SUPREME COURT OF QUEENSLAND

CITATION:	*Pauls Ltd v Dwyer & Ors* [2002] QCA 545
PARTIES:	**PAULS LIMITED** ACN 009 698 015 (applicant/respondent) v **JENNIFER MARY DWYER** **ANDREW DOUGLAS CAMERON** **PETA GILLIAN CATTO** **PAULS TRADING PTY LTD** ACN 009 804 077 **AKW INVESTMENTS PTY LTD** ACN 003 191 795 **ALLISTAIR HAZARD** **RICHARD KIRKBY** **HAZEL LILIAN NEILD** **DAVID TWEED** **WILLIAM R CAMERON** **ROBERT JOHN CHARLES CATTO (A/c THE RAGLAN SUPERANNUATION FUND)** **PAMELA WENDY ETHERIDGE** **LUCAS INVESTMENTS PTY LTD** ACN 008 404 911 **SUPER JOHN PTY LTD** ACN 000 375 093 **BATOKA PTY LTD** ACN 002 904 930 **THE AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** (respondents) **MILLY ELKINGTON** **GORDON BRADLEY ELKINGTON** **ROBERT JOHN CHARLES CATTO** (respondents/appellants) **ATTORNEY-GENERAL OF THE COMMONWEALTH** (intervenor)
FILE NO/S:	Appeal No 3262 of 2001 Appeal No 4152 of 2001 Appeal No 4345 of 2001 SC No 8241 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 December 2002
DELIVERED AT:	Brisbane
HEARING DATE:	18 September 2002

JUDGES: Davies and Jerrard JJA and Jones J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **Appeals numbered 3262 of 2001, 4152 of 2001 and 4354 of 2001 are dismissed.**

CATCHWORDS: CORPORATIONS - TAKE-OVER OFFERS - TAKE-OVER OFFERS AND STATUTORY CONTROL OF SHARE ACQUISITION - STATUTORY CONTROL OF SHARE ACQUISITION - where the respondent sought to acquire preference shares held by the appellants - where the respondent required to give fair value for the shares sought to be acquired - where the elimination of independent preference shareholders would give an administrative cost saving to the respondent - whether that cost saving should be taken into account in assessing fair value

CONSTITUTIONAL LAW - OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION - POWERS WITH RESPECT TO PROPERTY - POWER TO ACQUIRE PROPERTY ON JUST TERMS (CONSTITUTION, s 51(xxxi)) - JUST TERMS - PARTICULAR CASES - OTHER CASES - where the respondent sought to acquire preference shares held by the appellants - where the respondent required to give fair value for the shares sought to be acquired - where the elimination of independent preference shareholders would give an administrative cost saving to the respondent - whether the acquisition is not on just terms if that cost saving is not taken into account

CORPORATIONS - TAKE-OVER OFFERS - TAKE-OVER OFFERS AND STATUTORY CONTROL OF SHARE ACQUISITION - STATUTORY CONTROL OF SHARE ACQUISITION - where the respondent sought to acquire preference shares held by the appellants - where the respondent required to give fair value for the shares sought to be acquired - where the elimination of independent preference shareholders would give an administrative cost saving to the respondent - where one appellant submits the acquisition is not on just terms within s 51(xxxi) of the *Commonwealth Constitution* if that cost saving is not taken into account - whether if the acquisition is not on just terms the acquisition is invalidated or compensation is required to be paid

CORPORATIONS - TAKE-OVER OFFERS - TAKE-OVER OFFERS AND STATUTORY CONTROL OF SHARE ACQUISITION - STATUTORY CONTROL OF SHARE ACQUISITION - where the respondent sought to acquire preference shares held by the appellants - where the

respondent engaged an expert to conduct a draft valuation - where the respondent then sought a report from that expert - whether the expert's report lacked independence

CORPORATIONS - SUPERVISION, REGULATION AND CORRECTION - IRREGULARITIES IN PROCEEDINGS - VALIDATING PROVISION - PROCEDURAL IRREGULARITY - where the respondent failed to disclose information known to it - whether that failure was a procedural irregularity that may be excused

PROCEDURE - COURTS AND JUDGES GENERALLY - JUDGES - DISQUALIFICATION FOR INTEREST OR BIAS - IN GENERAL - OTHER MATTERS - where ground of appeal that the learned primary judge was biased - where the question of bias is irrelevant to the appeal

PROCEDURE - COSTS - DEPARTING FROM THE GENERAL RULE - POWERS OF COURT - where application against 90 per cent shareholder pursuant s 664F of the *Corporations Act* 2001 (Cth) - whether the 90 per cent shareholder should pay the appellant's costs of the appeal

Commonwealth Constitution, s 51 (xx), s 51(xxxi), s 51(xxxvii)
Corporations Act 2001 (Cth), Part 6A.2, s 664A, s 664C, s 664E, s 664F, s 667AA, s 667C, s 1322, s 1350

Australian Tape Manufacturers Association Ltd v The Commonwealth (1993) 176 CLR 480, applied
Capricorn Diamonds Investments Pty Ltd v Catto & Ors (2002) 41 ACSR 376, considered
Emerald Quarry Industries Pty Ltd v Commissioner of Highways (SA) (1979) 142 CLR 351, considered
Mutual Pools & Staff Pty Ltd v The Commonwealth (1994) 179 CLR 155, applied
Pauls Ltd & Anor v Elkington (2001) 189 ALR 551, considered
Pauls Ltd & Anor v Elkington [2001] QCA 414; Appeal No 680 of 2001, 2 October 2001, applied
Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands [1947] AC 565, considered
Re Goldfields Kalgoorlie Ltd and the Corporations Law; Winpar Holdings Ltd v Goldfields Kalgoorlie Ltd (2000) 176 ALR 86, considered
Re Goodyear Australia Ltd (2002) 167 FLR 1, considered
Teh v Ramsay Centauri Pty Ltd (2002) 42 ACSR 354, considered

COUNSEL: N Cotman SC for the appellant Milly Elkington
Gordon Bradley Elkington appeared on his own behalf
Robert John Charles Catto appeared on his own behalf

G J Gibson QC, with K N Wilson, for the respondent
D M J Bennett QC, with G A Hill, for the intervenor

SOLICITORS: Stephen Blanks & Associates (Sydney) for the appellant Milly Elkington
Gordon Bradley Elkington appeared on his own behalf
Robert John Charles Catto appeared on his own behalf
Biggs & Biggs Lawyers for the respondent
Australian Government Solicitor for the intervenor

[1] **DAVIES JA:** These are three appeals against a declaration by the Supreme Court on 13 March 2001 that the price of $2.57 per share represents fair value for the preference shares in Pauls Victoria Limited sought to be acquired by the respondent. His Honour no doubt intended thereby, as he was obliged to do by s 664F(3) of the *Corporations Law* (Vic) to approve the acquisition by the respondent of preference shares held by the appellants and others in Pauls Victoria Limited on the terms set out in the respondent's compulsory acquisition notices of 25 July 2000. It is common ground between the appellant Milly Elkington and the respondent that that appellant's appeal, which was instituted before 15 July 2001, was continued under the *Corporations Act* 2001 (Cth). The other appeals were under that Act.

[2] Before turning to the grounds of appeal it is necessary to say something about the circumstances in which the acquisition the subject of these appeals was sought to be made. The respondent and its wholly owned subsidiary Pauls Trading Pty Ltd were together the owners of all the issued ordinary shares in Pauls Victoria Ltd, a total of 24,716,071, and 13,397 of a total of 37,660 issued preference shares in that company. The appellants each owned some of the other preference shares in that company. It is common ground that the respondent was a 90 per cent holder within the meaning of Part 6A.2 of both the *Corporations Law* and the *Corporations Act*.

[3] Acting in purported compliance with s 664C of the *Corporations Law* the respondent, on 25 July 2000 lodged with ASIC and, by letter of that date, gave to each of the appellants and to the other holders of preference shares other than itself and Pauls Trading Pty Ltd, a compulsory acquisition notice in the prescribed form containing the matters referred to in subsection (1) of that section and a copy of a report prepared by a person nominated by ASIC, Mr Selak of Ferrier Hodgson, stating that in his opinion the terms proposed in the notice gave a fair value for the securities concerned and setting out his reasons for forming that opinion. It was also accompanied by an objection form which the appellants and others used to object to the acquisition pursuant to s 664E. The report which on its face complied with s 667A was dated 24 July 2000. Also accompanying the notice was a much more detailed valuation of the shares sought to be acquired, also by Mr Selak, bearing a typed date of June 2000 and apparently sent to the respondent by Mr Selak on 30 June 2000.[1]

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[1] Although that valuation is not referred to separately in the letters of 25 July 2000, it is common ground that a copy of it was sent with each of those letters. It may be inferred from this that the respondent intended it to be included in the description of "an independent expert's report … in terms of Section 667AA of the Law" described in each of the letters of 25 July 2000.

[4] In fact the sequence with respect to the engagement by the respondent of Mr Selak appears to have been as follows. On 27 March 2000, having resolved, subject to valuation, to compulsorily acquire the preference shares in Pauls Victoria Limited which it did not effectively then own, the respondent requested ASIC to nominate a list of persons to prepare an expert's report pursuant to s 667AA(1) of the *Corporations Law*. On 5 April 2000 ASIC nominated a panel of three experts from whom, on 13 April 2000 the respondent engaged Ferrier Hodgson. On 30 June 2000 Ferrier Hodgson (Mr Selak) sent to the respondent a draft valuation, subject to verification of facts. The respondent then sought from Mr Selak a report in terms required by s 664C and s 667A, having indicated a proposed compulsory acquisition at the higher end of a range of values stated by Mr Selak in his valuation. Mr Selak then furnished such a report dated 24 July 2000. As I have mentioned, copies of both the detailed valuation and the report of Mr Selak accompanied the compulsory acquisition notice of 25 July 2000.

[5] I mention all of this because the facts that the respondent had engaged Mr Selak to provide a valuation before it decided what amount it would offer, and that it then made its offer at a price at the higher end of Mr Selak's valuation range, were said by the appellants to invalidate the compulsory acquisition. This was apparently because, it was contended, Mr Selak's report lacked independence and was therefore not a report which complied with the Law or the Act. That was one of the bases of objection and of the grounds of this appeal.

[6] A second ground of appeal was that the cash sum for which the respondent proposed to acquire the shares, $2.57 per share, was not fair value for them within the meaning of that term in s 667C(1).[2] The term "fair value" was not defined but this subsection was and is in the following terms:

> "To determine what is fair value for securities for the purposes of this Chapter:
> (a) first, assess the value of the company as a whole; and
> (b) then allocate that value among the classes of issued securities in the company (taking into account the relative financial risk, and voting and distribution rights, of the classes); and
> (c) then allocate the value of each class pro rata among the securities in that class (without allowing a premium or applying a discount for particular securities in that class)."

[7] Because of arguments advanced by the appellants Dr Elkington and Mr Catto it is necessary to add that s 667C(2) provided and provides:

> "Without limiting subsection (1), in determining what is fair value for securities for the purposes of this Chapter, the consideration (if any) paid for securities in that class within the previous 6 months must be taken into account."

[8] The principal argument on this ground concerned the interpretation of s 667C(1) and in particular paragraph (a) thereof. That arises in the following way.

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[2] The relevant provision at the time of valuation, notice of compulsory acquisition and judgment was s 667C of the *Corporations Law*. Section 667C of the *Corporations Act*, which replaced it on 15 July 2001, is in identical terms.

[9] The preference shares of Pauls Victoria Limited were seven per cent non redeemable $2 cumulative preference shares. Other than in a winding up, where the maximum amount payable to preference shareholders was the face value of those shares, the preference shareholders were not entitled to participate in any further distributions of profits or assets and there was no entitlement to capital growth. The voting rights attached to the preference shares were very limited. They had certain rights in the event of reduction of share capital but that was not relevant in order to value them in the present situation.

[10] Mr Selak assessed the value of the company as a whole by capitalization of future maintainable earnings. In his written submissions Mr Cotman SC, for the appellant Milly Elkington, submitted that that was not the correct basis for valuing the shares, and that a correct valuation would have been based on what an alternative purchaser would have paid, a basis rejected by Mr Selak. However in his oral submissions Mr Cotman SC accepted the correctness of the maintainable earnings basis, submitting only that, in arriving at a valuation on that basis, Mr Selak should have added an amount representing administration costs which would be saved in consequence of the acquisition.

[11] Dr Elkington made similar submissions about the addition of an amount representing the administration costs and, for a reason which he did not make clear, sought to attribute the whole of the amount to the preference shares. He also submitted that Mr Selak, in acting under s 667C(1)(b), failed to and should have taken into account the voting rights of the preference shares, evidence of previous offers to buy those shares and evidence of sales of minority shares in other companies. Submissions similar to those referred to in the last sentence were also made by Mr Catto.

[12] Having arrived at a value of the company as a whole Mr Selak then allocated the value among the classes of issued shares by saying, in effect, that the value of preference shares must be fixed by a calculation based on capitalization of maintainable earnings for those shares and that the value of the company as a whole must be allocated by deducting that amount from the value of the company as a whole and allocating the remaining value to the ordinary shareholders. He then allocated the value of the preference shares as a whole among all preference shareholders equally without any premium or discount for the fact that the appellants and the other preference shareholders, other than the respondent and Pauls Trading Pty Ltd, were minority shareholders who objected to the acquisition.

[13] The administration costs which it was submitted could be saved by the acquisition reflected the fact, it was said, that there would be no need to maintain separate administrative arrangements for preference shares. It was submitted that there was evidence from which the learned trial judge could have found that this saving represented a capitalized sum of $20,000. And Mr Cotman SC submitted that there was evidence from which it should have been concluded that either 90 per cent or 50 per cent of this cost saving should be allocated to the preference shares. If all of those contentions are correct, he submitted, the price contained in the compulsory acquisition notice was not fair value for the shares sought to be acquired.

[14] A third ground of appeal, relied on only by Milly Elkington, was that an acquisition of shares pursuant to Chapter 6A was an acquisition of property within the meaning of that phrase in s 51(xxxi) of the *Commonwealth Constitution* and that such an

acquisition is not on just terms within the meaning of that paragraph if it permits an acquisition which does not take into account that saving in administration costs.[3] A consequence of this submission, if correct, is that a further question arises whether that would invalidate the acquisition under Chapter 6A or merely require payment of compensation pursuant to s 1350 of the *Corporations Act*.

[15] These were the principal grounds of appeal. As that which occupied most of the argument, and which appears to give rise to most difficulty, is the second of those which I have stated, the meaning and application of s 667C(1), it is convenient to discuss it first.

Fair value

[16] The respondent's entitlement to acquire the appellants' shares arose, subject to the appellants' rights of appeal, on 13 March 2001, the date on which the court approved the acquisition: s 664A(3)(b). However the question which arose for the expert, Mr Selak, in his report of 24 July 2000, was whether the terms proposed in the notice of acquisition gave fair value for the shares sought to be acquired: s 667A(1)(b). So the question what is fair value for the purposes of Chapter 6A was what was the fair value for those shares as at the date of notice of compulsory acquisition.[4]

[17] It may be accepted that, if the acquisition went ahead, there would, in consequence, be some savings to Pauls Victoria Limited and consequently to the respondent by virtue of the elimination of an independent group of preference shareholders. These were stated by Mr Ryan in his report of 9 January 2001 to the solicitors for the appellant Milly Elkington[5] to be the following:

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3 An appeal by that appellant on the ground that the acquisition, then pursuant to Part 6A.2 of the *Corporations Law*, came within s 51(xxxi), was rejected by this Court in *Pauls Ltd & Anor v Elkington* (2001) 189 ALR 551.

4 See also s 664C(2). And see *Capricorn Diamonds Investments Pty Ltd v Catto & Ors* (2002) 41 ACSR 376 at [89], [90]; *Teh v Ramsay Centauri Pty Ltd* (2002) 42 ACSR 354 at [28].

5 These, in turn, came from a report given by KPMG Corporate to the respondent on 20 October 1994 in connection with an earlier proposal to acquire the minority preference shares. The costs were there referred to as the respondent's costs which would be reduced by the sale of those shares to the respondent or the cancellation of those shares.

Cost item	Cost per annum
Stationery, postage and other expenditure in the preparation and distribution of preference share dividends	$358
Preparation and distribution of annual accounts, AGM notices and other communications	$28
Maintenance of share register	$50
Management time in considering the impact of business decisions on preference shareholders, say two days per year at $500 per day	$1,000
Legal expenses arising from that management time	$1,000
Total annual cost	**$2,436**

[6]

This annual saving seems to have been capitalized at $20,000.

[18] The learned primary judge accurately described these estimates as vague.[7] However as these figures appear to have come, originally, from the respondent I would be prepared to accept at least their total as a reasonable estimate of the amount which would be saved by the acquisition.

[19] I would therefore be prepared to accept that, because of the potential cost saving by elimination of the independent preference shareholders, the preference shares held by the independent shareholders were worth more to the respondent than to any other potential purchaser. However the question is whether that cost saving should be taken into account in assessing fair value within the meaning of s 667C(1).

[20] What is fair value of the shares for the purpose of acquisition must be ascertained from consideration of s 667C(1) read as a whole. In so reading it, it should be noted that one of its purposes[8] was to provide a method of valuation which would discourage greenmailing;[9] which I understand to mean, in this context, minority security holders in a listed entity obtaining from the majority security holder a price for their securities which reflects the premium which the majority security holder would pay to acquire the whole of the minority securities.[10] It is not difficult to see how a traditional method of valuing securities arguably permitted and, it seems

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6 Most but not all of these costs would be eliminated by acquisition of all minority shares; but some would remain if the preference share class remained; eg calculation of dividend on preference shares (Part 2H.5), preparation of annual accounts (s 319(1)) and maintenance of a share registry (s 169). On the other hand there are likely to be other, less readily quantifiable, advantages which would flow from the acquisition, some of which were identified in the Amended Statement of Issues of Milly Elkington.

7 Mr Cotman SC submitted that this meant that his Honour had insufficient evidence before him on which to find fair value.

8 See *Acts Interpretation Act* 1954 (Qld) s 14A; *Acts Interpretation Act* 1901 (Cth) s 15AA.

9 Legal Committee of the Companies and Securities Advisory Committee, *Compulsory Acquisitions Report*, January 1996 at 1.11, 10.1; Parliamentary Joint Committee on Corporations and Securities, *Report on the Corporate Law Economic Reform Program Bill 1998*, May 1999 at 7.31, 7.45; Explanatory Memorandum, Corporation Law Economic Reform Program Bill, 1998 at 3.58; *Capricorn Diamonds Investments* at [23] - [28].

10 Cf *Securities and Exchange Commission v First City Financial Corporation Ltd* (1989) 890 F 2d 1215 at 1222.

thereby encouraged, greenmailing because it was inevitable that, in some cases, a majority security holder would be prepared to pay more to acquire a minority holding than other persons would.[11]

[21] The way in which, it seems to me, s 667C(1) seeks to achieve this purpose is as follows. In the first place (par (a)) it requires the company to be valued as a whole, at the time of giving the notice of acquisition, in the way in which a company would ordinarily be valued at that date; that is, by assuming a hypothetical sale of the company as a whole between willing but not anxious parties without regard to the consequence of the proposed acquisition. That construction of par (a) gives effect to that purpose, in my opinion, by ensuring that no increase in value of the company in consequence of the acquisition, because of a saving in costs thereby obtained, is included in the value of the company as a whole, thereby possibly conferring a premium on the value of shares acquired.

[22] The appellants contended that this cost saving should have been taken into account in valuing the company as a whole. The respondent and the Attorney-General submit that such a contention is inconsistent with the *Pointe Gourde* principle.[12] Whilst I would not accept that submission there is, it seems to me some analogy between the contentions rejected by that principle and the appellants' contention. The latter involves an assumption about the nature or the consequence of the hypothetical sale in respect of which such valuation must be made. It assumes either that the company's undertaking is purchased by an entity which is not a company with two or more classes of shareholders; or that the company's shareholding will be purchased by one entity rather than two or more independent entities which may wish to maintain an independent preference shareholding. I do not think that, in valuing the company, any assumption should be made about what share holding hypothetical purchasers may adopt for the company, or may already have. That would be to speculate as to the manner or consequence of its hypothetical sale rather than to value the company as it is.[13]

[23] Mr Selak did not think that a hypothetical purchaser would pay more for the company as a whole because of the possibility that, after the purchase, there might be, effectively, only one shareholding resulting in an administration cost saving. He thought that would depend on the nature of the purchaser and, for that reason he did not think that it should affect its value to a hypothetical purchaser of whatever nature. That seems to me to be correct and I would accept his opinion as the learned primary judge did. But, even if I am wrong in the views I have expressed here, it can be seen from my discussion of s 667C(1)(b) that it would make no difference to the question before this Court.

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11 *Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer, Vizagapatam* [1939] AC 302; *Mordecai v Mordecai & Ors* (1988) 12 NSWLR 58 at 70; *Melcann Ltd v Super John Pty Ltd* (1994) 13 ACLC 92 at 94.

12 *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565; *Emerald Quarry Industries Pty Ltd v Commissioner of Highways (SA)* (1979) 142 CLR 351 at 356 - 357, 367, 372.

13 It is quite a different proposition that, in valuing a company, especially on the basis of future maintainable earnings, its future prospects and matters which materially affect those prospects must be taken into account; they are relevant to the value of the company's undertaking at the time of valuation.

[24] Secondly (par (b)), s 667C(1) requires the allocation of that value among the classes of shareholders having regard to their relative financial risks, voting and distribution rights consequent upon their being members of that class; not, it may be inferred, to matters other than of that kind. It would therefore not include any special value being attributed to a class of shares because of the special value which they or, as in this case, such of them as are owned by independent shareholders, may have for the majority shareholder.

[25] Mr Cotman SC submitted that Mr Selak did not allocate that value between the ordinary and the preference shares but simply valued the latter by capitalising the fixed dividends thereon. He submitted that Mr Selak could have done this without assessing the value of the company as a whole. Similar submissions were advanced by Dr Elkington. In this case that last submission is correct but it would not be so in every case; for example where there were two different classes of ordinary shareholders. And even in the case where there are preference shares such as these, the exercise in s 667C(1)(a) of assessing future maintainable earnings may be necessary where it is doubtful whether the company is capable of continuing to pay preference shareholders in full. More importantly, to fix the value of preference shares in the way in which Mr Selak did is, in my opinion, to make an allocation of the value of the company, to that extent, to those shares and an allocation of the balance of that value to the ordinary shares.

[26] As mentioned earlier, both Dr Elkington and Mr Catto submitted that the voting rights of the preference shareholders were given insufficient weight by Mr Selak. I do not think that there is any substance in that submission. Their voting rights could not give those shares, as a proportion of total shareholding, any greater value than the capitalized value of their future maintainable earnings.

[27] How, on a hypothetical sale of the company as a whole, the consideration would be distributed among the shareholders, taking into account the relative financial risk and voting and distribution rights of the classes,[14] is best illustrated, in my opinion, by assuming a hypothetical sale of the whole of the company's undertaking. On the assumption, contrary to my earlier opinion, that it was a sale to a company with no preference shareholder class, that costs were thereby reduced and maintainable profit increased, and that that would be reflected in an increase in the hypothetical sale price, no part of that increase in price would pass to the preference shareholders because of their limited financial risk, voting and distribution rights.[15] That is why I said that such an assumption would make no difference to the resolution of the question which this Court must decide.

[28] Even if that conclusion were wrong, the appellants' contention, based on Mr Ryan's opinion, that 90 per cent or even 50 per cent of the hypothetical cost saving should be attributed to the preference shares would be unsustainable. Those percentages do not appear to have been selected for any rational reason but rather because anything less than 50 per cent of the cost saving attributed to the value of the preference shares would leave their value well within the range assessed by Mr Selak. Indeed, in reality, these contentions seeks to make the division, not between ordinary

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14 See s 667C(1)(b).

15 Cf *Re Goodyear Australia Ltd* (2002) 167 FLR 1 at [79], [84].

shareholders and preference shareholders, but between majority and minority shareholders.[16]

[29] Thirdly (par (c)), s 667C(1) requires allocation of the value of each class pro rata among the shares in that class without any premium or discount in respect of particular shares. This ensures that, even within a class of shares, no special premium will attach to some shares in that class because of any special benefit which their acquisition will have for the majority shareholder.

[30] This construction of s 667C(1), in my opinion accords with the literal meaning of that provision and with its purpose.[17] It accords with its purpose by excluding from the fair value of the shares to be acquired the premium reflecting the additional amount which the majority shareholder would pay because it would thereby be acquiring the whole of the minority preference shares. And it follows from this construction that Mr Selak did not err, in assessing fair value of the preference shares, in failing to include any part of the administration costs which Pauls Victoria Limited, and consequently the respondent, would save upon all preference shares becoming owned by the respondent and Pauls Trading Pty Ltd.

[31] Sales of preference shares in the respondent in the previous six months were required to be taken into account: s 667C(2). Presumably, however, they could not have been taken into account in a way which would contradict or detract from the requirements of s 667C(1).[18] There was only one such sale, of 100 shares, which Mr Selak took into account but concluded was not representative of the value of such shares as a whole. In my opinion there is no cause to doubt the correctness of his conclusion or reasoning.[19] The appellants also sought to rely on an offer to acquire such shares in 1993, in different circumstances,[20] a proposed reduction of capital, not proceeded with, in 1994, and an acquisition by the respondent of 50 preference shares in 1998, the approval of which was reached only in December 1999, at $3.35 per share.[21] All involved circumstances so materially different as to make comparison useless and were made or proposed under an earlier and different statutory regime. Of even less relevance, in my opinion, was the evidence, rejected by the learned trial judge, of sales of or offers for minority shares in other

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16 Mr Cotman SC in his oral submissions contended that "those going", that is the minority shareholders, should receive 90 per cent of this premium, "those staying", being the respondent and its subsidiary, receiving only 10 per cent; a result which s 667C appears to have been intended to prevent.

17 However it must be accepted that judicial opinion on this question is mixed. See *Capricorn Diamonds Investments* at [62] - [71], [73] - [86]; *Teh* at [18] - [21]; *Winpar Holdings Ltd v Goldfields Kalgoorlie Ltd* (2000) 176 ALR 86 at [69]; *Re Goodyear Australia Ltd* at [71], [72], [74], [75].

18 "Without limiting subsection (1) … ".

19 The respondent was not involved in the sale but wrote to the purchaser advising that the price was in excess of the intrinsic value of the shares. The purchaser's correspondence revealed a misunderstanding of the rights of preference shareholders.

20 It was an offer to purchase all outstanding ordinary and preference shares at the same price of $3.35 per share.

21 The purchase was from a person who said he was not aware of the offer made in 1993.

companies. No basis for comparison was suggested; and to value the appellants' shares by making some such direct comparison as was suggested would, in my opinion, be to act inconsistently with s 667C(1).

Just terms

[32] It was common ground between the appellant Milly Elkington, the respondent and the Attorney-General that, from the commencement of the *Corporations Act* on 15 July 2001 her appeal continued "as if it were, and always had been, a proceeding in relation to a matter to which the provisions of the new corporations legislation that corresponds to the relevant old provision applies";[22] and that consequently thereafter the substantive law to be applied by this Court in hearing this appeal is Part 6A.2 of the *Corporations Act*. Mr Cotman SC did not contend that Chapter 6A was invalid in providing for compulsory acquisition of the minority security holders by a 90 per cent holder of securities. However he submitted that such an acquisition is an acquisition of property within the meaning of s 51(xxxi) of the *Commonwealth Constitution*; and that even if a value assessed without inclusion of any part of the administration costs which would be saved by the acquisition represents fair value for the appellant's shares acquired, it does not represent just terms within the meaning of s 51(xxxi).

[33] As already mentioned, this ground of appeal was not relied on by the other appellants. However, if Mr Cotman SC's submissions are correct, there is no reason why they would not also apply to these other acquisitions.

[34] The submissions of the respondent and the Attorney-General to the contrary were to much the same effect. First each submitted that the provisions of Part 6A.2 of the *Corporations Act* cannot properly be characterized as a law with respect to the acquisition of property within the meaning of s 51(xxxi). Secondly they submitted, in the alternative, that a value of shares assessed on the basis which I have held to be fair value also represents just terms within the meaning of s 51(xxxi). Thirdly, in the further alternative, they submitted that any value beyond fair value assessed in accordance with s 667C had been extinguished when Part 6A.2 of the *Corporations Law* commenced operation on 13 March 2000. And in the final alternative they submitted that, even if the appellant's contentions are accepted, that would not invalidate the acquisition; rather it would give rise to a claim for compensation pursuant to s 1350 of the *Corporations Act*. It is convenient to deal with the questions in that order.

[35] Neither the respondent nor the Attorney-General contended that an acquisition pursuant to Part 6A.2 was not an acquisition of property.[23] However they both submitted that it was not an acquisition of property within the meaning of s 51(xxxi) of the *Constitution* for the reasons given by Warren J in *Capricorn Diamonds Investments*.[24]

[36] These are, to adopt the written outline of the Solicitor-General:

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22 *Corporations Act* s 1384(3)(a).

23 They could hardly have done so. See for example *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509 - 511.

24 At [116] - [120].

> "Part 6A.2:
> (i) constitutes no more than 'the means appropriate and adapted to the achievement of an objective falling within [a head of power other than s 51(xxxi)] (in this case, s 51(xx)) where the acquisition of property without just terms is a necessary or characteristic feature of the means prescribed'; or
> (ii) merely adjusts the competing rights or claims of persons in a particular relationship or area of activity."[25]

[37] There is no doubt that some laws providing for the acquisition of property are nevertheless not laws which come within s 51(xxxi). That is because some other head of power expressly or impliedly authorizes an acquisition of property otherwise than on just terms. In such cases the transfer or vesting of title to property, otherwise than on just terms, is subservient and incidental to or consequential upon the principal purpose and effect sought to be achieved by a law within power.[26]

[38] It is accepted by the appellant Milly Elkington that a law which authorizes compulsory acquisition of minority shares by a 90 per cent shareholder is an objective within Commonwealth power. But Commonwealth power here goes beyond that for it is conferred not only by s 51(xx) but also, and more importantly, by s 51(xxxvii). What was referred under the latter power was not a general subject matter (such as "corporations") but the power to enact the Corporations Bill 2001 (Cth) to the extent that its provisions were not already within Commonwealth powers.[27] That Bill included Chapter 6A in the terms in which it was enacted in the *Corporations Act*. This was therefore a power which specifically authorized compulsory acquisition of minority shares by a 90 per cent shareholder for value determined in accordance with s 667C; and Chapter 6A, and especially s 667C, were enacted pursuant to that power.

[39] It follows from this that, if a compulsory acquisition upon terms as to value determined in accordance with s 667C is not an acquisition upon just terms, an acquisition otherwise than upon just terms is a necessary feature of legislation enacted pursuant to the referred power. Indeed, on that assumption, a guarantee of just terms in such a case as this would impair the Parliament's capacity to enact a law pursuant to the referred power. For that reason, in my opinion Chapter 6A, to the extent that it permits compulsory acquisition of shares for value assessed in accordance with s 667C, is not an acquisition of property which comes within s 51(xxxi).[28] However, on the assumption that I am in error in that conclusion I turn to the question whether an acquisition made pursuant to Part 6A.2 is on just terms notwithstanding that it permits acquisition at a value which fails to reflect the fact

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25 The passage quoted in par (i) is from the judgment of Brennan J in *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 179; and the proposition contained in par (ii) seeks to rely on *Australian Tape Manufacturers Association* at 510 and *Mutual Pools & Staff* at 171 - 172, 178, 189 - 190.

26 *Mutual Pools & Staff* at 171, 179.

27 *Corporations (Commonwealth Powers) Act* 2001 (Vic).

28 See fn 26.

that the minority shares may be worth more to the majority shareholder than to any other prospective purchaser.

[40] Where the only argument that the terms of an acquisition of property are not just is that the consideration is too low, it seems to me that, "just terms" and "fair value" are, ordinarily, interchangeable terms; if the value was fair, the acquisition was on just terms.[29] In s 667C, however, in which the legislature has departed from the traditional method of valuing securities, that may not be the case. In this case, for example, I have accepted that, because of the potential cost saving to the respondent, the appellant's minority preference shares are worth more to it than they would be to any other prospective purchaser; and I have concluded that that additional value is not included in the fair value of those shares assessed in accordance with s 667C(1).

[41] The reason why it is not included is that, in s 667C, the legislature has provided a means of assessment of fair value for compulsory acquisition of minority securities which it thought to be fair between the majority and minority security holders, taking the view that the practice of greenmailing was unfair between majority and minority security holders and that a valuation in accordance with its terms avoided that unfairness. The question, in my opinion, is whether, in doing so, it provided terms which were unjust to minority shareholders.

[42] The phrase "just terms" is not defined in the *Constitution* and it is plainly not a term of precise meaning. There is a range of values which may be said to be both fair value and, so far as that value fixes the consideration for an acquisition, just terms. Moreover, a measure of discretion must be left to the legislature which determines the method of valuation for the purpose of such acquisition, in determining what is just.[30] I think it was reasonable for Parliament to conclude that, for the purpose of the compulsory acquisition of minority securities in a public company, it was both fair and just to fix their value so as to exclude any premium for which such minority security holders might be able otherwise to hold out because the acquisition of all of the minority securities would result in some advantage to the majority security holder. Having reached that conclusion I think that s 667C was a way of achieving that result whilst still providing a price which is just to minority security holders.

[43] In my opinion, therefore, s 667C provides a method of determining the consideration payable for compulsory acquisition of minority securities which, so far as the value is fixed, provides for acquisition upon just terms. It is therefore unnecessary to consider the alternative argument that any value beyond that assessed in accordance with s 667C had been extinguished by that section of the *Law* before 15 July 2001.[31]

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29 *Grace Bros Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290; *Nelungaloo Pty Ltd v The Commonwealth* (1948) 75 CLR 495 at 569; *Smith v ANL Ltd* (2000) 204 CLR 493 at [48]; *The Commonwealth of Australia v State of Western Australia* (1999) 196 CLR 392 at [194].

30 *Grace Bros Pty Ltd* at 279 - 280, 291, 295; *McClintock v The Commonwealth* (1947) 75 CLR 1 at 24; *The Commonwealth v Tasmania. The Tasmanian Dam Case* (1983) 158 CLR 1 at 289 - 290.

31 See *Capricorn Diamonds Investments* at [115].

[44] Had it been necessary to consider that argument, however, I would have rejected it. The question is not what was the value of the appellant's shares for any purpose other than for a proposed acquisition now deemed to be pursuant to Chapter 6A of the Act. It is only for the purpose of such an acquisition that a valuation in accordance with s 667C must be made. Section 1384 says, in effect, that in respect of any such acquisition, for the purpose of continued proceedings the rights and liabilities acquired and incurred are taken always to have been acquired and incurred under the *Corporations Act*.[32] Consequently it is irrelevant what different rights and liabilities may have been acquired and incurred, prior to 15 July 2001, under the *Corporations Law*.

[45] It is also unnecessary to consider whether, if the method of fixing value contained in s 667C did not provide just terms, the acquisition the subject of this appeal would be invalidated. However I do not think that it would. On the contrary it seems to me that s 1350 would have the result that the acquisition would nevertheless be valid but that the respondent would be liable to pay compensation to the appellant of such reasonable amount as would be necessary to give her just terms.[33] The only argument advanced by the appellant against that conclusion is that, it was submitted, s 1350 did not provide a right of action against the Commonwealth and that, in the absence of such right, the terms were not just because they did not ensure that the obligation to pay compensation would be met. I do not think that there is any substance in that submission and it was not pursued orally in this Court. It might ordinarily be thought that a listed entity acquiring securities compulsorily would be capable of paying the reasonable amount assessed pursuant to s 1350; and the possibility that it would not is not, in my opinion, sufficient to render the terms of the section unjust.

Whether the report of 24 July 2000 was a report within the meaning of s 664C(2) and s 667A(1)

[46] It was not disputed by the appellants that Mr Selak was a person nominated by ASIC under s 667AA or that the report of 20 July 2000 otherwise complied with the terms of s 667A(1). Nor does it seem to have been suggested that Mr Selak's June valuation, given to the respondent on 30 June 2000, was other than what it appeared to be on its face; a valuation, upon a basis which I have held to be correct, of shares which the respondent had in mind acquiring. It did not purport to advise the respondent but to value those shares.[34]

[47] The principal submission on this ground, it seems, was that, having given his valuation to the respondent, Mr Selak could not bring an independent mind to the matter which he was required to state pursuant to s 667A(1)(b) namely whether, in his opinion, the terms proposed in the notice gave a fair value for the securities concerned. Yet the very reason why, as was plainly evident, and as he set out in his stated reasons for that opinion, Mr Selak was of the opinion that the terms proposed in the notice gave fair value for the shares was that the terms proposed a price at the

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32 Section 1384(3)(b).

33 *Pauls Ltd & Anor v Elkington* (2001) 189 ALR 551 at [21]; and cf *Minister for Primary Industry v Davey* (1993) 47 FCR 151 at 167.

34 It was, it is true, submitted in draft form subject to verification of facts; but it was never suggested that any facts on which it was based were false.

higher end of the range which he had stated in his valuation as the range of values for the shares. The fact that he had, shortly before giving that report, made a comprehensive valuation of the shares and that the notice proposed acquisition at a price at the higher end of the range assessed by him in that valuation, made it more, not less, likely that the opinion given in the report would be accurate.[35]

[48] The submission appeared to rest on two contentions. The first was that the report lacked independence because Mr Selak had already been engaged by the respondent to value the shares; and whether he was asked to give a report depended on the outcome of that valuation. And the second was that Mr Selak did not exhibit the degree of independence envisaged by a practice note of ASIC. It should be said at once that neither of these contentions is supported by anything contained in the legislative scheme; nor was any legislative provision relied on to support either of these contentions.[36]

[49] As to the first of them, as already mentioned, the respondent gave each appellant, with the notice, a copy not only of Mr Selak's report but also of his June valuation and it was plainly intended that the two should be read together. It is also clear that he was engaged to provide that valuation only after he had been nominated by ASIC for the purpose of obtaining a report pursuant to s 667AA. Before it approached Mr Selak or Ferrier Hodgson the respondent requested ASIC to nominate a person to prepare an expert's report pursuant to the *Law* and it was only after and upon ASIC's nomination that the respondent engaged Mr Selak to prepare the June valuation.

[50] It is true, as the appellants contend, that the respondent's intention to compulsorily acquire the minority preference shares was expressed by it to Mr Selak to be subject to the latter's valuation. Because that and the sequence of events which followed was relied on by the appellants to show absence of independence by Mr Selak I should set out the relevant terms of the letter of the respondent to Mr Selak of 6 April 2000.[37]

> "As discussed by telephone, we confirm that your firm has been nominated to us by ASIC, as one of three experts who might provide us with an expert's report required in terms of Section 664C of the Corporations Law ('Law'). Subject to the outcome of this report, we propose, under Section 664C of the Law, to compulsorily acquire the remaining Preference Shares in Pauls Victoria Limited which are not already owned by Pauls Limited (or its wholly owned subsidiary)."

Then followed a list of enclosed documents which had accompanied the application to ASIC and a reference to costs. The letter then continued:

> "In addition, we would propose obtaining your valuation in terms of Section 667C before finally deciding whether to proceed to compulsory acquisition. If we do proceed, we will then require from you the further information required by Section 667A to accompany

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35 It is plain that the respondent intended that the valuation and the report under s 667A be read together by the minority shareholders. See fn 1.

36 Section 667B(1) provides that the expert must not be an associate of the person giving the notice but Mr Selak was plainly not an associate of the respondent. See s 9 to s 17 of the Act.

37 A letter in the same terms was sent to each of the other two valuers nominated by ASIC.

> our compulsory acquisition notice and your quote should be dissected accordingly."

[51] I can find nothing in that letter, or in the sequence of events which followed it, which showed any lack of independence by Mr Selak. As already indicated, having been so engaged he sent the respondent on 30 June 2000 a detailed valuation subject only to its being checked for factual accuracy; the respondent gave a notice of compulsory acquisition at a price at the higher end of the range of values which had been assessed by Mr Selak; and Mr Selak unsurprisingly expressed the opinion that that price gave fair value.

[52] As to the second contention, it is unfortunate that a good deal of time was taken up at first instance with the question whether ASIC Practice Note 42 continued to be relevant after the amendments to the *Corporations Law* on 13 March 2000 because the debate tended to exaggerate the importance, to the resolution of the present question, of practice notes issued by ASIC. They are, no doubt, useful documents to guide practitioners. But they are of little or no assistance in the construction of the terms of the relevant statutory provisions none of which, it was asserted, had been infringed by the circumstances in which Mr Selak produced his report. Nor, I would add, was there any evidence from which it could reasonably have been inferred that Mr Selak, in giving his valuation and in giving his report was acting other than independently.

[53] Finally on this ground, whatever may have been the reality or perception of independence by Mr Selak, the question for the Court in the end was and is whether the terms set out in the compulsory acquisition notice gave fair value for the shares: s 664F(3). The learned primary judge held that they did and with that conclusion I agree. This ground of appeal therefore also fails.

Other Grounds

(a) failure to comply with statutory requirements

[54] In her written submissions Milly Elkington submitted that the respondent failed to disclose information known to it, material to deciding whether to object and not disclosed in the expert's report, contrary to s 664C(1)(e); and that that failure may not be excused pursuant to s 1322.[38] The information said not to have been disclosed was the administration cost saving to the respondent in consequence of the compulsory acquisition. The submission, whilst not abandoned, was not pursued in oral argument. It is not entirely clear whether that submission was also made by Dr Elkington and Mr Catto.

[55] The answer to it is that the information said not to have been disclosed was not material for the reason already given; it was not relevant to the fair value of the appellants' shares. The appellants having objected, the only question for the court was whether the respondent established that the terms set out in the compulsory acquisition notice gave fair value for the shares: s 664F(3). Having so concluded, the court must approve the acquisition.

[56] It was submitted, also in Milly Elkington's written submissions, that there were other procedural inadequacies or omissions by the respondent in giving its notice of compulsory acquisition. I do not find it necessary to refer to them in detail. None

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[38] See also s 1325A, s 1325D.

of them were established and all of them, if they had been established, would have been excused pursuant to s 1322. Moreover none of them could have affected the fair value of the shares.

(b) bias

[57] All appellants in their notice of appeal and written submissions relied on this ground. However in oral argument Mr Cotman SC for Milly Elkington abandoned this ground conceding, correctly in my view, that it led nowhere. By that he meant, as I understood him, that the sole question before this Court was, as I have said more than once, whether the terms of the compulsory acquisition notice gave fair value for the shares; and whether the learned primary judge was biased or not does not affect that question. I also understood Dr Elkington in his oral submissions to abandon that ground. However I do not think that Mr Catto did so.

[58] On several occasions during the course of the trial the learned primary judge made statements which could have been construed by the appellants as showing some antagonism to them. The statements were unnecessary and should not have been made. But in concluding, as I do, that the question of bias by his Honour is irrelevant to this appeal, I would not like it thought that I would have concluded that his Honour's statements were sufficient to give rise, in the mind of a party or in the mind of a fair minded and informed member of the public, to a reasonable apprehension of a prejudiced mind or a lack of impartiality on his Honour's part in the questions which he had to determine.

[59] For the reasons which I have given each of the appeals must be dismissed.

Costs

[60] The appellants submit that, even if their appeals are dismissed, the respondent should pay their costs. They rely for that submission on the terms of s 664F(4) which provides:

> "The 90% holder must bear the costs that a person incurs on legal proceedings in relation to the application unless the Court is satisfied that the person acted improperly, vexatiously or otherwise unreasonably. The 90% holder must bear their own costs."

The meaning of this provision, in the present context, was considered by this Court in its reasons in the costs application in *Pauls Ltd & Anor v Elkington*.[39] There the Court said:

> "The reference to 'legal proceedings' in s 664F(4) is capable of comprehending any and all legal proceedings; but it plainly has reference primarily to the application identified in s 664(1), which is the application by the 90% holder to the Court for approval of the compulsory acquisition. There is no compelling reason for regarding it as extending to an appeal brought from an order at first instance approving the acquisition."[40]

I agree with that view and conclude that the provision does not require this Court to order the respondent to pay the appellants' costs of these appeals unless it is satisfied that they acted improperly, vexatiously or otherwise unreasonably. Accordingly I would not so order.

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39 [2001] QCA 414, Appeal No 680 of 2001, 23 October 2001.

40 At [4].

[61] On the other hand, although I was not assisted in resolving any of the issues in these appeals by the arguments advanced by Dr Elkington or Mr Catto, I do not think that any of the appellants acted improperly, vexatiously or otherwise unreasonably in pursuing these appeals or that Dr Elkington or Mr Catto acted in any of those ways in presenting arguments in their appeals. On the contrary some of the questions which had to be resolved were novel and others had been the subject of conflicting decisions by judges at first instance.

[62] Mr Catto, although he did not appeal against the order for costs made by the learned primary judge which, in any event, would have required leave of that judge, nevertheless sought to have that order reconsidered by this Court. I would not accede to this course. He has not appealed against that order and has not sought leave from the learned primary judge to do so; moreover there is nothing which persuades me that his Honour erred in exercising his discretion in imposing the orders which he did.

[63] In those circumstances the appropriate course, it seems to me, is to make no order for costs in any of the appeals.

Orders

Appeals numbered 3262 of 2001, 4152 of 2001 and 4345 of 2001 are dismissed.

[64] **JERRARD JA:** I have read the reasons of Davies JA and agree with those save for one matter. I agree with the orders proposed, including that there be no order for costs in any appeal.

[65] The point upon which I respectfully diverge from the reasoning of Davies JA and Jones J is one which emerges from paragraphs [38] and [39] of the reasons for judgment of Davies JA. There, His Honour holds that since the *Corporations Act* (Cth) was enacted pursuant to the power conferred by s 51(xxxvii) of the Constitution, as a matter referred by various state parliaments, the enactment of the referred matter of the provisions of the *Corporations Bill* 2001 (Cth) included, as a necessary feature of legislation enacted pursuant to the referred power, enactment of Chapter 6A.2 and s 667C. The judgment holds that if a compulsory acquisition upon terms as to value determined in accordance with s 667C is not an acquisition upon just terms, then that acquisition other than on just terms is a necessary feature of that enacted legislation; and a guarantee of just terms in such a case as this would impair the Commonwealth Parliament's capacity to enact a law pursuant to the referred power.

[66] I consider Part 6A.2 of the *Corporations Act* is properly characterised as a law with respect to the acquisition of property, within the meaning of s 51(xxxi) of the Constitution. That appears to be the object of the part, and if so, it is not made any the less so by being enacted pursuant to a referred power. If the terms of Part 6A.2 make it a law with respect to the acquisition of property on terms which are not just, then I do not see how Part 6A.2 gains any constitutional validity otherwise lacking by reason of being enacted pursuant to s 51(xxxvii) rather than (xx). The referral of a power to legislate on a matter the subject of referral could not confer power upon the Commonwealth to legislate, for example, to establish or prohibit the free exercise of any religion. In similar vein, the judgment of the High Court in *Teori Tau v Commonwealth* (1969) 119 CLR 564 records (at CLR 570) that it has been

held[41] with respect to the heads of legislative power granted by s 51 of the Constitution that, by reason of the presence in that section of para (xxxi), none of the other heads of power, either of itself or aided by the incidental power, embraces a power to make laws for the acquisition of property. That being so, the head of referred power granted by s 51(xxxvii) could not include a referred power to make laws with respect to the acquisition of property otherwise than on just terms.

[67] The remarks of Latham CJ on s 51(xxxi) in a different context in *PJ Magennis Pty Ltd v The Commonwealth*[42] are apposite:-

> "… the constitutional provision would be quite ineffective if by making an agreement with a State for the acquisition of property upon terms which were not just the Commonwealth Parliament could validly provide for the acquisition of property from any person to whom State legislation could be applied upon terms which paid no attention to justice".

[68] As it happens I agree with Davies JA that s 667C provides a method of determining a (what it terms "fair") value for the minority securities being acquired by compulsion, which provides for their acquisition on just terms. Those terms in this matter encompass and reflect the value of those securities as an investment with a fixed rate of return (as they are), what would be available to the minority holders on a winding up of the company as a going concern, and the voting and other rights attaching to those shares. Those terms do allow the acquiring majority shareholders to enjoy the benefit of acquiring all the shares of the minority without paying any premium reflecting a percentage of the capitalised administrative saving potentially resulting over time from that acquisition, but these may not (all) actually occur; and not allowing for that possible saving, in the price paid to the remaining minority shareholders, does not result in unjust terms.

[69] I note that the argument put before the Court on the various appeals did not include any contention that the appellants should receive, as just terms for acquisition of their securities, any premium reflecting "greenmail". That is, the appellants limited their argument to the complaint that the potential administrative costs saving should have been taken into account when valuing the company, **and** ought to have come to them either as 100, 90, 50 or some other percentage of that hypothetical cost saving, divided amongst the minority whose shares were being acquired.

[70] **JONES J:** I have had the advantage of reading the reasons prepared by Davies JA. I agree with those reasons and the orders which he proposes.

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41 The reason is explained in the judgment of the Court in *WH Blakeley & Co Pty Ltd v The Commonwealth* (1953) 87 CLR 501 at 521.

42 (1949) 80 CLR 382 at 401.