Before the High Court

Adjusting Medicare Benefits: Acquisition of Property?

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Section 51 (xxxi) of the Commonwealth Constitution authorises the Federal Parliament to make laws with respect to "The acquisition on just terms from any State or person in respect of which the Parliament has power to make laws". Expressed as a positive conferral of power,[1] the provision was also intended to serve the purpose of controlling compulsory acquisition by the Federal Parliament.[2] That double purpose of s51(xxxi), of confirming the Parliament's legislative power to acquire property and protecting property holders against governmental interference with proprietary rights, has been widely acknowledged by the High Court.[3]

Because s51(xxxi) is seen as protecting the individual, the view has been expressed that the provision "should be liberally interpreted"[4] and "not . . . confined pedantically".[5] It is "to be given the liberal construction appropriate to such a constitutional provision".[6]

A "liberal construction" of s51(xxxi) would appear to require, not only a generous reading of the terms used in the provision (such as "acquisition" and "property"), but a close examination of any legislation which could have the effect of infringing the protection offered by the provision. Some 12 years ago, the present Chief Justice asserted that the consistency of a law of the Commonwealth with s51(xxxi) depended on the law's "direct legal operation and effect".[7] However, the High Court's more recent adoption of a broader approach to constitutional prohibitions and guarantees appears to

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1 The provision was added to the catalogue of the legislative powers of the Commonwealth to overcome doubts that the Parliament would have "a right of eminent domain for federal purposes": Quick, J, and Garran, R, *Annotated Constitution of the Australian Commonwealth* (1901) at 640.

2 Quick and Garran wrote, in 1901, that s51(xxxi) recognised "the immunity of private and provincial property from interference by the federal authority, except on fair and equitable terms": id at 641.

3 See, eg, *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v Commonwealth* (1943) 67 CLR 314 at 318 per Latham CJ, at 325 per Starke J; *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 349-50 per Dixon J; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371-2 per Dixon CJ; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 403 per Barwick CJ; *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 201-2 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ.

4 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 276 per Latham CJ.

5 *Bank of New South Wales*, above n3 at 349 per Dixon J.

6 *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 201-2 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ.

7 *Trade Practices Commission*, above n3 at 433 per Mason J.

challenge that assertion: over the past decade, the Court has accepted the general proposition that the impact of those prohibitions and guarantees must be assessed by considering the practical operation of an impugned law as well as its legal form.[8] If the Court was to accept the relevance of that approach to s51(xxxi), it would be endorsing the United States Supreme Court's approach to the Fifth Amendment to the United States Constitution, which stresses the economic impact of government action, the extent to which the action has interfered with investment-backed expectations and the character of the action.[9]

The matter of *Health Insurance Commission v Peverill*, currently awaiting argument before the High Court,[10] could give the Court the opportunity to consider the adoption of that approach to s51(xxxi), as well as allowing further refinement of the notions of "property", "acquisition" and "just terms".

The central issue in the matter is whether the *Health Insurance (Pathology Services) Amendment Act 1991* (Cth) ("the Amendment Act") is a law with respect to the acquisition of property within s51(xxxi) and as such fails to conform to the requirement expressed in that provision by not providing for "just terms". The resolution of this issue will depend on the answers to a number of specific questions: in particular, can a claim for the payment of a benefit conferred by legislation be described as "property"; does the legislative variation or extinction of such a claim amount to an "acquisition of property"; and can the provision, in substitution for the extinguished claim, of a claim to a benefit of lower value be described as the provision of "just terms" for any "acquisition of property"?

The Amendment Act retrospectively amended the *Health Insurance Act 1973* (Cth) ("the Act"). The Act provides, in s20, that a medicare benefit in respect of a professional service is payable by the Health Insurance Commission to the person who incurs the medical expense in respect of that service — in common terms, the patient. The professional services for which the benefit is payable include pathology services rendered by an approved pathology practitioner (in accordance with requests made under s16A of the Act), so long as those pathology services fall within one of the items in Schedule 1A. According to s10, the amount of the benefit payable under the Act is determined by reference to the relevant item in the Schedule. Section 20A(1) provides that a patient who is eligible for a medicare benefit may agree to assign "his right to the payment of the medicare benefit" to the person providing the professional service in "full payment for the medical expenses incurred" by the patient. That is, in common terms, the patient and

8 See, eg, *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 633 per Mason J, 662-3 per Deane J; *Cole v Whitfield* (1988) 165 CLR 360 at 399-400 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 487 per Mason CJ, at 507-8 per Brennan J, at 528 per Deane J, at 546 per Dawson J, at 559 per Toohey J, at 569 per Gaudron J, at 582 per McHugh J.

9 *Connolly v Pension Benefit Guaranty Corporation*, 475 US 211 (1986) at 224-5.

10 Following the removal, pursuant to s40(1) of the *Judiciary Act 1903*, of an appeal pending before the Full Court of the Federal Court from a decision of Burchett J, *Peverill v Health Insurance Commission* (1991) 32 FCR 133. The order for removal was made by Mason CJ, Brennan and Toohey JJ on 7 May 1992.

the practitioner may agree that the practitioner will "bulk bill" the Health Insurance Commission, rather than the patient paying the practitioner and recovering the relevant benefit.

Dr Peverill was an approved pathology practitioner, who had rendered a large number of pathology services (following requests made under s16A of the Act) relating to rubella. The various patients and Peverill agreed that the patients would assign, and Peverill accept, the patients' right to the payment of medicare benefits in full payment for the pathology services rendered by Peverill. Peverill then claimed payment of the assigned medicare benefit from the Health Insurance Commission. He maintained that the appropriate benefit was specified by item 1345 in Schedule 1A to the Act, namely $34.50; but the Commission decided that the appropriate benefit was specified by item 2294 in the same Schedule, namely $4.60. In proceedings under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), Burchett J held that the Commission's decision involved an error of law and that the benefit payable for the services in question was covered by item 1345.[11]

Peverill then sued the Health Insurance Commission in the Federal Court for moneys payable to him for the pathology services rendered by him over period from 3 December 1984 to 31 July 1989 and covered by item 1345. While this proceeding was pending, the Amendment Act was passed. The Amendment Act altered Schedule 1A and its predecessor, Schedule 1, so as to exclude services of the type rendered by Peverill from item 1345 and place them within new items, 2294(3) and (4). These alterations took effect from a number of specified earlier dates, so as to give the alterations . The effect of the Amendment Act was to reduce, with retrospective effect, the amount of benefit payable under the Act to Peverill for the pathology services that were the subject of the current proceeding in the Federal Court.

By an amended defence in that proceeding, the Commission pleaded that the relevant pathology services were excluded from item 1345 by the Amendment Act, so that the Commission was not liable to pay Peverill for those services under item 1345. In reply, Peverill raised the constitutional validity of the Amendment Act. Two grounds of invalidity were raised: first, that the Amendment Act offended s51(xxxi) of the Constitution by providing for the acquisition of property other than on just terms; and, secondly, that the Amendment Act offended s55 of the Constitution by inserting into the Act provisions imposing taxation. As the first ground succeeded, Burchett J concluded that the second ground did not arise.[12] However, that ground has not been abandoned by Peverill and, should the High Court decide that the Amendment Act is not objectionable as an acquisition of property, it will no doubt be asked to consider whether the Amendment Act introduced provisions imposing taxation into the Act.[13]

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11 *Peverill v Meir* (1990) 95 ALR 401. The respondent's appeal to the Full Court of the Federal Court was discontinued: *Peverill*, above n9 at 134.

12 *Peverill*, above n9 at 146.

13 A contention, one assumes, inspired by *Air Caledonie v Commonwealth* (1988) 165 CLR 462.

"Property"

In determining the scope of the protection offered by s51(xxxi), the High Court has adopted a broad view of the property interests which fall within its reach. The meaning of property, Rich J said in *Minister of State for the Army v Dalziel*,[14] "must be determined upon general principles of jurisprudence, not by the artificial refinements of any particular legal system". The concept extends to "any tangible or intangible thing which the law protects under the name of property";[15] to "innominate and anomalous interests";[16] and "to every species of valuable right and interest including real and personal property . . . and choses in action".[17]

In *Peverill v Health Insurance Commission*,[18] Burchett J had no doubt that the right given to Peverill by ss20 and 20A of the *Health Insurance Act* was "property" within s51(xxxi). It is difficult to quarrel with this classification. Peverill had rendered professional services at the request of patients, services for which, in the normal course, he would be entitled to charge each patient a fee. However, in the case of each patient, Peverill had agreed to accept, as payment for the services rendered, an assignment by the patient of the patient's right to the relevant medicare benefit payable by the Health Insurance Commission and thereupon became entitled to the payment of the relevant medicare benefit.

The patient's right and the corresponding obligation of the Commission arise from s20 of the Act: "medicare benefit in respect of a professional service is payable by the Commission on behalf of the Commonwealth to the person who incurs the medical expenses in respect of that service".[19] The right of the patient to demand payment from the Commission is unqualified, except for the requirement that the services are to be rendered in accordance with the Act;[20] the patient's right to payment is not dependent on the exercise of any discretion on the part of the Commission. Significantly, the patient's interest is described in the Act itself as a "right to the payment of medicare benefit".[21] Although it might be correct to describe the benefit as a gratuity conferred on patients (in the sense that the benefit is provided regardless of any consideration from patients), it is a gratuity which has, through its recognition in the Act, been transmuted into a statutory right vested in those patients who incur medical expenses in respect of a professional service and a statutory debt of the Commission.[22]

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14 Above n4 at 285.

15 Id at 295 per McTiernan J.

16 *Bank of New South Wales*, above n3 at 349 per Dixon J.

17 *Dalziel* above n4 at 290 per Starke J.

18 Above n9.

19 *Health Insurance Act 1973* (Cth), s20(1).

20 In the case of pathology services, for example, the procedures prescribed by s16A must be followed. These procedures require a "treating practitioner" to determine that the service is necessary (apart from a narrow range of services whose necessity may be determined by a pathologist): s16A(1); an approved pathology practitioner to render the service in an accredited pathology laboratory owned by an approved pathology authority: s16A(2); a written request for the service to be made by the treating practitioner or another pathologist: s16A(3) and (4); and the relevant pathology specimen to be collected in a prescribed manner: s16A(5A).

21 Id s20A(1)(a).

22 The development in the United States of a concept of welfare entitlements as "property" provides an illuminating parallel: see Grais, D J, "Statutory entitlement and the concept of

The assignment of that right to the practitioner rendering the service is contemplated, indeed facilitated, by s20A: the section provides that, where the patient and the practitioner agree that the patient assigns the right and the practitioner accepts the assignment "in full payment of the medical expenses incurred in respect of the professional service" by the patient,[23] then "the medicare benefit is . . . payable in accordance with the assignment or the agreement".[24] Again, the practitioner's right and the Commission's corresponding obligation are not subject to the exercise of any discretion; subject to compliance with certain formal and time requirements,[25] the right and obligation are unqualified.

If it is correct to describe the Act as giving rise to a right in the assignee as against the Commission to payment of the relevant medicare benefit, then that right is a chose in action, albeit that it is not itself assignable. There is a specialty debt, owed by the Commission to the assignee, the quantum of which is to be determined on the proper construction of the Act.[26]

"Acquisition"

If Dr Peverill's claim against the Health Insurance Commission constituted "property" within s51(xxxi), did the Amendment Act acquire that property? It is, at least, arguable that an acquisition of property involves a transfer of that property from one person to another; that the Amendment Act did not transfer Peverill's chose in action from Peverill to any other person; rather, the Amendment Act reduced the value or changed the incidents of that chose in action.

The proposition that an acquisition of property requires a transfer of some interest in that property was supported by some members of the Court in *Commonwealth v Tasmania*, the *Tasmanian Dam* case.[27] In the course of rejecting Tasmania's argument that Federal legislation prohibiting the use of certain State lands amounted to an acquisition of property, Mason J said that s51(xxxi) did not apply to legislation which "adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property".[28] Similar views were expressed by Murphy, Brennan and Deane JJ.[29] However, those observations appear to have been directed at legislation quite different in purpose and effect from the legislation involved in *Peverill*: the legislation[30] under consideration in *Tasmanian*

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property", (1977) 86 *Yale LJ* 695.

23 Id s20A(1). In the case of a pathology service, the agreement to assign the patient's right to medicare benefit may be effected through the pathology practitioner's acceptance of a written offer of assignment signed by the patient: id s20A(2) — recognising the distant or indirect relationship between most pathology practitioners and their patients.

24 Id s20A(3).

25 Id s20B(2).

26 As occurred in *Peverill v Meir* above n10.

27 (1983) 158 CLR 1.

28 Id at 145.

29 Id at 181 per Murphy J, at 246-7 per Brennan J, at 283 per Deane J.

30 The *World Heritage (Properties Conservation) Act 1983* (Cth); and regulations made under the *National Parks and Wildlife Conservation Act 1975* (Cth)

Dam[31] regulated the use which an owner could make of its property in the interest of protecting and conserving that property; and the justices were reacting to an argument that these regulatory controls so restricted the use of the property that they acquired the property.[32]

In *Tasmanian Dam*,[33] Deane J qualified the general proposition that the termination of a pre-existing right could not be treated as an acquisition of property; and that qualification may be seen as particularly relevant to the problem under consideration in *Peverill*. The situation would be more difficult, Deane J said, where one could identify some benefit flowing to the Commonwealth as a result of the legislation in question. If the effect of the legislation was to confer on the Commonwealth "an identifiable and measurable advantage or is akin to applying the property, either totally or partially, for a purpose of the Commonwealth, it is possible that an acquisition for the purposes of s51(xxxi) is involved".[34]

In *Peverill*,[35] Burchett J saw these comments and some observations of Mason J in *Tasmanian Dam*[36] as providing the point of departure for the analysis of the Amendment Act. In *Tasmanian Dam*, he said, "nothing tangible was obtained by the Commonwealth";[37] but in the present case "the Commonwealth gained the whole benefit of what it took from the applicant".[38] The retrospective reduction of the Commonwealth's debt allowed the Commonwealth to obtain the benefit of Peverill's right: to refuse to characterise this as an acquisition "would be to characterise the law 'by reference exclusively to its strict legal operation, without regard to its practical or substantial operation'", Burchett J said.[39]

One possible weakness in this analysis lies in the perspective from which the analysis is conducted. Burchett J appears to have seen the Amendment Act as doing no more than adjusting the relative rights of Peverill and the Commonwealth (or its agent, the Commission); and he stressed that, because s51(xxxi) is a constitutional guarantee, it must be concerned only with the effect of the legislation "upon the 'person' from whom the acquisition is made".[40] But there could be another perspective, which takes account of the wider range of interests that were adjusted by the Amendment Act. They would include the interests of patients, medical practitioners and tax-payers in the development and maintenance of a health care system that balances

31 Above n25.

32 The argument, that regulatory control on the use or disposition of property could involve an acquisition of that property, had attracted some support in *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397. See, in particular, id at 404 per Barwick CJ, 452 per Aickin J. However, the argument was contested by other justices in the same case: id at 409 per Gibbs J, at 416 per Stephen J.

33 Above n25.

34 Id at 283.

35 Above n9.

36 Mason J stressed that neither the Commonwealth nor anyone else acquired a proprietary interest of any kind in the property: id at 146.

37 *Peverill* above n9 at 142.

38 Ibid.

39 Id at 143. The quotation is from *Philip Morris Ltd v Commissioner for Business Franchises* (1989) 167 CLR 399 at 433 per Mason CJ and Deane J.

40 *Peverill* above n9 at 143.

efficiency and equity. Those interests could be sacrificed when one practitioner is able to extract a "windfall" from the system. One could argue that the Commonwealth and the Federal Parliament are bound to consider those wider interests; and that the Amendment Act represented a fair compromise between the wider interests and those of Dr Peverill.[41] One might also argue that the Amendment Act conferred no benefit on the Commonwealth — the beneficiary of the legislation was the amorphous entity known as the Medicare system, which is obliged to play a zero sum game, in which resources spent on pathology services are resources denied to other ends.

Those considerations may be reflected in the evaluation of the terms extended for the acquisition — that is, in determining whether they are "just". But they may also be relevant in analysing Federal legislation such as the Amendment Act to determine whether that legislation involves . There is, in Deane J's judgment in *Tasmanian Dam*,[42] the germ of an idea for such an analysis: where the benefit flowing from Federal legislation, he said, "is no more than the adjustment of competing claims between citizens in a field which needs to be regulated in the common interest . . . no question of acquisition of property for a purpose of the Commonwealth is involved".[43]

"Just terms"

The final point for consideration, in the context of s51(xxxi), is whether any "acquisition of property" effected by the Amendment Act can be said to provide "just terms". If the Amendment Act did acquire Peverill's property, it did so on terms which gave him another item of property, namely a right to the payment of benefit under item 2294(3) and (4). That property has a lower value than the property acquired from Peverill: are the terms of the acquisition just?

At first glance, the failure of the legislation to provide compensation equivalent to the value of the acquired property appears fatal. The terms fall below "the pecuniary equivalent of the property acquired", an essential ingredient of "just terms", according to Starke J;[44] they do not provide for the payment of the market value of the acquired property.[45]

However, there is by no means judicial unanimity on the characteristics of "just terms". That concept, according to Dixon J, is concerned with fairness, rather than full money equivalence.[46] It requires a balancing of the interests of the individual property owner and the interests of the community,[47] considerations that may be particularly apposite to social

41 The Amendment Act reclassified the rubella tests in question, and allowed for the payment of a medicare benefit below that held to be payable in *Peverill v Meir* above n10, but above that which the Commission had originally decided was payable. The benefit provided as a result of the Amendment Act was approximately one-half of the amount claimed by Dr Peverill: *Peverill* above n9 at 138.

42 Above n25.

43 Id at 283.

44 *Bank of New South Wales*, above n3 at 300 per Starke J.

45 *Nelungaloo v Commonwealth* (1948) 75 CLR 495 at 507 per Williams J, 546 per Starke J.

46 Id at 569 per Dixon J.

47 Id at 541-2 per Latham CJ; *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 291 per Dixon J.

welfare legislation.[48] It appears that, before Burchett J, an attempt was made to use considerations of this type to justify the retrospective changes made by the Amendment Act. The principal justification put forward by the Commission was, it seems, that the Amendment Act did no more than achieve what had been earlier attempted through an exercise of ministerial power, an attempt which had been held invalid because of a failure to follow certain statutory procedures.[49] This justification was, at best, inadequately developed in the proceedings before Burchett J: although the respondent filed an affidavit, detailing the previous attempts to amend the relevant items in Schedule 1A, that material apparently did not deal with the period before 1988,[50] nor did the affidavit explain why no action had been taken to remedy the defective ministerial determination for more than two years.[51]

It seems that no attempt was made before Burchett J to explore the deeper background to the present dispute. Pathology services have, since the introduction of the Medicare system in 1984, represented a particular problem for the Commonwealth and its administrative arm, the Health Insurance Commission. The problem could be described, from the Commonwealth's perspective, as one of containing the growth of an industry spawned by technology and feeding off public expenditure.[52] Whereas pathology was largely hospital-based 20 years ago, some 59 per cent of pathology services is now provided by private practitioners.[53] Of 500 approved pathology providers,[54] the 20 largest providers delivered almost half the total services in 1988-89.[55] The major constraint on the growth in the cost of pathology services has been the reduction, in real terms, of the medicare benefits paid for those services: while the use of pathology services increased by 54.3 per cent between 1984-85 and 1989-90,[56] the average benefit per service fell by 26 per cent in real terms over the same period.[57] That fall was produced by revision of the fees schedule — that is, by the type of revision which was found to be invalid (because of a failure to conform to statutory procedures) in *Queensland Medical Laboratory v Blewett*[58] and which the Parliament attempted to extend with retrospective effect through the Amendment Act.

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48 See McAuslan, P, "Administrative law, collective consumption and judicial policy", (1983) 46 *Modern LR* 1 at 2-3.

49 *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615 per Gummow J.

50 The ministerial determination declared to be void in *Queensland Medical Laboratory* above n49 was made on 8 September 1988. The determination was based on a recommendation of the Pathology Services Advisory Committee dated 31 July 1988.

51 The decision in *Queensland Medical Laboratory* above n49 was handed down on 18 December 1988; the *Health Insurance (Pathology Services) Amendment Act 1991* was passed on 24 April 1991.

52 See Australia, Parliament, Joint Committee on Public Accounts, *Medical Fraud and Overservicing—Pathology*, Report No 236 (1985); Deeble, J, "Medical Services Through Medicare" *National Health Strategy Paper No 2* (1991); Deeble, J, and Lewis-Hughes, P, "Directions for Pathology" *National Health Strategy Paper No 6* (1991).

53 Deeble and Lewis-Hughes, op cit at n11.

54 Laboratories which provided pathology services, for which medicare benefits are payable, must be owned by an approved pathology provider: *Health Insurance Act 1973* (Cth), s16A(2)(c).

55 Deeble and Lewis-Hughes, op cit at 43.

56 Id at 19.

57 Id at 21.

58 Above n49.

Of course, for these considerations to be taken as relevant to the assessment of "just terms", the Court would have to shift its focus from the position of the individual service provider. The Court would need to be persuaded that, in the context of broadly based social welfare programs such as Medicare, the financial and property interests of individuals such as Dr Peverill should give way to the public interest considerations reflected in constraints on levels of benefits.

In the Federal Court, Burchett J appears to have acknowledged that such considerations might have to be brought into account: there might be circumstances, he said, "where an uncompensated acquisition may be held to be proper, although those situations would be extraordinary".[59] But, even if the terms of the Amendment Act would have been reasonable if imposed earlier, the substantial lapse of time since Peverill had rendered the services would deny to those terms the character of "just terms". It would be difficult, Burchett J suggested,[60] for the Commonwealth to demonstrate that a major retrospective change could be "just", after "the extraordinarily long period" during which Peverill was obliged to pursue his legal entitlements.[61] The distinction implicit in these comments is interesting: a "little bit of retrospectivity" may be accepted as consistent with the provision of just terms; but retrospective legislation extending over a longer period and diminishing the value of rights which had accrued throughout that period could not be described as providing just terms. The distinction may be difficult to draw with precision; but, if the application of s51(xxxi) demands that attention be focused on the practical operation of the impugned legislation[62] or on "the substance of the matter",[63] nice distinctions may be irrelevant.

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59 *Peverill*, above n9 at 144.
60 Id at 145.
61 Those entitlements having been unequivocally confirmed in *Peverill v Meir* above n10.
62 See above n8.
63 *Peverill*, above n9 at 144.