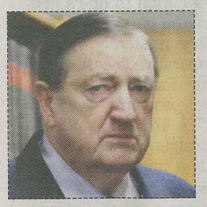
For the sake of our heritage, the buck must stop somewhere



YEAR AHEAD

Ian Callinan, QC

AUSTRALIAN lawyers work in the great tradition of the English common law. It is a system of law that is highly fact-specific.

It can be expensive. It aspires to justice in all cases, responding to the particular circumstances of each case.

Those who are not lawyers might, not unreasonably, think that there is nothing new under the sun and that there must be a precedent for everything. Unfortunately that is not so.

Every day a court somewhere in Australia will be deciding a case on facts, or a combination of facts and law, that have not been before a court before.

Usually, but not always, the application of principle, or a slight adaptation of it, will resolve the case. Sometimes, indeed quite often, legislative intervention in the field will either conclude, or at least influence, the outcome.

Experience of these, at this time of annual reflection, prompts speculation about what might be the major new legal issue of the coming years, and the capacity of our system to deal with it.

I see the cost, and who should bear it, of environmental, town planning and heritage measures as the most likely candidate. I have heard it said that if you wish to do your neighbours a bad turn, apply to have their property heritage-listed. This, I emphasise, is not an argument against heritage listing. It is just a plea for sharing its financial burden. A heritage listing can only be made in an actual or supposed public interest. As the listing comes at a cost, the public, as the beneficiary, should logically bear it.

Increasingly, planning laws are highly restrictive. No doubt some of them are in the enlightened self-interest of the land owners affected by them. But this is usually not so. Those land owners are precluded from unlocking the financial potential of their property. Rarely are they given any right to compensation.

The science of climate change is said by many to be settled. On any view, the science of effectively dealing with it is not. Until it is, many expedients will be tried and some inevitably will fail. In the meantime, the cost of remediation will not be evenly borne.

It has always been the common law that the owner of freehold land owns every tree on it. To combat the greenhouse effect, land clearing, the felling of trees for forest timber, grazing or cultivation will in places be forbidden, all of this again in the acknowledged and, it is said, necessary public interest.

It is a legitimate question: will proper compensation be available for the consequential involuntary reduction in value to freehold owners? I rather fear it will not. Yet I have heard it suggested that financial incentives will be available to those who plant trees.

The Australian Constitution provides that the commonwealth may only acquire property on just terms. Most states make similar provision but their obligation to pay compensation is not constitutionally entrenched. Neither the state acts in general nor the Constitution define acquisition. The High Court has tended to regard acquisition as an unduly narrow concept. The Tasmanian dam case is, to adapt the hydrological theme, the high-water mark of that narrowness.

This is not an argument against the preservation of that pristine waterway, the Franklin River, but simply against the exoneration of the Australian public from paying to Tasmania the cost of its preservation. This followed from the rejection by the High Court of an argument that compensation was due from the commonwealth.

The reluctance of governments to provide for compensation, and of the High Court to acknowledge that an erosion of property rights for the benefit of others does constitute a taking in an era of increasingly intrusive legislation, is a matter that urgently needs addressing.

Not just adjacent people but also the public generally always do acquire something of value when another person's right to use their property in a way that would not cause a legal nuisance is reduced. English law has long recognised restrictive covenants, agreements by which an owner agrees not to exercise a lawful proprietary right in order that a neighbour may have an enhanced enjoyment of their own property.

Not surprisingly, restrictive covenants can be worth a great deal of money. There is a clear analogy between a legislatively imposed involuntary restriction on a land owner and one given for value and noted on the title.

Each is equally a matter of public record and has all other relevant qualities in common. Yet under Australian law rarely does the former give rise to a right to compensation.

If, as heritage and other authorities often contend, a listed property does have economic potential as such, and the owner thinks differently, why should not the owner have a right to require the authority to buy the property and then make good its contentions of valuable utility, either itself or by leasing it to someone who can?

Laws to that effect have the further salutary result of discouraging excessive and indiscriminate listings.

Analogous laws relating to stringent environmental and town planning restrictions operating on a limited number of owners for a public benefit may also be worth considering.

Restrictions on reasonable usage, obligations of preservation, insistence on expenditure for no or little return, and on planting or replanting, are all potentially expensive. I see the crafting of a means of ensuring a fair and equitable sharing of this expense as a real challenge to the legislatures and the courts, including the High Court as the constitutional court, for 2008 and beyond.

Ian Callinan, AC, is a former justice of the High Court.

THE AUSTRALIAN THURSDAY JANUARY 3 2008

PAGE 10 Summer Living