CLR 210.

74 Ibid 230–1, citing *Yanner v Eaton* (1999) 201 CLR 351.

75 Ibid 232.

76 Ibid.

77 (2009) 240 CLR 140. It should be noted that in the same year the High Court addressed another case with a very similar factual basis, regarding groundwater bore licenses. The High Court in that case did not engage in a substantive discussion of the issue however, merely stating that the question had been resolved in *ICM*. See *Arnold v Minister Administering the Water Management Act 2000* (2010) 240 CLR 242.

78 See text accompanying nn 16-23.

GAIN AS LOSS: THE HIGH COURT'S 'GAIN' APPROACH IN REGULATORY ACQUISITION CASES

> [T]he fact remains that s 51(xxxi) is directed to 'acquisition' as distinct from deprivation. The extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property. For there to be an 'acquisition of property', there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property. On the other hand, it is possible to envisage circumstances in which an extinguishment, modification or deprivation of the proprietary rights of one person would involve an acquisition of property by another by reason of some identifiable and measurable countervailing benefit or advantage accruing to that other person as a result.[79]

Hence, loss and gain were often too sides of the same coin. In this case, however, since water was a 'natural resource', which the state had the unlimited right to alter, the majority ruled that no acquisition occurred.

Hayne, Kiefel and Bell JJ noted that 'there can be no *acquisition* of property unless some identifiable and measurable advantage is derived … That is, another must acquire 'an interest in property, however slight or insubstantial it may be.'[80] Hence, a slight 'identifiable and measurable' advantage was all that was needed for there to be an acquisition. While Hayne, Kiefel and Bell JJ acknowledged that the change in bore water licenses was to further the state's goal 'to achieve a reduction of 56 per cent in water entitlements in respect of the Lower Lachlan Groundwater System by 1 July 2016,'[81] they nevertheless concluded that 'the State gained no identifiable or measurable advantage from the steps that have been taken with respect to the plaintiffs' water licences and entitlements.'[82] In short, once again a weighing of losses versus gains controlled the ruling. The greater societal gain of preserving groundwater for future generations weighed more heavily than loss of profits to bore license holders.

One of the most recent cases to address the loss/gain analysis was the 2012 case of *JT International v Commonwealth* ('*JT International*').[83] In this case, a new Commonwealth law mandated that cigarette companies could no longer put their trademarks on individual cigarette cartons, but were required to merely print their brand name on a plain, brown background, next to a large anti-smoking warning. The statute contained a reading down provision whereby the requirement would be waived if it were ever found that it constituted a violation of s 51(xxxi), thereby protecting the Commonwealth from having to pay no matter what the High Court decided. This

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79 Ibid 179–80.

80 Ibid 201–2 (emphasis in original)(citation omitted).

81 Ibid 184.

82 Ibid 202.

83 (2012) 250 CLR 1.

highlighted the reality that at issue was the societal gain of eliminating smoking among the populace versus lost profits to cigarette companies. On balance, the societal gain of improving public health won over monetary interests of the tobacco industry. A majority of justices found that there was no gain from the measure, and therefore no compensable acquisition.

Using similar language to that stated before regarding the distinction between American style takings (loss orientation) and Australian acquisitions (gain orientation), French CJ noted that a taking 'involves deprivation of property seen from the perspective of its owner. Acquisition involves receipt of something seen from the perspective of the acquirer.'[84] He then acknowledged that the Commonwealth was pursuing health oriented 'public purposes to be advanced and ... public benefits to be derived from the regulatory scheme.'[85] Clearly, such 'public benefits' could include reduced Medicare costs of smokers, and increased tax revenues if people remain healthy and working. Yet in spite of this obvious proprietary gain, French CJ concluded that there was not an acquisition or 'receipt of something seen from the perspective of the acquirer.'[86]

Like French CJ, Gummow J admitted that Parliament stood to gain 'by regulating the retail packaging and appearance of tobacco products to reduce their appeal to consumers.'[87] Still, this was not enough in his opinion for an acquisition to be found. Gummow also discussed at some length the comparison between s 51(xxxi) and the 5th Amendment taking clause in the United States, in respect to regulatory acquisitions.[88] As with others who have discussed this distinction, his focus was on semantics, and the different meanings of the words 'take' (signifying a loss) and 'acquire' (signifying a gain).[89]

Heydon J in his dissent took note of Callinan J's comments in *ANL* 'that the distinctions between interfering with rights and acquiring rights, and between taking rights and acquiring rights, were not of significance.'[90] In other words, the loss/gain distinction was almost non-existent. Heydon J then observed that the 'rights the Commonwealth acquired substantially correspond with those the proprietors lost. A newly acquired right arose in the Commonwealth to command the publication of

84 Ibid 33–4.
85 Ibid 34.
86 Ibid 33–4.
87 Ibid 62.
88 Ibid 50–3.
89 Ibid 51–2.
90 Ibid 75.

messages it desires to have sent, without charge, to the public.'[91] He then concluded with this telling observation of the real intent of this law:

> In effect, the Commonwealth has said to the proprietors through the TPP Act: 'You have been controlling your intellectual property and your chattels with a view to making profits in your businesses; I want to stop you using the intellectual property in very large measure, and command you as to how you are to use what is left of your property, not with a view to making profits in your businesses, but with a view to damaging them by making the products you sell unattractive; I will therefore take over control of your intellectual property and chattels from you.' That control is a measurable and identifiable advantage relating to the ownership or use of property. It enlivens the s 51(xxxi) guarantee.[92]

Finally, the most recent acquisition case addressed by the High Court is the 2014 case of *Attorney-General (NT) v Emmerson* ('*Emmerson*'). [93] The Northern Territory enacted a law requiring forfeiture of all of a person's property if he was convicted of three specified drug-related offenses within a ten-year period. The forfeiture was to occur regardless of whether the forfeited property had any relation to the crime or not, and therefore could include property obtained by legitimate means. Emmerson was convicted of three drug offenses, and stood to lose $850,000, which everyone acknowledged he had obtained by legitimate means. He naturally brought suit asserting an acquisition without providing just terms. The loss to Emmerson was obvious, while the potential gain to the government went beyond the $850,000 Emmerson stood to lose, and included an effort to remedy 'the social consequences of drug crime.'[94] Indeed, the majority acknowledged a clear gain to the government, not only in terms of money, but of securing 'the legislative purpose of protecting society by incapacitating a drug trafficker.'[95] As happened in a number of cases described above in which money was too strong of an element for an acquisition to be denied (*Ex Parte Lawler, Australian Tape* and *Airservices Australia*), the majority sidestepped s 51(xxxi) by ruling that the law was outside the scope of that provision because it was a legitimate forfeiture to deter crime. Gageler J was the sole dissenter, asserting that an acquisition should have been found since the property at issue was not in any way related to the crime.[96]

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91 Ibid 83.

92 Ibid 84.

93 (2014) HCA 13.

94 Ibid [83].

95 Ibid.

96 Ibid [140].

In sum, starting in 1983, the High Court has required an identifiable gain for an acquisition under the constitution to be found. If there is no such gain, irrespective of any loss to the property owner, no acquisition will have occurred. The court has struggled with this approach, and frequently its decisions have been inconsistent and contradictory. For example, exceptions to the rule have been found when government merely 'adjusts entitlements,' or identifies the property at issue as being outside the coverage of s 51(xxxi). Ultimately, however, the cases demonstrate that what the test boils down to — as some justices have frankly been willing to occasionally admit — is whether a majority of the court are of the opinion that something was gained or not. And this balancing decision appears to have frequently been influenced by the egregiousness of what was lost by the claimant. In short, if the loss was harmful or big enough then an acquisition was found, irrespective of the gain.

II RAMIFICATIONS AND POLICY IMPLICATIONS OF THE 'GAIN' APPROACH

The overview above gives rise to many observations. One is that a 'loss' in respect to acquisitions appears to be derived from a 'rights' orientation of protecting individual property rights. A 'gain' orientation on the other hand is based on what is considered best for society, even at the expense of individual protections. While Australians cherish their rights, they have not fostered as strong a rights orientation to government action as in the United States, where the federal government and all 50 states have their own bill of rights. As is well known, the Australian Commonwealth has no bill of rights, and only Victoria has enacted a bill of rights among the Australian states. Australians are more open to the idea of doing what is best for society as a whole.

When an acquisition is based on a loss orientation such as in the United States, government will face lawsuits demanding compensation and large expenditures of public funds in cases where there was little if any gain to anyone. Society is therefore burdened with continually reimbursing individuals with little to show for it, all for the sake of preserving individual rights. Individuals under this approach can practically hold society hostage and demand a hefty 'ransom' every time they suffer a loss. This fosters a very strong 'me' orientation — highlighting the needs and rights of the individual over those of society.

On the other hand, under the 'gain' orientation Society's overall goals become more important than those of any individual. Under this view, individuals should frequently not be compensated at all, or given only very little compensation, since society's goals are far more important. Hence, individual rights may be abused, and private property owners may find themselves paying the bill for public projects. The obvious tensions between these two approaches result because, as Simon Evans

notes, 'the courts are attempting to compress the most highly contested political questions into propositions of law. These political questions invariably revolve around the relative value to be assigned to individual rights and the general welfare of the community.'[97]

Notwithstanding these theoretical differences, as was seen in the cases, it tends to appear that the result in many cases in Australia has been motivated as much by the extent of the loss as from any concern over finding a gain by someone. In this sense, the court's approach is not far removed from that of the United States, where a regulatory acquisition will be found based on balancing, when the individual loss is great enough to be found compelling by a majority of the justices. This was best expressed by Holmes J in the 1922 case of *Pennsylvania Coal v Mahon*,[98] in which he stated that 'while property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking.'[99] How far is 'too far' is anyone's guess. The corollary to this statement is that acts that do *not* go too far do not constitute a taking, even though there may be a loss to a property owner. The reason, once again given by Holmes J, is simple: 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'[100]

The gain orientation creates the appearance that this ad hoc balancing approach is not followed in Australia. After all, the focus is on gain, not loss, and gain should be easy to find. Yet in actuality, the cases suggest that the result may be essentially the same, and that just as much balancing occurs under either approach. This can be seen by analysing the nature of the gain and loss in each of the cases above, as shown below. In reviewing this table, it should be remembered that monetary or proprietary ownership aspects of gains and losses are not always easily seen at first glance, but can usually be found if one looks deeper. Likewise, societal gains are often very difficult to quantify in money, and indeed are often seen as being more important than monetary concerns.

CASE	LOSS	GAIN	ACQUISITION?
Tasmanian Dam Case 1983	Right to build a dam; electric power	Preservation of environment	No
Ludeke 1985	Control of union members	Govt control of labor disputes	No

97 Simon Evans, 'Should Australian Bills of Rights Protect Property Rights?' (2006) 31 *Alternative Law Journal* 23.

98 260 U S 393 (1922).

99 Ibid 415 (emphasis added).

100 Ibid 413.

Capital TV 1992	Broadcast revenue	Equal and free campaign time	No
Australian Tape 1993	Fee on Cassette tapes	Compensate lost copyright royalties	Not applicable (tax)[101]
Georgiadis 1994	Right to bring common law negligence claim	Government saved money	Yes
Mutual Pools 1994	Right to bring claim for money already received	Government saved money	No
Peverill 1994	Right to bring claim for prior, higher payments	Government saved money	No
Ex Parte Lawler 1994	Fishing vessel involved in crime	Enforcement of fishing laws	Not applicable (forfeiture)[102]
Newcrest Mining 1997	Lease to mine in remote area; no int'l pressure	Preservation of the environment	Yes
Mewitt 1997	Right to bring common law negligence claim	Government saved money	Yes
WMC Resources 1998	Permit to mine sea - bed in int'l waters under treaty	Preservation of the environment	No
Airservices Australia 1999	Money to pay liens on planes	Costly airport services and safety	Not applicable (creditor adjstmt)
ANL 2000	Time to bring claim reduced to 6 months	Government saved money	Yes
Chaffey 2007	Reduce worker's compensation	Government saved money	No
Telstra 2008	Use of lines and revenue therefrom	Equal use of lines by all	No
ICM 2009	Right to withdraw groundwater	Preservation of the environment	No
JT International 2012	Tobacco company trademarks and	Costly health services	No

101 As the fee was found to be a tax, it was invalidated on that basis. The majority stated that, if not for that, they would have found an acquisition. See text accompanying nn 13–14.

102 The court unanimously agreed that a forfeiture of property used in violation of law is outside the scope of s 51(xxxi), just like taxation. See text accompanying n 18. As such, this was not a true regulatory takings case; however, like *Australian Tape*, an acquisition would have been found if not for the exception that took it out of coverage by s 51(xxxi).

	revenues		
Emmerson 2014	$850,000	Deterrence of drug crime	Not applicable (forfeiture)

While there may be a few borderline cases, it can be seen from the above that in the majority of cases where the loss was considered greater than the government's gain from its regulatory act, an acquisition was usually found by the High Court (meaning that a 'gain' of some kind was found). In most cases, where the loss did not appear to be that great when balanced and compared to society's gain, no acquisition was found (meaning, paradoxically, that no 'gain' was found). Indeed, this was the most frequent occurrence, since there were more than twice as many denials than there were acquisitions. This suggests that the High Court is reluctant to rule in favour of private parties and tends to find for the government and society's gain (by ruling that there is no gain). In those cases where an acquisition *is* found, the loss is usually significant compared to the governmental gain. This is so notwithstanding the ongoing rhetoric about the need for a 'gain' in order to find an acquisition under s 51(xxxi).

The *JT International* case drives this point home better than any other. At issue in this case was an extremely desirable health measure, to discourage smoking. This could obviously result in reduced Medicare costs and more tax revenue from a healthier populace. The private loss was in the form of revenue earned by tobacco companies, which are seen as exploiting consumers at the expense of their health.[103] When the loss was weighed in the balance with the gain, the gain side of the ledger clearly won — meaning that the court had to *deny* any gain and say there was no acquisition. Of course, the justices used different arguments to distinguish the case from similar prior cases, which had opposite results. This highlights once more a point made over the years by several justices — that the 'gain' approach ultimately boils down to a matter of opinion, based on balancing.

Hence, the various verbal formulas or 'tests' given at times by the justices, ostensibly for guidance in how to resolve such cases, in reality are mere masks or screens for the actual balancing which is taking place. These 'tests' include: that an acquisition is found only where a proprietary interest is 'inherently susceptible' to variation (*Peverill*); that an 'identifiable and measurable advantage' is needed for an acquisition (*Newcrest Mining*); that the nature and object at issue makes finding an acquisition 'incongruous' (*Mutual Pools*); that the law in question is not directed solely at an

[103] The tobacco companies would disagree, of course. They would assert that the loss pertained to the use of their trademark, not their revenue. However, as Crennan J pointed out, for damage purposes a loss of use of a trademark is measured ultimately in lost sales revenue: (2012) 250 CLR 1, 71–4.

acquisition of property as such, but is a 'necessary and characteristic' means of achieving an objective (*AirServices Australia*); how 'property' is defined, in terms of whether the claimed property right at issue is merely part of a 'defeasible statutory grant' or is independent of such grant (*Chaffey*); and whether s 51(xiii) applies at all if it can be maintained the case is outside the scope of that provision (*Australian Tape* and *Emmerson*). In each instance, the words proposed by the justices sound compelling and are presented with confidence that, at last, a clear test has been found. Yet in each case, as other scholars have noted, the 'tests' are in reality very vague, difficult if not impossible to follow, and of little actual value in deciding acquisition cases. For example, Dixon notes that the various tests incorporate 'criteria of a very vague and somewhat circular nature,' and that each test 'obscures the substantive balancing required of the court.'[104] Simon Evans agrees, noting that each of the approaches taken by the court:

> has a major shortcoming. Despite their neat formulations and consistency with the decided cases, they lack predictive power. All rest on problematic intermediate concepts or verbal formulae; all involve assumptions about what acquisitions require compensation that are not elaborated in the judgments.[105]

Much of the problem comes from the way in which 'property' is defined when government regulation impacts private parties in ways that cost them money. As Simon Evans has noted, 'the potential to argue that any economic advantage is a form of property creates the possibility of arguing that any regulation at all amounts to an acquisition of property that requires compensation.'[106] Hence, if property is defined broadly it acts as a guarantee or protection to property owners. Because of this, 'the distinction between acquisition [gain] and deprivation [loss] has been progressively eroded.'[107]

Closely related to difficulties with a definition of 'property' is the trouble that comes from putting too much faith in the idea that a 'proprietary' or ownership right must be found for an acquisition to occur. Many of the cases were presumably decided on this basis, particularly the recent *JT International* case. However, such cases tend to

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104 Rosalind Dixon, 'Overiding Guarantee of Just Terms or Supplementary Source of Power? Rethinking s. 51(xxxi)' above n 10, 661–2.

105 Evans, 'When is an Acquisition of Property not an Acquisition of Property?' above n 10, 198. While Evans was commenting on the verbal formulas proffered in *Airservices Australia*, his extended discussion throughout his article shows that he was talking of the various 'tests' as they have been derived by the High Court prior to that case as well.

106 Simon Evans, 'Should Australian Bills of Rights Protect Property Rights?' above n 98, 23.

107 Simon Evans, 'Constitutional Property Rights in Australia: Reconciling Individual Rights and the Common Good,' found in Tom Campbell, Jeff Goldsworthy & Adrienne Stone (eds) *Protecting Rights without a Bill of Rights* (Ashgate 2006) 199.

narrowly focus on whether what was lost was merely regulated or extinguished, as compared to whether it surfaced as a proprietary, ownership gain to someone else. Such an approach is disingenuous and belies the problem with the 'gain' approach, since it qualifies the finding of a gain on the very loss that is not supposed to matter. To use an example, in the *JT International* case no one can deny that neither the Commonwealth nor any individual gained the trademark or sales revenue that was lost by the tobacco companies. On its face this suggests there was no gain. But that is only the result if we narrowly fixate on what the tobacco companies lost as *determinative* of whether there was a gain, which again shows a loss orientation. Clearly there *was* a societal gain to the Commonwealth from reduced health care costs it would have otherwise had to pay. The fact that this gain is not the flipside of the claimant's loss, or is not immediately linked to his loss, should not matter. If gain is truly all that is important in these types of cases, then that is all that should be looked at. While a few of the cases have mentioned this tangentially, they have usually continued to fixate on losses and have expended little if any effort to truly identify viable and very real gains.

Some scholars have proposed ways they think will help restore order to the confusion. For example, Dixon has proposed that s 51(xxxi) 'be read as a purely supplementary rather than primary source of power, which will be engaged where and only where no other source of power (whether in s51 or s122) can be said to support a Commonwealth enactment.'[108] Simon Evans is more candid, urging that the court make 'explicit the issues and values that underlie the balancing process.'[109]

However, it does not appear likely that the High Court will abandon its masked, ad hoc balancing approach any time soon. Under the guise of the 'gain' orientation under which losses are supposedly ignored and only gains matter, the court will probably continue to find acquisitions where the loss on balance outweighs the gain, irrespective of all the rhetoric and verbal 'tests' and 'formulas' that may be offered.

III CONCLUSION

The history of regulatory acquisition cases in Australia highlights many of the problems pertaining to the 'gain' approach. If 'gain' is the goal, it must somehow be defined in a way that subsequent courts can use in new cases. This has proven to be extremely hard to accomplish. What tends to happen more is that an underlying perception of the egregiousness of the loss (or lack thereof) when balanced against society's gain drives the decision of whether an acquisition will be found.

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108 Dixon, above n 10, 640.

109 Simon Evans, 'When is an Acquisition of Property not an Acquisition of Property?' above n 10, 202.

However, the decision of whether to focus on 'gain' or 'loss' in regulatory takings is in many ways a policy decision, based on whether societal or individual rights should prevail. Most Australians would no doubt agree that such a question should really be answered by the polity through the legislative branch, rather than the judiciary. Finding a way to accomplish this, however, presents a significant challenge.