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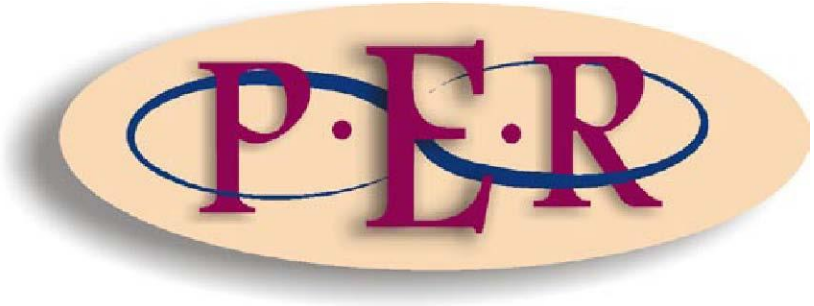
ISSN 1727-3781



2015 VOLUME 18 No 1

http://dx.doi.org/10.4314/pelj.v18i1.03

WHEN DOES STATE INTERFERENCE WITH PROPERTY (NOW) AMOUNT TO EXPROPRIATION? AN ANALYSIS OF THE *Agri SA* COURT'S STATE ACQUISITION REQUIREMENT (PART II)*

EJ Marais**

1 Shortcomings of the state acquisition requirement

1.1 Introducing the problems

In *Agri South Africa v Minister for Minerals and Energy*[1] (*Agri SA*) the Constitutional Court recently revisited the distinction between deprivation (section 25(1)) and expropriation (section 25(2)) and held that state acquisition is the key element that distinguishes these two forms of infringement. This finding has important implications for how courts will approach future cases based in the property clause, especially in terms of (i) the meaning and role of state acquisition as well as (ii) whether it is capable of coherently distinguishing between these two types of state interference in all instances.

Part I of this article investigates the first question and indicates that the meaning attributed to state acquisition in *Agri SA* is largely similar to how it was construed in pre-constitutional law.[2] Acquisition relates to the ownership of the affected property or the right to exploit it, at least when the impugned statute has a transformative purpose.[3] However, concerning the role of state acquisition there was a definite shift

* Part I appears in the same edition of this journal.

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1 *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC).

2 See *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC); *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC); *Harksen v Lane* 1998 1 SA 300 (CC) and compare *Tongaat Group Ltd v Minister of Agriculture* 1977 2 SA 961 (A) 972; *Pretoria City Council v Modimola* 1966 3 SA 250 (A) 258; *Wallis v Johannesburg City Council* 1981 3 SA 905 (W) 908-909; *Beckenstrater v Sand River Irrigation Board* 1964 4 SA 510 (T) 515; *Minister van Waterwese v Mostert* 1964 2 SA 656 (A) 667. See further the discussion in s 3.2 of Part I of this article. There are also interesting similarities with how "acquisition" is interpreted in Australian constitutional property law: see s 3.4 of Part I of this article.

3 *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 68-71.

away from pre-constitutional expropriation law, where acquisition seems to have been merely a general hallmark (or consequence) of expropriation rather than an indispensable requirement (or cause) for it.[4] In *Agri SA* Mogoeng CJ ruled that state acquisition is the "key requirement" that distinguishes expropriation from deprivation.[5] Without state acquisition there can (now) be no expropriation of property.

It is trite that most expropriations result in state acquisition and that it is therefore a useful factor for establishing whether or not expropriation occurred.[6] However, there are at least two problems with viewing acquisition as the defining characteristic that distinguishes expropriation from deprivation. Firstly, the judgments[7] on which Goldstone J relied in *Harksen v Lane*[8] (*Harksen*) provide dubious support for viewing state acquisition as the central characteristic of expropriation.[9] Secondly, the distinction between deprivation and expropriation is simply not so straightforward as to depend only on the effect of the infringement.[10] Against this background Part II of this article elaborates on the second question, namely whether or not state acquisition is able to properly decide all expropriation questions. It starts by setting out three types of cases that reveal the shortcomings of this "requirement." In terms of the first scenario (section 1.2), which concerns legislation that explicitly authorises expropriation, it is argued that state acquisition is (still) only a consequence of a valid expropriation and not a pre-requisite for it. The second instance (section 1.3) demonstrates the inadequacies of only focusing on the effect of a property interference for the purpose of categorising it as either deprivation or expropriation. The third situation (section 1.4) concerns the anomalies of state acquisition in the context of legislation which primarily has a regulatory objective, but which also

4 See ss 3.2-3.3 of Part I of this article and compare the discussion in s 1.2 below.

5 *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 58-59. The Constitutional Court was not unanimous on this point, though. Both Cameron J and Froneman J in their respective minority judgments question whether state acquisition is a necessary feature of every expropriation: see *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 77-78 (Cameron J) and paras 102-105 (Froneman J).

6 Van der Walt *Constitutional Property Law* 197, 345. See also s 1.2 below.

7 *Tongaat Group Ltd v Minister of Agriculture* 1977 2 SA 961 (A) 972; *Beckenstrater v Sand River Irrigation Board* 1964 4 SA 510 (T) 515. Mogoeng CJ relied on these judgments indirectly through citing *Harksen v Lane* 1998 1 SA 300 (CC) paras 31-32 in *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 58-59.

8 *Harksen v Lane* 1998 1 SA 300 (CC).

9 These cases (mentioned in fn 7 above) are discussed in s 3.2 of Part I of this article.

10 Compare the discussions in ss 1.2-1.4 below.

provides for expropriation under certain circumstances. Section 2, in turn, investigates how a purpose-based approach towards the expropriation question – as set out in *Harksen* and informed by Australian constitutional property law[11] – could avoid the fallacies of the acquisition requirement prevalent in each of the scenarios discussed in section 1.

1.2 "Expropriation-proper" cases

The first scenario involves situations where the state expropriates property pursuant to legislation that expressly authorises expropriation. These so-called "expropriation-proper" cases show why it is tempting to link the expropriation and acquisition questions. The paucity of judgments and academic literature concerning the meaning of expropriation in both the pre- and post-constitutional eras unfortunately complicates an investigation into this matter. Still, I believe that one of the few recent decisions on expropriation, namely *eThekwini Municipality v Spetsiotis*[12] (*Spetsiotis*), supports my argument.

In *Spetsiotis* the state (in the form of the eThekwini Municipality) was the owner of certain immovable property which it leased to the respondent. In the light of the upcoming 2010 FIFA World Cup the applicant wished to develop the property for purposes related to South Africa's hosting this event. It therefore wanted to expropriate the respondent's lease, which was to expire only in 2014, so as to have unburdened use of the premises. Although the case did not concern the meaning of expropriation,[13] it presents a useful example for the present purpose.

The KwaZulu-Natal High Court in Durban held that the state had followed the correct procedure to expropriate the respondent's lease[14] and that the purpose behind the

11 I rely on Allen's view (Allen *Commonwealth Constitutions* 174-179) of how the theory developed by Sax 1964 *Yale LJ* 36-76 influenced the expropriation jurisprudence of the Australian High Court. See further s 2.3 below.

12 *eThekwini Municipality v Spetsiotis* 2009 JOL 24536 (KZD).

13 The case actually turned on whether the purpose behind the expropriation was a public purpose or in the public interest.

14 It is unclear from the decision whether the lease was a registered long-term lease (and therefore a limited real right) or whether it was merely an unregistered lease (in which instance it would simply be a personal right). For present purposes I assume that the lease was a registered one, especially given its duration.

expropriation was indeed a public purpose. Consequently, the respondent's lease was validly expropriated and he had to vacate the premises. It was undisputed that the empowering statute[15] authorised expropriation in the prevailing circumstances.

When the state expropriates property in instances like *Spetsiotis* it essentially extinguishes the affected right upon expropriation, after which it has unburdened use and enjoyment of its property. Upon expropriating the lease the state's ownership of the land reverted back to its full and unburdened extent, as its entitlements of use and enjoyment were no longer limited or subtracted by the presence of the long-term lease.[16] What the state acquired under these circumstances can therefore be described as the correlative of what the respondent lost.[17] Consequently, the state acquisition requirement laid down in *Agri SA* accommodates expropriation-proper cases such as this, since the state (re)acquired the right to exploit its property.[18] This requirement is hence able to correctly classify property infringements in situations where the empowering legislation expressly provides for expropriation, at least where the expropriation results in the acquisition of property by the state. It follows that the acquisition requirement will not present problems in the majority of expropriation-proper cases, since most expropriations result in state acquisition of property.

However, confining the expropriation investigation to whether or not acquisition took place obfuscates the true explanation of why the infringement constitutes expropriation, in that it conflates cause and effect. The state would not have been able to expropriate the respondent's lease if there had been no statutory authority for it in the first place.[19] A more principled explanation as to why expropriation occurred under these circumstances – one which accords with the position in pre-constitutional

15 Section 190 of the *KwaZulu-Natal Local Authorities Ordinance* 25 of 1974.

16 See the discussion in s 3.2 of Part I of this article and compare *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 194-195 per Dawson J and Toohey J and *British Columbia v Tener* 1985 17 DLR 4th 1; 32 LCR 340 para 68. See further the discussion of Australian law in s 3.4 of Part I of this article.

17 See *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 58 and compare *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297 311 per Brennan J, which is discussed in s 3.4 of Part I of this article.

18 Compare *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 68-71.

19 Gildenhuys *Onteieningsreg* 9-10; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 559; Van der Walt *Constitutional Property Law* 343-344. See also *Pretoria City Council v Modimola* 1966 3 SA 250 (A) 258; *Joyce & McGregor Ltd v Cape Provincial Administration* 1946 AD 658 671. See further the discussion of pre-constitutional expropriation law in s 3.2 of Part I of this article.

expropriation law[20] – is therefore not to concentrate on the effect of the interference but rather on the authorising source itself. In this sense the empowering provision, namely section 190 of the *KwaZulu-Natal Local Authorities Ordinance* 25 of 1974, clearly sets out the procedures, circumstances and conditions under which expropriation may take place and also provides for compensation (through incorporating the *Expropriation Act* 63 of 1975), as required in terms of the authorisation requirement.[21] Thus, the fact that the legislation in *Spetsiotis* explicitly authorised the state to undertake the expropriation is the real reason why the interference constitutes expropriation, not the fact that it (incidentally) led to state acquisition of property. Indeed, it is conceivable – at least theoretically – that an empowering statute could authorise the expropriation of property through its mere extinguishment or destruction without the state acquiring anything in the process.[22] Under these circumstances the authorisation requirement would have no problem recognising the interference as expropriation, although it is difficult to see how the state acquisition requirement would arrive at this conclusion.

It follows that whether or not a property interference amounts to expropriation (still) depends on the pre-constitutional authorisation requirement and not the effect of the infringement, even though this is not recognised in case law.[23] Although the state acquisition requirement confirms why expropriation took place in cases like *Spetsiotis*, it does not present a workable method for distinguishing between deprivation and expropriation in all expropriation-proper cases.

1.3 "Forfeiture-type" cases

As said in the previous section, the fact that most expropriations result in state acquisition might create the mistaken impression that whether or not expropriation occurred depends only on if the state acquired property. Forfeiture-type cases, which involve scenarios where the state acquires property pursuant to legislation that is regulatory in nature, exemplify the second problem of confining the expropriation

20 See the discussion of pre-constitutional expropriation law in s 3.2 of Part I of this article.
21 Gildenhuys *Onteieningsreg* 9-10; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 559.
22 Van der Walt *Constitutional Property Law* 197, 345; Van der Vyver 2012 *De Jure* 131-133.
23 Neither *Agri SA* nor the decisions on which it relied to construe the state acquisition requirement (namely *Harksen* and *Reflect-All*) referred to the authorisation requirement at all.

inquiry to the effect of the infringement. Examples of such infringements include criminal forfeiture of property and (perhaps)[24] also laws regulating insolvency.

Criminal forfeiture or confiscation – as it is referred to in the *Prevention of Organised Crime Act* 121 of 1998 (*POCA*) – involves state action whereby the state acquires property without the consent of the owner upon conviction of an offence.[25] Section 18(1) of *POCA* provides that a court may, upon convicting a defendant of an offence, inquire into any benefit which the defendant may have derived from the offence and then make an order for the payment against the defendant to the state of any amount the court considers appropriate. A court may also make *any further orders* it deems fit to ensure the effectiveness and fairness of that order, such as forfeiting property used in the commission of an offence or acquired with funds related to an offence. The purpose behind criminal forfeiture is *inter alia* to "strip sophisticated criminals of the proceeds of their criminal conduct"[26] and to prevent them from repeating their crimes.[27] Laws governing criminal forfeiture of property are aimed at protecting public health and safety and are therefore regarded as being regulatory in nature.[28]

However, if one formalistically applies the state acquisition requirement to cases involving criminal forfeiture it is clear that what the affected party loses (namely ownership of the forfeited object) is not only "substantially similar"[29] but virtually identical to what is acquired by the state. The state is the ultimate beneficiary and is allowed to exploit the forfeited property, which includes selling it and using the proceeds to help combat crime. In terms of Mogoeng CJ's judgment, criminal forfeiture clearly fits the state acquisition (or expropriation) model. However, it makes little

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24 I expand on the reason for this qualification in the last paragraph of this section.

25 Van der Walt *Constitutional Property Law* 314-316; Van der Walt 2000 *SAJHR* 32-33. See ch 5 of *POCA*, especially s 18. A comprehensive discussion of criminal forfeiture is beyond the scope of this article. For a more detailed analysis, see Van der Walt *Constitutional Property Law* 314-319 and Van der Walt 2000 *SAJHR* 1-45.

26 *National Director of Public Prosecutions v Gardener* 2011 4 SA 102 (SCA) para 19.

27 *National Director of Public Prosecutions v Gardener* 2011 4 SA 102 (SCA) para 19; *S v Shaik* 2008 5 SA 354 (CC) para 25. See also Van der Walt *Constitutional Property Law* 312.

28 Van der Walt *Constitutional Property Law* 311-312, 316-317; Van der Walt 2000 *SAJHR* 2-4, 6-7. See also Sax 1964 *Yale LJ* 74-76. It is worth mentioning that even though criminal forfeiture does not amount to expropriation, it must still satisfy the requirements for a valid deprivation in s 25(1) of the *Constitution*. I expand on why criminal forfeiture does not amount to expropriation in s 2.3 below.

29 *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 58-59.

sense to regard criminal forfeiture as expropriation which requires compensation, as it would be nonsensical to compensate criminals who forfeit property used in the commission of offences.[30] Nevertheless, it is hard to avoid this conclusion in the context of the effect-centred test the *Agri SA* court formulated to establish whether or not expropriation took place.

The same problem seems to present itself in the context of section 21(1) of the *Insolvency Act* 24 of 1936 (*Insolvency Act*), which is discussed in more detail elsewhere[31] and will hence not be repeated here. It allows the state, through the Master, to acquire the property of the solvent spouse until such time as he or she can prove that the property does not belong to the insolvent estate. The provision therefore also results in the state acquiring ownership of the solvent spouse's property,[32] although it must be emphasised that the state does not acquire the right to exploit the affected property.[33] Thus, the vesting of the solvent spouse's property in the Master of the High Court and later in the trustee of the insolvent estate seemingly also satisfies Mogoeng CJ's state acquisition test. Be that as it may, it is unhelpful to regard this type of interference, as with criminal forfeiture, as expropriation which requires compensation. It follows that there must be another explanation of why these property infringements do not amount to expropriation, even though they result in state acquisition of property.[34]

1.4 "Hybrid" cases

The third type of case which displays the flaws of the state acquisition requirement relates to instances where the property infringement is sourced in legislation that is primarily aimed at regulating property but which also provides for expropriation. Legislation of this type may be characterised as hybrid in that it authorises both

30 Sax 1964 *Yale LJ* 75-76; Van der Walt *Constitutional Property Law* 335, 347-348; Allen *Commonwealth Constitutions* 163.

31 See s 3.3 Part I of this article.

32 Compare *Harksen v Lane* 1998 1 SA 300 (CC) para 30, especially fn 13.

33 Even though it appears that ownership vests in the Master of the High Court: see *Harksen v Lane* 1998 1 SA 300 (CC) para 30, citing *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163 175. However, neither the Master nor the trustee acquires the entitlement to use or exploit the property, which counts against regarding this interference as expropriation: see Hopkins and Hofmeyr 2003 *SALJ* 51.

34 I expand on this explanation in s 2 below.

deprivation and expropriation, depending on the specific situation. A prime example of such an act is the *MPRDA*, which expressly authorises the state to expropriate property[35] and also stipulates that anyone who can prove that his property has been expropriated in terms of the Act may claim compensation from the state.[36] Yet, it was shown earlier[37] that the main objective of the *MPRDA* is to bring about an institutional regime change[38] in South Africa's mineral and petroleum law and not to expropriate mineral rights *en masse*. Categorising interferences sourced in such statutes is therefore a more difficult nut to crack, especially since the authorisation requirement does not provide a straightforward answer in this context.[39] Furthermore, it is debatable whether the effects of the *MPRDA* on Sebenza's rights did not amount to state acquisition. To answer this question one should distinguish between the moment the *MPRDA* abrogated certain entitlements[40] held by old order right holders when it came into effect, and when Sebenza's mineral rights were extinguished at the expiration of the applicable one-year period.[41] Counsel for Agri South Africa based their case solely on the former point in time to challenge the constitutionality of the Act.

The Constitutional Court held that the *MPRDA* had not resulted in state acquisition of Sebenza's mineral rights, since the state had not acquired either ownership of the affected mineral rights or the right to exploit them. At least two points of criticism can be levelled against this finding, firstly regarding the effect of the Act on its date of commencement and, secondly, when the Act extinguished Sebenza's old order rights

35 Section 55 of the *Mineral and Petroleum Resources Development Act* 28 of 2002 (the *MPRDA*).

36 Item 12(1) of Schedule II to the *MPRDA*. Another example of such a hybrid act is the *Gauteng Transport Infrastructure Act* 8 of 2001, which also provides for expropriation as well as compensation: See part 3 of the Act.

37 See s 2.1 of Part I of this article.

38 Van der Walt *Constitutional Property Law* 418. See also Mostert *Mineral Law* 78.

39 This is because the *MPRDA* sets out the circumstances, procedures and conditions upon which expropriation may take place (see s 55 of the *MPRDA*, which incorporates the *Expropriation Act*) and also provides for compensation (see s 55 *MPRDA*, again incorporating the *Expropriation Act*, read with Item 12(1) of Schedule II to the *MPRDA*).

40 Especially the *ius abutendi*: see Mostert *Mineral Law* 93, 138-140, 142. See also Badenhorst 2013 *THRHR* 484-485 and Van der Vyver 2012 *De Jure* 135-136. See further s 2.1 of Part I of this article.

41 Item 8(4) of Schedule II to the *MPRDA*.

at the expiration of the one-year deadline.[42] Rautenbach[43] refers to the fact that under the *Minerals Act* 50 of 1991 (*Minerals Act*) the state could enforce the exploitation of minerals against the will of mineral right holders only if it expropriated the rights against payment of compensation. Under the *MPRDA* this possibility of receiving compensation is "lost" upon its coming into effect, as holders of unactivated old order rights are now forced to activate these rights or risk losing them. The state therefore has the benefit of keeping the money it would otherwise have had to pay out in terms of the *Minerals Act*, which benefit Rautenbach[44] thinks satisfies the state acquisition requirement.[45]

The second point of criticism is found in a decision of the Australian High Court, namely *Commonwealth v WMC Resources Ltd*[46] (*WMC Resources*). This case concerned the constitutionality of legislation that extinguished the interest held by a mining company in an exploration permit to explore for petroleum on the continental shelf off Australia. The company argued that this extinguishment resulted in an uncompensated expropriation (or acquisition, in Australian legal terminology) contrary to section 51(xxxi) of the *Commonwealth Constitution* (1900).[47] The minority held that the extinguishment of the permit indeed resulted in an acquisition of property by reason of its revesting in the Commonwealth upon its extinguishment.[48] The Commonwealth

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42 Oddly, Mogoeng CJ does not seem to have considered the effect of the *MPRDA* on Sebenza's rights at this point in time to decide whether expropriation took place. This is an important consideration, as Sebenza lost valuable property when the Act extinguished its unactivated old order rights at the expiration of the one-year period provided in Item 8(4) of Schedule II to the *MPRDA*.

43 Rautenbach 2013 *TSAR* 747. See also *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 45-46.

44 Rautenbach 2013 *TSAR* 747, citing *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 106 (Froneman J's minority judgment). Compare this argument to the reasoning in *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297, which is discussed in s 3.4 of Part I of this article.

45 Compare Van der Vyver 2012 *De Jure* 135-136. However, Van der Vyver concludes – rather superficially – that the deprivation caused by the *MPRDA* in this context results in expropriation by reason of it being authorised by law of general application and because it is for a public purpose or in the public interest. This is due to his view (130) that the non-arbitrariness requirement in s 25(1) is not similar to the public purpose or public interest requirements in s 25(2). For criticism of this argument, see fn 51 in Part I of this article.

46 *Commonwealth v WMC Resources Ltd* 1998 HCA 8.

47 The acquisition requirement in Australian constitutional property law is discussed more fully in s 3.4 of Part I of this article.

48 *Commonwealth v WMC Resources Ltd* 1998 HCA 8 paras 53-59 per Toohey J and paras 246-247 per Kirby J. Toohey J (paras 53-59) and Kirby J (paras 246-247) maintained that the benefit obtained by the Commonwealth was proprietary in nature and therefore satisfied the acquisition

could subsequently, so the argument went, grant it to others and thus derive financial gain from it – be it in the form of taxes or otherwise. It is worth emphasising that Froneman J arrived at a similar conclusion in his minority judgment in *Agri SA* concerning the effect of the *MPRDA*, which enables the state to grant new rights to minerals to third parties in situations where old order rights were extinguished because of non-conversion.[49]

In view of Rautenbach's argument and the minority judgments in *WMC Resources* (read with Froneman J's minority judgment), it may very well be asked whether the *MPRDA* did not perhaps result in state acquisition of property, either upon its commencement or when Sebenza's old order rights were extinguished. Such a conclusion would mean – in terms of Mogoeng CJ's effect-centred acquisition test – that Sebenza's rights were acquired by the state and that expropriation therefore occurred. In this regard *WMC Resources* bears interesting parallels to the extinguishment of unused old order rights held by mineral right holders such as Sebenza who did not (or could not) convert them into new order rights before the expiration of the applicable deadline. Though these two arguments do not categorically discredit the *Agri SA* court's finding regarding state acquisition, they do raise valid questions concerning the outcome of the case if the Court would have found that acquisition had in fact taken take place.

The three types of cases discussed in this section demonstrate the problems of basing the expropriation question exclusively on the effect of the infringement. The distinction between deprivation and expropriation is just not as simplistic so as to depend exclusively on whether or not the state acquired property. The question which has to be asked is if there is an alternative to state acquisition, one which is capable of distinguishing between deprivation and expropriation on a more coherent basis. Against this background I think a possible solution which is akin to the pre-constitutional authorisation requirement lies in not concentrating on the effect of the

requirement in s 51(xxxi) of the *Commonwealth Constitution* (1900). The majority, however, found that no acquisition had taken place. See also Allen 2000 *Sydney LR* 356-357.

49 *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 80-81. Compare Badenhorst 2014 *THRHR* 328-329 and Badenhorst and Mostert 2004 *Stell LR* 49-50.

interference but rather on considering the source of the infringement in terms of its broad context and purpose, as was done by Goldstone J in *Harksen*.[50]

2 A principled approach towards the expropriation question

2.1 Harksen's *first qualification*

Goldstone J's judgment in *Harksen* provides an outline for adjudicating expropriation cases on a more principled basis in that it is capable of avoiding the pitfalls of the state acquisition requirement illustrated by the three types of cases above. As mentioned elsewhere,[51] the Court added two qualifications to the expropriation inquiry besides establishing whether acquisition occurred, namely (i) the broad context and purpose of the impugned provision as a whole as well as (ii) the permanence of the interference.[52] It has already been explained why the permanence qualification is unhelpful,[53] but the first qualification is useful in that it focuses on the source of the infringement (rather than its effect) by taking into account the purpose behind the impugned statute. Establishing the purpose of legislation is an important consideration in the context of the different aims behind the two powers through which the state may interfere with property, namely deprivation (section 25(1)) and expropriation (section 25(2)).[54] Moreover, the first qualification is akin to the pre-constitutional authorisation requirement, since it also focuses on the source of the interference to answer the expropriation question.

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50 A number of academic commentators think that focusing on the source or power that authorises the property interference is helpful for distinguishing between deprivation and expropriation: see Van der Walt *Constitutional Property Law* 192-193, 196-199, 210, 212; Mostert *Mineral Law* 123-124, 153; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 544; Allen *Commonwealth Constitutions* 163-164, 177-178. See also Iles "Property" 539, 550.

51 Section 3.3 of Part I of this article.

52 *Harksen v Lane* 1998 1 SA 300 (CC) paras 35-36.

53 Allen *Commonwealth Constitutions* 167, citing *Minister of State for the Army v Dalziel* 1944 68 CLR 261; Van der Walt and Botha 1998 *SAPL* 22-23, citing *Attorney-General v De Keyser's Royal Hotel* 1920 AC 508. See further s 3.3 of Part I of this article.

54 See s 2.3 below. Compare Iles "Property" 550, who thinks that Ackermann J's discussion of Australian law in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 76-83 also supports such a purpose-based investigation for distinguishing between deprivation and expropriation.

The *Harksen* court held that the interference caused by section 21(1) of the *Insolvency Act* – even though it resulted in state acquisition – did not amount to expropriation.[55] The Court relied[56] on *Van Schalkwyk v Die Meester*[57] in this regard, where it was found that section 21(1) is *inter alia* meant to prevent the wrongful alienation of assets from an insolvent estate, and to prevent malicious or accidental damage, as well as the theft of assets belonging to the insolvent estate by third parties.[58] The goal of the impugned provision is thus to "temporarily … lay the hand of the law"[59] upon the property of the solvent spouse by creating a procedure to protect the interests of creditors to the insolvent estate as well as those of the solvent spouse. Against this background Goldstone J held that "section 21 do[es] not have the purpose or effect of … [an] expropriation of property".[60]

Although Goldstone J did not expand on what purposes are characteristic of legislation which provides for expropriation (save the permanence requirement), nor how his approach might be used to distinguish between deprivation and expropriation in future cases, his focus on the aims of the impugned statute provides guideposts for how this may be done. Indeed, the purposes behind section 21(1) mentioned in the previous paragraph are typical of the state's regulatory police power (deprivation), which includes the state's role in resolving civil disputes.[61] When viewed from this angle it becomes clear why the interference at hand amounts to deprivation rather than expropriation, since the aim behind section 21(1) is not to acquire property for the state.[62]

That Goldstone J did not merely focus on the effect of section 21(1) to decide whether it amounts to expropriation should be applauded. This entails a nuanced approach towards the expropriation question, one which recognises that the difference between

55 *Harksen v Lane* 1998 1 SA 300 (CC) paras 30-39.
56 *Harksen v Lane* 1998 1 SA 300 (CC) para 35 fn 28.
57 *Van Schalkwyk v Die Meester* 1975 2 SA 508 (N).
58 *Van Schalkwyk v Die Meester* 1975 2 SA 508 (N) 510.
59 *Harksen v Lane* 1998 1 SA 300 (CC) para 36.
60 *Harksen v Lane* 1998 1 SA 300 (CC) para 37.
61 Sax 1964 *Yale LJ* 36-37, 62-63; Van der Walt *Constitutional Property Law* 195-197; Allen *Commonwealth Constitutions* 174-175, 179-180; Van der Walt *Constitutional Property Clauses* 333-334. See further s 2.3 below.
62 See the sources referred to in fn 61.

deprivation and expropriation is not as simple as merely asking if the state acquired the affected property and which is cognisant of the fact that expropriation can (at least in terms of pre-constitutional law) take place only pursuant to empowering legislation. It also underscores the danger of conflating cause and effect, as the mere fact that state acquisition occurred – as in *Harksen* – does not necessarily entail that the interference results in expropriation. Indeed, if the Constitutional Court had focused only on the effect of section 21(1) the chances are that it might have decided that the interference did amount to an uncompensated expropriation of the applicant's property.

Harksen's first qualification bears a striking resemblance to how the Australian High Court establishes if an acquisition of property amounts to expropriation in terms of section 51(xxxi). Indeed, many of the explanations in that jurisdiction confirm the outcome in *Harksen*, especially when understood against the background of Sax's theory and how it – according to Allen[63] – influenced the jurisprudence of this legal system when it comes to distinguishing between deprivation and expropriation.[64] Australian constitutional property law therefore helps to inform *Harksen*'s purpose-based approach, especially given the fact that Goldstone J did not expand on what (other) purposes would be typical of deprivation and expropriation respectively.[65]

2.2 The purpose of the authorising statute in Australian constitutional property law

The High Court uses a two-step methodology to decide whether or not a property infringement amounts to "expropriation" for the purposes of section 51(xxxi)[66] of the *Commonwealth Constitution* (1900) (the *Constitution*), namely (i) was there "acquisition" of property as meant in section 51(xxxi) and (ii) was the acquisition an

63 Allen *Commonwealth Constitutions* 175-179.

64 See s 2.3 below.

65 The door to legal comparison with this jurisdiction was opened in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 76-83, where Ackermann J discussed Australian law for the purpose of deciding the property dispute at hand.

66 This section is the Australian property clause: see Van der Walt *Constitutional Property Clauses* 39, 41. See also the discussion in s 3.4 of Part I of this article.

acquisition of property with respect to section 51(xxxi)?[67] The aim of this methodology is to characterise legislation authorising property infringements as either expropriatory or regulatory in nature, as only section 51(xxxi) requires just terms (or compensation).[68]

The first step concerns the question of whether or not the interference results in acquisition of property. This requirement has already been discussed in Part I of this article and will therefore not be dealt with here.[69] Suffice it to say that a property infringement will amount to acquisition if the Commonwealth (or someone else) acquires a proprietary benefit which pertains to the ownership or use of the affected property.[70] However, the mere fact that a property interference results in acquisition does not necessarily mean that it requires just terms, as the Australian property clause does not inhibit other legislative powers aimed at acquiring property without just terms.[71] To determine whether the acquisition amounts to "expropriation" or not, it must be ascertained if the acquisition is an acquisition *with respect to* section 51(xxxi). An acquisition of property will not be an acquisition with respect to section 51(xxxi) if it is explicitly sourced in or authorised by a different "head of power" (or federal state power)[72] outside the property clause.[73] One example of such an "other" head of power is the federal power for the levying of taxes, which is specifically provided for in section

67 Van der Walt *Constitutional Property Clauses* 43-44 and fn 31. This methodology is neatly expounded by Brennan J in *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 176, 178.

68 Allen *Commonwealth Constitutions* 176. "Just terms" may be understood as meaning "compensation" for the present purposes: see Van der Walt *Constitutional Property Clauses* 58-60 and compare Allen 2000 *Sydney LR* 369-370.

69 See s 3.4 of Part I of this article.

70 *JT International SA v Commonwealth of Australia* 2012 HCA 43 para 30 per French CJ; *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 184-185 per Deane J and Gaudron J; *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994) 179 CLR 297 304 per Mason CJ, Deane J and Gaudron J 311 per Brennan J.

71 *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 171 per Mason CJ and 179-180 per Brennan J.

72 Van der Walt *Constitutional Property Law* 348.

73 *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 171 per Mason CJ, 177-179 per Brennan J, 187 per Deane J and Gaudron J and 199-200 per Dawson J and Toohey J; *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297 304, 306 per Mason CJ, Deane J and Gaudron J; *Re Director of Public Prosecutions; Ex Parte Lawler* 1994 179 CLR 270 277 per Brennan J and 291 per Dawson J. In other words, if an acquisition is explicitly authorised under another federal power which does not provide for acquisition in terms of s 51(xxxi), the just terms guarantee does not apply.

51(ii).[74] Another is the acquisition of state railways in terms of section 51(xxxiii).[75] Acquisitions sourced in these heads of power do not entail acquisitions with respect to section 51(xxxi) and therefore do not require just terms, even though the Commonwealth acquires property in the process.

Laws affecting acquisition that do not provide for just terms and which are not explicitly sourced outside section 51(xxxi) will also not necessarily require just terms.[76] One of the *loci classici* in this context is *Re Director of Public Prosecutions; Ex Parte Lawler*[77] (*Lawler*), which concerned the forfeiture of a fishing boat. In this case a person used a fishing boat for commercial fishing in Australian waters without the necessary licence to do so. The person was subsequently convicted and the boat forfeited to the Commonwealth pursuant to the applicable statute. However, the boat did not belong to the party contravening the law but to innocent third parties. These individuals subsequently challenged the authorising legislation as providing for the acquisition of property without just terms.

It is clear that the legislation resulted in an acquisition of property by the Commonwealth. However, the High Court held that the empowering statute did not entail acquisition with respect to section 51(xxxi), as the primary purpose of the impugned statute was not to acquire property for the Commonwealth but rather to

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74 *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 170-171 per Mason CJ, 178 per Brennan J and 186-187 per Deane J and Brennan J; *Trade Practices Commission v Tooth & Co Limited* 1979 142 CLR 379 453-454 per Aickin J; *Australian Tape Manufacturers Association Ltd v The Commonwealth of Australia* 1993 177 CLR 480 509-510 per Mason CJ, Brennan J, Deane J and Gaudron J; *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297 306 per Mason CJ, Deane J and Gaudron J; *Re Director of Public Prosecutions; Ex Parte Lawler* 1994 179 CLR 270 284 per Deane J and Gaudron J. See also Allen *Commonwealth Constitutions* 177.

75 Allen *Commonwealth Constitutions* 176 fn 43. It is not necessary to multiply examples, but another head of power outside s 51(xxxi) is s 51(xviii), which concerns "copyrights, patents of inventions and designs, and trade marks". For a judgment that concerned this head of power, see *Nintendo Co Ltd v Centronics Systems Pty Ltd* 1994 HCA 27.

76 *Re Director of Public Prosecutions; Ex Parte Lawler* 1994 179 CLR 270; *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 170 per Mason CJ, 178 per Brennan J and 186-188 per Deane J and Gaudron J; *Australian Tape Manufacturers Association Ltd v The Commonwealth of Australia* 1993 177 CLR 480 509-510 per Mason CJ, Brennan J, Deane J and Gaudron J; *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297 306 per Mason CJ, Deane J and Gaudron J; *Attorney-General (Cth) v Schmidt* 1961 105 CLR 361 372 per Dixon CJ.

77 *Re Director of Public Prosecutions; Ex Parte Lawler* 1994 179 CLR 270. The principles laid down in this case were confirmed in *Theophanous v The Commonwealth* 2006 225 CLR 101.

proscribe criminal conduct.[78] It was further decided that the means used by the challenged law were reasonably related to its purpose – the fact that the forfeited property belonged to innocent third parties did not change this conclusion.[79] The forfeiture was justified in view of the nature of the property (a fishing boat), the deterring effect it had on both guilty and innocent owners, and the difficulty of enforcing laws aimed at preventing illegal commercial fishing along the length of the Australian coastline. Indeed, to require just terms under these circumstances would be inconsistent with the aims of the law regulating forfeiture.[80] For these reasons the Court concluded that the empowering statute falls within another head of power, namely section 51(x),[81] and not section 51(xxxi), even though it is not explicitly sourced in the former section. Consequently, criminal forfeiture generally falls outside section 51(xxxi), since its main aim is not to acquire property for the Commonwealth but rather to discourage criminal conduct, even though the forfeited property is ultimately put to a public use – such as using the proceeds from selling the forfeited property to help combat crime.[82]

Thus, whether an acquisition of property does or does not result in expropriation depends not only on the effect of the interference but also on whether the legislation authorising the acquisition can be characterised as a law *with respect to* section

78 *Re Director of Public Prosecutions; Ex Parte Lawler* 1994 179 CLR 270 276 per Mason CJ, 277-278, 280-281 per Brennan J and 288-290 per Dawson J. See also *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 170 per Mason CJ, 187 per Deane J and Gaudron J and 199-200 per Dawson J and Toohey J; *Attorney-General (Cth) v Schmidt* 1961 105 CLR 361 372-373 per Dixon CJ; *Theophanous v The Commonwealth* 2006 225 CLR 101 114-115 per Gleeson CJ. Allen *Commonwealth Constitutions* 176-179 thinks this finding accords with what Sax 1964 *Yale LJ* 62-36 describes as the state's "arbitral capacity," which allows it to limit (or even extinguish) property values for purposes of protecting public health and safety, and to settle civil disputes without having to pay compensation. See further the discussion in s 2.3 below.

79 *Re Director of Public Prosecutions; Ex Parte Lawler* 1994 179 CLR 270 276 per Mason CJ, 280-281 per Brennan J and 294 per McHugh J. The nature of the property (a fishing boat), coupled with the difficulty of preventing illegal fishing along the Australian coastline were held to be decisive as to why the forfeiture was legitimate in this case.

80 *Re Director of Public Prosecutions; Ex Parte Lawler* 1994 179 CLR 270 285 per Deane J and Gaudron J and 292-293 per McHugh J. See also *Theophanous v The Commonwealth* 2006 225 CLR 101 114-115 per Gleeson CJ. See further Allen *Commonwealth Constitutions* 177.

81 This section grants the Commonwealth the power to make laws with respect to "fisheries in Australian waters beyond territorial limits".

82 Allen *Commonwealth Constitutions* 178-179. See also *Re Director of Public Prosecutions; Ex Parte Lawler* 1994 179 CLR 270 278 per Brennan J; *Theophanous v The Commonwealth* 2006 225 CLR 101 115-116 per Gleeson CJ, 124-127 per Gummow J, Kirby J, Hayne J, Haydon J and Crennan J.

51(xxxi).[83] To answer this question it must then be established in which head of power the impugned legislation is sourced, which is done by ascertaining the statute's main purpose. If the acquisition is merely ancillary or incidental to the primary aim of the impugned law, such as proscribing criminal conduct, it will not be an acquisition with respect to the property clause.[84] Yet under these circumstances the means selected – in other words the property interference itself – must still be appropriate and adapted to the purpose which the legislation seeks to achieve, if it is to pass constitutional muster.[85] It follows that if the primary aim of the authorising statute is to acquire property for the Commonwealth (as was for instance the case in *Georgiadis v Australian and Overseas Telecommunications Corporation* (*Georgiadis*)),[86] then it will be an acquisition with respect to section 51(xxxi), which requires just terms. If the impugned statute fails to provide just terms in this context, it will be declared invalid.[87]

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83 *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 171 per Mason CJ, 177-178 per Brennan J and 188-189 per Deane J and Gaudron J; *Re Director of Public Prosecutions; Ex Parte Lawler* 1994 179 CLR 270 285-286 per Deane J and Gaudron J; *Attorney-General (Cth) v Schmidt* 1961 105 CLR 361 372-373 per Dixon CJ.

84 *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 179-181 per Brennan J, 199-200 per Dawson J and Toohey J; *Re Director of Public Prosecutions; Ex Parte Lawler* 1994 179 CLR 270 286 per Deane J and Gaudron J, 288-289 per Dawson J and 293 per McHugh J; *Theophanous v The Commonwealth* 2006 225 CLR 101 114-115 per Gleeson CJ. Allen *Commonwealth Constitutions* 176-179, relying on the theory developed by Sax 1964 *Yale LJ* 74-75, is of the opinion that the state is not acting in its enterprise capacity under these circumstances (and hence no compensation is required) even though the particular property interference leads to an increase in state resources. The reason for this is that the state gains a benefit which is merely incidental to the one which is obtained by all persons in society – in this instance the proscription of criminal conduct. See further the discussion in s 2.3 below.

85 *Re Director of Public Prosecutions; Ex Parte Lawler* 1994 179 CLR 270 281 per Brennan J, 285-286 per Deane J and Gaudron J, 290-291 per Dawson J and 293-294 per McHugh J; *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 179-181 per Brennan J. In *Re Director of Public Prosecutions; Ex Parte Lawler* 1994 179 CLR 270 286 Deane J and Gaudron J held that for a law which authorises the forfeiture of property belonging to an innocent third party, it must be ascertained whether the property infringement is "reasonably capable of being seen as appropriate and adapted to achieving, or, as reasonably proportionate to some object or purpose within [one of the Commonwealth's heads of] power". Van der Walt *Constitutional Property Clauses* 45 thinks this entails a proportionality test for determining whether laws authorising interferences with property which do not amount to acquisition for purposes of s 51(xxxi) are constitutionally valid. Allen 2000 *Sydney LR* 363-364 is of the same opinion, although he states (at 269) that the proportionality test is applied "with a high level of deference" towards the judgment of the Commonwealth Parliament.

86 *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297. The High Court found that the main aim of the impugned statute was to release the Commonwealth from its obligation to pay the debt (so as to save money) while failing to provide just terms.

87 *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297. Allen *Commonwealth Constitutions* 178-179 thinks that this finding corresponds with what Sax 1964 *Yale LJ* 62-63 refers to as the government's "enterprise" capacity or function, which allows it to acquire (or expropriate) property for its own account, upon which compensation must be paid to the affected property holder. See further the discussion in s 2.3 below.

The state's role in resolving or settling competing claims is another instance where the acquisition of property may be merely ancillary to the primary purpose of the authorising statute.[88] A decision on this point is *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia*[89] (*Mutual Pools*), which concerned the constitutionality of legislation that extinguished the Commonwealth's liability to refund taxes to certain pool builders. The aim of the legislation was to prevent windfall benefits to pool builders in situations where they passed the applicable tax on to third parties, namely pool owners. The primary objective behind the statute was thus to ensure that the tax refunds reached the right persons, namely the pool owners and not the pool builders. The majority held that the impugned legislation did not have the acquisition of property as its principal aim and that its main purpose was merely to regulate competing claims. For this reason the acquisition fell outside section 51(xxxi).[90] It follows that laws which "provide for the ... general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest"[91] usually do not fall within the ambit of section 51(xxxi), even though they may incidentally result in the acquisition of property.[92]

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88 *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 171 per Mason CJ, 178 per Brennan J and 188-189 per Deane J and Gaudron J; *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297 306-307 per Mason CJ, Deane and Gaudron J; *Attorney-General for the Northern Territory v Chaffey* 2007 231 CLR 651 667 per Kirby J. A similar example from South African law is *Harksen v Lane* 1998 1 SA 300 (CC), where Goldstone J held that the purpose of the vesting of the applicant's property in the Master or trustee was not to expropriate (or acquire) property but rather to protect the interests of the creditors to the insolvent estate: see Van der Walt *Constitutional Property Law* 230 fn 113, 350 fn 54.

89 *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155.

90 *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 175 per Mason CJ, 179-181 per Brennan J and 186-191 per Deane J and Gaudron J. It is debatable whether there was actually an "acquisition" of property (in the sense of the Commonwealth acquiring a proprietary benefit) in this instance: see Van der Walt *Constitutional Property Clauses* 65-66.

91 *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 189-190 per Deane J and Gaudron J and 171 per Mason CJ. The use of the word "regulation" here suggests that these purposes relate to the state's police power and not the power of eminent domain: see Van der Walt *Constitutional Property Law* 348-349; Van der Walt *Constitutional Property Clauses* 47. Allen *Commonwealth Constitutions* 174-179 thinks that this approach corresponds with Sax's description (Sax 1964 *Yale LJ* 62-63) of the government's "arbitral" function or capacity to resolve (ie regulate) competing claims, which – in his view – explains why the property interference at hand amounts to the deprivation of property, which does not require compensation. See further the discussion in s 2.3 below. See also *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297 306-307 per Mason CJ, Deane J and Gaudron J; *Attorney-General for the Northern Territory v Chaffey* 2007 231 CLR 651 667 per Kirby J.

92 *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 189 per Deane J and Gaudron J. Compare *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) para 63, *Pennsylvania Coal Co v Mahon*

The state's role in settling civil disputes also extends to the vesting of property other than claims in the Commonwealth. An interesting example in Australian law – one that is similar to *Harksen* – concerns laws which govern bankruptcy and insolvency by vesting ownership of the property belonging to an insolvent estate in the Official Receiver (or Master, in the South African context) upon sequestration.[93] Australian law is clear on this point: laws relating to bankruptcy and insolvency do not lead to the acquisition of property with respect to section 51(xxxi).[94] As in *Mutual Pools*, the primary purpose of the vesting of the insolvent person's property in the Official Receiver is not to acquire property for the Commonwealth but rather to regulate competing claims of creditors to the insolvent estate so as to protect their interests. For this reason the acquisition is not an acquisition with respect to section 51(xxxi), which means that just terms are not required.

In Australian law, state interference with property must therefore satisfy two requirements for it to amount to expropriation that requires just terms. Firstly, there must be an acquisition of property as meant in section 51(xxxi). Once it is established that there was acquisition it must be determined in which "head of power" the authorising statute is sourced to decide whether or not the acquisition was an acquisition with respect to section 51(xxxi). This is done by identifying the primary purpose of the authorising legislation. If the principal aim is to acquire property for the Commonwealth, it falls within section 51(xxxi) and just terms will be required. If the impugned provision does not provide just terms in this context, it will be declared invalid. On the other hand, if the main objective of the legislation is not to acquire property for the Commonwealth but relates to the protection of public health and safety or the regulation of competing claims, it will not be an acquisition for the

260 US 393 (1922) para 9 as well as *Mugler v Kansas* 123 US 623 (1887) 665. See further Van der Walt *Constitutional Property Law* 196-197, 354-356; Allen *Commonwealth Constitutions* 179-180.

93 The most cited decision on this point is *Attorney-General (Cth) v Schmidt* 1961 105 CLR 361.

94 *Attorney-General (Cth) v Schmidt* 1961 105 CLR 361 372-373 per Dixon CJ; *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297 306 per Mason CJ, Deane J and Gaudron J; *Re Director of Public Prosecutions; Ex Parte Lawler* 1994 179 CLR 270 284 per Deane J and Gaudron J. See also Allen *Commonwealth Constitutions* 176-177. In view of Australian law one could also argue that the vesting which occurs in the context of insolvency proceedings does not amount to the "acquisition" of property even in South African law, as neither the Master nor the trustee acquires the right (or entitlement) to the use the property: see Hopkins and Hofmeyr 2003 *SALJ* 51 and compare the discussion surrounding fn 33 above.

purposes of the property clause, even though it may incidentally result in the acquisition of property. Yet under these circumstances the means chosen must be appropriate and adapted to the ends sought for the law authorising the interference to be constitutionally compliant.

2.3 Lessons for South African constitutional property law

The second step of the High Court's methodology is remarkably similar to Goldstone J's first qualification in *Harksen*, as both approaches investigate the purpose behind the impugned statute to decide the expropriation question. Australian constitutional property law underscores the problems prevalent in basing this inquiry solely on the state acquisition requirement, as illustrated by the three types of cases discussed earlier.[95] Although the presence of state acquisition is indicative that expropriation may have occurred, the acquisition must also be an acquisition *with respect to* section 51(xxxi). To answer this question the main aim or purpose of the impugned provision must be identified to ascertain in which "head of power" it is sourced. This explanation complicates legal comparison, however, as it is unique to the specific structure of the Australian *Constitution*.[96] Still, Van der Walt[97] thinks that the logic concerning the structural division between the federal state powers which govern deprivation and expropriation in Australian law also applies to the differences between these forms of state interference in countries like South Africa – especially when viewed in terms of Sax's theory. In this context Allen[98] believes that the head of power investigation broadly corresponds to the theory developed by Sax in his classic article[99] to help distinguish the powers that govern deprivation and expropriation. It is therefore necessary to briefly set out Sax's theory so as to understand how the High Court's section 51(xxxi) jurisprudence could help inform Goldstone J's first qualification.

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95 See ss 1.2-1.4 above. Compare the finding in *Lawler* in s 2.2 above, which confirms the conclusions drawn in s 1.3 as to why the expropriation inquiry should not be limited to the effect of the property infringement, as some regulatory interferences with property (such as criminal forfeiture) also result in state acquisition of property.

96 Van der Walt *Constitutional Property Law* 348-349.

97 Van der Walt *Constitutional Property Law* 196 fn 15, 348-349.

98 Allen *Commonwealth Constitutions* 175-179 relies on Sax 1964 *Yale LJ* 36-76 for the purposes of his argument. Although Sax's theory does not incorporate the deprivation-expropriation distinction directly, Allen (Allen *Commonwealth Constitutions* 175) thinks it is mostly consistent with this distinction.

99 Sax 1964 *Yale LJ* 36-76.

According to Sax there are two forms of government activity through which the state may reduce or diminish established property values, namely its arbitral (or mediating) capacity and its enterprise capacity. The arbitral capacity or function entails that the state resolves competing claims of various citizens and groups within society without acquiring resources in the process. Examples in this regard include neighbour law, rent control and insolvency laws. Another occurrence of this function is when the state limits – or even destroys – property so as to protect public health and safety.[100] Compensation is not required under these circumstances, no matter how severe the loss, as the aim of this power is to "defin[e] standards to reconcile differences among the private interests in the community".[101] One of the most important features of the arbitral capacity in this context is the fact that these purposes constitute what is known as the state's core police power functions.[102] Against this background Allen thinks that Sax's theory underlies a judgment like *Mutual Pools*, where the Court ruled that the infringement does not result in the acquisition of property with respect to section 51(xxxi) by reason of the aim of the impugned legislation, namely to resolve conflicting claims.[103] It also clarifies a case like *Lawler* where the state actually acquires property, as long as the acquisition is incidental to one of the specified purposes.[104] Another judgment which relates to this line of thinking is *JT International SA v Commonwealth of Australia*,[105] where it was held that the infringement does not result in expropriation by reason of the purpose of the impugned legislation, namely to protect public health (and not to acquire economic resources for the state's own benefit).[106] It follows that property infringements sourced in this capacity merely entail non-compensable exercises of the police power, as long as the requirements for a valid deprivation are met as well.

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100 Sax 1964 *Yale LJ* 69. Compare *Miller v Schoene* 276 US 272 (1928), where the United States Supreme Court held that it is justifiable to destroy a landowner's trees – without paying compensation – so as to prevent them from spreading a plant disease to the apple orchards of a nearby neighbour.

101 Sax 1964 *Yale LJ* 63.

102 Sax 1964 *Yale LJ* 62-76; Van der Walt *Constitutional Property Clauses* 410-423.

103 Allen *Commonwealth Constitutions* 177-179. See further fn 84 above as well as the surrounding main text.

104 Allen *Commonwealth Constitutions* 176-179. See further fn 78 above as well as the surrounding main text.

105 *JT International SA v Commonwealth of Australia* 2012 HCA 43.

106 See the discussion of this judgment in s 3.4 of Part I of this article. Yet, it is worth emphasising that the High Court ruled that no acquisition took place on the facts before it.

The second way in which the state may diminish property values is through its enterprise capacity. In terms of this function the state actively partakes in the free market to benefit some state enterprise, such as the building of public roads, schools or dams. Therefore, when acting in this capacity the state enhances its economic position by acquiring resources from the citizenry. Sax distinguishes between the state's arbitral and enterprise capacities through establishing what constitutes fair or unfair state action. As it will be in the state's interest to acquire as many resources for as little as possible, it would amount to unfair or arbitrary government if it were allowed to enhance its resource position – at the cost of one or a small group of individuals – without compensating the individual or group for the loss. The purpose behind compensation in this regard is thus to provide a "bulwark against arbitrary, unfair, or tyrannical government."[107] The outcome in *Georgiadis*, where the state extinguished the applicant's common-law claim for damages without compensating him, comes close to this reasoning, as the primary purpose of the impugned statute was to enhance the Commonwealth's resources (in that it no longer had to pay out the claim).[108] Consequently, the High Court's method of establishing in which "head of power" a statute is sourced by identifying its main purpose – so as to answer the expropriation question – broadly follows Sax's theory for ascertaining in which government capacity the state is acting.[109] Against this background it is now possible to draw on the jurisprudence of the High Court concerning its second step, for the purpose of extrapolating principles to inform *Harksen*'s first qualification.

The *Harksen* court's focus on the purpose of the impugned statute to determine whether or not expropriation occurred is analogous to identifying the primary objective of the legislation for ascertaining in which state power[110] (namely deprivation or expropriation) the authorising legislation is sourced.[111] If the purpose of the statute relates to one of the state's core police power functions, such as protecting public health and safety or the settling of civil disputes, the interference is probably sourced

107 Sax 1964 *Yale LJ* 64.
108 Allen *Commonwealth Constitutions* 178. See further fn 87 as well as the surrounding main text.
109 Allen *Commonwealth Constitutions* 176-179. See also Van der Walt *Constitutional Property Law* 196 fn 15, 348-349.
110 Or government capacity, to use Sax's term.
111 Van der Walt *Constitutional Property Law* 348-349.

in the state's arbitral (or deprivation) function. However, the state acts in its enterprise (or expropriatory) capacity when the main objective behind the impugned statute is to acquire resources from one owner or a small number of owners to enhance its economic position, which then requires the payment of compensation. This reasoning confirms Goldstone J's finding as to why section 21(1) of the *Insolvency Act* does not result in expropriation of property, as the provision is aimed at protecting the interests of creditors to the insolvent estate as well as those of the solvent spouse, and not to acquire resources for some state enterprise.[112]

Harksen's first qualification reveals why expropriation-proper cases result in expropriation. When legislation authorises expropriation, it is the purpose of the statute (or source) that explains why the interference is expropriatory in nature. Indeed, the aim behind the impugned statute in a case like *Spetsiotis* is not to regulate competing claims – as was the case in *Harksen* – but to acquire property for the state in order to realise a state enterprise (ie upgrading the municipal property for purposes related to South Africa's hosting the 2010 FIFA World Cup). This reasoning is also able to clarify why the expropriation of property via its destruction amounts to expropriation, since the infringement's classification depends on the purpose of the authorising source and not on its effect.[113] Interestingly, the result of Goldstone J's purpose-based approach in this context is similar to conclusion one reaches under the pre-constitutional authorisation requirement.[114]

Harksen's purpose-based technique also clarifies why forfeiture-type cases do not amount to expropriation. It is trite that the objective of legislation that authorises criminal forfeiture is not to acquire property for the state – such as to build schools or dams – but to protect public health and safety by removing from the hands of criminals

112 *Harksen v Lane* 1998 1 SA 300 (CC) paras 35-36, citing *Van Schalkwyk v Die Meester* 1975 2 SA 508 (N) 510. Compare the finding in *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) para 64 in terms of this approach, where the Court held that the purpose of the impugned statute was *inter alia* to protect road planning processes.

113 However, in this sense the state acquisition requirement, even if only a preliminary issue, is unhelpful for establishing whether or not expropriation occurred in situations where the impugned statute authorises expropriation without the state acquiring anything in the process. See further the discussion in s 1.2 above.

114 See the discussion in s 1.2 above. This requirement is discussed more fully in s 3.2 of Part I of this article.

instrumentalities used in the commission of offences, so as to prevent them from repeating their crimes.[115] In this regard forfeiture-type cases are analogous to *Harksen*, where it was held that the purpose of section 21(1) of the *Insolvency Act* is not to transfer property to the Master or trustee but to ensure that the insolvent estate is not deprived of property to which it is entitled so as to protect the interests of creditors, which purposes relate to the state's role in resolving civil disputes. The fact that the state acquires property in the process should not detract from this conclusion, as long as the acquisition – in terms of Australian law – is merely incidental to some other legitimate purpose. It follows that the state is merely acting in its arbitral (or police power) capacity in the context of criminal forfeiture and insolvency, as confirmed by cases like *Lawler* and *Mutual Pools*. However, even though the interference does not result in expropriation, it must still satisfy the requirements for a valid deprivation of property in section 25(1) of the *Constitution*.[116] Interestingly, this outcome is (again) comparable to the pre-constitutional authorisation requirement, since statutes that govern criminal forfeiture and insolvency invariably do not set out the circumstances, procedures and conditions under which the state may expropriate property, and also do not provide for compensation.

Finally, I turn to the application of Goldstone J's approach to hybrid cases, as typified by legislation such as the *MPRDA*. As said earlier,[117] one must first distinguish between two points in time to ascertain if the *MPRDA* results in expropriation, namely the date when the Act came into effect and the moment when unactivated old order rights were extinguished.[118] Concerning the first stage, Mogoeng CJ was justified in finding that the abrogation of the *ius abutendi* had not resulted in state acquisition, as the state had not obtained the right or entitlement (not) to exploit the minerals to which

115 See the discussion of forfeiture-type cases in s 1.3 above.

116 Compare the position in Australian law, which is discussed in fn 85 above as well as the surrounding main text.

117 Section 1.4 above.

118 Some authors, such as Badenhorst 2014 *THRHR* 328-330 and Van der Vyver 2012 *De Jure* 125-142, think that the state custodianship model introduced by the *MPRDA* on its date of commencement resulted in the expropriation (or even nationalisation, according to Van der Vyver) of the common-law rights and entitlements landowners held in mineral and petroleum resources in or on their land. However, these conclusions – which again (over)emphasise the effect of the infringement – are not supported by *Harksen*'s purpose-based approach towards the expropriation question: see the discussion in the next few paragraphs below.

these rights pertained.[119] Yet, Rautenbach[120] thinks that the abrogation of the *ius abutendi* satisfied the state acquisition requirement, since the state acquired the benefit of keeping the money it would otherwise have had to pay out to holders of unused mineral rights under the pre-*MPRDA* regime in order to force them to activate these rights.

Closer analysis, however, reveals that Rautenbach's concern is misplaced. In terms of the *FNB* methodology it must first be ascertained if the affected interest qualifies as constitutional property.[121] Indeed, there can be no expropriation in terms of section 25(2) if there is no constitutional property at hand. In this sense it is doubtful whether that which is lost by the holders of unactivated old order rights – namely the possibility of receiving compensation under the *Minerals Act* for being forced to activate their mineral rights – amounts to property, as the right to receive compensation under the *Minerals Act* might not yet have vested when the *MPRDA* came into effect. Before vesting the right to receive compensation would merely have been a possible future interest or a *spes*. In terms of *National Credit Regulator v Opperman*[122] an interest must have vested in terms of established legal principles and it must also be a concrete asset in order to amount to constitutional property.[123] The mere fact that an interest has value or relates to a person's general wealth or financial status, as was the case with Sebenza, is insufficient for it to qualify for protection under the property clause.[124]

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119 It is trite that the state did not acquire the *ius disponendi*, as mineral right holders could still sell their old order rights after the *MPRDA* came into operation. However, this was possible only with the written permission of the Minister: see s 11(1) of the *MPRDA*. See further the discussion in s 2.1 of Part I of this article.

120 Rautenbach 2013 *TSAR* 747. See also the discussion in s 1.4 above.

121 This methodology was laid down in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 46. Compare the approach in *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 32-46, where the Court also first considered whether the affected interest amounted to property for the purposes of s 25.

122 *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) para 58.

123 See Van der Walt *Constitutional Property Law* 119-123, 130-131; Marais 2014 *SALJ* 219-222 and the sources referred to there.

124 Van der Walt *Constitutional Property Law* 119-123, 130-131. See also Marais 2014 *SALJ* 219-222. Compare the reasoning in *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297 discussed in s 3.4 of Part I of this article. However, it is worth pointing out that the applicable legislation in *Georgiadis* had the effect of abolishing *existing* claims as opposed to the *MPRDA*, which merely eliminated the possibility of lodging a claim in future for compensation for being forced to exploit mineral rights under the *MPRDA*. The fact that these future claims have not yet vested in terms of applicable legal rules and are, furthermore, not concrete, specific assets probably means that no state acquisition took place, as there was no "property" as yet.

Consequently, there can be no possibility of expropriation, as the affected interest does not amount to constitutionally protected property in the first place. Yet, it would have been a different matter if a holder of unused old order rights already had a vested claim for compensation based on the fact that the state had forced that person to activate the rights under the *Minerals Act* before the *MPRDA* came into force – but this is not what happened in *Agri SA*.

However, matters are more complex regarding whether the *MPRDA* results in expropriation in terms of the second stage.[125] In cases of non-conversion the unactivated old order rights ceased to exist and the state could then award new rights to those minerals to third parties, although it did not acquire the right to exploit those rights themselves. In view of the minority opinion in *WMC Resources*, read with Froneman J's minority judgment in *Agri SA*, this benefit might very well result in state acquisition of property. Nonetheless, I think that the interference is sourced in the state's arbitral (or deprivation) capacity, irrespective of whether state acquisition took place or not. Indeed, the acquisition here (if there is one) would be merely incidental to the primary purposes of the Act, as was the case in judgments like *Lawler* and *Mutual Pools*. By extinguishing unactivated old order rights due to non-conversion, even though the state could grant new rights to these minerals to third parties, it did not acquire the right to exploit the affected mineral rights for its own financial benefit and it therefore did not enhance its resource position. Consequently, it cannot be said that the purpose of the extinguishment of mineral rights held by parties like Sebenza was the acquisition of resources for the state, which it could use for some state enterprise. The primary objectives behind the *MPRDA* are to open up the mining industry and to ensure optimal (and ecologically responsible) exploitation of the country's mineral wealth.[126] These aims broadly relate to the state's core police power function of resolving competing claims, in that the *MPRDA* sets standards as to how mineral rights may henceforth be acquired, held and exploited by private parties,

125 Namely when the *MPRDA* extinguished unactivated old order rights that were not converted into new order prospecting or mining rights.

126 See the preamble of the *MPRDA* as well as s 2(c) and 2(h) of the Act.

which indicate that the interference at hand is regulatory rather than expropriatory in nature.[127]

The fact that the interference is not sourced in the state's enterprise capacity does not mean, however, that it is necessarily constitutional. It must also satisfy the requirements for a valid deprivation set out in section 25(1) of the *Constitution*.[128] Interestingly, Agri South Africa based its case exclusively on section 25(2) and did not in any way focus on the requirements of section 25(1). The latter section stipulates that property may be deprived only in terms of law of general application and no law may permit the arbitrary deprivation of property. The *MPRDA* probably complies with the law-of-general-application requirement, as it is precise, specific and accessible to the citizenry.[129] As regards non-arbitrary deprivation, *FNB* held that deprivations must be both substantively and procedurally non-arbitrary to satisfy this requirement.[130] It would be difficult to challenge the constitutionality of the relevant provisions in the *MPRDA* on the basis of substantive non-arbitrariness, especially given the express mandate in the *Constitution* – as well as normative considerations – requiring reforms in the mineral sector.[131] The only likely avenue to launch a constitutional attack would therefore be to challenge the *MPRDA* on the basis of procedural arbitrariness.

Van der Walt[132] opines that the test for procedural non-arbitrariness in terms of section 25(1) should be informed by the principles of administrative law under section 33 of the *Constitution* as well as the *Promotion of Administrative Justice Act* 3 of 2000 (*PAJA*). One of the central questions in this regard is whether or not the *MPRDA* satisfies the procedural fairness requirement of administrative law. The Act provides

127 It is worth stating that it is unclear whether the authorisation requirement would be as effective in arriving at this conclusion, especially since the Act explicitly authorises expropriation and also provides for compensation: see s 55 and Item 12(1) of Schedule II to the *MPRDA*.

128 Compare the position in Australian law discussed in fn 85 above.

129 Woolman and Botha "Limitations" 34-51–34-52. See, however, the concerns raised by Badenhorst and Mostert 2004 *Stell LR* 29.

130 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.

131 Van der Walt *Constitutional Property Law* 447-448. See also *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 53 (Mogoeng CJ) and 80 (Froneman J). See further Van der Vyver 2012 *De Jure* 138-139.

132 Van der Walt *Constitutional Property Law* 264-270; Van der Walt 2012 *Stell LR* 90-93. However, neither s 33 of the *Constitution* nor *PAJA* will find any direct application, as the deprivation caused by the *MPRDA* – through the extinguishment of Sebenza's unactivated mineral rights – was brought about directly by legislation and in the absence of administrative action.

a procedure whereby holders of unused old order rights could convert them into either new order prospecting or mining rights within a period of one year. Generally this process appears to be procedurally fair, as holders of unactivated mineral rights were afforded an opportunity to convert these rights into new order rights and did not merely lose them upon the commencement of the *MPRDA*. The facts surrounding Sebenza, however, are rather unique in that it was precluded from applying for conversion before the deadline due to its untimely insolvency. The *MPRDA* does not allow extensions in this regard and merely provides for the extinguishment of unconverted old order rights at the end of the period. This oversight may very well mean that the deprivation caused by the *MPRDA* is procedurally unfair – and thus in conflict with section 25(1) – in that it fails to adequately cater for parties that find themselves in situations similar to that of Sebenza.[133] Consequently, Agri South Africa might have had a better chance of arguing that the *MPRDA* resulted in procedurally arbitrary deprivation of Sebenza's property.

To conclude, the *Harksen* approach – as informed by Australian constitutional property law – offers a workable method for deciding hybrid cases as well as forfeiture-type cases while at the same time providing a principled explanation for expropriation-proper cases. In this regard the importance of the state acquisition requirement ought to be reconsidered in future section 25 cases, especially in the context where an empowering statute might authorise expropriation through the mere destruction of property without the state acquiring anything in the process. (Over) emphasising the state acquisition requirement could potentially lead to anomalous outcomes if acquisition is indeed an indispensable requirement for all expropriations.[134]

3 Conclusion

According to the *FNB* methodology all constitutional property disputes must start with section 25(1). This methodology makes it unnecessary to initially distinguish between deprivation and expropriation, as the necessity of making this distinction is postponed to a later stage of the inquiry. However, in *Agri SA* the Constitutional Court recently

133 Van der Walt *Constitutional Property Law* 447-448.

134 Compare *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 77-78 (Cameron J) and paras 102-105 (Froneman J).

confirmed its willingness to go straight to the section 25(2) step when parties focus their cases on the expropriation requirements. The question whether a property interference constitutes either deprivation or expropriation will therefore be of greater significance (and contention) in future cases based on the property clause.

The *Agri SA* court found that state acquisition constitutes the main difference between expropriation and deprivation – absent such acquisition the infringement can, at most, amount to deprivation of property. The Court formulated a context-sensitive test to ascertain whether acquisition (and hence expropriation) occurred, which test primarily considers the effect of the infringement. Against this background this article ascertains the meaning and role of state acquisition in South African law (Part I) and also whether this requirement is able to distinguish between deprivation and expropriation on a coherent basis (Part II).

The meaning Mogoeng CJ attributed to acquisition broadly relates to the pre-constitutional definition for expropriation. Expropriation is still an original method of acquisition of ownership, which means that what the state acquires need not correlate exactly to what is lost – the acquisition requirement will be satisfied as long as there is substantial similarity between the two. The Court held that the state must acquire ownership of or the right to exploit the affected property for there to be state acquisition (at least where the impugned statute has a transformative purpose). This definition explains why the expropriation of limited real rights (such as long-term leases and servitudes) results in state acquisition, which conclusion finds support in Australian law. Australian law is helpful for ascertaining the meaning of state acquisition, especially since it also provides guidelines for one of the factors Mogoeng CJ listed to establish whether acquisition had taken place, namely the source of the affected right.

Yet, viewing acquisition as the central feature for expropriation disregards its true role, as explained in Part I of this contribution. Pre-constitutional expropriation law shows that state acquisition is merely a general hallmark or explanation for expropriation rather than an indispensable requirement for it. Thus, it is more of a consequence than a requirement for expropriations validly performed pursuant to authorising

legislation. Indeed, two of the most authoritative decisions on the meaning of expropriation during the pre-constitutional era – which were relied on by both the *Harksen* and *Agri SA* courts – concern statutes that explicitly authorised the state to expropriate property, and which incidentally resulted in the state acquiring property. It is therefore tempting to regard this consequence as a distinguishing characteristic of every expropriation, especially since most expropriations do result in state acquisition. However, it ignores the principles of pre-constitutional South African expropriation law, which determine that the state can expropriate property only in terms of legislation that specifically authorises expropriation while at the same time disregarding the fact that some expropriations could – at least theoretically – result in the destruction of property without the state acquiring anything in the process. Interestingly, Australian constitutional property law also reveals that the mere presence of acquisition does not automatically mean that a property interference amounts to expropriation.

Part II, in turn, expands on the shortcomings of the effect-based nature of the acquisition requirement for establishing whether or not expropriation took place, by discussing three different scenarios. These scenarios reveal that only focusing on the effect of a property infringement is unable to produce reliable results in all cases, especially those that fall within the grey area where deprivation starts to blur into expropriation. Fortunately, *Harksen* provides a workable method for solving this conundrum. To decide the expropriation question Goldstone J not only focused on the effect of the infringement but also on the broad context and purpose of the authorising statute. As the main purpose behind the impugned statute was held to be to protect the interests of the solvent spouse as well as those of creditors to the insolvent estate, the Court found that the interference – even though it resulted in a "transfer" of property to the state – did not amount to expropriation.

Goldstone J's method broadly correlates with the pre-constitutional authorisation requirement, which also considers the source of the interference, while at the same time bearing interesting parallels to how expropriation cases are decided in Australian law. The High Court of that country follows a two-step methodology in this regard: was there acquisition of property and, if so, was it an acquisition with respect to

section 51(xxxi)? Thus, whether or not an interference with property amounts to expropriation in Australian law depends not only on its acquisitive effect. For an acquisition to amount to expropriation it has to be determined in which "head of power" the empowering statute is sourced, in terms of the second step of the methodology. This is done by identifying the main aim or purpose of the legislation. If the primary purpose relates to the protection of public health and safety or the state's role in resolving civil disputes, the interference does not amount to expropriation. This will be the case even if the state acquires property, as long as the acquisition is merely incidental to one of the specified functions and the means selected by the impugned provision are appropriate and adapted to the purpose served. However, if the primary objective of the legislation is to acquire property for the state so as to enhance its resource capacity, the infringement is sourced in section 51(xxxi) (meaning it results in expropriation) and thus requires compensation. If the impugned statute does not provide compensation under these circumstances, it will be declared invalid.

The High Court's focus on the purpose of the impugned statute to identify in which head of power it is sourced – based on Allen's reading of Sax – is broadly consistent with Sax's theory for distinguishing between the state's arbitral (deprivation) and enterprise (expropriation) capacities. In this sense a property interference that aims to settle private disputes (such as *Harksen*) or which purports to protect public health and safety (like criminal forfeiture) is merely an instance of the state's police power. However, if the primary aim of the statute is to acquire resources for the state in order to realise some state enterprise (like building schools or highways), the infringement will be sourced in the state's power of eminent domain. In view of this interpretation, the Australian High Court's jurisprudence on expropriation provides valuable insights as to how *Harksen*'s purpose-based approach could be used to decide future cases based on the property clause. It would therefore be preferable if the Constitutional Court did not concentrate on the effect of an infringement but rather considered the purpose of the interference when deciding section 25 cases. *Harksen* embodies a principled method for distinguishing deprivation and expropriation, one which circumvents the danger of mistakenly classifying legitimate transformative initiatives

– such as the *MPRDA* – as affecting uncompensated expropriation contrary to section 25(2) of the *Constitution*.

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LIST OF ABBREVIATIONS

MPRDA	Mineral and Petroleum Resources Development Act
PAJA	Promotion of Administrative Justice Act
POCA	Prevention of Organised Crime Act
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law
Stell LR	Stellenbosch Law Review
Sydney LR	Sydney Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
Yale LJ	Yale Law Journal

WHEN DOES STATE INTERFERENCE WITH PROPERTY (NOW) AMOUNT TO EXPROPRIATION? AN ANALYSIS OF THE *Agri SA* COURT'S STATE ACQUISITION REQUIREMENT (PART II)*

EJ Marais**

SUMMARY

Section 25 of the *Constitution* provides two ways in which the state may interfere with property rights, namely deprivation (section 25(1)) and expropriation (section 25(2)). As only the latter requires compensation, there is an incentive for property holders to label any infringement with their property as expropriation in the hope of being compensated for their losses. It is therefore essential to have a principled distinction between deprivation and expropriation, especially given the danger that uncertainty in this regard can hold for legitimate land reform initiatives, which often entail severe limitations on property.

This contribution attends to *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC), where the Constitutional Court recently revisited this distinction and held that the distinguishing feature of expropriation is that it entails state acquisition of property. Without state acquisition the interference can (at most) amount to deprivation. Unfortunately, viewing state acquisition as the "key requirement" for expropriation is problematic. Firstly, it ignores the true nature of this feature in that it is only a consequence of a valid expropriation rather than a pre-requisite for it – at least in terms of pre-constitutional law. It is therefore inaccurate, concerning both pre- and post-constitutional expropriation case law, to regard acquisition as an indispensable requirement for expropriation. Secondly, limiting the constitutional property inquiry to whether or not the state acquired property appears inadequate as a means of solving difficult cases where the state acquires property pursuant to

* Part I appears in the same edition of this journal.

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infringements like taxation and criminal forfeiture. As both these examples result in state acquisition, there must be another explanation of why they do not amount to expropriation.

KEYWORDS: expropriation; deprivation; section 25; property clause; state acquisition; constitutional property law; *Agri SA* case.