

THE EMINENT DOMAIN IN AUSTRALIA: THE
‘INDIVIDUAL RIGHTS’ APPROACH TO S
51(xxxi) OF THE *AUSTRALIAN CONSTITUTION*

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ABSTRACT

The interpretation of ‘acquisition of property on just terms’ in s 51(xxxi) of the *Australian Constitution* is contested. This thesis re-evaluates the historical, theoretical and comparative contexts of the placitum, and comprehensively examines the High Court’s s 51(xxxi) jurisprudence since Federation, in order to identify the best interpretation of the placitum – that is, one which is contextually coherent, doctrinally consistent and capable of resolving current interpretive controversies.

The genesis of s 51(xxxi) is traced to two traditions: the English constitutional protection of private property expressed in the theory of Locke and Blackstone, as reflected in nineteenth century legislative practice in England and the Australian Colonies; and the European public law theory of eminent domain, as constitutionalised in the United States. Both traditions required full market-value compensation in every individual case when private property was appropriated. This was the understanding of s 51(xxxi) reflected in the Convention Debates and other relevant historical materials, and these contexts were habitually referenced by the Framers of the *Australian Constitution*. To the extent that the American experience contained a more robust justification for the requirement of compensation, and had been rigorously enforced by the Courts, s 51(xxxi) followed the American model.

This is the interpretation of s 51(xxxi) adopted by the High Court for the first forty years: one focussed on the placitum’s purpose of protecting ‘individual rights’, and not on its role in conferring a ‘legislative power’. This changed after World War Two, when Justice (and later Chief Justice) Dixon led the Court away from its earlier jurisprudence and from the contextual understanding of s 51(xxxi), replacing the focus on the individual with a dominant concern to maximise legislative power. The s 51(xxxi) jurisprudence has never fully recovered from this deviation, despite increasing instances of reversion to aspects of the ‘individual rights’ approach over the ensuing years. To the extent that agreed difficulties remain in the Court’s interpretation of s 51(xxxi), this thesis demonstrates that the complete adoption of the ‘individual rights’ approach is the only contextually coherent and doctrinally consistent solution to those difficulties, given the historical, theoretical and comparative contexts of s 51(xxxi) and the development of the High Court’s jurisprudence interpreting the placitum.

DECLARATION

This work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text.

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