The Drafting of the Australian Commonwealth Acquisition Clause

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Abstract

The Australian acquisition clause, found in the *Commonwealth Constitution* at s 51(xxxi), is worded as a grant of the power of eminent domain. Most Australian scholars feel it is quite different from the American takings clause, found in the Fifth Amendment of the United States of America (U.S.) *Constitution*. The distinct wording of the two clauses is often highlighted as proof that they are very different. However, the Australian Confederation debates in 1898 demonstrate that the Australian founders concern was chiefly to limit the acquisition power, just as the Americans had done with their Fifth Amendment. This is so even though the Australian acquisition clause is worded as an express grant of power, while the U.S. Fifth Amendment is not. The Australian founders sought to accomplish similar goals with their acquisition clause as the Americans did with their Fifth Amendment. Specifically, both groups of founders sought to provide three acquisition safeguards. The first is a form of due process or just terms to guarantee fairness. The second is the requirement of a public use or purpose related to the powers of government. The last is the requirement for compensation. The Confederation debates and statements by the Australian founders show their intention to incorporate in the new *Commonwealth Constitution* the elements of the Fifth Amendment that they thought were good, but with their own unique wording.

Introduction

The Australian Commonwealth acquisition clause is an anomaly. The clause is listed in the *Constitution* among the legislative powers of Parliament in Chapter 1, Part V, s 51(xxxi), as the right of the Commonwealth to acquire needed private property. Although it is listed among general grants of parliamentary power, the language of the clause suggests an effort to limit and restrain the power of the Commonwealth,

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as compared to the States. Acquisitions must be 'on just terms,' and only for purposes 'in respect of which the Parliament has power to make laws'.

The Commonwealth acquisition clause bears some similarities to the American takings clause in the Fifth Amendment of the *U.S. Constitution*. Indeed, Dixon J of the Australian High Court, as he then was, said in 1941 that the source for s 51(xxxi) was the Fifth Amendment of the *U.S. Constitution*.[1] As recently as 2009, Kirby J agreed with this characterization, stating that Australia's acquisition clause was 'inspired by the Fifth Amendment to the *Constitution* of the United States'.[2] However, most Australian scholars focus on the differences of the two clauses rather than any similarities. As illustrations of how the clauses differ, they cite the variance in the wording of both clauses. They also refer to the fact that the U.S. power of eminent domain is implied whereas in Australia it is expressly stated in the *Constitution*.[3]

Obviously the fact that both Australia and the U.S. chose to include specific acquisition/takings clauses in their federal *Constitutions* at all is significant. The respective states within each country for the most part already had such protections and the common law likewise provided such protections.[4] The decision to insert an additional acquisition/takings clause at the federal level was a conscious choice on the part of the drafters of these *Constitutions*. The founders wanted to make it as clear as possible that there were identified limits beyond which acquisitions could not occur when the national government exercised its power of eminent domain. They knew that the British Parliament was supreme and could acquire private property without restraint if it so desired, and they wanted to make it clear that such was not to be the case in their own country.[5]

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1 *Andrews v Howell* (1941) 65 CLR 255, 282. See also *The Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77, 82–3.

2 *Wurridjal v Commonwealth* [2009] HCA 2 (2 February 2009), [306].

3 See below n 47.

4 For U.S. state protections, see below n 27 and n 29. Australian state protections were largely modelled after the *British Land Clauses Consolidation Act 1845* (UK), and were enacted by the respective states in the next three decades after that act came into being. See Douglas Brown, *Land Acquisition* (1st ed, 1972), 12-14. Common law protections are discussed below n 15. French J also discussed the manner in which the common law provided safeguards when property was compulsorily acquired in *Wurridjal v Commonwealth* [2009] HCA 2 (February 2 2009), [76]. In speaking of the *Australian Commonwealth Constitution*, his Honour stated 'that its interpretation can be informed by common law principles in existence at the time of federation. There is a principal long pre-dating federation that, absent clear language, statutes are not to be construed to effect acquisition of property without compensation. The principal was recognized by Blackstone.'

5 See text accompanying n 25-26, and n 53-58.

The founders' decision to include acquisition/takings clauses in the *Australian* and *U.S. Constitutions* was prescient, since today acquisition cases are numerous. The national government's power to acquire property and the limitations on that power has been extensively debated in a number of cases in both countries.[6] The importance of clearly defined constitutional or legislative limits on the power to acquire, which the judiciary must enforce notwithstanding the difficulties in doing so, was recently highlighted in the case of *Griffiths v Minister for Lands, Planning and Environment*.[7] In this case wording from Lord Cottenham in an 1839 British acquisition case quoted below, rings just as true today.

> The powers are so large that it may be necessary for the benefit of the public. But they are so large, and so injurious to the interests of individuals, that I think it is the duty of every court to keep them most strictly within those powers; and if there be any reasonable doubt as to the extent of the powers, they must go elsewhere and get enlarged powers; but they will get none from me.[8]

This article takes a close look at the formation of the Australian Commonwealth acquisition clause in s 51(xxxi), as compared to the Fifth Amendment of the *U.S. Constitution*. It investigates the intent of the founders in both countries in drafting their respective expropriation clauses, but with heightened emphasis on the intent of the Australian founders. In particular, it reviews whether the clauses were intended to accomplish the same purposes and to express essentially the same limitations on the acquisition power. The first part of this article summarizes the drafting of the U.S. Fifth Amendment. The second part discusses the debates of the founders of the *Australian Commonwealth*

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6 A listing of the numerous cases that have discussed the acquisition/takings clauses over the years in both countries is beyond the scope of this article. Some of the principal recent cases in the U.S. are: *City of Monterey v Del Monte Dunes*, 526 U.S. 687 (1999); *Palazzolo v Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Pres. Council v Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Kelo v City of New London*, 545 U.S. 469 (2005); *Lingle v Chevron USA* 544, U.S. 528 (2005). Some principal recent cases in Australia include: *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513; *Commonwealth v WMC Resources* (1998) 194 CLR 1; *Theophanous v Commonwealth* (2006) 225 CLR 101; *Griffiths v Minister for Lands, Planning and Environment*, [2008] HCA 20 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 15 May 2008); *Wurridjal v Commonwealth* [2009] HCA 2 (Unreported, French CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 2 February 2009).

7 [2008] HCA 20 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 15 May 2008).

8 Ibid [118], citing Lord Cottenham in *Webb v Manchester & Leeds Railway Co*. (1839) 41 ER 46, 47-48.

Constitution in 1898, regarding the Commonwealth acquisition clause in s 51(xxxi). The third part concludes by examining the Australian founders' view of the principal limitations found within the Australian acquisition clause, as contrasted with the limits in the Fifth Amendment.

The takings clause in the *U.S. Constitution*

A meaningful review of the similarities and differences between the Australian and American takings clauses first requires a review of the drafting, intent and meaning of protections against takings found in the *U.S. Constitution*.

The ban on Bills of Attainder - The first Constitutional takings protection

While American takings are usually associated with the Fifth Amendment to the *U.S. Constitution*, ss 9 and 10 in Article 1 contain a takings protection as well, in the form of a ban on bills of attainder.[9] A bill of attainder is a legislative act imposing punishment on a person or group without a trial.[10] Such a bill will normally divest the person or group of life, liberty or property, without the benefit of any due process, and without giving any compensation.[11] Bills of attainder were used by all of the states during the revolutionary war, in large measure to help fund the war effort.[12] These bills were directed at British sympathizers more commonly referred to as 'Tories' or 'loyalists'. The state's abuse of this power had been so extensive during the revolution and thereafter[13] that

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9 Article 1, s 9 banned bills of attainder by the federal legislative body such as Congress. Article 1, s 10 banned bills of attainder by any state legislature.

10 Black's Law Dictionary, 'Bill of Attainder' (1999, 8th ed.).

11 'If the punishment be less than death, the act is termed a bill of pains and penalties.' Anderson's Dictionary of law, 'Bill of Attainder' (1889), citing *Cummings v. Missouri*, 4 Wall. 387 (1866). However, bills of have attainder have been understood to include bills of pains and penalties since the beginning of the republic. Chief Justice Marshall pronounced that '[a] bill of attainder may affect the life of an individual, or may confiscate his property or both.' *Fletcher v Peck*, 10 U.S. 87, 138 (1810).

12 Robert J Cynkar, 'Constitutional Conflicts on Public Lands: Dumping on Federalism,' (2004) 75 *University of Colombia. Law Review*., 1261, 'Bills of attainder were, accordingly, a popular means for raising revenue as well as getting rid of those whom the state feared.' at 1286; Daniel J. Hulsebosch, 'A Discrete and Cosmopolitan Majority: The Loyalists, the Atlantic World, and the Origins of Judicial Review,' (2006) 81 *Chicago-Kent Law Review* 809, bills of attainder 'reflect a conscious program of ousting loyalists and generating income for states whose revenue sources were devastated by war.' at 835; Leonard W Levy, *A License to Steal: The Forfeiture of Property* (1996), 'Tory estates were subject to confiscation on a widespread basis as a means of assisting the states to finance the war': at 37.

13 For a review of the extent of such bills, see Claude Halstead Van Tyne, *The Loyalists in the American Revolution* (1959). Appendix C in particular describes 60 separate

the ban on bills of attainder was adopted without dissent by the delegates to the Constitutional Convention.[14] This ban was intended to prevent the most egregious and arbitrary of takings without preventing legitimate exercises of eminent domain, which was covered by the British common law that the Americans had assumed.[15]

The purpose of the Bill of Rights

The *U.S. Constitution* was drafted in 1787, and was ratified by a sufficient number of states to take effect in 1788. However, during the process of ratification, many states which ratified the *Constitution* expressed dissatisfaction with the lack of a bill of rights. In order to obtain the necessary ratification, those in favour of the *Constitution* promised that a bill of rights would be adopted as soon as the new national legislature came into effect. Chief among those making this promise was James Madison, who not only wrote the 'Virginia Plan' on which the *U.S. Constitution* was based, but who in 1789, also wrote the bill of rights and submitted it to Congress for review. Once Congress completed its revision of Madison's proposals, the proposed bill of rights was submitted to the people for their acceptance, pursuant to the process outlined in the *Constitution* for amendments. The bill of rights obtained the final necessary ratifications and became part of the *Constitution* in 1791.[16]

Personally, Madison considered a bill of rights to be little more than a 'parchment barrier' that would not necessarily prevent a violation of property and individual rights.[17] He felt that the most effective control of

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bills of attainder by the states during the revolutionary era that were directed primarily at property.

14 Gaillard Hunt, *The Writings of James Madison* (1900-1910) 276, 407.

15 The best expression of the common law related to takings was given by William Blackstone in 1765:

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land. [I]n this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained.

William Blackstone, *Commentaries on the Laws of England* (1765, facsimile reprint, 1979), 134-135.

16 Forrest McDonald, *States' Rights and the Union: Imperium in Imperio, 1776-1876* (2000), 18-25.

17 Gaillard Hunt, *The Writings of James Madison*, above n 14, 271.

state violations of rights was achieved by the inclusion of a power in the federal *Constitution* which allowed the federal government to review state laws. The 'legislative veto' proposed by Madison at the Constitutional Convention, whereby the federal legislature could review and nullify any act of any state legislature, was shot down by the other delegates. In its place, they inserted specific limits on states' powers in Article 1. One such limit was the ban on bills of attainder under s 10. The federal judiciary was left to enforce these provisions.[18]

While Madison felt that this arrangement was an erosion of the legislative veto he had proposed, he accepted it as the compromise that it was.[19] Accordingly, the federal government could still prevent certain civil rights abuses and takings by the states, as specified in the *Constitution*. The ban on bills of attainder and other limitations in Article 1 such as that characterised by s 9 prohibited arbitrary takings and actions by the federal government as well.

Hence, when Madison drafted the bill of rights, his main motivation was not so much to include required protections (which he believed were protected either by the *Constitution* or by the common law), but to accomplish other goals. One goal was to fulfil the promise made at the ratifying conventions of the *Constitution* to include a bill of rights within the constitutional framework. Another goal was to prevent another Convention because Madison knew that if the promised bill of rights did not occur, opponents could succeed at calling a new Constitutional Convention, which would have been disastrous.[20]

> Madison stated on one occasion 'experience proves the inefficacy of a bill of rights on those occasions when its control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every state. In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current.

18 That the founders contemplated judicial review from the outset is demonstrated by several of their statements on the subject. Governor Morris indicated that under the constitution, 'a law that ought to be negatived will be set aside in the judiciary department'. Gaillard Hunt, *The Writings of James Madison*, above n 14, 449. Madison stated that 'The jurisdiction of the supreme court must be the source of redress'. Gaillard Hunt, *The Writings of James Madison*, above n 14, 442.

'It may be said that the judicial authority, under our new system will keep the states within their proper limits, and supply the place of a negative on their laws'. Gaillard Hunt, *The Writings of James Madison*, above n 14, 26.

19 The debate on the legislative veto, and the creation of the limits in Article 1, s 10 and the judicial veto, are found in Gaillard Hunt, *The Writings of James Madison*, above n 14, 35, 55, 120-128, 172, 194-196, 216, 229, 286-288, 319, 442, 447-449.

20 As Madison himself stated in his speech proposing the bill of rights, 'I should be unwilling to see a door opened for a re-consideration of the whole structure of the government, for a re-consideration of the principles and the substance of the powers

Therefore, Madison included only those provisions in the proposed bill of rights that were generally recognized as true civil rights protections, and which would not be opposed.[21] Most, if not all of his proposals were already protected by the common law which the Americans had assumed from the British, by state constitutions and by state declarations of rights.

The drafting of the Fifth Amendment

Madison's proposed wording that ultimately became the Fifth Amendment was as follows:

> No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same office; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.[22]

The first part of the amendment aspired to provide protection for the criminally accused. The last part of the amendment dealt solely with takings. The reference to due process applies to the protection afforded to the criminally accused, as well as to protection from arbitrary takings.

The Congress did not change Madison's proposed due process language which was similar to due process clauses in many of the state constitutions.[23] Four states had requested that such due process language be included in the bill of rights. However, no state had requested the inclusion of the 'takings' provision proposed by Madison.[24] Apparently, he included it because he firmly believed that private property should be

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given; because I doubt, if such a door was opened, if we should be very likely to stop at that point which would be safe to the government itself.' Annals of Congress, 1st Session, June 8, 1789, 448-59.

21 Gaillard Hunt, *The Writings of James Madison*, above n 14, 225-26, 406, 409.

22 Ibid 378.

23 Due process is generally understood to have originated in Chapter 39 (later 29) of the *Magna Carta* of 1215, which states that 'No freeman shall be taken or [and] imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] the law of the land.' William S. McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* (1914, 2d ed), 375. The reference to being 'outlawed' as part of the due process protection is significant, as is more fully seen in the discussion of bills of attainder, above. 'Law of the land' and 'due process of law' were considered similar if not identical concepts, since the time of Sir Edward Coke, an influential jurist and legal scholar in England. Edward Coke, *Institutes of the Lawes of England* (first published 1628-1644, 1797 ed.) vol 2, 50.

24 Ellen Frankel Paul, *Property Rights and Eminent Domain* (1987), 74.

protected from encroachments by the national government.[25] He wanted to make it clear that, although the British Parliament retained unfettered power to defy the common law and take property without compensation,[26] the U.S. legislature was subject to limitations that prevented it from doing so. Congress apparently agreed, since they accepted Madison's wording, with some modifications. The final wording of the takings (due process and compensation) portion of the Fifth Amendment was as follows:

> [N]or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

At the time the Fifth Amendment was created, only two of the states had takings compensation language in their constitutions or declarations of rights.[27] The 1787 Northwest Ordinance, enacted to govern the largely uninhabited area around Ohio, also had such wording.[28]

However, the majority of the states had due process language to protect from arbitrary takings, or language requiring that 'consent' be obtained for takings for public use. The common law required that if the legislature gave its consent on behalf of an unwilling property owner (and thereby a taking occurred), compensation must be given.[29]

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25 Madison indicated this belief most strongly in 1785, four years before he drafted the Fifth Amendment, when he was asked what rights a proposed constitution for the new state of Kentucky should contain. Among the rights suggested by Madison was a restraint on government 'from taking private property for public use without paying its full value'. Gaillard Hunt, *The Writings of James Madison*, above n 14, 168.

26 Gaillard Hunt, *The Writings of James Madison*, above n 14, 386.

27 The two states were Vermont and Massachusetts. The various state *Constitutions* are contained in: Francis Thorpe (ed), *The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the States, Territories, Colonies now or Heretofore Forming part of the United States* (1993, reprint of 1909 ed).

28 Article II of the Northwest Ordinance of 1787 stated that 'no man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same'. Philip B Kurland and Ralph Lerner, *The Founders Constitution* (1st ed, 1987) 28.

29 Eleven of fourteen states had law of the land language. Eight states adopted the consent language. See Thorpe, *The Federal and State Constitutions*, above n 27. For a discussion of the consent language, see Matthew P. Harrington, 'Public Use' and the Original Understanding of the So-Called "Takings" Clause,' (2002) 53 *Hastings Law Journal* 1245.

While the consent language varied and in some states (notably North Carolina and Maryland) seemed mainly directed at taxation, language used in other states indicated

The intent of the Fifth Amendment

Bearing in mind the background of the Fifth Amendment, it becomes clear that the Fifth Amendment embodied three primary concepts related to takings, which were essentially copied from the British common law. The first is the concept of due process. The second is that of public use and the third concept is compensation. The intent was that some type of due process needs to be followed when property is to be taken or acquired. Any attempt by the legislature to take without such a procedure is void. While the procedure itself should necessarily include both the public use and compensation elements, these elements were separately stated, probably for additional emphasis. It was stated that takings could occur only when it was for a 'public use' and when it was within the scope of legislative power. It could not be used as a punitive action such as in a bill of attainder. Furthermore, compensation must be paid if the due process and public use elements are satisfied.

Interestingly, modern American scholars focus so much on the 'takings clause' itself as opposed to the 'due process' clause that they tend to overlook the due process aspect of takings that was intended in the Fifth Amendment.[30] The plain wording of the Fifth Amendment shows that due process is an essential and undeniable element of what was intended as a safeguard against governmental takings. The words unquestionably state that a person may not be deprived of property unless due process is first satisfied. Apart from life and liberty, property was also to be protected from arbitrary government action by due process.

When the Fifth Amendment was adopted, it was understood to only apply to the federal government.[31] The ban on state bills of attainder was still

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that both expropriation and taxation were intended to be covered by the clause. See Thorpe, *The Federal and State Constitutions*, above n27.

For example, in Pennsylvania, the language in Chapter 1, Section VIII states 'no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives.' Likewise, the 1776 Virginia Bill of Rights, stated in article VI that men cannot be 'deprived of their property for public uses without their own consent or that of their representatives'. See Thorpe, *The Federal and State Constitutions*, above n27.

Regarding the common law requirements, see Blackstone, above n 15.

30 For example, in Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985), the author acknowledges that 'the due process clause has been the home of much takings law,' but discusses due process in only 4 pages of his 350 page book at 140.

31 The Supreme Court so held in *Baron v Baltimore* (1833) 7 Peters 243. However, one scholar asserts that the Fifth Amendment was understood, at least by some state jurists, as applying not only to the federal government, but to the states as well, even before

the primary defence against arbitrary takings by the states. However, with the passage of time, the attainder clause fell into disuse, and its true purpose was largely forgotten. Since the civil war and the adoption of the Fourteenth Amendment, the most significant portions of the bill of rights that previously only applied to the federal government were applied to the states as well.[32] Hence, the Fifth Amendment was the primary protection against takings in the American context when the *Australian Commonwealth Constitution* was formed in the 1890s. Naturally this was the source which the Australian founders referred to in creating their protection against Constitutional takings.

The origination of Australia's acquisition clause

The origination, meaning and purpose of Australia's acquisition clause can be best understood by reviewing the history of the drafting of the *Commonwealth Constitution*. It is equally important to analyse the intent of the framers in including this clause within that *Constitution*.

The making of an *Australian Commonwealth Constitution*

While there was occasional talk of federation of the Australian colonies from the 1850s, the first attempt to take federation seriously did not materialise until the late 1880s. By then, an Australian 'Federal Council' had been created, which was a loosely organized body of colonial delegates who attempted to deal with interstate issues such as extradition, service of process and the regulation of fisheries.[33] Desiring a stronger union than this, Sir Henry Parkes, the then Premier of New South Wales, convinced his fellow colonial premiers to meet in 1890 to discuss federation. Their meeting led to a Constitutional Convention in 1891 (of which Parkes was the chair), which subsequently led to the drafting of a new *Constitution*.[34]

The 1891 draft *Constitution* was largely modelled on the *U.S. Constitution*. The one major exception was the prime ministerial arrangement of 'responsible government' modelled after the British version.[35] While this draft *Constitution* did allow for the Commonwealth

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the civil war and the adoption of the Fourteenth Amendment. See Jason Mazzone, 'The Bill of Rights in the Early State Courts' (2007) 92 *Minnesota Law Review* 1.

32 Murray A. Wilcox, *An Australian Charter of Rights?* (1993) 10, 20-22.

33 William G. McMinn, *A Constitutional History of Australia* (1979), at 92-102. However, the most essential and influential state, New South Wales, never could be persuaded to join the council. Ibid.

34 Ibid 102-104.

35 Ibid 104-108. See also Erling M. Hunt, *American Precedents in Australian Federation* (1930) 58-61. The 1891 draft *Constitution* can be found at: *Official Report of the*

to obtain property directly from the states,[36] it contained no explicit bill of rights or general takings clause regarding the taking of private property from individual citizens.[37] The reason, as expressed by some Australians over the years, is that 'responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights'.[38]

This new *Constitution* was not particularly well received, especially in New South Wales, since many felt that it failed to adequately resolve issues regarding Senate powers and the disbursement of tariff revenues. The Parliament of New South Wales failed to ratify the document and as a result it was never adopted.[39]

After years of political manoeuvring, a new Constitutional Convention was called, which met in three separate sessions in 1897-98. While many of those attending this new convention had attended the earlier Convention, there were some new faces. Among these was Edmund Barton, who had replaced Parkes as the primary leader of the federation movement from New South Wales and Richard O'Connor, Solicitor General in New South Wales. Barton and O'Connor were two of three drafters of the revised *Constitution* Bill. They also played a key role in the development of the *Australian Commonwealth Constitution*.[40] The two of them made extensive comments about the acquisitions clause, which were ultimately inserted into the *Constitution*. Others who commented on the acquisition clause included Isaac Isaacs (Attorney

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National Australasian Convention Debates, Sydney, 2 March to 9 April 1891. (Sydney, 1891). The 1891 and later 1897–98 Official Record of the Debates have been reprinted in a six volume set, which are available in searchable form on the internet at <http://www.aph.gov.au/senate/pubs/records.htm> at Feb 17, 2009, and also at <http://setis.library.usyd.edu.au/oztexts/fed.html> at Feb 17, 2009. This later website also contains contemporaneous materials written by the Australian founders.

36 The parts of the 1891 draft *Constitution* that pertain to takings and compensation of state property with state approval are: Chapter 1, Part V, s 53(2), which provided for the Commonwealth to acquire property, 'with the consent of the Parliament of the State in which such places are situate, for the construction of forts, magazines, arsenals, dockyards, quarantine stations, or for any other purposes of general concern'.

37 However, Chapter V did contain many provisions modelled after the U.S. bill of rights, including an equal protection clause. See Appendix: Commonwealth of Australia Bill in *Official Report of the National Australasian Convention Debates, Sydney*, above n 35. After debate in the 1897-98 convention, the equal protection clause was deleted and was never included in the final Australian Constitution. See Tuesday, February 8, 1898 debates, in *Official Report of the National Australasian Convention Debates (Third Session): Melbourne 1898*.

38 Robert Menzies, *Central Power in the Australian Commonwealth* (1st ed, 1967) 54.

39 William G. McMinn, above n 33, 104-108; Erling Hunt, above n 34, 58-70.

40 William G. McMinn, above n 33, 111.

General of the state of Victoria), George Turner (Premier of Victoria), John Cockburn and Josiah Symon (from South Australia), John Quick, Henry Higgins and Simon Fraser (from Victoria).[41]

First mention of an acquisition clause in the debates

The new convention essentially rewrote the 1891 Constitutional draft, making substantial changes to the powers of the senate and providing a method to resolve political stalemates between the two houses of parliament.[42] A bill of rights was not discussed by the delegates. As the convention neared its close in the last session in 1898 in Melbourne, the clauses in the 1891 draft relating to the taking of state property were similar to the 1891 version, although reworded to some degree.[43]

However, on January 25, 1898, Barton rose to make a new and surprising proposition. He suggested that a general acquisition clause should be inserted into the then clause 52 (subsequently renumbered as clause 51). Clause 52 originally listed the powers of the Parliament. The clause proposed by Barton was that Parliament would have power to make laws regarding '[t]he acquisition of property on just terms from any state or person for the purposes of the Commonwealth'.[44] A substantially similar clause is found currently in the *Australian Commonwealth Constitution* in s 51(xxxi).

The debates on this subject are brief. One scholar has commented that the convention's discussion of this clause 'provides little assistance in interpreting s 51(xxxi),' yet nevertheless concludes that,

> [O]ne thing is clear, however. The Debates do not support the assertion that the section was modelled on the American Takings clause.[45]

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41 Erling Hunt, above n 35, 17-32, 81.

42 Ibid 86-95.

43 These clauses are listed above in n 36. By this time in the convention some of them had been renumbered. Chapter 1, Part V, s 53(2) on the Commonwealth acquiring state property for dockyards and other purposes still had the same numbering. Chapter II, s 10 regarding executive assumption of public service departments was renumbered as Chapter II, s 69. Chapter IV, s 6 regarding compensation for state acquired property was renumbered as Chapter IV, s 86. Chapter V, s 12 was renumbered as Chapter V, s 105. Finally, Chapter VI, ss 3 and 4 had been renumbered as Chapter VI, ss 115 and 116. These clauses were to be renumbered yet again by the time the final *Constitution* was approved. There had been some wording changes in all these sections.

44 *Official Report of the National Australasian Convention Debates (Third Session)* above n 37, 151.

45 Simon Evans, 'Property and the Drafting of the Australian Constitution,' (2001) 29 *Federal Law Review* 12, II.C.

The idea that s 51(xxxi) was modelled on the Fifth Amendment comes from the statement of Dixon J, in the 1941 case of *Andrews v. Howell*. His Honour stated that, 'the source of sec 51 (xxxi.) is to be found in the Fifth Amendment of the *Constitution* of the U.S., which qualifies the power of the U.S. to expropriate property by requiring that it should be done on payment of fair compensation'.[46]

Many scholars disagree with Dixon J and highlight instead what they perceive as the differences between the two clauses.[47] For most scholars, the Australian acquisition and American takings clauses are distinctly different. This paper submits that, although the debates do not specifically say that the Fifth Amendment was the source for s 51(xxxi), a careful reading of the debates and the historical context of the times indicates that the Australian founders made use of the American experience in forming their acquisition clause. Moreover this clause had the same basic purpose and was intended to serve the same function as the U.S. Fifth Amendment. Hence, Dixon J's statement was fairly accurate.

The acquisition clause as debated by the founders

Although the debates on the proposed clause are brief, a detailed review of this part of the convention is warranted. Barton prefaced his proposed acquisition clause on January 25, 1898 by acknowledging that there were already clauses in the draft *Constitution* which allowed the

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46 (1941) 65 CLR 255, 282. See also *The Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77, 82–3. As noted above, Kirby J agreed with this characterization, stating in 2009 that s 51(xxxi) was 'inspired by the Fifth Amendment to the *Constitution* of the United States.' *Wurridjal v Commonwealth*, [2009] HCA 2 (Unreported, French CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 2 February 2009), [306].

47 See Patrick H. Lane, *A Manual of Australian Constitutional Law* (1987, 4th ed.) 160.

> While I was able to compare our acquisition power and the United States 5th amendment., I must also contrast these two provisions. The United States clause is part of a Bill of Rights oriented, of course, towards the protection of the rights of individuals. On the other hand, our acquisition power is precisely that: a power of Federal Parliament to acquire property.

George Williams, *Human Rights under the Australian Constitution* (1999) 'While the guarantee in s 51(xxxi) is drafted as a grant of power, the equivalent provision in the United States Constitution is set out as a limitation on power' at 141; R.M. Eggleston, 'Industrial Relations', in R. Else-Mitchell, (ed) *Essays on the Australian Constitution* (1952) Australia's acquisition power is 'more restricted than the federal power of eminent domain in America, which stands on its own feet as a part of sovereign power and is limited only by the requirements that just compensation shall be paid and the taking shall be for a public use' at 182 ; Evans, above n 45. At II.C:

> [T]he Debates do not support the assertion that the section was modelled on the American Takings Clause … Not only is the language of the sections very different, so too are their respective historical contexts.

Commonwealth to assume jurisdiction over lands given to it by the states.[48] Indeed, concern that these references could perhaps be interpreted as a limit on the federal government's power of eminent domain (so that such power could only be exercised with state approval) may well have spurred Barton to introduce his proposed acquisition clause.[49] For Barton, state approval was not a proper limit. In introducing his proposal, Barton noted:

> [T]here is no express provision in the Constitution for the acquisition by the Commonwealth of any property the acquisition of which might become necessary. It has been suggested to me that subsection (37) of clause 52 might give a sufficient power of legislation for that purpose, but there is a doubt on the subject.[50]

Subsection 37 of clause 52 was the Australian version of the 'necessary and proper' clause, found in Article 1, s. 8, subparagraph 18 of the *U.S. Constitution*. The U.S. version states that Congress shall have the following power:

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48 The clauses referred to on January 25, 1898, included Chapter 1, Part V, s 53(2), which provided for the Commonwealth to acquire property, 'with the consent of the Parliament of the State in which such places are situate, for the construction of forts, magazines, arsenals, dockyards, quarantine stations, or for any other purposes of general concern.' Chapter IV, s 86, which provided that, in respect to all such properties taken over by the Commonwealth from the states:

> the fair value thereof, or of the use thereof, as the case may be, shall be paid by the Commonwealth to the State from which they are taken over. Such value shall be ascertained by mutual agreement, or, if no agreement can be made, in the manner in which the value of land, or of an interest in land taken by the Government of the State for the like public purposes is ascertained under the laws of the State.

Chapter V, s 105 provided that a state could surrender property to the Commonwealth, which if accepted by the Commonwealth would 'become and be subject to the exclusive jurisdiction of the Commonwealth'.

49 Indeed, Barton stated that:

> When you hand over such powers as are included in the naval and military defence of the Commonwealth, you unfairly and unwisely restrict those powers, if you make it necessary to procure separate legislation for the acquisition of any lands required for the purposes of defence, because you make the federal authority subject to the dictation of the state authority in regard to each transfer. This convinces me that power must be given to the federal authority not to acquire lands compulsorily, but to legislate upon the subject.

Official Report of the National Australasian Convention Debates (Third Session) above n 37, 154. Hence, Barton expressed his desire to see 'just terms' legislation as the limitation, rather than state approval.

50 *Official Report of the National Australasian Convention Debates (Third Session)* above n 37, 151.

> [T]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this *Constitution* in the Government of the United States, or in any Department or Officer thereof.

Subsection (37) of clause 52 of the *Australian Commonwealth Constitution* stated that Parliament shall have power to make laws regarding:

> [A]ny matters necessary for, or incidental to, the carrying into execution of the foregoing powers or of any other powers vested by this *Constitution* in The Parliament or the Executive Government of the Commonwealth or in any department or officer thereof.

Glynn noted that this clause was essentially the same as its counterpart in the *U.S. Constitution*.[51]

By directly referring to subsection 37, Barton raised the heart of the issue. Was an express acquisition clause necessary, especially in the unique entity they were creating, which would be subordinate to the Crown but superior to the states at the same time? Was the power of eminent domain sufficiently implied in the concept of sovereignty? Did the other references in the *Constitution* to state approval of federal government jurisdiction over land serve as a limit to an otherwise implied power to take?

The main point raised by scholars in claiming that the American and Australian takings clauses are fundamentally different has to do with the expression of the power. In Australia, the power of eminent domain is expressly stated as a granted power to Parliament, while in the U.S. it is implied, and the *Constitution* refers to it as a limitation only.[52] This alone suggests that the two clauses are indeed vastly different.

Or are they? The purpose of the U.S. takings clause in the Fifth Amendment is to provide clear limits on the power of eminent domain, regardless of its source. Another purpose is to highlight that the American Congress, in contradistinction to the British Parliament, did not retain an unfettered power to take private property without limitations. Is not the main purpose of the Australian provision the same? In other words, the

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51 Ibid 152.

52 See above n 47.

expression and source of the power is actually of secondary importance. What really matters is how the power is limited.

Apparently Barton thought this was so. In commenting that the federal power of eminent domain should not be subject to state approval as a limitation, he said:

> [T]his convinces me that power must be given to the federal authority not to acquire lands compulsorily, but to legislate upon the subject as I have suggested in the sub-section.[53]

This suggests that Barton agreed with Isaacs' repeated assertion that the power of eminent domain was an implied and sovereign power.[54] However regardless of whether it was implied or expressed, Barton was more concerned with expressing a proper limitation of that power that was not based on state approval of federal acquisitions, but on other criteria. Indeed, as noted above, when Barton initially raised the issue, he stated:

> [I]t has been suggested to me that subsection (37) of clause 52 might give a sufficient power of legislation for that purpose, but there is a doubt on the subject.[55]

It should be noted that fully one year before, Higgins had clearly stated that the government's power to acquire private property was inherent.

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53 *Official Report of the National Australasian Convention Debates (Third Session)* above n 37, 154.

54 Isaacs stated more than once that the eminent domain power is inherent and implied, on January 25 and 28, 1898. *See Official Report of the National Australasian Convention Debates (Third Session)* above n 37, 152, 154, 260. However, not all of the delegates agreed with this. For example, Glynn disagreed, quoting from an interpretation of the U.S. 'necessary and proper' clause in Sheppard's Constitutional Text Book, which stated that the clause could not be used to create new powers not expressly granted. See Furman Sheppard, *The Constitutional Text-Book: A Practical and Familiar Exposition of the Constitution of the United States, and of Portions of the Public and Administrative Law of the Federal Government* (ed, 1863). Glynn then stated that because no power to acquire territory was given in the Australian Constitution, subsection 37 could not be used to imply a power of eminent domain. *Official Report of the National Australasian Convention Debates (Third Session)* above n 37, 152. Quick also expressed doubts, as discussed more fully in footnote 61, below.

55 See *Official Report of the National Australasian Convention Debates (Third Session)* above n 37, 151 (emphasis added). In commenting elsewhere on subsection 37, Barton also said 'The question is whether it is sufficiently clear that that provision would give the Commonwealth *power to legislate* for the resumption of lands.' Ibid (emphasis added).

Neither Barton nor anyone else had objected to the statement.[56] In sum, for Barton, it was not so much the source of the power, but its limitations that needed to be stated in the *Constitution*.

Clearly the power to legislate proposed by Barton and the power to acquire are closely related. However, arbitrary acquisition of land by government based on an express grant or implied power of eminent domain was an obvious possibility and a grave danger unless there were limitations on the power in the *Constitution*. Like Madison,[57] Barton knew and acknowledged that the British Parliament retained unfettered power to override the common law and take private property without limitation.[58] His acquisition clause therefore appears to have been intended, just as the U.S. Fifth Amendment, to make it clear that there were limits beyond which the federal legislature could not go.

This is seen more clearly in Barton's response to Turner's complaint that the proposed clause was dangerous because an expression of such an extensive power could be taken too far. Turner commented with tremendous perception on the tendency of government to gradually horde power, stating,

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56 *Official Report of the National Australasian Convention Debates, Sydney*, above n 35, 1015-16. Higgins was discussing a proposal by Wise to prohibit the federal government from alienating its property, a proposal opposed by Barton and O'Connor and which ultimately failed. Higgins stated:

> [In] framing a Constitution we are giving the Federal Parliament power to acquire territory for the purposes of the Federation. It must acquire territory belonging to private persons or to the Crown.

Later, in expressing opposition to Wise's proposal to limit federal alienation of land, Higgins stated:

> I think Mr. Barton has struck the nail on the head when he said it was not a matter to be considered in framing a Constitution. In framing the Constitution power is given to acquire Crown or private lands by the Federal Government, but at the same time, what is to be done by the Commonwealth is not a matter of Constitution framing.

No delegate opposed these statements of an implied power of eminent domain.

57 Above, text accompanying n 26.

58 In *NSW v Commonwealth*, (1915) 20 CLR 54, Barton stated that:

> [A] Statute passed by a Sovereign Parliament is equally within the legal rights of the Legislature whether it nakedly confiscates property or takes it upon terms of payment more or less. That is the position in the United Kingdom, and the right flows from the Sovereignty of Parliament.

However, in the *Australian Commonwealth Constitution*, just as in the U.S., it was different:

> In some of the States of the American Union the power of expropriation is limited by their Constitutions to acquisition on just terms. So in our Federal Constitution not only must the terms be just, but the power is limited to the purposes in respect of which the Parliament has power to make laws. *NSW v Commonwealth* (1915) 20 CLR 54, 78.

> Where there is a power, the body having that power would probably extend it to its utmost limit. If they go a little further than we intended or a little beyond the strict reading of the Act, how are we to stop them?[59]

Barton's response reveals the very purpose he had suggested the clause as one intended mainly to limit the acquisition power. He stated that:

> [O]ne answer to that is that if you give this power to acquire landed property on just terms, you would have the compensation regulated by the provisions of an Act.

Barton knew that the Australian states had all enacted general legislation putting limits on acquisitions modelled largely after the *British Land Clauses Consolidation Act 1845*.[60] Clearly, he contemplated national legislation of the same type, with its limitations consistent with those of the clause in the *Commonwealth Constitution*. In Barton's mind, legislation by which the acquisition power would be fair and be restrained, and under which compensation would be provided, was the key. Quick also appears to have picked up on this point. After discussing whether subsection 37 could be used to imply a power of eminent domain,[61] he stated that at any rate 'there is no machinery in that clause

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59 *Official Report of the National Australasian Convention Debates (Third Session)* above n 37, 152.

60 See above, n 4.

61 Quick said, 'It is very doubtful whether, a general provision of that kind would give this express power.' *Official Report of the National Australasian Convention Debates (Third Session)* above n 37, 152. The apparent reason for this is expressed in Quick and Garran's subsequent Annotated *Constitution* of the Australian Commonwealth, in which they said that 'it was not considered advisable to allow the right of eminent domain in the Commonwealth to be dependent upon any implied or incidental power' as in the United States. They further noted that the implied power of eminent domain was proclaimed by the courts in the United States 'under the *Constitution* of a sovereign state. The Commonwealth is not a sovereign state, but a federated community possessing many political powers approaching, and elements resembling, sovereignty, but falling short of it. Its Parliament can only exercise delegated powers carved out for it, and assigned to it, by the sovereign Parliament of Great Britain and Ireland'. John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (first published 1901, reprinted 1976) 640–1. However, it is unlikely that the Australian founders really believed their new national government was so lacking in sovereignty that only Great Britain had the power to declare a taking. What is more likely is that the founders took seriously their intention to create a national governmental structure that was truly limited in its federal powers, with unspecified powers being reserved to the states.

for determining the mode in which the Commonwealth is to acquire the land of a state'.[62]

The founders discuss and refine their view of the acquisition clause

Although Barton withdrew his proposed wording on January 25, 1898, at the request of Turner and Isaacs, both of whom wanted more time to study the subject, the issue surfaced again in the debates three days later[63] Once again, Barton made it clear that limiting the national legislature's powers and providing for legislation that would act as a limit to the power of eminent domain was his intent in proposing the acquisition clause.

This time, the subject was clause 53(2), which at that time discussed the potential seat of federal government. It also provided for the Commonwealth to exercise 'authority over all places acquired by the Commonwealth, with the consent of the state in which such places are situate, for the construction of forts, magazines, arsenals, dockyards, quarantine stations, or for any other purposes of general concern'.[64]

Barton opposed the wording, stating, '[t]his is not a clause which deals in any way with the powers to acquire land, whether it is the acquisition of land for the seat of government or the acquisition of land for an arsenal or thereof. Therefore this kind of expression is not required'.[65] He then proposed that the wording be stricken since:

> [I]t should be provided for, either in a separate clause or by some provision such as I suggested in clause 52, which would apply equally to the acquisition of land by the consent of the state, or to such compulsory acquisition as might be justified by any law.[66]

A short while later in the same debate, Barton repeated his desire to see the wording of clause 53(2) changed, stating that, 'what I object to in the subsection is that it imports words with reference to the mode of acquisition which may, perchance, be thought to have an enacting effect'.[67] By this statement, Barton indicated his concern that clause 53(2) may be interpreted as providing for eminent domain without any

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62 *Official Report of the National Australasian Convention Debates (Third Session)* above n 37, 155.

63 Ibid 154.

64 Ibid 256. This clause was later substantially modified.

65 Ibid.

66 Ibid (emphasis added).

67 Ibid 257.

specified limitation on the 'mode of acquisition' by legislation or the 'just terms' requirement of his own proposed acquisition clause.

Other members of the convention had similar concerns. For example, in the debate on January 28, 1898, Cockburn said, 'Would there not be some right of pre-eminent powers in the Federal Parliament, unless it was restricted by this Act, to take any land anywhere it chose?' Isaacs replied, 'Yes and so there ought to be.' Cockburn's response was direct and immediate: 'I do not think there ought to be'.

He then continued, 'I should like this committee to be clear as to whether or not it is intended that the Federal Parliament should have power to take land from any state without the consent of the State'.[68] Cockburn too was concerned with expressing limits on the acquisition power, although in his mind the limit should be based on State approval. As Barton had previously stated however, a limitation on acquisitions in the nature of state approval was unacceptable because it would 'make the federal authority subject to the dictation of the state authority in regard to each transfer'.[69]

O'Connor then took up the debate. This is significant, since it was O'Connor who ultimately proposed the final wording for s 51(xxxi) on March 4, 1898, which was approved by the Convention. O'Connor reminded Cockburn 'that there is no such power for the acquisition of land for the ordinary purposes of the Commonwealth.' In response, Cockburn raised the same point that Barton had raised three days earlier about the adequacy of subsection 37 to give rise to such an implied power. While O'Connor replied in the negative, he indicated that it was limitations on the power, not its source, which was at issue. He stated that, '[i]t will be wise, later on, to add a clause which I think the Convention will see the advisability of adding, restricting the power to acquire land to acquisition for the public purposes of the Commonwealth'.[70]

Hence, O'Connor understood, as did Barton that the convention needed to clearly state limitations on the Australian legislature's power to acquire private property, just as the Americans had done with their Fifth Amendment, in contrast to the unlimited powers of the British Parliament. When Higgins asked if it would not be better to just let the

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68 Ibid 257-258.

69 Ibid 154.

70 Ibid 258.

Commonwealth buy all the property it wanted rather than acquire it, O'Connor replied, '[E]xactly so. I do not think the honourable member apprehends what I am saying. I admit that for all such purposes the Commonwealth would have the power either to purchase or to acquire compulsorily on fair terms'.[71] The reference to 'fair terms,' obviously in line with Barton's suggested wording of 'just terms,' was once again an acknowledgment of a need for expressed limitations in the acquisition clause.

But the debate was not over. Higgins next asked whether clause 105 would not cover the matter of eminent domain. Clause 105 dealt with States surrendering property to the Commonwealth.[72] O'Connor replied, 'that clause does not deal with the question as to whether the Commonwealth may acquire land for any purpose.' Symon then asked, 'Is that power of the State necessary in this *Constitution* at all?' Tellingly, O'Connor replied, 'I do not know that it is.' Hence, he joined Isaacs and Barton in acknowledging that an implied power of eminent domain may exist under subsection 37, but like Barton he felt that such a power needed to be expressed in the *Constitution* by way of a limitation. Hence, when Symon objected to an explicit acquisition clause being inserted into the *Constitutio*n, stating, 'I think it is an interference', O'Connor replied with another reference for the need to limit such a power.[73]

Referring back again to clause 53(2) which had sparked the debate that day, O'Connor said, 'all territory will be acquired lawfully under the *Constitution*, and it is territory acquired in that way which is dealt with under this subsection. This is not the proper place to indicate how the property is to be acquired. That matter must be dealt with by another place. [A]ll that need be dealt with here is the matter of handing over. We can deal with how the territory should be handed over in some other way'.[74] O'Connor was clearly stating that the details of how to acquire land were not technically at issue at the moment, but definitely needed to be stated in a separate clause which contained limitations on the acquisition power.

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71 Ibid 258.

72 The section referred to was Chapter V, s 105, which provided that a state could surrender property to the Commonwealth, which if accepted by the Commonwealth would 'become and be subject to the exclusive jurisdiction of the Commonwealth.' *Official Report of the National Australasian Convention Debates, Sydney*, above n 35, Appendix: Commonwealth of Australia Bill.

73 *Official Report of the National Australasian Convention Debates, (Third Session)* above n 37, 1874

74 Ibid 259.

Finally, on March 4, 1898, O'Connor re-introduced the acquisition clause that Barton had first proposed five and a half weeks earlier. After presenting the wording which became what today is found in s 51(xxxi), O'Connor stated, '[s]ome question has been raised as to whether the Commonwealth has the power inherently of acquiring property under just terms of compensation'. When asked by Fraser whether the terms of acquisition needed to be stated in the wording, O'Connor replied, 'No, you do not want to state the terms in the *Constitution*. Of course an Act will have to be passed by the Commonwealth Parliament elaborating this enactment, and no doubt proper provision will be made in that Act for the method of acquiring lands, and the mode in which lands shall be obtained for the purposes of the Commonwealth'. The terms 'method' and 'mode' are key here, as expressing a limitation on the acquisition power. Hence the act of legislation, which must be for a public purpose, which must be just in its terms and provide for compensation, would serve as the limitation on the acquisition power. The proposed clause was then approved without further discussion.[75]

Limitations in Australia's acquisition clause

The debates and the wording of the Australian Commonwealth acquisition clause indicate that three limitations were intended in the *Commonwealth Constitution*. These were the same basic limitations as are found in the Fifth Amendment of the *U.S. Constitution*. These are due process or just terms whereby a fair process for the acquisition must occur, a public use or purpose, and compensation. How the Australian founders viewed each of these will be discussed in turn.

The requirement for just terms

Just what did Barton mean by the phrase 'just terms' which he included in his proposed acquisition clause? This phrase is not found in either the *U.S. Constitution*, or elsewhere in the *Australian Commonwealth Constitution*. As we shall see, in Barton's mind, it came from the U.S.

Barton gives his understanding of what he meant by the phrase 'just terms' in the 1915 case of *NSW v. Commonwealth*,[76] which was handed down by the Australian High Court while Barton was a member of that court. Among other things, this case dealt with the *Wheat Acquisition Act 1914* (NSW), pursuant to which the State expropriated wheat during World War One. Hence, at issue was acquisition by a State. In commenting on the validity of the act, Barton J first made the interesting

75 Ibid 1874.

76 (1915) 20 CLR 54, 78.

observation that the acquisition/expropriation power was inherent or implied in the sovereignty of the State of New South Wales, rather than expressly stated as in the *Australian Commonwealth Constitution*. This statement highlights again that Barton had no trouble finding an implied power of eminent domain, as part of the powers of sovereignty. Barton then made the following revealing statement:

> [I]n some of the States of the American Union the power of expropriation is limited by their Constitutions to acquisition on just terms.[77]

He went on to say that there was no such limiting language in the New South Wales *Constitution*. A review of the constitutions of the 45 States in the American union both at the time this statement was made, and at the 1898 founding of the *Australian Commonwealth Constitution* 17 years earlier, fails to reveal any reference whatsoever to 'just terms'.

However, almost all of the State *Constitutions* contained due process or takings clauses which were very similar (if not identical) to the Fifth Amendment.[78] Hence, it would appear that in Barton's mind, the concept of due process as applied to takings was the rough equivalent of 'just terms.'

If due process was roughly what Barton meant by 'just terms,' why did his proposed acquisition clause not use that phrase instead? There is a very good reason for this, which again relates to the American experience. By 1898, the words 'due process' had come to be understood as an American concept related to procedural and substantive fairness. While the Australians were willing to adopt American Constitutional forms that appeared to fit their circumstances, they were wary of including terminology that might create as many problems as they solved. Such was apparently the case with the specific words 'due process of law'. These words had experienced 100 years of litigation and interpretation in the U.S., not all of which was clear or understandable. Hence, it comes as no surprise that during the Australian debates, one of

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77 Barton noted in the opinion that not only did the *Australian Constitution* require just terms in eminent domain cases, but also that 'the power is limited to the purposes in respect of which the Parliament has power to make laws.' However, Barton went on to note that none of these federal limitations applied to New South Wales. Ibid (emphasis added).

78 The various U.S. state *Constitutions* are found in: Francis Newton *Thorpe*, *The Federal and State Constitutions*, above n 27.

the leading Australian founders, Alfred Deakin, stated that the American due process clause 'has given them a great deal of trouble'.[79]

Indeed, on February 8, 1898, the convention considered inclusion of a due process clause as a limit on the States in the *Australian Commonwealth Constitution*. The delegates eventually voted against including such a clause, primarily because of the American baggage this term would have come with.[80] Yet even in doing so, the delegates recognized that some sort of fairness element like due process was needed in respect to takings. This is found in the debates between Isaacs and O'Connor on the meaning of the term 'due process,' in which Isaacs presented the following question:

> Suppose a State wanted land for railway purposes, and took it compulsorily, there being a provision in one of the statutes that the amount to be paid should be determined by arbitration, would not that be taking the land without due process of law?

O'Connor responded, 'No, it would not'.[81] While the speakers may have disagreed on whether the procedure of arbitration satisfied due process, the main significance of both the question and the answer is that Isaacs and O'Connor understood that acquisitions were subject to basic principles of fairness such as those embodied in the concepts of due process or just terms.

Since the Australian convention had debated and thrown out the 'due process' terminology, it obviously could not be included in the Australian acquisition clause. Significantly, both Barton and O'Connor had voted in favour of the due process language which was stricken. With the omission of this term, the need for the 'just terms' reference was even more pressing.[82] Hence, while the words were troublesome, the limiting concept in respect to acquisitions was not. What was needed were words that connoted some form of fairness or justice, similar to the American concept of due process, but without all the baggage that term carried with

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79 *Official Report of the National Australasian Convention Debates (Third Session)* above n 37, 667.

80 Ibid 690.

81 Ibid 688.

82 Barton's proposed acquisition clause with the phrase 'just terms' occurred a few days before the debate on the potential adoption of the 'due process' clause. Astute politician that he was, Barton was no doubt aware that 'due process' was a loaded term and would not likely be accepted by the other delegates, and therefore he used 'just terms' in his takings proposal instead. The subsequent refusal to accept 'due process' in the *Australian Constitution* confirmed this.

it. The words 'just terms' seemed to fit the bill. These words were apparently invented or adopted by Barton.

Members of the Australian High Court have indicated their understanding that 'just terms' is indeed considered to be a guarantee of basic fairness. In the 2009 case of *Wurridjal v Commonwealth*,[83] Gummow and Hayne JJ in their concurring opinion quoted with approval a statement by Kitto J that 'the standard of justice postulated by the expression 'just terms' is one of fair dealing between the Australian nation and an Australian State or individual in relation to the acquisition of property'.[84] In the same opinion, Kirby J stated that 'just terms imports a wider inquiry into fairness than the provision of just compensation stated in the Fifth Amendment'.[85] Hence, to this day fundamental fairness is considered to be the essence of 'just terms,' just as Barton intended.

Public Use/Purpose for which the Legislature has power to act

It is noteworthy that in the debates, O'Connor and others made repeated reference to acquisitions for 'the public purposes of the Commonwealth'.[86] This is obviously very close in meaning to the 'public use' reference in the U.S. Fifth Amendment. These references denounce another alleged difference between the American and Australian acquisition clauses that, as we shall see, is more illusory than real.

At least one scholar has asserted that the American 'public use' reference in the Fifth Amendment is different from the phrase, 'purpose in respect of which the Parliament has power to make laws' in s 51(xxxi).[87] He maintains that the Australian provision, 'unlike the Fifth Amendment, says nothing about use and it is not confined to the acquisition for use, although it might be thought that the placitum contemplated only the acquisition of property which the Commonwealth proposed to use'.[88]

That is exactly what the founders contemplated. As such, the alleged distinction between the two terms is not in accord with the intent expressed by the founders at the Constitutional Convention. Rather, it appears to be an opinion based on subsequent Australian judicial

83 [2009] HCA 2 (Unreported, French CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, February 2 2009).

84 Ibid [190], citing *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545, 600.

85 Ibid [307].

86 See below n 87-91, and accompanying text.

87 Eggleston, above n 47, 182-183.

88 Ibid 183.

interpretations in which the distinction between the two terms has been created.[89] Statements at the Australian convention indicate that the founders specifically had the American experience and the American public use clause in mind when they created the language they used.

Barton's original proposed language for the acquisition clause on January 25, 1898, stated that Parliament should have the power of 'acquisition of property on just terms from any State or person for the purposes of the Commonwealth'.[90] When O'Connor proposed the different final wording on March 4, 1898,[91] in the brief discussion that followed, he twice stated that the clause pertained to the exercise of eminent domain 'for the purposes of the Commonwealth'.[92] Accordingly, he reaffirmed the very same wording that Barton had originally proposed. Hence, O'Connor understood that there had been no change in the underlying intent of the clause as proposed by Barton, even though the wording had changed.

During the debates, other founders repeatedly reaffirmed their understanding that this is what they were talking about. For example, Quick acknowledged that their discussion was about eminent domain exercised 'for public purposes'.[93] Cockburn referenced the power of eminent domain 'for the purposes of government'.[94] O'Connor in the debates prior to his final proposal on March 4, 1898, referred to 'the acquisition of land for the ordinary public purposes of the Commonwealth'.[95]

Why then was the language changed from 'for the purposes of the Commonwealth' to 'for any purpose in respect of which the Parliament has power to make laws'? The debates show that the change was based on some comments by Isaacs on January 28, 1898 (a mere three days after Barton's initial acquisition clause proposal) regarding the American

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89 Lane traces the Australian case law in which this distinction is made. See Simon Lane, above n 47, 166-67.

90 *Official Report of the National Australasian Convention Debates (Third Session)* above n 37, 151.

91 The final wording, again, was that the power of eminent domain was limited to 'any purpose in respect of which the Parliament has power to make laws.' *Australian Constitution* s 51(xxxi).

92 *Official Report of the National Australasian Convention Debates (Third Session)* above n 37, 1874

93 *Australian Constitution* s 51(xxxi).

94 *Official Report of the National Australasian Convention Debates (Third Session)*, above n 37, 260. The *Kohl* case is found at 91 U.S. 367 (1875)

95 *Official Report of the National Australasian Convention Debates (Third Session)* above n 37, 261

power of eminent domain. Isaacs was well versed in American law and made frequent reference to the U.S. and its *Constitution*. The following exchange between Isaacs and other delegates is enlightening in respect to the public use/parliamentary powers wording:

> Isaacs: It has been held over and over again in the United States that it is one of the attributes of sovereignty that the Supreme Government shall be unfettered in carrying out the powers entrusted to it, and for the purpose of carrying out those powers it has the right to acquire land compulsorily. No express power is given in the United States *Constitution*, and the Supreme Court of that country has held that no express language is necessary. That power was exercised for the first time, I think, in 1875, but it has since been exercised, beyond all doubt, on several occasions.
>
> Reid: For what purposes?
>
> Isaacs: For public purposes-only for the purposes committed to it by the Constitution.
>
> Higgins: In the *Constitution* of the United States there is a general power given for all purposes incidental.
>
> Isaacs: Oh, the same as we have here.
>
> Kingston: Is not the supremacy of the United States Government a little different from the supremacy of our proposed Federal Government?
>
> Isaacs: Not in this respect. The supremacy, as far as the powers committed to it are concerned, would, in this respect, I apprehend, be exactly the same as the Supremacy of our Commonwealth Government in relation to its powers.[96]

Isaacs then quoted the *Kohl*[97] case at length, including numerous references to eminent domain for public uses. It is clear that Isaacs felt that the American and Australian powers and limitations in respect to eminent domain, and particularly public use, were the same. Following his quotation of the case, Isaacs stated, 'I think it has been laid down more than once in express terms that, for the purpose of carrying out the

96 Ibid 260.

97 Ibid 1874.

powers expressly given to the federal authority in the *Constitution*, the right of eminent domain is an essential attribute'.[98]

It therefore appears to have been no accident that the language in s 51(xxxi) regarding eminent domain was changed from Barton's 'for the purposes of the Commonwealth' to Isaacs', 'for any purpose in respect of which the Parliament has power to make laws.' The wording change was no doubt due to Isaacs' discussion of the public use concept in America, as described above. Hence, we once again see that the Australian founders were utilizing the American experience in creating their acquisition clause and were expressing essentially the same concept as embodied in the U.S. Fifth Amendment. However, they made sure they did so in a way that was uniquely their own.

Compensation – the heart and soul of Acquisitions

Probably the concept most closely associated with acquisitions is compensation. This principle is frequently assumed as part of eminent domain to such a degree that it seems hardly necessary to state it explicitly.

Such appears to have been the thinking of Barton in proposing s 51(xxxi). When Turner objected that granting the power of eminent domain explicitly may encourage the Parliament to go overboard in using it, Barton responded, '[o]ne answer to that is that if you give this power to acquire landed property on just terms, you would have the compensation regulated by the provisions of an Act which would probably involve arbitration or the verdict of a jury'.[99] Clearly for Barton, compensation was an essential element of the clause he was proposing, even though the word 'compensation' was not actually used in the Australian acquisition clause.

O'Connor thought similarly. When he proposed the wording for s 51(xxxi) that was adopted on March 4, 1898, he offered the following as to why the clause was needed:

> Some question has been raised as to whether the Commonwealth has the power inherently of acquiring property under just terms of compensation; that is to say, whether it is not driven to bargain and sale only.[100]

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98 Ibid 261.

99 Ibid 152.

100 Ibid 1874 (emphasis added).

For O'Connor, compensation was the most elemental part of 'just terms'. This coincides with O'Connor's previous response to Isaacs during the debate regarding due process, in which both men acknowledged that 'the amount to be paid' was part of the concept of due process.[101]

Significantly, the case of *Chicago B&Q RR Co. v City of Chicago*[102] had been handed down by the U.S. Supreme Court only a short time before the convention debates. Isaacs' was undoubtedly familiar with this case, and it is likely that O'Connor, Barton, and many of the other delegates were as well. The U.S. Supreme Court concluded in this case that compensation was included within due process, regardless of any separate reference to compensation in the Fifth Amendment.[103] The same point applied to the Australian 'just terms,' as shown in O'Connor's statement that s 51(xxxi) had to do with 'acquiring property under just terms of compensation'.[104] Similar thinking persists among members of the High Court today. As noted above, Kirby J recently stated that 'just terms' imports a wider inquiry into fairness than the provision of 'just compensation alone' as found in the Fifth Amendment.[105]

Indeed, the *Chicago B&Q* case may have provided much of the impetus for Barton's suggestion of s 51(xxxi) in the first place. As noted above, Barton's main point in this proposition was that the terms of the acquisition needed to be specified in a legislative act. The court in *Chicago B&Q* stated that '[d]ue process of law requires a legislative act authorizing the appropriation, pointing out how it may be made and how the compensation shall be assessed'.[106]

Conclusion

The detailed discussion above emphasizes that the founders understood that the primary need in respect to acquisitions was to express limitations in the national *Constitution* on the legislature's power to acquire private property, just as the Americans had done with their Fifth Amendment. This was to make it clear that the national legislature in both countries were subject to limitations in their powers, unlike the British Parliament

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101 Ibid 688, and text accompanying n 78, above.

102 166 U.S. 226 (1897).

103 The court stated 'it is not due process of law if provision be not made for compensation.' Ibid 236.

104 *Official Report of the National Australasian Convention Debates (Third Session)* above n 37, 1874.

105 *Wurridjal v Commonwealth* [2009] HCA 2 (Unreported, French CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, February 2 2009), [307].

106 *Chicago B&Q RR*, 166 U.S. 226 (1897), 240-41, citing 2 Story Const. § 1956.

which retains unlimited power. While the wording of the acquisition or takings clauses in Australia and the U.S. was different, the intent and purpose of the limitations was essentially the same. Indeed, when a careful comparison is made of the two clauses, it is seen that each was intended to cover essentially the same ground. Hence, the differences between the U.S. and Australian acquisition clauses are more illusory than real. Members of the High Court of Australia have acknowledged this, and Australian scholars should be willing to do likewise.

The Australian founders were very much aware of the Fifth Amendment and of American case law. They had the benefit of 100 years of American Constitutional history to draw on, in framing their own *Constitution*, and did not hesitate to make use of it.[107] Over a dozen different American writers were referred to at various times in the debates.[108] Interestingly, the American Constitutional experience was sometimes cited both for and against the same proposition.[109] However, the main point is that the Australians were fully aware of American Takings law in drafting their own acquisition clause. Indeed, we have seen above that in drafting their acquisition clause, the Australians specifically drew upon the American experience, and then created a clause that was uniquely their own. In doing so however, they expressed the same three essential limiting elements as found in the Fifth Amendment, namely due process or just terms as an expression of fundamental fairness, public use or purpose justifying the acquisition and compensation. These three elements in the Australian acquisition clause were simply stated in a different way.

Hence, while the Australian acquisition clause was phrased as a grant of the eminent domain power, its real purpose was to place limits on that power. Although the Australian founders did not merely copy the wording of the U.S. Fifth Amendment, they were wise enough to draw upon the American experience and to adopt the same basic acquisition limitations. The framers of the acquisition clauses in both countries had the same goals in mind, in spite of the different language they used to achieve those goals. The alleged distinctions between the two clauses are

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107 Erling Hunt, above n 35, 5-6, 15.

108 The most frequently cited source was James Bryce, *American Commonwealth* (1895, 3rd ed), which was mentioned no less than 53 times in the 1897-98 debates. Other American Constitutional commentators mentioned included Baker, Cooley, Curtis, Kent, Macy, Sheppard, Story, and Woodrow Wilson. The references are sprinkled throughout the Official Report of the National Australasian Convention Debates, 1897-98.

109 Erling Hunt, above n 35, 15.

primarily a product of subsequent interpretation, not the original intent of the framers.