SUPREME COURT OF QUEENSLAND

CITATION:	*Energex Ltd v Elkington & Ors* [2003] QCA 430
PARTIES:	**ENERGEX LIMITED** ACN 078 849 055 (applicant/respondent) **v** **GORDON BRADLEY ELKINGTON** (respondent/appellant) **ARTHURS TRADING CO PTY LTD** ACN 072 242 098 (respondent) **MR ANTHONY HUNTA AND MRS DENISE LYNDA BIDDULPH** (respondent) **MR JOHN FREDERICK BLIGH** (respondent) **ANDREW DOUGLAS CAMERON** (respondent) **KATHERINE VICTORIA MAY CAMERON** (respondent) **ROBERT FRANKLIN CAMERON** (respondent) **MR ROBERT FRANKLIN CAMERON** (respondent) **MR ROBERT FRANKLIN CAMERON** (respondent) **ESTATE LATE STUART FRANCIS GRIFFITHS CAMERON** (respondent) **WILLIAM ROBERT CAMERON** (respondent) **MR ANDREW EASTON** (respondent) **MR NICHOLAS PAUL HASLUCK** (respondent) **MRS CONSTANCE WINIFRED HUMPHRIES** (respondent) **ESTATE LATE MARION AGNES HYLES** (respondent) **ELLEN LAING** (respondent) **MR JOHN WESTON SEAFORTH MACKENZIE** (respondent) **ELIZABETH NESTA MARKS** (respondent) **PINK PUMPKIN PTY LTD** ACN 007 680 604 (respondent) **TOMYFUTURE HEATH PTY LTD** ACN 085 982 805 (respondent)

MR COREY VINCENT
(respondent)
EST WILLIAM VINCENT WALTON DECD
(respondent)
MRS ROSEMARY HAMILTON WEST
(respondent)
MR JOHN WHITE AND MRS NICOLE WHITE
(respondent)
MR ANDREW JOHN WHITE
(respondent)
WINPAR HOLDINGS LIMITED ACN 003 035 523
(respondent)

ENERGEX LIMITED ACN 078 849 055
(applicant/respondent)
v
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	(respondent) **ELIZABETH NESTA MARKS** (respondent) **PINK PUMPKIN PTY LTD** ACN 007 680 604 (respondent) **TOMYFUTURE HEATH PTY LTD** ACN 085 982 805 (respondent) **MR COREY VINCENT** (respondent) **EST WILLIAM VINCENT WALTON DECD** (respondent) **MRS ROSEMARY HAMILTON WEST** (respondent) **MR JOHN WHITE AND MRS NICOLE WHITE** (respondent) **MR ANDREW JOHN WHITE** (respondent) **WINPAR HOLDINGS LIMITED** ACN 003 035 523 (respondent/appellant)
FILE NO/S:	Appeal No 11159 of 2002 Appeal No 11170 of 2002 SC No 3973 of 2001
DIVISION:	Court of Appeal
PROCEEDINGS:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	30 July 2003
JUDGES:	de Jersey CJ, Jerrard JA and Helman J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeals dismissed with costs to be assessed**
CATCHWORDS:	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)) – GENERALLY – whether s 51(xxxi) *Constitution* (Cth) applies to Part 6A.2 *Corporations Act* 2001 (Cth) – whether Part 6A.2 *Corporations Act* 2001 (Cth) constitutionally invalid as providing for acquisition of property on other than "just terms" CORPORATIONS – CORPORATE FINANCE – SHARES – OTHER MATTERS – where respondent held full beneficial

interest in at least 90 percent by value of all securities in company – where respondent sought to compulsorily acquire all preference shares in company held by others – where respondent's expert's report made no allowance for any "special value" attached to securities – whether valuation of preference shares should have included allowance for "special value" – whether Court should have approved compulsory acquisition of preference shares

PROCEDURE – COSTS – APPEALS AS TO COSTS – WRONG EXERCISE OF DISCRETION – where learned trial Judge found that these appellants acted unreasonably and reduced appellants' costs accordingly – where learned trial Judge refused to make any order as to costs in relation to application for stay – whether learned trial Judge erred in exercise of discretion

Austrim Nylex Ltd v Kroll [2001] VSC 168, approved
Austrim Nylex Ltd v Kroll (No 2) (2002) 42 ACSR 18, approved
Austrim Nylex Ltd v Kroll (No 3) [2002] VSC 290, distinguished
Capricorn Diamonds Investments Pty Ltd v Catto (2002) 168 FLR 146, approved
re Goodyear Australia Ltd (2002) 167 FLR 1, considered
Mutual Pools and Staff Pty Limited v Commonwealth (1994) 179 CLR 155, considered
Pauls Ltd v Dwyer (2002) 43 ACSR 413, approved
Pauls Ltd v Elkington (2001) 189 ALR 551, approved
Teh v Ramsay Centauri Pty Ltd (2002) 42 ACSR 354, followed

Constitution (Cth), s 51(xxxi)
Corporate Law Economic Reform Program Act 1999 (Cth)
Corporations Act 2001 (Cth), s 664A, s 664C, s 664E, s 664F, s 667A, s 667AA, s 667C, s 1350

COUNSEL: The appellant appeared on his own behalf in Appeal No 11159 of 2002
N Cotman SC for the appellant in Appeal No 11170 of 2002
P Keane QC, with J McKenna SC, for the respondent

SOLICITORS: The appellant appeared on his own behalf in Appeal No 11159 of 2002
Stephen Blanks & Associates for the appellant in Appeal No 11170 of 2002
Clayton Utz for the respondent

[1] **de JERSEY CJ**: The memorandum and articles of association of Allgas Energy Ltd provide for ordinary and preference shares. On the evidence before the learned primary Judge, the total value of the ordinary share capital of the company amounted to 99.85 percent of its total value, with the balance of .15 percent representing the value of preference share capital. At relevant times the respondent

Energex Ltd owned all of the ordinary share capital in Allgas, and 58.5 percent of its preference share capital (116,995 shares of a total of 200,000). Accordingly, the respondent held full beneficial interests in at least 90 percent by value of all of the securities in Allgas and fell within the scope of s 664A(2) of the *Corporations Act* 2001 (it being common ground the provisions of Part 6A apply).

[2] The respondent sought compulsorily to acquire all Allgas preference shares held by others. It issued compulsory acquisition notices under s 664C on 5 March 2001, offering $2.05 per share. More than 10 percent of the holders of the preference shares, subject to the notices, objected to the acquisition, under s 664E. The respondent then applied to the court for approval of the acquisitions, under s 664F.

[3] It fell to the respondent to establish that the terms set out in the compulsory acquisition notices gave a "fair value" for the securities (s 664F(3)). To that end, the respondent relied on the report (and evidence) of John Alistair Hope, a partner of Ernst and Young, who was nominated by ASIC under s 667AA to prepare the required expert's report. Such a report must state whether, in the expert's opinion, the terms proposed in the compulsory acquisition notice give a fair value for the securities (s 667A(1)).

[4] Mr Hope reported that as at 2 March 2001, the preference shares were worth $1.61 to $1.79 per share, such that the $2.05 offer represented fair value. Certain preference share holders then commissioned a report from Wayne Lonergan. Mr Hope subsequently reviewed Mr Lonergan's report, which set substantially higher values, but Mr Hope held to his own view. By then, however, Douglas J had given judgment in *Pauls Ltd v Dwyer* (2001) 19 ACLC 959, holding that allowance for "special value" was impermissible in light of s 667C. In his original report, Mr Hope had made some such allowance. He therefore reduced his range from $1.61 to $1.79, to $1.34 to $1.52.

[5] The learned primary Judge approved the compulsory acquisition. The application before him had been opposed by the present appellants, Winpar Holdings Pty Ltd and Dr Elkington.

[6] Central to his Honour's assessment was s 667C, which provides, as to the valuation of securities in such circumstances:

> "(1) 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).

> (2) 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."

[7] It was common ground that none of the preference shares had been purchased within the six months preceding the report.

[8] In the proceedings at first instance, the appellants challenged the constitutionality of the relevant statutory provisions, being those contained in Part 6A.2 of the *Corporations Act* 2001. Mr Cotman SC, who appeared for the appellant Winpar both at first instance and on appeal, conceded before the learned Judge and before us that the basis of the constitutional challenge – that the provisions contemplated the compulsory acquisition of property on other than "just terms" contrary to s 51(xxxi) of the Commonwealth Constitution – had been rejected by the Court of Appeal in *Pauls Ltd v Elkington* (2001) 189 ALR 551. In reliance on that authority, the learned Judge rejected the constitutional challenge.

[9] Mr Cotman submitted before us that the provisions of Part 6A.2 should be characterized as providing for the acquisition of property on other than just terms, and that insofar as the subsequent case of *Pauls Ltd v Dwyer* (2002) 43 ACSR 413 holds to the contrary, it is wrong and should not be followed. He submitted that acquisition of property was the sole or dominant purpose of these provisions, attracting the constraint of s 51(xxxi), and that the provisions should not be seen as merely concerned with resolving or adjusting competing property rights as discussed in *Mutual Pools and Staff Pty Limited v Commonwealth* (1994) 179 CLR 155. To seek to demonstrate the injustice of the terms of this compulsory acquisition, this appellant relied on disparity between the amount of $2.05 offered, and the amounts of $10.00 and $8.50 per share involved in the respondent's unsuccessful attempts to acquire the shares in November 1998 and February 1999, and on the failure of the valuation evidence accepted by his Honour – assuming it to be sustainable – to reflect the circumstance that the minority shares may be worth more to a majority shareholder than to another prospective shareholder.

[10] *Pauls Ltd v Dwyer* is a comparatively recent decision of the Court of Appeal which should be followed unless demonstrably wrong, and such error has certainly not been demonstrated. The decision, furthermore, does not stand alone. Courts have consistently rejected a contention that the validity of these provisions is affected by s 51(xxxi): *Pauls Ltd v Elkington*, supra; *re Goodyear Australia Ltd* (2002) 167 FLR 1, paras 95-99; *Capricorn Diamonds Investments Pty Ltd v Catto* (2002) 168 FLR 146, para 117; *Austrim Nylex Ltd v Kroll* [2001] VSC 168 and *Austrim Nylex Ltd v Kroll (No 2)* (2002) 42 ACSR 18, para 41. That body of authority establishes that such provisions are not laws "with respect to the acquisition of property from any…person" within s 51(xxxi); that in any event they do not provide for acquisition on terms which are other than just; and that s 1350 of the *Corporations Act* 2001 constitutes an ultimate safeguard against any invalidity of Part 6A.2.

[11] It is unnecessary to traverse the appellant Winpar's challenge further, in view of the comprehensive and authoritative rejection of the basis of that challenge by the Court of Appeal in *Pauls Ltd v Dwyer* in particular.

[12] In his written submissions, Mr Cotman submitted that the learned Judge erred in three specific respects: in holding that "synergies" which may be achieved following acquisition of all shares (resulting in administrative savings and other economies) should not be included in the assessment under s 667C; in holding, alternatively, that an allowance made by Mr Hope in that regard was adequate; and in excluding, as irrelevant, offers previously made on the market in an attempt to acquire the outstanding preference shares. In his oral submissions at the hearing of the appeal, Mr Cotman identified, as matters of objection not already concluded against his appellant by authority, Mr Hope's having allowed nothing for the voting rights attaching to the preference shares, and his having allowed nothing as a premium for control. Mr Cotman submitted that what may be involved in the approach mandated by s 667C was not exhaustively catalogued in the legislation.

[13] As to synergies, the learned Judge determined, as a matter of fact, that what may in that regard be achieved is speculative, and his conclusion was reasonably open. That aside, his Honour took the view that it was not the legislative intent "that an entrenched minority shareholder is to benefit from the addition of a sum representing synergies (which could not be achieved but for the forced but successful resort to the compulsory acquisition procedure)". In my view, making any allowance for this consideration is excluded by well-established authority. I refer especially to *Pauls Ltd v Dwyer*, paras 27 and 28; *Capricorn Diamonds*, paras 56, 62; and *Austrim Nylex (No 2)*, paras 14, 16, 30.

[14] Mr Cotman, in his written outline, urged us to prefer the reasoning on this subject in *Goodyear*, but no other court has adopted that reasoning, and this court should in any event follow *Pauls Ltd v Dwyer*.

[15] As to previous offers, his Honour rejected them as an indication of fair value for purposes of s 667C. As a matter of construction, it is arguably significant that sub-s (2) deals expressly with transactions within the preceding six months. The Judge's approach is in any event consistent with *Pauls Ltd v Dwyer*, para 31 and what was held by Warren J in *Austrim Nylex (No 2)*, para 14.

[16] As to allowance for voting rights, Mr Hope effectively allowed nothing because of the potentially overwhelming effect of the exercise of voting rights by the holder of the ordinary shares. While Dr Elkington asserted the right to speak at a general meeting had some worth, Mr Hope's factual approach was plainly open, and it should also be recognized that the learned Judge found that the value of the preference shares fell "comfortably" short of the offer.

[17] As to the allowance of a premium for control, *Pauls Ltd v Dwyer*, para 24, concludes the matter against the appellant.

[18] As to the contention that s 667C does not exhaustively set forth all considerations, those particularly raised by Mr Cotman have by and large been found incompatible with the process rendered mandatory by the provision, and the authorities cited above establish that.

[19] Dr Elkington submitted that in assessing "the value of the company as a whole" (s 667C(1)(a)), the value selected should reflect any "special value for a particular purchaser". But as Barrett J pointed out in *Teh v Ramsay Centauri Pty Ltd* (2002) 42 ACSR 354 at para 17, the provision "is not concerned with the "value of the

company as a whole" to any particular person". This led into a submission that allowance should be made for synergistic benefits, untenable for reasons already covered.

[20] This appellant submitted Mr Hope impermissibly valued the preference shares by reference to notional market value, not the considerations specified in s 667C(1)(b). That is not factually correct. In his first report, Mr Hope addressed the rights attaching to the preference shares. The specific issue of voting rights is covered above.

[21] As to the manner of allocation required by the sub-section, Dr Elkington advanced the criterion of the market place, and submitted again that "special benefits deriving from full ownership" should be taken into account. The learned Judge made the following observation:

> "Section 667C fixes a method of assessing fair value which does not sit easily with the notion that preference shareholders are entitled, when the procedure in Pt6A is invoked, to the price which they could command in the market by demanding a price for their securities above a fair value, or as Foster J said in *Re Elders Australia Ltd*; *Super John Pty Ltd v Futuris Rural Pty Ltd* (1998) FCA 1377, by using the position of a minority shareholder as leverage in the context of a takeover in order to seek a significant financial advantage. (The present case is not concerned with a takeover, but the concept is equally applicable to it.)"

I respectfully agree, and see also *Capricorn Diamonds*, para 63. Reference has already been made to the substantial body of authority excluding the consideration of special benefits or premiums.

[22] Dr Elkington submitted the learned Judge should have distinguished between a minority shareholder within a class, being "the classic greenmailer referred to by Santow J in *Goodyear*", and the class generally. It is however irrelevant whether or not the appellant be termed a minor shareholder within a class or the holder of a small class of shares. The approach taken by Mr Hope and accepted by the Judge was consistent with *Pauls Ltd v Dwyer, Goodyear* and *Austrim Nylex (No 2)*.

[23] It remains to mention Dr Elkington's attempt to distinguish *Pauls Ltd v Dwyer* factually, on the basis there were in that case no synergistic benefits and the voting rights were valueless. It is not legitimate to rely on those points of arguable difference to characterize what amount to binding statements of principle and approach as obiter dicta.

[24] The appellants also appeal against the costs order made by the learned Judge. Section 664F(4) provides that the party in the position of this respondent should bear all costs of the proceedings, unless the court is satisfied that any other party has acted "improperly, vexatiously or otherwise unreasonably". His Honour took the view that these appellants had acted unreasonably, such as to warrant reducing the costs otherwise to be allowed to them by two-thirds.

[25] The essence of his reasoning appears from the following passage:

> "…by the time of the hearing there was authority in three jurisdictions…rejecting the principles relied on. To the extent that there was perceived conflict between decisions, it was in a real sense unnecessary to the decision to resolve it because the expert's report proceeded on the most favourable view to the respondents…resulting in a higher determination of "fair value" than if the other view, which was reflected in a later opinion by the same expert, had been used as the basis for the operative expert's report. It was…unreasonable to pursue that aspect of the matter…it is in my view a case where it was unreasonable to rely on a number of the propositions referred to…It is a matter of impression what costs order ought to be made. Having regard to my impression of the course the matter took, I order the applicant pay to each of the first and twenty-sixth respondent 1/3 of the costs of the application to be assessed on the standard basis."

Those passages are extracted, I note, from a comprehensive, detailed four page judgment on costs.

[26] For the appellant Winpar, Mr Cotman submitted that the Judge should not have made that finding as to unreasonableness, that he failed adequately to expose his reasoning, and that he erred in relying on his "impression" in determining the extent of the costs to be allowed. Dr Elkington separately submitted he had been treated unfairly, bearing in mind that he appeared for himself and incurred only out of pocket expenses.

[27] That did not however necessitate his Honour's taking any particularly indulgent approach to costs in relation to Dr Elkington when – as his Honour noted – Dr Elkington chose to attend and independently support contentions already raised by the other appellant.

[28] As to the points taken by Mr Cotman, it suffices to say that his Honour's approach was plainly open and justified and the passages extracted above did sufficiently expose his reasoning.

[29] None of the bases justifying interference with a discretionary exercise as involved here has been established.

[30] One aspect remains. When judgment was given, the appellants applied for an order staying the proceedings, to allow them time to consider the reasons for judgment in order to determine whether or not they should appeal. The learned Judge refused the application for a stay, and refused to favour the appellants in relation to the costs of that application, having been referred to s 664F(4). The Judge took the view that the application for the stay did not amount to "legal proceedings in relation to the application". He added:

> "The application was dealt with immediately and refused. In the particular circumstances, it may be doubted whether any significant additional costs could be justified. I consider that the appropriate order is that there be no order as to costs of that application."

[31] Mr Cotman relied on the breadth of the expression "in relation to".

[32] In *Pauls Ltd v Elkington*, the Court of Appeal held that s 664F(4) did not extend to the costs of an appeal. It was 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."

By parity of reasoning, the section should not in my view be read as extending to proceedings for a stay.

[33] Mr Cotman relied on *Austrim Nylex Ltd v Kroll (No 3)* [2002] VSC 290, but it is sufficient to observe that the ambit of the phrase "legal proceedings in relation to an application" was not in issue in those proceedings, that court was not referred to the costs decisions in *Pauls Ltd v Elkington*, and in any event Warren J refused to allow the applicants for a stay their costs.

[34] I would order that the appeals be dismissed, with costs to be assessed.

[35] **JERRARD JA:** In this matter I have had the great advantage of reading the judgment of de Jersey CJ, with much of which I respectfully agree; and I respectfully adopt the relevant facts carefully described in his Honour's judgment. The appellant Gordon Elkington complained in his grounds of appeal and argument about errors by the learned trial judge (and other courts upon whose decisions the judge relied or followed) in the construction and application of s 667C in particular and Pt 6A.2 of the *Corporations Act* 2001 in general. However the appellant Winpar Holdings Pty Ltd, as well as making similar criticisms, also submitted by grounds 10 and 12 of its notice of appeal, supported in part by its written and oral argument, that the fair value of its shares assessed in accordance with s 667C did not provide just terms for the acquisition of those shares, within the meaning of s 51(xxxi) of the Constitution. The following observations are in response to those grounds of appeal 10 and 12.

[36] This Court held in *Pauls Limited v Elkington*[1] that Pt 6A.2 of the (then) *Corporations Law* of Victoria, enacted by s 7 of the *Corporations (Victoria) Act* 1990, and being an Act of a State Parliament, was immune from any attack on the ground that that Part provided for the acquisition of private property on other than just terms. This was because a State legislature could validly enact laws that did just that. This Court also, by majority, expressed the opinion that s 1350 of the *Corporations Act* 2001 (Cth) saved Pt 6A.2 of that Act from invalidity, should s 51(xxxi) of the Constitution require that an acquisition of minority shareholding under the Act be on just terms.

[37] In *Pauls Limited v Dwyer & Ors*,[2] this Court by majority held that there was no requirement that such acquisition of minority shareholdings under Pt 6A.2 of the Act be on just terms. It also held unanimously both that Pt 6A.2 did provide just terms for acquisition, and that where the fair value as determined in accordance with

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1 (2001) 189 ALR 551.

2 (2002) 43 ACSR 413.

s 667C in that Part did not achieve just terms, s 1350 would save the acquisition from invalidity by its requirement that the minority shareholders be paid a reasonable amount by way of compensation. Presumably, this is such as would give just terms.

[38] The majority view in *Dwyer* on the constitutionality of Pt 6A.2 of the Act makes it unnecessary for this Court to determine if the unanimous view in *Dwyer* expressed in [42], [68] and [70] of that judgment, namely that the method of calculating the fair value at which shares were compulsorily obtained resulted in just terms for their acquisition, was necessarily correct when applied to facts such as the ones in this case; or should be reconsidered. In *Dwyer* the appellants did not argue on appeal that the assessed fair value denied them a premium value their shares held, such premium value reflecting the "greenmail" benefit to the majority of acquiring 100 per cent of the shares.

[39] Since these acquisitions may be considered elsewhere, I make the following comments, recognising that they reflect what was a minority view in *Dwyer* and that as the Chief Justice notes in his judgment in this matter, a number of judges (who command wide respect) have expressed views in accordance with the majority in *Dwyer*. The extent of that judicial support for the majority view in *Pauls Limited v Dwyer*, that the validity of Pt 6A.2 of the *Corporations Act* is not affected by s 51(xxxi), cited by the learned Chief Justice at [10] of his reasons, has led me to re-examine my own view, in deference to those other ones. The most careful explanation of the contrary view is perhaps to be found in the judgment of Warren J in *Capricorn Diamonds Investments v Catto*, particularly at [103]-[120], together with her Honour's earlier remarks at [22]-[29]. The essence of her Honour's reasons in *Catto* is summarised in the written outline of the Solicitor-General presented to this Court in the appeal on *Pauls Limited v Dwyer* and reproduced at [36] of the reasons of Davies JA in that case.

[40] As expressed by Warren J those provisions of Ch 6A, introduced by the *Corporate Law Economic Reform Program Act* No 156 of 1999 (Cth), are laws which in providing for the acquisition of minority shareholdings by a 90 per cent majority shareholder are laws merely adjusting the competing rights or claims of persons in a particular relationship or area of activity[3] or are laws providing no more than the means appropriate for the achievement of an objective, where the acquisition of property without just terms is a necessary or characteristic feature of the means prescribed.[4] The judgment of Warren J cites the explanatory memorandum to the *Corporate Law Economic Reform Bill* 1998 (at [22] of her reasons) in *Catto*, as including as an aim of those reforms to "make it easier for majority shareholders to obtain the benefits of 100 per cent ownership".

[41] The judgment then further cites that explanatory memorandum as identifying the purpose of those legislative amendments as including:

> "…legislative mechanisms for the compulsory acquisition of securities. These are intended to balance the interests of facilitating

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3 *Australian Tape Manufacturers Association Limited v The Commonwealth* (1993) 176 CLR 480, 510 per Mason CJ, Brennan, Deane and Gaudron JJ.

4 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155, 179-181 per Brennan J and *Air Services Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133, 180 per Gleeson CJ and Kirby J.

> changes in corporate ownership with the need to protect the rights of minority shareholders."

That explanatory memorandum would seem to have been written with the observations in the joint judgment in *Australian Tape Manufacturers* at CLR 510 firmly in mind.

[42] The "benefits of 100 percent ownership" which it is the aim of that legislation to make easier for the majority shareholders to obtain as a consequence of enacting Pt 6A.2 in the *Corporations Law* and then *Corporations Act*, are the benefits from acquiring the shares of the minority. Likewise, the changes in corporate ownership facilitated by that legislation are the acquisition of those shares. I consider that makes it fair to characterise Pt 6A, and certainly Pt 6A.2 and the accompanying Pt 6A.4, as a law with respect to the acquisition of property.[5]

[43] I consider acquisition of minority shares without just terms is neither a necessary nor a characteristic feature of legislation either with respect to "foreign corporations and trading and financial corporations formed within the limits of the Commonwealth", or laws enacted pursuant to the referred power in s 51(xxxvii). I respectfully regard it as an invalidly self-fulfilling argument that legislation allowing acquisition of the minority shareholders' property without just terms is a necessary or characteristic feature of that part of the *Corporations Act*, simply because it was referred in those terms and enacted that way; I endeavoured to explain why being simply so enacted provided no particular constitutional validity, in *Pauls Limited v Dwyer* at [65]-[67]. I further consider that it is not self-evidently necessary that minority shareholders should not receive just terms for their shares if acquired by the majority in reliance on laws enacted by the Commonwealth. While one object of the legislation was to enable the majority shareholder to avoid paying a premium for the benefit of holding all the shares, achieving that object is not a necessary feature of legislation enabling the majority to obtain the benefit of 100 percent ownership for consideration. I do not grasp why it should be considered characteristic of it.

[44] The facts in this appeal are capable of showing that a significant part of the commercial or market value of the minority shares held by the appellants, assessed otherwise than in accordance with 667C, derives from the benefit to the majority of acquiring those minority shareholdings. The argument is far stronger in that regard than in *Dwyer*; there the capitalised administrative savings to the majority shareholdings from acquiring 37,660 shares was $20,000; here the capitalised figure is $3 million, in respect of the acquisition of 83,005 shares. The benefit to the majority from acquiring those minority shareholdings is considerable, and known to both buyer and seller.

[45] The right of a willing but not anxious seller to sell at a price reflecting the buyer's expected benefit from ownership is a right usually attaching to property, to sell at a market price set by market forces. The fair value assessed for the appellants' shares in accordance with s 667C excludes any value reflecting that right. The observation in the joint judgment in *Gambotto v WCP Ltd*[6] is relevant here, namely that an expropriation at less than market value is prima facie unfair. That joint judgment

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5 The test suggested by Deane and Gaudron JJ at CLR 188 in their joint judgment in *Mutual Pools*.

6 (1994-1995) 182 CLR 432, 447.

went on to emphasise that a shareholder's interest could not be valued solely by the current market value of those shares, and that whether a price offered was fair depended on a variety of factors, including assets, market value, dividends, and the nature of the corporation and its likely future. A fair price for the minority shareholding calculated on that basis might often be different from the fair value calculated in accordance with s 667C.

[46] On these facts the right to sell at a price reflecting the buyer's interest in acquisition appears to have a real value, and the terms on which the shares are being acquired exclude that element of their value. It is as real as the value that river, bay or other views can give to a residential property; and to acquire property without paying for that element of value is to acquire it on other than just terms. I consider s 1350 accordingly has the effect that the minority shareholders are entitled to compensation of a reasonable amount, being perhaps the difference between the assessed fair value and the market value, the latter perhaps being fixed at its upper limit at the last on-market trade in those preference shares of $12.50 on 11 May 1999.

[47] Regarding the costs orders, I agree with the learned Chief Justice that the appellants very largely re-argued at length their submissions on s 667C which have previously been rejected by this and other courts. For that reason I agree with the order as to costs.

[48] In the result, being bound by the majority decision in *Dwyer*, I agree with the orders proposed by the Chief Justice.

[49] **HELMAN J:** I agree with the order proposed by the Chief Justice and with his reasons.