FEDERAL COURT OF AUSTRALIA

Esposito v Commonwealth of Australia [2015] FCAFC 160

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| Citation: | Esposito v Commonwealth of Australia [2015] FCAFC 160 |
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| Appeal from: | Esposito v Commonwealth of Australia [2013] FCA 1039  Esposito v Commonwealth of Australia [2014] FCA 1440  Esposito v Commonwealth of Australia [2015] FCA 3 |
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| Parties: | **JUNE YVONNE ESPOSITO, MARGARET-ANNE HUTTON, DANIEL WALTER MASSAIOLI, SAM DE MARIA and FRANCESCO JOHN TALARICO v COMMONWEALTH OF AUSTRALIA, STATE OF NEW SOUTH WALES, SHOALHAVEN CITY COUNCIL, FOUNDATION FOR NATIONAL PARKS AND WILDLIFE and MINISTER FOR THE ENVIRONMENT (COMMONWEALTH)** |
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| File number: | NSD 78 of 2015 |
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| Judges: | **ALLSOP CJ, FLICK AND PERRAM JJ** |
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| Date of judgment: | 17 November 2015 |
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| Catchwords: | **CONSTITUTIONAL LAW** – whether appellants’ property acquired contrary to s 51(xxxi) of the Constitution – whether decision of Minister to decline approval constituted acquisition – whether any deprivation and corresponding receipt established – whether claims made in respect of a spes bearing a proprietary character – whether funding agreement between the Commonwealth and New South Wales was an attempt to avoid s 51(xxxi) – whether just terms provided in any event  **ADMINISTRATIVE LAW** – whether Minister empowered by the Environment Protection and Biodiversity Conservation Act 1999 (Cth) to prevent rezoning of land – whether rezoning constitutes an ‘action’ under that Act – whether relief should be granted in respect of partially ultra vires decision of Minister in circumstances – whether funds advanced illegally – whether Minister failed to have regard to relevant considerations  **UNJUST ENRICHMENT** – whether unjust enrichment claim logically coherent alongside s 51(xxxi) case  **PRACTICE AND PROCEDURE** – whether appropriate to grant declaratory relief – whether changes to reasons for judgment grounds for appeal – consideration of basis of power to amend reasons for judgment – whether primary judge erred in refusing leave to amend and in making certain evidentiary rulings |
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| Legislation: | *Constitution* ss 51(xxxi), 96  *Environment Protection and Biodiversity Conservation Act 1999 (*Cth) ss 18, 18A, 19, 26(2), 27A, 67, 68, 131A, 133, 136, 519, 523, 524  *Financial Management Legislation Amendment Act 1999* (Cth) s 5(3)  *Natural Heritage Trust of Australia Act 1997* (Cth) ss 8, 19  *Federal Court Rules 2011* (Cth) r 39.04  *Environmental Planning and Assessment Act 1979* (NSW) ss 54, 55, 64, 69, 70, 74, 76, 76A, 76B |
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| Cases cited: | *Bell v Veigel* [2008] NSWCA 36  *Commonwealth v New South Wales* [1923] HCA 34; (1923) 33 CLR 1  *Commonwealth v Tasmania* [1983] HCA 21; (1983) 158 CLR 1  *Commonwealth v WMC Resources Ltd* [1998] HCA 8; (1998) 194 CLR 1  *Georgiadis v Australian and Overseas Telecommunications Corporation* [1994] HCA 6; (1994) 179 CLR 297  *ICM Agriculture Pty Ltd v Commonwealth* [2009] HCA 51; (2009) 240 CLR 140  *Johnston Fear & Kingham & Offset Printing Co Pty Ltd v Commonwealth* [1943] HCA 18; (1943) 67 CLR 314  *JT International SA v Commonwealth* [2012] HCA 43; (2012) 250 CLR 1  *Melbourne Corporation v Commonwealth* [1947] HCA 26; (1947) 74 CLR 31  *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24  *Minister of State for the Army v Dalziel* [1944] HCA 4; (1944) 68 CLR 261  *Mutual Pools & Staff Pty Ltd v Commonwealth* [1994] HCA 9; (1994) 179 CLR 155  *Newcrest* *Mining (WA) Ltd v Commonwealth* [1997] HCA 38; (1997) 190 CLR 513  *PJ Magennis Pty Ltd v Commonwealth* [1949] HCA 66; (1949) 80 CLR 382  *Save the Ridge Inc v Commonwealth* [2005] FCAFC 203; (2005) 147 FCR 97  *Telstra Corporation Ltd v Commonwealth* [2008] HCA 7; (2008) 234 CLR 210  *Todorovic v Moussa* [2001] NSWCA 419; (2001) 53 NSWLR 463  *Tre Cavalli Pty Ltd v Berry Rural Co Operative Society Ltd* [2013] NSWCA 235  *Wurridjal v Commonwealth* [2009] HCA 2; (2009) 237 CLR 309  *Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351  Butt P, *Land Law* (6th ed, Thomson Reuters, 2010)  *Shoalhaven Local Environmental Plan* *1985* |
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| Date of hearing: | 19-20 May 2015 |
|  |  |
| Date of last submissions: | 22 September 2015 |
|  |  |
| Place: | Sydney |
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| Division: | GENERAL DIVISION |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 151 |
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| Counsel for the Second Respondent: | Mr E Muston and Mr N Kelly |
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| Solicitor for the Fourth Respondent: | Bartier Perry |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 78 of 2015 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | JUNE YVONNE ESPOSITO  First Appellant  MARGARET-ANNE HUTTON  Second Appellant  DANIEL WALTER MASSAIOLI  Third Appellant  SAM DE MARIA  Fourth Appellant  FRANCESCO JOHN TALARICO  Fifth Appellant |
| AND: | COMMONWEALTH OF AUSTRALIA  First Respondent  STATE OF NEW SOUTH WALES  Second Respondent  SHOALHAVEN CITY COUNCIL  Third Respondent  FOUNDATION FOR NATIONAL PARKS AND WILDLIFE  Fourth Respondent  MINISTER FOR THE ENVIRONMENT (COMMONWEALTH)  Fifth Respondent |

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| JUDGES: | ALLSOP cj, FLICK AND PERRAM JJ |
| DATE OF ORDER: | 17 NOVEMBER 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.
2. The application for an extension of time for leave to appeal be dismissed with costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
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| BETWEEN: | JUNE YVONNE ESPOSITO  First Appellant  MARGARET-ANNE HUTTON  Second Appellant  DANIEL WALTER MASSAIOLI  Third Appellant  SAM DE MARIA  Fourth Appellant  FRANCESCO JOHN TALARICO  Fifth Appellant |
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| JUDGES: | ALLSOP cj, FLICK AND PERRAM JJ |
| DATE: | 17 NOVEMBER 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

# The Court:

## 1. Introduction

1. The appellants are the representative members of a class action commenced in 2013 against the Commonwealth, its Minister for the Environment (‘the Federal Minister’), the State of New South Wales, Shoalhaven City Council (‘the Council’) and the Foundation for National Parks and Wildlife (‘the Foundation’), a not-for-profit organisation involved in the acquisition of certain land for addition to the national reserve. The class consists of persons who once did, or do still, own allotments of land in an area called the Heritage Estates which is near Jervis Bay.
2. The Heritage Estates consist of 1,232 lots of land which were sold to approximately 1,100 individuals in the late 1980s. At the time these purchases took place, the lots were not zoned by the Council in a way which permitted residential dwellings to be erected upon them. Despite this, it is apparent that the entrepreneurs involved in the sales of the land to the appellants (and those whom they represent) suggested at the time of their purchases that there was reason to believe that the zoning restrictions might be lifted in the future. The evidence before the primary judge suggested, and we accept, that many of the class members are people of modest means and for whom these purchases were seen as significant investments.
3. The entrepreneurs’ intimation that at some stage the land might be rezoned was not far-fetched. Local councils such as the Council derive revenue by way of rates from residents and the Council had an interest in increasing the number of ratepayers if possible. More generally, subject to being satisfied that appropriate infrastructure might be put in place, the Council’s attitude to rezoning seems to have been benign.
4. The Heritage Estates are, however, located on the Bherwerre isthmus which is said to form a habitat corridor for species and ecosystems in the nearby Booderee National Park, which lies on land owned by the Commonwealth. The Heritage Estates are also nearby to the Jervis Bay National Park and form a natural corridor between the two parks. In addition, the isthmus is itself a habitat for two threatened flora (the Leafless Tongue Orchid and the Biconvex Paperbark) and two threatened fauna (the Eastern Bristlebird and the Grey-headed Flying-fox) all of which were, and remain, listed under the provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (‘the EPBC Act’). We will call these the ‘Threatened Species’. There is a minor issue, which it is not necessary to resolve, as to whether the Eastern Bristlebird had its habitat on the Heritage Estates or whether its habitat was elsewhere but affected by development on the Heritage Estates.
5. By 2007, following a protracted series of inquiries and consultations, the Council had before it a proposal with two aspects to it, first, to rezone 730 of the 1,232 lots in the Heritage Estates as residential and, secondly, to construct a road network, undertake certain bushfire prevention steps and provide services and infrastructure to the land (‘infrastructure works’), to support that scale of residential development. It will be observed that, in form, the rezoning proposal was a regulatory proposal, whereas the infrastructure works involved actual development activity by the Council. Later in these reasons, we consider the implications which may flow from this distinction. The twofold proposal was the result of a considered report into the area conducted in 1999 for the New South Wales Government by Mr Kevin Cleland. Amongst the topics Mr Cleland considered were environmental ones. Ultimately, he recommended that some of the Heritage Estates should be opened up for residential development. This gave some support to any expectation of rezoning.
6. We will return to the detail of the EPBC Act shortly, but for now it is enough to know that the presence of the Threatened Species on the Heritage Estates meant that the Council’s proposal to complete the infrastructure works could not proceed without the permission of the Federal Minister under the EPBC Act. The Council lodged a referral on 9 May 2007, in effect, seeking the approval from the Federal Minister for the rezoning and the infrastructure works. As we later explain, the EPBC Act did not prohibit the rezoning and the Federal Minister’s permission for it was not needed.
7. Following more consultations and submissions, the Federal Minister decided that neither the rezoning, nor the infrastructure works should be permitted to proceed. This he did on 13 March 2009. Both before and after this time the EPBC Act barred the Council from proceeding with the infrastructure works. On its face, the refusal also denied the Council permission to carry out the rezoning, but that permission was not required. Further, under State law the power to rezone land was vested in the relevant State Minister, so that the Council, in any event, did not have the power to rezone the land. We examine more closely later in these reasons the legal effect of the Federal Minister’s refusal to grant his permission for the carrying out of an activity which did not require permission by a person who could not, in any event, perform the activity.
8. What appears to have provided the substantial impetus to the commencement of the present proceeding is the governmental efforts, in the aftermath of the Federal Minister’s refusal decision, to add the land within the Heritage Estates to the national reserve with the eventual aim of adding it to the Jervis Bay National Park. This proposal, as finally consummated, took the form of an inter-governmental agreement between New South Wales and the Commonwealth under which, using funds provided by the Commonwealth, land in the Heritage Estate would be voluntarily (not compulsorily) acquired. At the same time, an undertaking was given to rezone the land E2, that is to say, such that it could only be used for environmental conservation. An initial offer price of $5,500 per lot was made to landowners on 31 October 2012, with the price dropping to $5,000 per lot thereafter until 3 June 2013 when the offer was set to expire. Ultimately, the offer period was extended to 30 December 2013. By the time the present proceeding was commenced, a number of landowners had accepted the offer but there were some who had not. The lead applicant in the representative proceeding, Mrs Esposito, was amongst those who opted to retain their land. Mr Talarico, an appellant, was amongst those landowners who had accepted the offer.
9. It was common ground before the primary judge that after the Federal Minister took the steps he did on 13 March 2009 to protect the Threatened Species this had resulted in the appellants’ lots being worth between $0 and $500.
10. The appellants’ proceedings advanced two main arguments. First, their property had been acquired by the Commonwealth without it providing just terms contrary to s 51(xxxi) of the *Constitution*. Secondly, the decision of the Federal Minister to refuse the Council’s proposal under the EPBC Act was liable to administrative review. In addition, a number of minor points on appeal were pursued. We consider these matters in that order.

## 2. The Constitutional Arguments Based on s 51(xxxi)

1. The appellants pursued two arguments about s 51(xxxi). The facts as described above are largely sufficient to understand the basic point of their first constitutional argument. The impact of the Federal Minister’s decision on 13 March 2009 was such as to reduce the value of their land effectively to nil by imposing upon them Federal legal constraints which, in substance if not form, have had the effect of barring them from the enjoyment of their land. At the same time, the Commonwealth has received what was said to be the correlative advantage of increasing the environmental amenity of the Booderee National Park.
2. The second constitutional argument about acquisition was less straightforward and depended upon a clearer understanding of the voluntary acquisition scheme. That scheme appears on its face to be an outcrop of the operation of the *Natural Heritage Trust of Australia Act 1997* (Cth) (‘the Natural Heritage Act’). This Act continued in existence an account known as the Natural Heritage Trust of Australia Account which had been established by s 5(3) of the *Financial Management Legislation Amendment Act 1999* (Cth). The account has a number of purposes which are set out in s 8 and which include, by subs (d), ‘the National Reserve System’ and, by subs (j), the making of grants of financial assistance for the purposes of s 8 including, relevantly, grants for the purpose of the National Reserve System. The National Reserve System is not, in terms, defined in that Act but its ‘primary objective’ is identified in s 13 as being ‘to assist with the establishment and maintenance of a comprehensive, adequate and representative system of reserves’.
3. Section 19 of the Natural Heritage Act contemplates that the Commonwealth might make a grant to a State of financial assistance. Such a grant would be a grant within the meaning of s 96 of the *Constitution*. Section 96 provides:

‘96 Financial assistance to States

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.’

1. Section 19(2) of the Natural Heritage Act required any such grant of financial assistance to a State to be set out in a written agreement between the Commonwealth and the State in question.
2. The Minister administering the Natural Heritage Act also administered a program under it whose purpose was the acquisition of land for addition to the National Reserve. This program was entitled ‘Caring for Our Country’.
3. In June 2011, the National Parks and Wildlife Service (which is an emanation of the State of New South Wales, not the Commonwealth), the Council, the Southern Rivers Catchment Authority and the Foundation applied under this program for a grant of $5,526,400. A second application was later made on 8 February 2012 for $5,493,400 which, if successful, was to be used to purchase all of the lots in the Heritage Estates. That application explained the public benefit of the proposal as including the protection of significant biodiversity and the improvement of the linkage between the Jervis Bay and Booderee National Parks. That linkage was said to promote the maintenance of ecological processes across the landscape and the improvement of the resilience and capacity of the biodiversity to adapt to climate change.
4. On 18 May 2012, the Federal Minister approved the provision of funding to the State of New South Wales of up to $6,042,740 to assist it with the voluntary acquisition of the land within the Heritage Estates, and on 12 June 2012 a written funding agreement between the Commonwealth and New South Wales to that effect was concluded. A subsequent agreement was entered into between the Foundation and the State of New South Wales under which the $6,042,740 was to be used by the Foundation to acquire voluntarily the land in the Heritage Estates. We will return to this later, but for now it is sufficient to observe that the process resulted in the two tiered offer mentioned above being made to the landowners which many, but not all, accepted.
5. The above is sufficient to provide a background to the appellants’ second constitutional argument. It was that there had been a concerted action between the Commonwealth, the State and the Council to use the EPBC Act to reduce the value of the class members’ land to nothing and then, using the inter-governmental funding agreement, to make a State entity the acquiring authority, thereby outflanking any prohibition which would have prevented the Commonwealth itself from acquiring the land under s 51(xxxi) (the States not themselves being subject to the just terms prohibition in that provision).
6. The primary judge rejected both of these constitutional arguments because he found that no property of the appellants had, in fact, been acquired. Quite apart from that, his Honour thought that even if there had been an acquisition of property it had been accompanied by the provision of just terms sufficient to satisfy the requirements of s 51(xxxi) by reason of the offers which had been made which his Honour found, in fact, coincided with the value of the land at the time just before the Federal Minister’s refusal decision. So far as the concerted action was concerned, his Honour noted that its true nature had not been precisely explained by the appellants, but, even leaving that to one side, the fine detail of the evidence did not, at all, suggest the existence of an agreement to subvert the *Constitution.*

## 3. The Status of the Land

1. To assess these arguments it is necessary to understand more clearly the legislative basis of what took place. To clarify this process we will focus on a single lot of land. The land owned by Mr and Mrs Esposito, that is to say, Lot 77 in Deposited Plan 8770 was acquired by them under a contract dated 27 February 1988. Lot 77 consisted of an estate in fee simple under the provisions of the *Real Property Act 1900* (NSW). According to the certificate of title issued to Mr and Mrs Esposito, their interest in the land was subject to the reservations and conditions set out in the Crown grant. It was not suggested that any of these reservations or conditions was directly relevant, although they do point in the correct direction when it comes to assessing precisely what Mr and Mrs Esposito’s property was for the purposes of s 51(xxxi).
2. What is relevant is that development of land in New South Wales has at all material times been regulated under the auspices of the *Environmental Planning and Assessment Act 1979* (NSW) (‘the EPA Act’). That Act contemplates the making of local environmental plans which are planning instruments for local government areas. In 1985, the relevant State Minister made the *Shoalhaven Local Environmental Plan 1985* (‘the Plan’). Clauses 8 and 14(2)(a) of it proscribed in the Heritage Estates the erection of residential dwellings on individual lots which were less than 40 hectares in area. In 1985 the then form of s 76 of the EPA Act prevented any development on land where that development was prohibited by an environmental planning instrument such as the Plan. The same prohibition has appeared in s 76B since 1998. All of the lots involved in this litigation are less than 40 hectares in area. It follows that at the time the various members of the class acquired their lots they were acquiring land upon which, by State law, they were not permitted to build residential dwellings. There remained, of course, the vestigial possibility that at some future stage the land owners might succeed in agitating for a change to the zoning rules embodied in the Plan. But unless that hope were fulfilled in some way one cannot escape the fact that what the class members had purchased was land upon which they were not permitted to build. Whilst the landowners were subsequently successful in persuading Mr Cleland’s inquiry that some residential development should be permitted, it remained the reality that unless, and until, the Planwas amended to give effect to that proposal, what they owned, as opposed to what they hoped to own, was land upon which residential development was forbidden. This is an important fact when one comes to consider the appellants’ argument that their use of the land has been sterilised by Federal action. It was already largely sterilised by State law.

## 4. The EPBC Act

1. That sterilisation by State law remained in place when, on 16 July 2000, the EPBC Act commenced. Of the EPBC Act it is now necessary to say a little more. It is a complex statute. Relevant for present purposes is its regulation of environmental matters when development proposals affect either Commonwealth land or threatened or endangered species. Here the relevant Commonwealth land was the Booderee National Park and the relevant species were the Threatened Species. On the topic of threatened species, Ch 2 is entitled ‘Protecting the environment’ and Pt 3 of that Chapter deals with the environmental requirements pertaining to matters of national environmental significance. Relevantly, these include, in Subdiv C of Div 1, ‘Listed threatened species and communities’. As to Commonwealth land, Subdiv A of Div 2 of Pt 3 deals with the protection of the environment from actions involving Commonwealth land.
2. The effect of ss 18 and 19 (which are contained in Pt 3 of Ch 2) is that unless a person holds an approval under Pt 9 from the Federal Minister, he or she is not permitted to take an *action* that has, or will have, a significant impact on a listed threatened species. Sections 18 and 19 provide as follows:

‘18 Actions with significant impact on listed threatened species or endangered community prohibited without approval

Species that are extinct in the wild

(1) A person must not take an action that:

(a) has or will have a significant impact on a listed threatened species included in the extinct in the wild category; or

(b) is likely to have a significant impact on a listed threatened species included in the extinct in the wild category.

Civil penalty:

(a) for an individual—5,000 penalty units;

(b) for a body corporate—50,000 penalty units.

Critically endangered species

(2) A person must not take an action that:

(a) has or will have a significant impact on a listed threatened species included in the critically endangered category; or

(b) is likely to have a significant impact on a listed threatened species included in the critically endangered category.

Civil penalty:

(a) for an individual—5,000 penalty units;

(b) for a body corporate—50,000 penalty units.

Endangered species

(3) A person must not take an action that:

(a) has or will have a significant impact on a listed threatened species included in the endangered category; or

(b) is likely to have a significant impact on a listed threatened species included in the endangered category.

Civil penalty:

(a) for an individual—5,000 penalty units;

(b) for a body corporate—50,000 penalty units.

Vulnerable species

(4) A person must not take an action that:

(a) has or will have a significant impact on a listed threatened species included in the vulnerable category; or

(b) is likely to have a significant impact on a listed threatened species included in the vulnerable category.

Civil penalty:

(a) for an individual—5,000 penalty units;

(b) for a body corporate—50,000 penalty units.

Critically endangered communities

(5) A person must not take an action that:

(a) has or will have a significant impact on a listed threatened ecological community included in the critically endangered category; or

(b) is likely to have a significant impact on a listed threatened ecological community included in the critically endangered category.

Civil penalty:

(a) for an individual—5,000 penalty units;

(b) for a body corporate—50,000 penalty units.

Endangered communities

(6) A person must not take an action that:

(a) has or will have a significant impact on a listed threatened ecological community included in the endangered category; or

(b) is likely to have a significant impact on a listed threatened ecological community included in the endangered category.

Civil penalty:

(a) for an individual—5,000 penalty units;

(b) for a body corporate—50,000 penalty units.

19 Certain actions relating to listed threatened species and listed threatened ecological communities not prohibited

(1) A subsection of section 18 or 18A relating to a listed threatened species does not apply to an action if an approval of the taking of the action by the person is in operation under Part 9 for the purposes of any subsection of that section that relates to a listed threatened species.

(2) A subsection of section 18 or 18A relating to a listed threatened ecological community does not apply to an action if an approval of the taking of the action by the person is in operation under Part 9 for the purposes of either subsection of that section that relates to a listed threatened ecological community.

(3) A subsection of section 18 or 18A does not apply to an action if:

(a) Part 4 lets the person take the action without an approval under Part 9 for the purposes of the subsection; or

(b) there is in force a decision of the Minister under Division 2 of Part 7 that the subsection is not a controlling provision for the action and, if the decision was made because the Minister believed the action would be taken in a manner specified in the notice of the decision under section 77, the action is taken in that manner; or

(c) the action is an action described in subsection 160(2) (which describes actions whose authorisation is subject to a special environmental assessment process).

(4) A subsection of section 18 or 18A does not apply to an action, to the extent that it is covered by subsection 517A(7).’

1. The species on the list are placed upon it by the Federal Minister and the Threatened Species are all on it. Section 26(2) has the effect of prohibiting *action* being taken outside Commonwealth land that has or will have, or is likely to have, a significant impact on the environment on Commonwealth land. It provides:

‘26 Requirement for approval of activities involving Commonwealth land

…

Actions outside Commonwealth land affecting that land

(2) A person must not take outside Commonwealth land an action that:

(a) has or will have a significant impact on the environment on Commonwealth land; or

(b) is likely to have a significant impact on the environment on Commonwealth land.

Civil penalty:

(a) for an individual—1,000 penalty units;

(b) for a body corporate—10,000 penalty units.’

1. In addition, ss 18A and 27A make contraventions of these rules criminal offences.
2. ‘Action’ is defined in s 523(1) of the EPBC Act as follows:

‘523 *Actions*

(1) Subject to this Subdivision, *action* includes:

(a) a project; and

(b) a development; and

(c) an undertaking; and

(d) an activity or series of activities; and

(e) an alteration of any of the things mentioned in paragraph (a), (b), (c) or (d).’

1. Plainly constructing the infrastructure works on the Heritage Estates would be a ‘development’ within this definition. As we later explain, the actions of a State Minister to amend a zoning rule are not.
2. The content of ‘action’ is reduced, however, by s 524 which carves out from its scope certain governmental decisions. Section 524 is as follows:

‘524 Things that are not *actions*

(1) This section applies to a decision by each of the following kinds of person (*government body*):

(a) the Commonwealth;

(b) a Commonwealth agency;

(c) a State;

(d) a self‑governing Territory;

(e) an agency of a State or self‑governing Territory;

(f) an authority established by a law applying in a Territory that is not a self‑governing Territory.

(2) A decision by a government body to grant a governmental authorisation (however described) for another person to take an action is not an *action*.

(3) To avoid doubt, a decision by the Commonwealth or a Commonwealth agency to grant a governmental authorisation under one of the following Acts is not an *action*:

(a) the *Customs Act 1901*;

(b) the *Export Control Act 1982*;

(c) the *Export Finance and Insurance Corporation Act 1991*;

(d) the *Fisheries Management Act 1991*;

(e) the *Foreign Acquisitions and Takeovers Act 1975*;

(f) the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*;

(g) the *Quarantine Act 1908*;

(h) the *Trade Practices Act 1974*.

This subsection does not limit this section.’

1. In this case, the Booderee National Park which adjoined the Heritage Estates was, as we have said, on Commonwealth land and the Heritage Estates were said to form a habitat corridor for the species and ecosystems in it. The effect of ss 18 and 26(2) was, therefore, to prevent any action which might have had a significant impact on the Threatened Species or the environment of the Booderee National Park.
2. Elaborate provision was then made in Ch 4 for a decision-making process which could lead to an approval being granted under Pt 9. Within Pt 9 itself was s 133 which empowered the Federal Minister to grant his approval to any action which might otherwise be prohibited (as in this case) by ss 18 or 26(2). Section 133 provided:

‘133 Grant of approval

Approval

(1) After receiving the assessment documentation relating to a controlled action, or the report of a commission that has conducted an inquiry relating to a controlled action, the Minister may approve for the purposes of a controlling provision the taking of the action by a person.

(1A) If the referral of the proposal to take the action included alternative proposals relating to any of the matters referred to in subsection 72(3), the Minister may approve, for the purposes of subsection (1), one or more of the alternative proposals in relation to the taking of the action.

Content of approval

(2) An approval must:

(a) be in writing; and

(b) specify the action (including any alternative proposals approved under subsection (1A)) that may be taken; and

(c) name the person to whom the approval is granted; and

(d) specify each provision of Part 3 for which the approval has effect; and

(e) specify the period for which the approval has effect; and

(f) set out the conditions attached to the approval.

Note: The period for which the approval has effect may be extended. See Division 5.

Persons who may take action covered by approval

(2A) An approval granted under this section is an approval of the taking of the action specified in the approval by any of the following persons:

(a) the holder of the approval;

(b) a person who is authorised, permitted or requested by the holder of the approval, or by another person with the consent or agreement of the holder of the approval, to take the action.

Notice of approval

(3) The Minister must:

(a) give a copy of the approval to the person named in the approval under paragraph 133(2)(c); and

(b) provide a copy of the approval to a person who asks for it (either free or for a reasonable charge determined by the Minister).

Limit on publication of approval

(4) However, the Minister must not provide under subsection (3) a copy of so much of the approval as:

(a) is an exempt document under the *Freedom of Information Act 1982* on the grounds of commercial confidence; or

(b) the Minister believes it is in the national interest not to provide.

The Minister may consider the defence or security of the Commonwealth when determining what is in the national interest. This does not limit the matters the Minister may consider.

Notice of refusal of approval

(7) If the Minister refuses to approve for the purposes of a controlling provision the taking of an action by the person who proposed to take the action, the Minister must give the person notice of the refusal.

Note: Under section 13 of the *Administrative Decisions (Judicial Review) Act 1977*, the person may request reasons for the refusal, and the Minister must give them.

Definition

(8) In this section:

*assessment documentation*, in relation to a controlled action, means:

(a) if the action is the subject of an assessment report—that report; or

(b) if Division 3A of Part 8 (assessment on referral information) applies to the action:

(i) the referral of the proposal to take the action; and

(ii) the finalised recommendation report relating to the action given to the Minister under subsection 93(5); or

(c) if Division 4 of Part 8 (assessment on preliminary documentation) applies to the action:

(i) the documents given to the Minister under subsection 95B(1), or the statement given to the Minister under subsection 95B(3), as the case requires, relating to the action; and

(ii) the recommendation report relating to the action given to the Minister under section 95C; or

(d) if Division 5 of Part 8 (public environment reports) applies to the action:

(i) the finalised public environment report relating to the action given to the Minister under section 99; and

(ii) the recommendation report relating to the action given to the Minister under section 100; or

(e) if Division 6 of Part 8 (environmental impact statements) applies to the action:

(i) the finalised environmental impact statement relating to the action given to the Minister under section 104; and

(ii) the recommendation report relating to the action given to the Minister under section 105.’

1. It is important to pause at this juncture to observe that the Federal Minister’s actions in this case, on 13 March 2009, consisted of a refusal to grant permission to do something which was already prohibited by ss 18 and 26(2). The refusal decision was itself not the legal source of the prohibition. The Federal Minister’s refusal decision therefore had no legal impact on the appellants’ land which had, since 16 July 2000, been subject to the Federal prohibition on the taking of significant action.
2. The appellants’ case below, and in this Court, proceeded upon an assumption that it was the Federal Minister’s decision of 13 March 2009 which had resulted in the sterilisation of the development potential of their land. However, this is not what transpired at least as a matter of law. Whatever the fetter on the development of the appellants’ land was, it arose when the EPBC Act came into force on 16 July 2000. It was at that time that it became subject to a prohibition that prevented significant action which impacted on the Threatened Species or the environment of the Booderee National Park. What occurred on 13 March 2009 was not the imposition of some fresh prohibition by the Federal Minister but rather a decision by him under Pt 9 not to *lift* the prohibition which already existed under Pt 3.
3. Indeed, as we discuss below, the EPBC Act did not prevent the rezoning of the land at all. Its only effect has been to prevent the infrastructure works.

## 5. The First Acquisition Argument (Grounds 1, 3 and 5)

1. Nevertheless, the case appears to have been approached by the appellants on the basis that it was the Federal Minister’s decision which constituted the alleged acquisition for the purposes of their first acquisition argument. A variant of this assumption put forward by the appellants was that the acquisition was wrought by the administrative process leading to the decision of 13 March 2009. This does not appear to us to make sense but is, in any event, not materially different. Whatever way it is framed, the assumption is, so it seems to us, wrong. Nevertheless, at least in relation to the appellants’ first argument the constitutional issues thrown up by asking the correct question are the same as those thrown up by asking whether the decision of 13 March 2009 affected the acquisition. This is because the legal fetters incorrectly identified by the appellants as flowing from the Federal Minister’s decision are the same as the legal fetters which in fact were put in place on 16 July 2000 when the EPBC Act commenced. The only difference is one of timing, i.e., on the correct view any acquisition took place on 16 July 2000 not 13 March 2009. Subject to issues of valuation, the failure correctly to identify the actual acquisition point does not substantively diminish the appellants’ arguments.
2. The prohibitions in ss 18 and 26(2) of the EPBC Act operated as a fetter on ‘actions’ which could be taken on the land and what they prevented was ‘action’ which would have a ‘significant impact’ either upon the environment of the Booderee National Park land or the Threatened Species. We have set out the definition of ‘action’ above at [26].
3. Section 51(xxxi) of the *Constitution* confers legislative power on the Commonwealth to make laws with respect to:

‘the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws’.

1. Although s 51(xxxi) is expressed as a grant of legislative power it is orthodox that its requirement of just terms radiates throughout the various heads of Commonwealth legislative power in s 51: *Johnston Fear & Kingham & Offset Printing Co Pty Ltd v Commonwealth* [1943] HCA 18; (1943) 67 CLR 314 at 318 per Latham CJ, 325 per Starke J. Further, after some initial uncertainty, it seems that it applies to the exercise of the legislative power with respect to territories in s 122: *Wurridjal v Commonwealth* [2009] HCA 2; (2009) 237 CLR 309.
2. The first step in the appellants’ argument must inevitably, therefore, be a characterisation of the EPBC Act as a law with respect to the acquisition of property. Their case is that it is such a law because the Federal Minister’s decision had the effect of sterilising their land. The Federal Minister’s power was conferred by s 133(1) (set out above at [30]).
3. Section 133(1) shows the emptiness of asking whether a refusal to grant permission to lift a pre-existing prohibition results in any kind of acquisition. But assuming, for the sake of argument, that it was meaningful to ask such a question then the effect of the submission would be that s 133(1) was invalid to the extent that it authorised what would otherwise be an acquisition contrary to s 51(xxxi). It would then follow that the Federal Minister’s decision would be ultra vires the EPBC Act because the EPBC Act could not constitutionally support such a decision.
4. That conclusion, however, needs to be read in light of s 519 of the EPBC Act which provides:

‘519 Compensation for acquisition of property

When compensation is necessary

(1) If, apart from this section, the operation of this Act would result in an acquisition of property from a person that would be invalid because of paragraph 51(xxxi) of the Constitution (which deals with acquisition of property on just terms) the Commonwealth must pay the person a reasonable amount of compensation.

Definition

(2) In this Act:

*acquisition of property* has the same meaning as in paragraph 51(xxxi) of the Constitution.

Court can decide amount of compensation

(3) If the Commonwealth and the person do not agree on the amount of compensation to be paid, the person may apply to the Federal Court for the recovery from the Commonwealth of a reasonable amount of compensation fixed by the Court.

Other compensation to be taken into account

(4) In assessing compensation payable by the Commonwealth, the Court must take into account any other compensation or remedy arising out of the same event or situation.’

1. This has the effect that s 133(1) will never be invalid because of s 51(xxxi) – just terms are always provided by s 519. Consequently, it is within constitutional authority for s 133(1) to have the effect of acquiring property. More precisely, if the effect of ss 18 and 26(2) were to acquire the appellants’ property this too will be constitutionally permitted; the only issue will be the determination of just terms compensation under s 519.
2. Accepting that constitutional reality, the appellants did indeed seek compensation under s 519 in the Court below. In order for that claim to succeed it was, therefore, necessary for them to show that, but for s 519, an acquisition would have occurred to which s 51(xxxi) would otherwise have applied.
3. The primary judge concluded that no such acquisition had occurred.
4. Whether one focuses, as the appellants do, on the decision-making power in s 133(1) or on the actual prohibitions in ss 18 and 26(2) the acquisition in question is, as we have said, the same (apart from the question of timing). It involves an analysis of whether the prohibitions imposed by the EPBC Act constitute an acquisition of property in the requisite sense.
5. The appellants’ acquisition argument was that the effect of the EPBC Act was to reduce the appellants’ ‘equity’ in their land whilst conferring on the Commonwealth the environmental benefits flowing to the Booderee National Park, i.e., improved flora, fauna and biodiversity. In addition, it was said that the Commonwealth might obtain a direct financial benefit through increased visitors’ fees paid to enter the Booderee National Park. In effect, the argument was that the Commonwealth had enriched the environmental status of its own National Park by emasculating the appellants’ land and depriving it of all value.
6. It remains necessary, however, for the appellants to show that there has been an acquisition of *property*. Whether one believes that the requirement that the Commonwealth must provide just terms when it engages in compulsory acquisition should extend to compulsorily acquired interests which are not property is not a question for this Court. Different, and legitimate, views might be held on that essentially political question – there are many valuable rights within the economy which are not proprietary in nature and the current drafting of s 51(xxxi) does not protect them from compulsory acquisition by the Commonwealth without compensation. Be that as it may, the prohibition in s 51(xxxi) is on the acquisition of property.
7. It is also established that there must be a receipt by the Commonwealth or another person of some proprietary interest. Analytically, these two principles flow from the words in s 51(xxxi) ‘acquisition of property’ which carry with them, as a matter of ordinary language, the concept of a deprivation of property, on the one hand, and a receipt of it, on the other. As French CJ explained in *JT International SA v Commonwealth* [2012] HCA 43; (2012) 250 CLR 1 at 33 [41]-[42], ‘There is, however, an important distinction between a taking of property and its acquisition… Taking involves deprivation of property seen from the perspective of its owner. Acquisition involves receipt of something seen from the perspective of the acquirer’. Mason J explained the same point in *Commonwealth v Tasmania* [1983] HCA 21; (1983) 158 CLR 1 at 145:

‘The emphasis in s 51(xxxi) is not on a “taking” of private property but on the acquisition of property for purposes of the Commonwealth. To bring the constitutional provision into play it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.’

1. Despite that it is also established that what is taken need not be identical to what is received. Thus in *Newcrest* *Mining (WA) Ltd v Commonwealth* [1997] HCA 38; (1997) 190 CLR 513, land which was subject to Newcrest’s mining leases was added to the Kakadu National Park which, under Commonwealth law, had the effect of preventing any further mining activity. What Newcrest lost was its right to mine but this was not what the Commonwealth gained. Rather, it obtained land freed from the company’s rights, but this was nevertheless sufficient to engage s 51(xxxi): see (1997) 190 CLR 513 at 530 per Brennan CJ, 560 per Toohey J, 561 per Gaudron J and 634 per Gummow J. For the same reason, when the Commonwealth extinguishes an obligation owed by it to another person of a proprietary nature this will involve an acquisition of property within the meaning of s 51(xxxi) even though what is taken is not precisely that which is received: cf. *Mutual Pools & Staff Pty Ltd v Commonwealth* [1994] HCA 9; (1994) 179 CLR 155 at 176 per Brennan J. And this will include not only debts (as in *Mutual Pools*) but also causes of action (as in *Georgiadis v Australian and Overseas Telecommunications Corporation* [1994] HCA 6; (1994) 179 CLR 297 at 305-307, 311-12).
2. So it is no objection, necessarily, to the appellants’ argument that the environmental benefits received by the Commonwealth via the Booderee National Park (or the additional gate revenues) do not precisely match what it is that the appellants say was taken from them, namely, the equity in their land.
3. What then is the property which the appellants say has been acquired from them? Here, we think the appellants’ argument encounters some difficulties. In their favour, it is true that the concept of ‘property’ is not, for the purposes of s 51(xxxi), ‘a monolithic notion of standard content and invariable intensity’: cf. *Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351 at 366 [19]. Thus the mere fact the appellants cannot literally point to something which has been taken from them is not necessarily dispositive.
4. Indeed, the variable content in the concept of property has generated conceptual difficulties in those cases where there is seen to be some distinction between an item of property per se and the rights which may attach to, or accompany, that property. Two contrasting decisions of the High Court illustrate the problems which can arise in this area. In *Minister of State for the Army v Dalziel* [1944] HCA 4; (1944) 68 CLR 261, Mr Dalziel had conducted a car park on land leased by him at Wynyard in Sydney. The Quartermaster-General took control of the car park under reg 54 of the *National Security (General) Regulations* and gave possession of the car park to the United States Armed Forces. What was taken from Mr Dalziel was his right to occupy the carpark but his lease was itself never acquired. He continued to own the leasehold estate in land which he had held and what he was deprived of instead was the right of possession attaching to that leasehold. The Court concluded that the right of possession was itself proprietary: see at 285 per Rich J, 290 per Starke J, 295 per McTiernan J and 299 per Williams J. Hence there was an acquisition to which s 51(xxxi) applied. Several of the judgments *Dalziel* noted the ability to transfer a right to possession was an indicium of its proprietary nature.
5. On the other hand, in *Telstra Corporation Ltd v Commonwealth* [2008] HCA 7; (2008) 234 CLR 210, the Court was clear to distinguish Telstra’s ownership of its fixed-line copper wire network (called the ‘PSTN’) from the statutory licence rights Telstra needed (and held) to use that physical infrastructure as a telecommunications network (it being an offence to conduct a telecommunications network without such a licence). Telstra had argued that by requiring it to permit other telecommunications providers to access its network so that they too could use it (as part of a Federal monopoly infrastructure access regime), the Commonwealth had acquired its property in the underlying copper wire network. Telstra sought to say that it was in the same position as Mr Dalziel. But this proposition the High Court rejected, holding instead that Telstra’s argument ‘proceeds from an unstated premise that Telstra has larger and more ample rights in respect of the PSTN than it has’ ((2008) 234 CLR 210 at 233 [52]). What was affected by the access regime was not Telstra’s property in the PSTN but rather the statutory rights which Telstra held (but also needed to hold) to operate it as a telecommunications network which had always been subject to the limitations which Telstra sought to impugn as effecting an acquisition. It followed that there was no acquisition of Telstra’s property to which s 51(xxxi) applied.
6. What then are the appellants’ rights here? Each of the class members who have retained their land is the registered proprietor of a lot in a deposited plan under the provisions of the *Real Property Act 1900* (NSW). The definition of ‘proprietor’ in s 3 of that Act confirms that a ‘proprietor’ is ‘[a]ny person seised or possessed of any freehold or other estate or interest in land at law or in equity in possession or in futurity or expectancy’. The certificates of title confirm that the appellants own an estate in fee simple. A fee simple is one of the three freehold estates – the fee simple, the fee tail and the life estate. It is said that the fee simple is the ‘most extensive in quantum, and the most absolute in respect to the rights which it confers’: *Commonwealth v New South Wales* [1923] HCA 34; (1923) 33 CLR 1 at 42, quoting *Challis’s Real Property* (3rd ed, p 218).
7. Despite the *Real Property Act 1900* (NSW) creating a statutory system of title by registration it is apparent that it did not disturb the underlying common law nature of the fee simple. As such it is, as a matter of formality, an estate in land held as a tenant from the Crown. As Professor Butt has observed, the fee simple is ‘as close as the law gets to ownership of land itself, consonant with the feudal principle of tenure and with modern statutory restrictions on the rights of landowners’: see Butt P, *Land Law* (6th ed, Thomson Reuters, 2010) at p 125. Two observations flow from this. First, the proprietor of an estate in fee simple does not own the land itself. The land is held in radical title by the Crown; what the proprietor owns is the estate in fee simple which carries with it permanent rights of possession and so on. Secondly, the content of the bundle of rights constituting the fee simple is governed by common law, parts of which are nearly 800 years old. It is inherent in the nature of the common law that it is susceptible to variation by statute.
8. Since the passage of the EPA Actthe common law rights attaching to the fee simple in New South Wales have been varied extensively. Relevantly, in this case they have been varied by the operation of that Act and thePlan which has, at all material times, removed what would have been the appellants’ otherwise unfettered right to build on their land what they please. The consequence is that the rights actually owned by the appellants comprise:

(a) the common law fee simple; but

(b) diminished by the provisions of the EPA Act and the Plan*.*

1. As a matter of property law, it is this bundle of rights which the appellants owned as at 16 July 2000 when the EPBC Act came into force and it is still what they owned when the Federal Minister came to make his refusal decision on 13 March 2009.
2. Neither of those events had the effect of diminishing these rights of the appellants. The appellants were not legally permitted to build residential dwellings on their land at any time and the EPBC Act did not change that state of affairs either when it became law on its proclamation or when the Federal Minister made his decision under it.
3. The appellants’ argument necessarily therefore must beat a retreat to two other somewhat more ephemeral concepts to found their argument that their property was acquired. These were:

(a) the fact that the EPBC Act had the effect that they were denied the future possibility of zoning changes which were likely in light of Mr Cleland’s report; and

(b) this effect diminished the value of, or as they put it the ‘equity’ in, their land.

1. The difficulty with these propositions is that, assuming they are correct, neither of them is proprietary in nature. The hope, even if well-founded (as it probably was), that the State Minister might lift the zoning restrictions in the future because of Mr Cleland’s positive recommendation was just that – a hope. A hope, or spes, is not a species of property and this is so regardless of whether it be well-founded, unrealistic or fantastic. One cannot, for example, assign a hope or sell it to another. This is not to say that assignability is an invariable indicium of property but only that its absence is not analytically irrelevant in a case such as the present.
2. On the other hand, the argument that the EPBC Act diminished the value of the land runs into the immediate difficulty that it is well-established that s 51(xxxi) does not protect the value of an item of property from diminution but only the property itself from acquisition: *Commonwealth v WMC Resources Ltd* [1998] HCA 8;(1998) 194 CLR 1 at 72-73 [193]-[194] per Gummow J. See also *ICM Agriculture Pty Ltd v Commonwealth* [2009] HCA 51; (2009) 240 CLR 140 at 180 [84] per French CJ, Gummow and Crennan JJ, at 201-202 [147] per Hayne, Kiefel and Bell JJ. This was recently affirmed in *JT International SA v Commonwealth* [2012] HCA 43; (2012) 250 CLR 1 where a prohibition on the plaintiff tobacco companies using their registered trademarks on cigarette packaging was held not to involve an acquisition of property contrary to s 51(xxxi) even though it had the effect of dramatically reducing the value of the trade marks: see especially (2012) 250 CLR 1 at 106 [295] per Crennan J.
3. In those circumstances, it is clear to us that the appellants continue to own all of the property they have always owned. What they have lost—the fulfilment of a value adding hope and with it the destruction of much of the value of their property—are not themselves proprietary in nature. It follows that the first claim under s 51(xxxi) must fail because of the absence of any acquisition of the appellants’ property.
4. As we have already said, the EPBC Act does not prevent the rezoning of the land by the State Minister. In fact, the only effect that Act presently has on the appellants’ land is to prevent the Council building infrastructure which might support residential development. We would not necessarily accept that that degree of sterilisation is quite as extreme as that propounded by the appellants. For example, if the land were rezoned residential it might be possible to build a residential dwelling on it even if there was no supporting infrastructure. There are some difficult issues relating to this which were not explored in argument and which make it inappropriate to consider this further. For the purposes of these reasons we are content to assume that they are practically the same.
5. The appellants’ first argument also fails because it is not shown that the exiguous benefits conferred on the Commonwealth were proprietary either. The suggested benefits of improved environmental amenity for the Booderee National Park and with it increased patronage of that Park by a fee paying public may well be benefits which inure to the Commonwealth but they are not property or proprietary in nature. This may be contrasted with the situation in *Newcrest* where the Commonwealth obtained the possessory entitlement of land free from Newcrest’s rights to mine that land. Here the Commonwealth obtains the benefit of a habitat or habitats beneficial to the Booderee National Park’s ecosystems and the Threatened Species. But unlike the situation in *Newcrest* these improvements do not reflect the release of the Commonwealth’s land from some pre-existing affectation. To the contrary, the Commonwealth’s land has always had these qualities because the Heritage Estates have not yet been developed. So too, we regard the suggested increased gate revenues as speculative and, in any event, not shown to be other than de minimis.
6. The first acquisition argument, therefore, fails.

## 6. The Second Acquisition Argument (Grounds 4 and 6)

1. It is useful then to turn to the second way in which the constitutional argument was put. Instead of focussing on the operation of the EPBC Act as a law with respect to the acquisition of property, the appellants now submitted that the funding agreement between the Commonwealth and New South Wales which provided the funds which were to be used to acquire the appellants’ land was to be seen as a circuitous device by which the Commonwealth and the State could, by combination, avoid the prohibition in s 51(xxxi). On this view of affairs, the Commonwealth and New South Wales would combine to accomplish what the Commonwealth could not by itself constitutionally achieve. There were two steps. First, the Commonwealth would use its powers under the EPBC Act to render the land in the Heritage Estates effectively worthless. Secondly, New South Wales would then use its powers to acquire the land using the funds provided by the Commonwealth under the agreement.
2. It is true, as all parties before us accepted, that the Commonwealth may not impose as a condition on a s 96 grant to a State a requirement that it acquire property other than on just terms. This was the very holding in *PJ Magennis Pty Ltd v Commonwealth* [1949] HCA 66; (1949) 80 CLR 382. In that case, the Commonwealth entered into an agreement with New South Wales, Victoria and Queensland to provide funding to allow them compulsorily to acquire land for the settlement of returning veterans of the Second World War. The agreement was reached in or around 1945 but provided that the compensation that would be paid under it would be the value of the land as at 10 February 1942 when war-time price controls had been introduced. The agreement was then approved by both Commonwealth and State legislation. The plaintiff’s land was slated for acquisition and it contended that the acquisition of it at its value on 10 February 1942 involved an acquisition other than on just terms since by the time of the proposed acquisition it was worth much more by reason of substantial improvements which had been made. A majority of the Court held the Commonwealth statute infringed s 51(xxxi). This principle would apply in the current case to prevent the conclusion between the Commonwealth and New South Wales of an agreement under which the Commonwealth would fund acquisitions by New South Wales of land for the purposes of the Natural Heritage Act on terms which were not just within the meaning of s 51(xxxi). But that, for the reasons which follow, is not what has happened in this case.
3. There are a number of difficulties which confront this argument at the outset. The principle one is that New South Wales did not use any of its powers to acquire land compulsorily nor was it required to do so under the agreement. It merely put the Foundation in funds to make offers to acquire the land. There was no compulsion required and none imposed. The appellants were not obliged to accept the offers which were made and, indeed, many members of the class did not. There is thus missing from this limb of the appellants’ case any compulsory acquisition which might fall within s 51(xxxi). It is a critical difference with *Magennis.*
4. One way to evade this problem might be to suggest that the acquisition was constituted not by the offers which were in fact made but instead by the operation of the EPBC Act to sterilise the land. But there are two difficulties with this view. First, if that is the argument then there is no need to allege an arrangement with New South Wales at all because the acquisition is unrelated to the events which occurred after 13 March 2009. Secondly, the argument would fail for the reasons we have already given in relation to the first argument. In any event, we did not really apprehend that this was what the appellants were submitting.
5. Another way to evade the problem might be an argument that although it appeared on its face that the acquisition of the Heritage Estates land had been voluntary this concealed the truth of the matter. On this view, the appellants were confronted with a Hobson’s choice between nothing and $5,500 which would be said, we apprehend, to be no choice at all.
6. Whilst we would accept that the question of whether there is an acquisition for the purposes of s 51(xxxi) is a question of substance and not form, and whilst we would also accept that it is possible that an apparently voluntary disposal may conceal, in fact, an involuntary acquisition, we do not consider this can be said to have occurred in this case. What was presented was a choice between a modest offer and the unpalatable prospect of keeping land which was sterilised for the foreseeable future by the EPBC Act. We do not think that the prospect of the latter was so forlorn in its outlook that it should be seen as depriving of their voluntariness the actions of those who accepted the offer of the former. This is underscored by the fact that some people did, indeed, choose not to accept the offer. Rational reasons for doing so might have included holding out for a change in the attitude of the Federal Minister to the Threatened Species.
7. In those circumstances, we do not accept that there was any acquisition even assuming the concerted action was established.
8. In any event, the primary judge found that the alleged concerted action was not made out. Competing for the field were two different historical interpretations of what had happened:

(a) the Federal Minister’s decision on 13 March 2009 to refuse to permit the Council to proceed with its proposal was driven by his desire to protect the Threatened Species and the Booderee National Park. After that decision was made, State and local authorities then had to determine what was to be done. At that point, acquiring the land voluntarily and gradually adding it over time to the Jervis Bay National Park appeared a sensible solution. The Commonwealth provided funding for projects of that kind and, in due course, the Commonwealth was approached for funding. It acceded to the request and, in the usual course, this resulted in a funding agreement. On this view, whilst the Federal Minister’s decision of 13 March 2009 was the catalyst for what thereafter transpired, the Federal Minister had not been motivated by a desire to bring about the ensuing proposal. Still less was the whole process (which was spread out over several years) the result of concerted action between the State and the Commonwealth to incorporate the Heritage Estates into the National Reserve; or

(b) the Federal Minister’s decision on 13 March 2009 was, in fact, part of a larger decision-making process under which the Commonwealth, the State, and the Council (and others) had agreed that the State should acquire the land using Federal funding. On this view of affairs, the decision on 13 March 2009 was the device which rendered the land worthless and thereby not only reduced its value (and the compensation which would need to be paid) but provided the practical impetus to landholders to accept the offers which would eventually be made.

1. The primary judge considered this factual debate at paras [69] to [105] with his conclusion at paras [125] to [129] as follows:

‘125 The applicants were unable to point to any occasion when such an arrangement was made. Furthermore, the applicants were unable to identify when the alleged arrangement was made.

126 In addition, when appropriate consideration is given to the evidence, it is quite clear that the actions taken by the respondents from time to time in and after 2009 were the result of a developing situation relevantly instigated by the Council’s referral to the Minister of its proposal to rezone the land in the Heritage Estates, a referral which it was bound to make. As at May 2007, there had been a long history of attempts on the part of the landowners in the Heritage Estates to persuade the State and the Council to rezone their land.

127 The EPBC Act decision was made after due consultation and compliance with the relevant statutory provisions. The actions taken subsequently to assist the landowners to unlock some value for their land were taken as a result of the Council’s *Caring for Our Country* application which, on the evidence, was not made for any reason other than in order to assist the landowners. The mechanisms chosen for making available Commonwealth funds were legitimate and orthodox and undertaken in compliance with the Commonwealth’s obligations to disburse Commonwealth funds in accordance with the relevant governing statutory provisions.

128 It is no doubt true that the Commonwealth took precautions to ensure that it did not breach the Constitutional guarantee. However, this is hardly a matter for which it can be legitimately criticised.

129 To my mind, the evidence did not support the applicants’ contention that an informal arrangement was made by the respondents designed to deprive the applicants of all value in their land and to avoid the Constitutional guarantee. I reject their contention that such an arrangement was made.’

1. There were two critical pieces of evidence on this topic, to both of which the primary judge referred. The first was the Council’s submission to the Federal Minister dated 3 March 2009, just a few days before his decision. It is apparent from it that the Council was aware of the consequences to the landowners if the Federal Minister did not give his approval. Furthermore, the Council was plainly concerned for the landowners’ welfare. It sought to persuade the Federal Minister that it would be beneficial that the land should ultimately be acquired. One paragraph of the submission read:

‘If the proposal is not ultimately approved, Council strongly believes joint Government acquisition would be an appropriate solution to allow the land to be managed for conservation purposes whilst alleviating the financial impacts on the landowners. If the Commonwealth does not take immediate proactive action to resolve the land ownership matter, I believe the continued preservation of the biodiversity values could be jeopardised.’

1. Whilst this is potentially consistent with the second interpretation of events we have just outlined, the difficulty is that what happened in response to it was not. When the Federal Minister made the decision on 13 March 2009 he had before him a Departmental brief. That brief canvassed a great deal of material but it also dealt expressly with the submission that there should be a joint acquisition of the land in these terms:

‘The department recommends that you do not entertain the possibility that the Commonwealth might purchase the land as a result of your decision. It is not government policy to acquire land purchased in the hope that it may be zoned for development when landowners’ speculations are not realised. Although the environmental significance of the site has been established through the EPBC assessment process, this process does not determine whether or not land is suitable for Commonwealth acquisition.’

1. What this says is that the necessary decision-making process to ascertain whether the land should be acquired had not been engaged at that point so that that matter could not be pursued. The appellants objected to the characterisation of them as land speculators. Whether that is so or not does not undermine what this memorandum shows about what the Department believed.
2. And, so it seems to us, the point that this distinct decision-making process had not been engaged, must be right. There was a substantial decision-making process which had to be enlivened under the Natural Heritage Act before any s 96 grant could be made. The difficulty for the appellants is that there is no trace of any such decision-making process taking place before 13 March 2009 and a great deal of evidence that it took place in 2011 when the Council eventually made its application under the ‘Caring for Our Country’ program.
3. We agree with the primary judge that far from establishing that the events which occurred from the commencement of the process under the EPBC Act through to the s 96 grant were a manifestation of a single decision to acquire the land, precisely the opposite is shown. The primary judge’s conclusion was correct.
4. At trial the appellants also sought to demonstrate illegality in the provision of financial assistance by the Commonwealth. The illegality was said to lie in breaches of s 44 of the *Financial Management and Accountability Act 1997* (Cth) and ss 19 to 21 of the Natural Heritage Act.The precise nature of this illegality was not in any way explained. For completeness, we therefore record that, like the primary judge, we discern no illegality of any kind. The allegation has no basis in the documents tendered at trial or in the testimony given. The cross-examination of the relevant official, Mr Taylor, the assistant secretary of the Department, did not establish any improper dealings. The relevant part Mr Taylor’s evidence was:

‘Mr King: Did you know as at 4 April 2012 that as a consequence of Minister Garrett’s decision the land of the land holders in the Heritages Estates had been reduced to a nominal value.

His Honour: I reject the question

Mr Taylor, he’s asking you about the decision of 13 March 2009, although he for some reason won’t say that. He wants to know whether you formed the opinion at some stage after that date that one of the consequences of that decision was to reduce the land in this estate to a nominal value? --- I understand that, you Honour. Thank you.

And so, the question is did you form that view at some stage subsequent to March 2009? --- I had no view in relation to the – the disposition of the land or the value of it. I mean, I was aware of broad concerns across the community, by all means, certainly that. But I’m not a valuer, and I don’t know what would have happened there.’

1. There is, therefore, no basis for concluding that the funding arrangement was part of some larger plan to evade or contravene the provisions of the *Financial Management and Accountability Act* *1997* (Cth) or the Natural Heritage Act*,* whatever those allegations meant.
2. The appellants’ second argument about acquisition must, therefore, also fail.

## 7. Just Terms (Grounds 2, 15 and 16)

1. There was a further debate as to whether, in any event, the terms provided were just terms (had there been an acquisition). The primary judge accepted at para [140] that as at 12 March 2009 the value of each lot was $2,500 to $5,000. Since the offers made were for $5,000 or $5,500 he concluded that even if there had been an acquisition to which s 51(xxxi) applied, just terms had been provided.
2. This involved a consideration of expert valuation evidence. The appellants had called Mr Rayner. He was asked to value four lots immediately prior to 13 March 2009. The lot number, the lot area and his valuation were as follows:

Lot 77 in DP 8770 – 961m2 – $16,500

Lot 333 in DP 8590 – 1,069m2 – $17,000

Lot 71 in DP 8772 – 790m2 – $16,000

Lot 11 in DP 8771 – 1,492m2 – $19,000

1. He also concluded that if the Council’s rezoning proposal had proceeded the values would have been:

Lot 77 – $145,000

Lot 333 – $155,000

Lot 71 – $145,000

Lot 11 – $160,000

1. In preparing his report Mr Rayner was told to take account of current zoning restrictions and also progress in revising the zoning. His report recorded the instructions which had been given to him as:

‘…You are asked to have regard to the market value and any potential value in relation to the land, including consideration of the pre-existing zoning, and progress in revising that zoning, announcements of the Council and progress towards the re-zoning to residential development status.’

1. Mr Rayner then took into account a number of comparable purchases. Without setting these out they spanned a range of between $500 and $87,000.
2. The Commonwealth called Mr Austin. He also proceeded by reference to comparable sales and he too examined in some detail the question of rezoning potential. He arrived at very different figures to Mr Rayner:

Lot 77 – $2,500

Lot 333 – $5,000

Lot 71 – $5,000

Lot 11 – $5,000

1. He gave detailed reasons for arriving at this view. At the trial, Mr Rayner and Mr Austin prepared a joint statement of the matters upon which they agreed and those upon which they disagreed. They agreed that the value that the land held was now largely nominal, a matter recorded by the primary judge at para [108]. Neither abandoned his position on the acquisition value.
2. The main difference between them concerned whether the future zoning potential had to be gauged by reference to a planning strategy called the Jervis Bay Settlement Strategy (which involved staged development over time) and the role of illegal land clearing in that process of assessment. Mr Rayner accepted neither of these matters. For his part Mr Austin also queried whether many of the comparable sales relied on by Mr Rayner had, in truth, been arm’s length transactions.
3. The primary judge dealt with this evidence at paras [106] to [108] and [140].

‘106 The applicants called as a witness Mr KM Rayner, a Certified Practising Valuer, who provided valuations of the applicants’ land. The respondents relied upon the expert report of Mr Austin who is also a Certified Practising Valuer. The two valuers conferred prior to the hearing and prepared a Joint Report dated 11 October 2013.

107 For present purposes, it is not necessary to discuss the evidence given by the valuers in any detail.

108 The Joint Report recorded that, after the EPBC Act decision was made, the market values of the lots in the Heritage Estates were nominal. Mr Rayner assessed them at figures ranging between $100 and $600 per lot while Mr Austin assessed each allotment as having a value of $500. The valuers also agreed that the possibility that the land would be rezoned so as to permit the construction of dwelling houses thereon ought not to be taken into account in valuing the land. Rezoning was nothing more than a possibility and ought not to be regarded as fairly within the basket of attributes both real and potential enjoyed by the land.

…

140 *“Just terms”* connotes fairness rather than compensation. Here, according to Mr Austin, the value of the applicants’ land as at 12 March 2009 (immediately before the EPBC Act decision was made) ranged from $2,500 to $5,000. Had the Commonwealth contravened or impaired the Constitutional guarantee, it seems to me that the price offered to the applicants by the Foundation constituted *“just terms”* within the meaning of s 51(xxxi) of *The Constitution*.’

1. His Honour did not give any reasons for rejecting Mr Rayner’s evidence as his Honour appears implicitly to have done at para [140]. There were, so it seems to us, at least three issues which needed to be resolved:

* What was the role of future zoning potential for both valuers? In this regard the last sentence of para [108] does not appear to us necessarily to be an accurate statement of the evidence.
* What was the role, if any, of Mr Austin’s contention that the value of the lots had been affected by illegal clearing and the concomitant potential for expensive make good notices?
* Was Mr Austin correct to use the Jervis Bay Settlement Strategy and its proposed process of staged development in relation to the issue of the potential for future rezoning?

1. It is not possible for this Court to determine what the correct answer to these questions is. We have not had the benefit of the trial submissions on which valuer was to be preferred and we have not seen them cross-examined. That said, neither are we satisfied that this issue has been sufficiently examined in the Court below. Had the issue arisen we would have remitted the matter for trial on the valuation questions on the basis that the primary judge’s reasons do not adequately expose his process of reasoning. There may also be much to be said for the view that the appropriate valuation date is 16 July 2000.
2. For all of those reasons, and despite the last point just made, we reject the appellants’ arguments based on s 51(xxxi).

## 8. Administrative Law Arguments (Grounds 7, 8 and 10)

1. In addition to their constitutional arguments the appellants raised a number of administrative law arguments. These were:

(a) ***The Power Argument*.** Here the appellants submitted that the EPBC Act did not extend to require authorisation of the Council’s zoning decision which was said to be amongst a class of decisions exempt from the decision-making processes erected by the EPBC Act;

(b) ***The Funding Argument.*** The appellants submitted that the funding which had been advanced under the agreement had been advanced in breach of the *Financial Management and Accountability Act 1997* (Cth) and the Natural Heritage Actbecause it was in contravention of s 51(xxxi); and

(c) ***The Relevant Considerations Argument.*** The appellants submitted that the Federal Minister had failed to take into account a relevant consideration by not having regard to the adverse socio-economic impact his refusal decision would have. Further, it was said that he had failed to take into account as a relevant consideration the fact that there was no, or no significant, impact on the viability of the habitat on Commonwealth land.

### (a) The Power Argument

1. We have highlighted already the distinction between that aspect of the Council’s proposal which related to the exercise by the State Minister of his legislative power under the provisions of the EPA Actto vary the zoning rules relating to the land in the Heritage Estates and the Council’s own proposal to carry out the infrastructure works required to support any such residential development.
2. The appellants now advanced an argument that the prohibitions in the EPBC Act did not apply, in terms, to the exercise by the State Minister of that power. Following the Court raising the matter in argument, they also submitted that if the EPBC Act did, on its proper construction, purport to regulate the ability of a State to exercise legislative power it would be constitutionally invalid. The invalidity was submitted to be a consequence of the inability on the part of the Commonwealth to legislate with respect to the content of State law. This involved an invocation of the principle of the immunity of instrumentalities established in *Melbourne Corporation v Commonwealth* [1947] HCA 26; (1947) 74 CLR 31.
3. The first argument should be accepted. The prohibitions in ss 18 and 26(2) are directed at ‘actions’ which have or will have significant various environmental effects. Section 523 contains the definition of ‘action’ and is set out above at [26].
4. It will be seen that the reference in s 523(1)(b) to a ‘development’ is certainly sufficiently wide to embrace the Council’s own proposed infrastructure works. It is likely that those works also fall within subparas (1)(c) and (d). It was assumed by the appellants before us that the rezoning proposal was also an action within the meaning of s 523 although the subparagraphs said to capture it were not identified (the appellants’ principal argument, at least orally and in their primary submissions, with which we deal below, was not that rezoning was not an action within s 523; rather it was that it was an action within s 523 carved out from it by s 524).
5. It appears to us that this assumption is unwarranted. A rezoning of land involves an amendment to a local environmental plan. In this case, it involves amending the plan so as to remove a prohibition on the granting of development consent and replacing it with a rule that permits the consent authority, here the Council, in its discretion to grant development consent. The relevant prohibitions were derived from ss 76A and 76B of the EPA Actwhich provided as follows:

‘76A Development that needs consent

(1) General

If an environmental planning instrument provides that specified development may not be carried out except with development consent, a person must not carry the development out on land to which the provision applies unless:

(a) such a consent has been obtained and is in force, and

(b) the development is carried out in accordance with the consent and the instrument.

(2) For the purposes of subsection (1), development consent may be obtained:

(a) by the making of a determination by a consent authority to grant development consent, or

(b) in the case of complying development, by the issue of a complying development certificate.

(3), (4) (Repealed)

(5) Complying development

An environmental planning instrument may provide that development, or a class of development, that can be addressed by specified predetermined development standards is complying development.

(6) A provision under subsection (5) cannot be made:

(a) (Repealed)

(b) if the development is designated development, or

(c) if the development is development for which development consent cannot be granted except with the concurrence of a person other than:

(i) the consent authority, or

(ii) the Director-General of National Parks and Wildlife as referred to in section 79B (3), or

(d) so as to apply to land that is critical habitat, or

(e) so as to apply to land that is, or is part of, a wilderness area (within the meaning of the *Wilderness Act 1987*), or

(f) so as to apply to land that comprises, or on which there is, an item of the environmental heritage:

(i) that is subject to an interim heritage order under the *Heritage Act 1977*, or that is listed on the State Heritage Register under that Act, or

(ii) that is identified as such an item in an environmental planning instrument, or

(g) so as to apply to land that is identified as an environmentally sensitive area in the environmental planning instrument that makes provision for the complying development.

A provision made under subsection (5) has no effect in relation to development or land at any time during which the development or land is development or land to which paragraph (a)–(g) applies.

Note. Further provisions concerning complying development are found in Division 3 of this Part.

(7)–(9) (Repealed)

76B Development that is prohibited

If an environmental planning instrument provides that:

(a) specified development is prohibited on land to which the provision applies, or

(b) development cannot be carried out on land with or without development consent,

a person must not carry out the development on the land.’

1. By s 74, an environmental planning instrument could be amended by making a subsequent environmental planning instrument. The person who matters and could, therefore, amend a local environmental plan was the State Minister administering the EPA Act. He or she could do so under s 70. This provided:

‘70 Making of local environmental plan

(1) After considering the Director-General’s report made under section 69, the Minister may:

(a) make a local environmental plan:

(i) in accordance with the draft local environmental plan as submitted by the council under section 68 (4), or

(ii) in accordance with that draft plan with such alterations as the Minister thinks fit relating to any matter which in the opinion of the Minister is of significance for State or regional environmental planning,

(b) direct that action be taken in accordance with subsection (3), or

(c) decide not to proceed with the draft local environmental plan.

(1A) Without limiting subsection (1) (a) (ii), the alterations that may be made by the Minister relating to any matters which in the opinion of the Minister are of significance for State or regional environmental planning may comprise changes of substance to the draft local environmental plan and may arise from submissions or otherwise from the Minister’s consideration of the matters in the draft plan.

(2) A local environmental plan shall apply to such area or part of such area as is described in that plan.

(3) The Minister may (but need not) direct the council to publicly exhibit, wholly or in part, a draft local environmental plan that has been altered pursuant to this section or section 68, and the provisions of this section and sections 66, 67, 68 and 69 shall, with any necessary adaptations, apply to that plan.

(4) Where the Minister decides to make a plan in accordance with subsection (1), the Minister may exclude certain provisions of the draft plan or exclude part of the land from the draft plan, or both (in this section referred to as *the deferred matter*) which, in his or her opinion, require or requires further consideration but which should not prejudice the making of the local environmental plan.

(5) The Minister may subsequently take action in accordance with this section in respect of the deferred matter as if it were a draft local environmental plan submitted under section 68 (4).

(6) Where the Minister decides not to proceed with a draft local environmental plan under subsection (1) (c), the Minister shall give such directions to the council as the Minister considers necessary in relation to that decision.

(7) The Minister shall inform the council of his or her decision under subsection (1) and, except where the Minister decides to make a local environmental plan in accordance with the draft local environmental plan as submitted by the council under section 68 (4), the reasons therefor, and may at the same time give directions to the council as to the procedure to be followed in connection with making his or her decision known to the public.

(8) Notwithstanding anything in this section and without affecting the power to make alterations pursuant to subsection (1), the Minister may make a local environmental plan with such alterations as the Minister thinks fit, being alterations that do not affect the substance of the provisions of the plan as submitted by the council or as altered pursuant to subsection (1).’

1. The Council did not have a direct role in this process beyond its responsibility for preparing a draft local environmental plan, pursuant to either ss 54 or 55. This draft would be forwarded to the Director-General of the Department under s 64, who, in turn, would prepare a report for the Minister, pursuant to s 69.
2. In this case, the effect of the rezoning as a matter of law would be that the existing prohibition on any development in the Heritage Estates imposed by s 76B would be replaced with a new prohibition on development unless Council’s development consent was first obtained, flowing from ss 76A(1) and 76B(b). This change to the legal landscape would have been brought about by an exercise of delegated legislative power by the State Minister under s 70.
3. Returning then to s 523 of the EPBC Act, we do not accept, and it was not suggested that we should, that an exercise of State legislative power which does not relate to any development in particular and which merely empowers a Council to grant its approval to future developments thereby engaging s 76A can be described as a project, development, undertaking or activity or series of activities within the meaning of s 523. Nor, should we say for completeness, do we accept that the Council’s role as a ‘consent authority’, or its obligation to prepare a draft planning instrument for the Minister, leads to any different outcome.
4. In *Save the Ridge Inc v Commonwealth* [2005] FCAFC 203; (2005) 147 FCR 97 the Full Court declined to decide whether an amendment to a local environmental plan was ‘action’ within the meaning of s 523. There are, with respect, some difficulties in determining precisely what was decided in that case. The matter concerned the posing of separate questions which related to whether the making of the amendment to the plan was ‘action’: see (2005) 147 FCR 97 at 99 [2] per Black CJ and Moore J. The trial judge had concluded that the action of amending the plan could have no impact on the environment within the meaning of s 28: see 102 [12]. The question before the trial judge was not whether the ‘action’ had an impact within the meaning of s 28 but whether it was an ‘action’. The Chief Justice and Moore J declined to answer the first question because (at 104 [17]) they did not think that the issue of whether there had been an ‘impact’ could be determined on assumed facts by means of a separate question. Emmett J, in dissent on this issue, proceeded on the same basis (that is to say, that the question was one about ‘impact’) but would have answered it ‘No’. It appears to us that the question which was answered by all four judges in *Save the Ridge* (whether the amendment had an impact on the environment within the meaning of s 28) was not the question which was formally posed (which was whether it was an ‘action’). This is made more complex because the Court then proceeded to determine that the amendment was not an ‘action’ because as a governmental decision it was carved out by s 524. As a matter of formality it is apparent that the Full Court made no finding about the content of s 523 and we are at liberty to decide that issue as we have above without proceeding inconsistently with *Save the Ridge*. It is true that our reasoning would have resulted in the answer to the first question in *Save the Ridge* being ‘no’ but it appears that this issue was not argued before the Full Court. That makes it unnecessary for us to express a view about the operation of s 524; the operation of the carve out from s 523 it contains does not arise for consideration because we do not accept that s 523 is itself engaged. There is, therefore, no need for us to express a view about the correctness of the Full Court’s approach to the operation of s 524 in the case before it. The parties proceeded on this basis and it is the appropriate course for us to adopt. In those circumstances, the actions of a State Minister in amending a zoning rule under the EPA Act is not ‘action’ within the meaning of s 523 and the prohibitions erected by the balance of the EPBC Act do not apply to such activity.
5. When the Council submitted its referral to the Federal Minister under the EPBC Act on 9 May 2007 it described the proposal in these terms:

‘Council is undertaking that may culminate [sic] in the rezoning of land from a rural to residential zone to enable the construction of up to 730 dwellings on 730 lots (recommendation 5 of the 1999 Commission of Inquiry (CoI)).

If the proposed rezoning proceeds as currently proposed, there will a requirement to construct the road network, undertake bushfire asset protection clearing and maintenance and provide service and infrastructure within the subdivision.

If the land is rezoned, it is intended that development would occur in four stages (CoI recommendation 6) subject to further investigations and pre-development water quality monitoring etc.’

1. It is apparent thereafter that the Federal Department concluded that ‘action’ under the EPBC Act was involved which consisted both of the infrastructure works *and* the rezoning. Typical of the process is a Departmental document concerning the assessment approach to be employed of 22 June 2007 which, in part, read:

|  |  |
| --- | --- |
| **Proposed action** | |
| **proposed action** | Rezoning and public infrastructure works to facilitate residential development of the Heritage Estate, Worrowing Heights, NSW. |
| **Referral decision: Controlled action** | |
| **status of proposed action** | The proposed action is a controlled action.  *The project will require assessment and approval under the Environment Protection and Biodiversity Conservation Act 1999 before it can proceed.* |
| **relevant controlling provision**s | The project is likely to have a significant impact on:   * Listed threatened species and communities (sections 18 & 18A) * Commonwealth land (section 26 & 27A) |
| **designated proponent** | Shoalhaven City Council |

(‘Controlled action’ need not here distract – it is defined in s 67 of the EPBC Act to be action that would be prohibited without approval under Pt 9).

1. This document was erroneous to the extent it suggested that ‘rezoning’ was an action regulated by the EPBC Act. It also erroneously identified the person doing the rezoning as the Council when that function rested in the State Minister. Both errors were then perpetuated throughout the remainder of the decision-making process. The detail of this may be safely omitted but it ultimately culminated in the Federal Minister’s decision of 13 March 2009 which it is now useful to set out in full:

|  |  |
| --- | --- |
| **DECISION TO REFUSE ACTION** | |
| **Heritage Estates Rezoning and Public Infrastructure Works, Facilitating Development of 730 Lots, Worrowing Heights, NSW (EPBC 2007/3448)**  This decision is made under (Section 130) of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).  **Proposed action** | |
| **person to whom the decision applies** | Shoalhaven City Council |
| **proposed action** | Rezoning and public infrastructure works to facilitate residential development of 730 lots at the Heritage Estates, Woorrowing Heights, NSW, as described in the referral of 7 May 2007. |
| **Refusal decision** | |
| **relevant controlling provision**s | * Listed threatened species and communities (sections 18 & 18A) * Commonwealth land (sections 26 & 27A) |
| **Decision on action: Refusal** | |
| **Decision** | Refuse approval of the action |
| **Person authorised to make decision** | |
| **name and position**  **signature**  **date of decision** | PETER ROBERT GARRETT  Minister for the Environment, Heritage and the Arts  [Signed]  13 March 2009 |

1. In our opinion, to the extent that this decision purported to refuse permission to the State Minister to make an amendment of the Plan it was ultra vires. Such an approval was not needed because amending a plan is not an ‘action’ within the meaning of s 523 of the EPBC Act. Put another way, since approval was not needed for the rezoning the Federal Minister had no power either to give or refuse it. We have set out s 133(1) of the EPBC Act above at [30] (which confers the power on the Federal Minister to grant approval). It is clear that it is only enlivened by the presence of ‘controlled action’ and, hence, for the reasons already given, on the presence of ‘action’ within the meaning of s 523.
2. The situation then is that a rezoning by the State Minister amending a local environmental plan under s 523 is not an ‘action’ under s 523. These conclusions, therefore, make it unnecessary to consider the appellants’ additional argument, advanced only at the hearing of the appeal (and at the suggestion of the Court), that the EPBC Act was invalid to the extent that it purported to interfere with State legislative activity by prohibiting the making of a State law. The EPBC Act does not, on its proper construction, do this. It may be doubted, we think, that a Commonwealth law that said, in terms, that a State could not make a law could be valid but this need not now be finally decided. Commonwealth law renders inconsistent State law inoperative by reason of s 109 of the *Constitution*. But it would appear to us likely to lie outside the competence of any entity in the Federation to tell other entities what laws they can make.
3. The consequence of the conclusion we have reached is that the Federal Minister’s decision is partially ultra vires to the extent it deals with the rezoning proposal. We reject the submission that the Court should only set aside the decision in its entirety. The erroneous assumption that the zoning process required approval is plainly severable from the balance of the decision.
4. The remedial issues which flow from this are not straightforward. There are several issues which arise. First, the effect of a declaration that the refusal is partially invalid will leave the State Minister free, if he wishes, to rezone the land residential but the Council will remain prohibited by the EPBC Act from installing any infrastructure to support any subsequent residential development. If the land is rezoned, what the Council will do when presented with development applications seeking approval under s 76B for the construction of homes unserviced by infrastructure is not clear but we cannot exclude the possibility that some form of residential development may be approved, albeit necessarily rather basic.
5. Secondly, it would not have been possible for the Council to recast its referral so that instead of seeking approval for the rezoning (which the State Minister did not need) it sought approval for the actual construction of homes instead. This is because the terms of s 68 of the EPBC Act permit a referral only to be made by the person who is proposing to take the action:

‘68 Referral by person proposing to take action

1. A person proposing to take an action that the person thinks may be or is a controlled action must refer the proposal to the Minister for the Minister’s decision whether or not the action is a controlled action.

…’

1. The Council is not proposing to construct the homes so this is not something which it could refer. This makes it impossible to suppose that relief might be declined on the basis that the referral (and, with it, the refusal decision) could simply be reworded to replace ‘rezoning’ with ‘a proposal to develop residential lots’. The invalidity is not merely, therefore, to be seen as formal or technical.
2. Thirdly, on the other hand, it is unclear whether the appellants would themselves now require approval under the EPBC Act if the rezoning proceeded and the Council granted development consent. Whilst it may be doubted that the construction of a single dwelling could constitute ‘an action having significant impact’ within the meaning of ss 18 or 26(2) even though each individual development would be an action under s 523(1)(b) (‘a development’), it is not clear, and we do not determine, whether the construction of several such dwellings by different people on disparate lots would constitute an ‘activity or series of activities’ within the meaning of s 523(1)(d).
3. Fourthly, these three considerations weigh both in favour of and against the making of a declaration. They weigh in favour because they may suggest that the grant of relief would not necessarily lack utility. They weigh against because if relief be granted it will generate, or at least continue, a period of regulatory uncertainty.
4. Fifthly, in the period between the making of the Federal Minister’s refusal decision and the commencement of the appellants’ proceedings the voluntary acquisition program was commenced and people have acted on the faith of it. There is a sense in which it may be seen as unfair on those who have accepted the offers (some of whom are class members) if, now, gates are opened which may lead to an escalation in the value of the land which has already been sold.
5. Sixthly, these uncertainties would not exist if the declaratory relief had been sought promptly and, in any event, before 2011 when the voluntary acquisition program commenced. Whilst one can see that it was not until after 2011 that the appellants were in a position to run their second argument that the voluntary acquisition program was invalid as a result of s 51(xxxi), we have rejected that argument. We do not accept it provides a sufficient reason not to have sought administrative law relief as soon as the refusal decision was made or, in any event, before 2011 when it became obvious that steps were being taken in reliance upon it.
6. Seventhly, whilst it is possible to think that a declaration might have utility because, as touched upon above, it will provide some clarity, on balance we are not satisfied that this is factually so. This is because the prohibitions which bar significant action do not emerge from the refusal decision under s 133 but from the terms ss 18 and 26 themselves. A refusal decision has no direct legal consequences. Regardless of what this Court declares about the refusal decision, therefore, ss 18 and 26 will continue to prevent action having, or likely to have, a significant effect.
7. The grant of declaratory relief is discretionary. Although the appellants submitted that they were entitled to the declaration almost as of right, this submission is plainly wrong. In all of the above circumstances, we do not think it would be consistent with good administration to declare the refusal decision partially invalid. There has been delay and it would achieve nothing. We should be clear that despite refusing declaratory relief we regard the State Minister to be at liberty to rezone the land if he wishes.

### (b) The Funding Argument

1. The appellants’ submission was that to the extent that decisions had been made by the Federal Minister to fund the voluntary acquisition program these were ultra vires the *Financial Management and Accountability Act 1997* (Cth) and the Natural Heritage Act. This argument proceeded on the premise that an acquisition contrary to s 51(xxxi) had been established. For the reasons we have already given, the arguments which would make good that premise should be rejected. It is not, in that circumstance, necessary to consider this aspect of the matter any further.

### (c) The Relevant Considerations Argument

1. There were two matters which were said to be relevant and which were alleged not to have been considered by the Federal Minister in making his refusal decision of 13 March 2009. These were:

(a) the adverse socio-economic impacts on, and substantial losses to, the class members caused by the refusal decision. In this regard, it was said that the Federal Minister had failed to have regard, or sufficient regard, to a report called the Stubbs report (which had been prepared as part of the process leading to the Federal Minister’s decision), the views of the Shoalhaven Landowners Association or those of the Council; and

(b) the fact that there would be no, or no significant, impact on the land as a viable habitat. In this regard, it was said that the Federal Minister had failed to take into account, or sufficiently into account, a report prepared by Ms Gabrielle Kibble in 1994 for the NSW Department of Planning.

1. These arguments both involve two steps: first, that the nominated matter was relevant in an administrative law sense; and, secondly, that it was not considered.
2. The concept of a relevant consideration in administrative law denotes a matter of which a decision-maker is bound to take account. This is a legal issue to be determined from the terms of the law under which the decision is made. This will include those matters which the law explicitly says must be taken into account but also other matters when this is discernible from the subject-matter, scope and purpose of the law: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-40 per Mason J.
3. The EPBC Act makes elaborate provision for what the Federal Minister is to take into account in reaching a decision. In particular he is required to consider as ‘mandatory considerations’ the economic and social matters arising from the proposal (s 136(1)(b)). Further, he is required by s 136(1) in approving action covered by ss 18, 19 or 26 to take account of ‘matters relevant to any matter protected’ by those provisions. This would include the extent of any environmental impact.
4. In those circumstances, we would accept that both the socio-economic and environmental consequences of the approval were mandatory considerations in the *Peko-Wallsend* sense.
5. The Federal Minister is also bound to consider any public environment report which has been prepared under s 99: s 136(2)(c)(i). Such a report was prepared in this case and contained the report which had been prepared by Dr Stubbs and upon which the appellants rely. In that sense, we accept that the Federal Minister was bound to take account of his report.
6. It was possible for the Federal Minister to call for public comment on the proposal under s 131A and, if he did, he was bound to take any submissions he received into account: s 136(2)(f). In this case, however, he decided not to call for public comment following a Departmental recommendation to that effect dated 5 February 2009. Whilst the Department had come into possession of a number of submissions during the referral process, these were not s 131A submissions and he was not explicitly required to take them into account. Given that the activation of a public submission process was optional for the Federal Minister we do not think that it can be implied in a *Peko-Wallsend* sense that he was bound to take account of submissions not flowing from the s 131A process. For that reason, while he had possession of the submission from the Landowners Association and the Council he was not obliged to take these into account. Nor, for a similar reason, was he obliged to take into account Ms Kibble’s report of 1994.
7. We are comfortably satisfied, however, that the Federal Minister did, in fact, take into account each of the public environment report, the views of the Landholders Association and the Council and the report of Dr Stubbs. The Federal Minister was given a proposal decision brief for his consideration and a minute of the decision. We infer that he read the brief. There was no suggestion that he had not. It contained comprehensive and detailed consideration of both the socio-economic and environmental impacts of the decision. It included the reports of Dr Stubbs and the submissions made by the Landholders Association and the Council. These matters were before the decision-maker and it cannot be said that they were not considered. Indeed, it is clear from the briefing note that the Federal Minister was very much aware of the position of the Landowners Association and the Council. Nor do we accept, even assuming it gave rise to a ground of review, that the regard which was had to these matters was not sufficient.
8. We are unable to discern whether Ms Kibble’s report was before the Department or the Federal Minister. Assuming in the appellants’ favour that it was not, the claim still fails because it was not a mandatory consideration in the *Peko-Wallsend* sense.

## 9. Unjust Enrichment (Ground 9)

1. This allegation was made at para 3 of the amended statement of claim. It related only to the claims of the 400 or so lot owners who had accepted the Foundation’s offer and sold their land. The allegation was that they had sold at an undervalue and hence that the Foundation had been unjustly enriched.
2. As the primary judge correctly observed, this claim was wholly unreal. It was not in dispute by the end of the trial that the lots were essentially worthless. Indeed, this worthlessness was the basic thrust of the entire acquisition case. How the sales at $5,000 could have been at an undervalue in that circumstance eludes us. Indeed, we have difficulty understanding how a claim that the value of land had been reduced to nil could be pursued alongside a claim that a sale price of $5,000 was at an undervalue. In this regard, the interests of the lot holders who had sold appear directly contrary to those who had not (at least the way the unjust enrichment claim was formulated). There is no substance in this ground which should be rejected.

## 10. Publication orders relating to class action (Ground 11)

1. This was not pursued in the further amended notice of appeal.

## 11. The Multiple Judgment Argument (Ground 12)

1. His Honour delivered judgment on 24 December 2014. There are two versions of this judgment extant. One is the hardcopy which was physically handed to the parties on that day. The second is another version bearing the same date which was distributed to the parties on 6 January 2015. It included corrections by the primary judge to the earlier version. The orders contained in this judgment were not entered until 9 April 2015.
2. We were provided with a copy of his Honour’s judgment which was marked up to reflect the differences between these two versions. The main difference is the absence of the sixth applicant, Mr Talarico, as a party on the face of the judgment. Any initial sense of alarm at this is, however, altogether allayed when one brings to account, as one must, that the appellants’ lawyers had left Mr Talarico as a party off on their own pleadings. One can hardly blame the primary judge, in that circumstance, for assuming that the applicants’ lawyers had correctly named their own clients on the face of their pleadings.
3. The remaining differences between the judgments may be grouped into two classes: trivial and less trivial. Into the trivial category can be placed the following:

* the substitution of the word ‘their’ and ‘they’ for ‘its’ and ‘it’ in para [21];
* the addition of the words ‘Rural 1(a) (Rural “A” (Agricultural Protection) Zone) and’ in para [30];
* the deletion of ‘(the controlled action decision)’ from para [48] as a defined term;
* the deletion of ‘I shall return to that meeting later in this section of these Reasons’ in para [44] (his Honour did not, in fact, so return);
* the addition of the word ‘Agreed’ in para [54];
* the addition of the word ‘Proposed’ in front of ‘Decision Brief’ in paras [54] and [56];
* the addition of the word ‘proposed’ in front of ‘decision’ in para [62];
* the substitution of the phrase ‘a referral which it was bound to make’ for the phrase ‘as it was bound to do’ at para [126];
* the capitalisation of the word ‘Constitutional’ in paras [135] and [138];
* the addition of the words ‘and afterwards’ and ‘so as to permit the construction of dwelling houses thereon’ in para [137];
* various minor renumberings in paras [143] to [147]; and
* the deletion of ‘clearly’ in para [147].

1. Into the less trivial category may be placed three paragraphs which, marked up to show the differences, are as follows:

‘20 Finally, the applicants claim that the respondents have been unjustly enriched at the expense of the landowners in the Heritage Estates because **the State ~~it~~** has acquired land in the Heritage Estates at a significant undervalue **and the other respondents have acquired other advantages**.

23 It will be necessary also to consider the claim for unjust enrichment against the **respondents and against the** State **in particular**.

149 Only one of the applicants (Mr **Talarico** **~~Massaioli~~**) has accepted the Foundation’s offer to purchase land in the Heritage Estates.’

1. It will be seen that the changes to paras [20] and [23] reflect the fact that the unjust enrichment claim was brought against the Commonwealth, New South Wales and the Foundation and not just the State. The changes to para [149] involve the addition of Mr Talarico (who, as mentioned above, had been left off as a party).
2. Whilst these are not merely stylistic neither are they substantive. It is not in doubt that a superior court may revise its reasons for judgment although the power to do so does not come, as the Commonwealth submitted, from the slip rule (which is about orders and not reasons). The power is instead most likely implied in the *Federal Court Rules 2011* (Cth): *Todorovic v Moussa* [2001] NSWCA 419; (2001) 53 NSWLR 463 at 469 [50] per Beazley JA; *Bell v Veigel* [2008] NSWCA 36 at [221] per Mason P (Giles and Tobias JJA agreeing); *Tre Cavalli Pty Ltd v Berry Rural Co Operative Society Ltd* [2013] NSWCA 235 at [54] per Gleeson JA (McColl and Leeming JJA agreeing).
3. The same authorities establish that the power does not extend to altering the substance of reasons which have already been given. The extent of the formal changes which may be made is difficult to predict in practice because of the unstable nature of the distinction between form and substance. Further, there may well be differences in approach between reasons delivered orally and those delivered in writing (although we express no concluded view on that matter).
4. In this case, we do not think that the primary judge revised the substance of his reasons for judgment in any way. Even if he had, the outcome would not be, as the appellants suggested, that the second version of the judgment was inefficacious but only that the revised elements in it which went beyond acceptable revision would simply be ignored in this Court: *Todorovic* (2001) 53 NSWLR 463 at 469 [53].
5. The variations were not substantial in the requisite sense. Even if one ignored the elements of the judgment which were varied, this would have no dispositive effect upon the appeal.
6. On 8 January 2015 his Honour delivered a judgment dealing with the class action consequences flowing from his judgment of 24 December 2014: *Esposito v Commonwealth of Australia* [2015] FCA 3. It was said that his Honour had no power to do so as he was functus officio. The orders had not, by then, been entered so this submission is simply incorrect. His Honour remained entitled to make further orders or vary the orders he had already made: r 39.04 of the *Federal Court Rules 2011* (Cth).
7. We reject Ground 12.

## 12. Delay (Ground 13)

1. Next it was suggested that his Honour had erred in having told the parties that judgment would be delivered in December 2013 and then, after the passing of a number of other subsequent dates upon which his Honour had also said judgment would be delivered, did not deliver judgment until 24 December 2014. We did not apprehend this argument to have been pursued on the hearing of the appeal.

## 13. Rulings on Evidence (Ground 14)

1. By ground 14, the appellants contended that the primary judge had erred in failing to admit into evidence:

(a) the Department of Land’s valuation summaries for adjoining blocks of land;

(b) valuation evidence of Hyams;

(c) evidence as to a minerals licence granted in respect of the land called PEL 469;

(d) ‘the Stocklands evidence’;

(e) the gazettal of roads by the Council; and

(f) ‘the affidavit evidence of the Appellants’.

1. At the hearing of the appeal (a) was not pressed. In relation to (b) and the related written submission that the primary judge had refused to admit Ex J pp 301-302, it transpired that the appellants had withdrawn the tender of this material at trial. As to (c), this was in evidence as Ex H. Why this was inadmissible was not explained. As to (d), the appellants did not identify what this was but evidence about the redevelopment of land nearby the Heritage Estates by Stockland was Ex L. Why this was inadmissible was not explained. In their written submissions, the appellants advanced no argument about (e) and (f), which we consider no further. They did raise other evidentiary matters not comprised in the final form of the notice of appeal. We do not consider those. Ground 14 should be dismissed.

## 14. The Valuation Evidence (Grounds 15 and 16)

1. The appellants contested his Honour’s treatment of the expert evidence. There is no need to deal with this ground in light of our conclusion at [92] that his Honour’s reasons about that topic were not sufficient.

## 15. Traders Point (Ground 17)

1. This was not pursued in the further amended notice of appeal.

## 16. Pleading Issues (Ground 18)

1. Prior to the trial, the primary judge had refused the appellants leave to amend their statement of claim by the insertion of a new para 10, and consequentially amend paras 11, 13 and 14. Further, his Honour struck out paras 11 to 14 of the statement of claim. They also sought to make ancillary amendments to their originating application. This application the primary judge partly refused: *Esposito v Commonwealth of Australia* [2013] FCA 1039.
2. Paragraphs 10 to 14 involved a claim of misrepresentation against various of the respondents. Its basic point was that the letters offering $5,000 per lot sent by the Foundation after 2012 were misleading because the land was worth more. However, the loss which was then particularised was the devaluation to the land caused by the EPBC Act decision in 2009. As the primary judge correctly observed this makes no sense. Letters sent in 2012 and 2013 cannot cause loss in 2009. His Honour was correct not to permit this pleading.
3. It is likely that leave to appeal this order is necessary as it was a matter of practice and procedure, was interlocutory in nature and was out of time. Ultimately, leave was sought in the present proceeding when notices of objection to competency were filed. Leave should be refused. The decision is not attended by any doubt. Nor could it have made the slightest difference when the primary judge ultimately found that the lots were valueless.

## 17. Orders

(1) The appeal be dismissed with costs.

(2) The application for an extension of time for leave to appeal be dismissed with costs.

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| I certify that the preceding one hundred and fifty-one (151) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop, and Justices Flick and Perram. |

Associate:

Dated: 17 November 2015