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Ms Kristina Crichton
Committee Clerk
Standing Committee on Public Administration
Parliament House
4 Harvest Terrace
West Perth WA 6005
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Your ref:
Our ref: GAM

By post and email

31 July 2019

Dear Ms Crichton,

Inquiry into private property rights – submission by Glen McLeod Legal

1. These submissions to the Inquiry into Private Property Rights by the Standing Committee on Public Administration are made on behalf of Glen McLeod Legal, a law firm practising in planning and environmental law, including compensation law for takings and injurious affection.

2. The principal of the firm Glen McLeod has approximately four decades in this area of law.

3. We believe some fundamental changes are needed in the law, as it relates to compensation for takings and injurious affection. This is based on our experience in representing many clients who have made claims for takings for public purposes under Parts 9 and 10 of the *Land Administration Act 1997* (WA) and injurious affection under Part 11 of the *Planning and Development Act 2005* (WA) (**P&D Act**).

4. We support some recommendations of the Western Australian Law Reform Commission's Project 98 (July 2008) 'Compensation for Injurious Affection'.

5. In particular, we support Recommendation 17, that all valuation matters under section 176 of the P&D Act be determined by the State Administrative Tribunal. There is no sound reason for putting parties to the expense of a private arbitration when there exists an expert Tribunal having the requisite expertise to deal with such matters. In our view this reform is 'low hanging fruit' which for the reasons given by the Law Reform Commission is long overdue for implementation.

6. We also note and support in particular Recommendation 18 that section 179 of the P&D Act provide that the compensation payable to the owner includes both:

    (a) the reduction of the value of the reserved land; and

    (b) the reduction of the value of adjoining land owned by the applicant.

7. A further reform needed in our view relates to section 177(3) of the P&D Act, which provides that the Arbitrator, in determining compensation, must be satisfied that the

sale or development application that has triggered the claim was made in 'good faith'. This is a problematic requirement in our experience. If a landowner suffers detriment because of a reservation, which is probably always the case, then there should be no added 'good faith' requirement which is in effect an unjustified impediment to making a claim.

8. We are also concerned about the effects on land owners of reserved land who have purchased from an owner who has not claimed compensation for the reservation. For many years it was the convention in Western Australia that the unexecuted claim was passed to a subsequent owner. The High Court cast doubt on this practice when it overruled the Western Australian Court of Appeal in the case of *WAPC* v. *Temwood Holdings Pty Ltd [2004] HCA 63.*

9. Reform is now needed in light of a more recent High Court decision which confirmed that subsequent owners cannot claim, even where no claim was made by an earlier owner, in particular at the time of the reservation: *Western Australian Planning Commission v Southregal Pty Ltd & Anor; Western Australian Planning Commission v Leith* [2017] HCA 7.

10. That decision again overruled the Western Australian Court of Appeal and also the Supreme Court at first instance.

11. Law reform is now needed to bring the law back to the long-standing practice in WA prior to the doubt cast on an owner's rights in *Temwood* and *Southregal.*

12. However, many of the potential claimants who have suffered loss as a result of Government legislation or policy have been unable to claim under the above statutory regimes. Some fundamental issues are set out in the attached papers authored or co-authored by Glen McLeod, entitled:

    - 'The Tasmanian Dam Case and Setting Aside Private Land for Environmental Protection: Who Should Bear the Cost?'; and
    - 'The Importance and Nature of the Presumption in Favour of Private Property'.

13. If you have any questions or wish to discuss the above, please let us know.

Yours sincerely,

Glen McLeod
Principal
Glen McLeod Legal

The importance and nature of the presumption in favour of private property.

Glen McLeod[1] and Angus McLeod[2]

Despite the increasing volume of written law, the common law principles that property cannot be taken by the state without just compensation and that it is presumed that Parliament did not intend to interfere with property rights unless clear words to that effect are used, remain of fundamental importance. Their role should not be underestimated, and their particular place within our system of law must be properly understood, especially within the context of the developing areas of town planning and environmental law. In particular it is misguided to suggest that there should be a 'public interest' exception applicable to planning and environmental law. On the contrary, it is in the public interest that Parliament be truly an accountable body; it must act with transparency and only be permitted to infringe private rights by clear, specific legislation.

1. Introduction

There is an apparent tension between the common's law protection of private property rights and government action with respect to the environment and town planning. It surfaced in the *Tasmanian Dams* case,[3] and has increasingly done so in Australian jurisprudence since then.[4] This apparent tension can be relieved if the common law principles and their legal context are properly explained. The purpose of this article is to set out briefly those principles and their legal context. An understanding of these principles and their context is part of the legal background necessary for a proper consideration of the recent decision of the High Court in *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 83 ALJR 557;165 LGERA 68 [PDF]; 254 ALR 1; [2009] HCA 12 ('*Fazzolari*'). In this Article some commentary is offered on the *Fazzolari* case in light of the analysis of the background principles.

2. The presumption that Parliament did not intend to interfere with fundamental rights.

2.1 The importance of statutory interpretation

The importance of the jurisprudence concerning statutory interpretation is loosely proportionate to the ever-increasing volume of legislation. As the coverage of the statute books becomes more complete, the responsibility of the

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[3] *Tasmania v The Commonwealth* (1983) 158 CLR 1; 57 ALJR 450; 46 ALR 625; [1983] HCA 21. Compare the majority judgement of Justice Brennan (see 246-248) with the minority judgement of Justice Deane (see 282-291).

[4] See further Gray S, 'Can environmental regulation constitute a taking of property at common law?' (2007) 24 EPLJ 161.

legal system is to uphold and develop a sustainable and comprehensive framework of principle through which legislation can be consistently interpreted. It is through this framework that the proper application of the law and the judicial review of government action can be effected. The responsibility the legal system bears in maintaining a suitable framework of statutory interpretation is to ensure that the public will is expressed in a way that conforms to the basic principles of our legal system. This responsibility is no less important than upholding the rule of law itself.

The contemporary approach of Australian courts to interpretation is purposive in nature and informed by the grammatical context of provisions, the consequences of a literal construction, the purpose of the statute and the canons of construction.[5] This means that the courts may depart from the literal meaning of words, even if there is no ambiguity, in the furtherance of legislative intent.[6]

2.2 The general presumption against interference with fundamental rights

The 'canons of construction' are rules which define necessary implications to be drawn when interpreting a statute. They include the presumption that Parliament did not intend to interfere with fundamental rights unless precise words are used to that effect ('General Presumption').[7] The General Presumption is not a factual prediction about what parliament actually intended in any given case. Rather, in the words of the then Chief Justice Murray Gleeson:

> In a free society, under the rule of law, it is an expression of a legal value, respected by the courts and acknowledged by the courts to be respected by Parliament.[8]

The General Presumption has been identified as a key aspect of the rule of law in Australia,[9] England[10] and New Zealand;[11] that is to say that it is recognized as a key aspect of the rule of law in the system of parliamentary democracy through which Australia is governed.[12] This principle is summed up in an oft-quoted passage of Lord Hoffman:

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[5] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [78]; 72 ALJR 841; 153 ALR 490; [1998] HCA 28 (*Project Blue Sky*).
[6] *Project Blue Sky* (1998) 194 CLR 355 at [80].
[7] *Coco v The Queen* (1994) 179 CLR 427 at 437; 68 ALJR 401; 72 A Crim R 32; 120 ALR 415.
[8] *Al-Kateb v Godwin* (2004) 219 CLR 562 at [20]; 78 ALJR 1099; 208 ALR 124; 79 ALD 233; [2004] HCA 37.
[9] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 83 ALJR 327 at [47]; 252 ALR 471; [2009] HCA 4.
[10] *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131; [1999] 3 All ER 400; [1999] 3 WLR 328 ('*Simms*').
[11] *R v Pora* [2001] 2 NZLR 37 at [53].
[12] See further, French R, 'Adding Value to Lawmaking' (Paper delivered at the Australia and New Zealand Scrutiny of Legislation Conference, Canberra, 6 July 2009); Spigelman JJ, 'The Common Law Bill of Rights' (First Lecture in the 2008

> [T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.[13]

Despite its fundamental place in the law the General Presumption is at times referred to as being in conflict with parliamentary sovereignty.[14] Are our parliaments so insulated from the legal system as to be ignorant of this fundamental aspect of the rule of law? That would not appear to be the case. Indeed, the General Presumption may be better seen as a 'working hypothesis' of parliament,[15] rather than an alien instrument of the court's invention. The Federal Attorney General, Robert McClelland, recently referred to the General Presumption as 'vitally important' in the work of the courts, noting that parliamentarians often rely on its application.[16]

2.3 The General Presumption distinguished from the old presumption against interference with the common law

There is an important distinction between fundamental legal principles and common law rights in a general sense that are inherently susceptible to legislative change.[17] For the majority of the first century of Australian federation the High Court applied the General Presumption within the context of the presumption against interference with common law rights.[18] This continued

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McPherson Lectures, *Statutory Interpretation & Human rights*, University of Queensland, Brisbane, 10 March 2008).

[13] *Simms* [2000] 2 AC 115 at 131. See further Spigelman, n10, 30 n69.

[14] For example Nash G, 'Statutory Interpretation Today' (2008) 145 *Victorian Bar News* 26, 26.

[15] *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at [21]; (2004) 209 ALR 116; (2004) 78 ALJR 1231; (2004) 133 IR 49; [2004] HCA 40.

[16] McClelland R, "Promotion and protection of human rights' (Paper presented at the 2009 Annual Castan Centre Conference 'The Changing Human Rights Landscape', State Library of Victoria, Friday 17th July 2009) 10.

[17] *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, [28] per McHugh J; (2001) 178 ALR 218; (2001) 75 ALJR 626; [2001] 22(5) Leg Rep 26; [2001] HCA 14.

[18] *Nolan v Clifford* (1904) 1 CLR 429 at 444 (Griffiths CJ); [1904] HCA 15; *Bishop v Chung Bros* (1907) 4 CLR 1262 at 1273–1274; [1908] VLR 10a; (1907) 13 ALR 412; [1907] HCA 23; *Potter v Minahan* (1908) 7 CLR 277 at 304; (1908) 14 ALR 635; [1908] HCA 63; *Melbourne Corporation v Barry* (1922) 31 CLR 174

until the nineteen nineties, when the continual increase in legislation altering areas of existing common law began to undermine the feasibility of a broad presumption against the interference with the common law. At the beginning of that decade there was still some observance of this broad presumption,[19] though even by 1988 there were signs that legislative intent was gaining pre-eminence.[20] Likewise, the General Presumption was still framed in the context of the broad presumption against interference with the general law.[21] By the end of that decade the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384; (1998) 153 ALR 490; (1998) 72 ALJR 841; [1998] HCA 28 had definitively established the primacy of legislative intent in the interpretation of legislation regardless of whether it altered existing common law rights.[22] However in the same breath the Court also recognized the continuing importance of the General Presumption.[23] In that case the Court affirmed the authoritative statement of the General Presumption given four years earlier in *Coco v The Queen* (1994) 179 CLR 427 at 437:

> The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.

The utility of this formulation of the General Presumption is that it does not rely on or refer to the context of the broad presumption against interference with common law rights. It is a definitive statement about a narrow field: basic rights, freedoms or immunities, not a broad statement about a preference for the common law. The General Presumption became a cannon of construction rather than part of a broader legal principle. In this form the General Presumption has

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at 206; [1923] VLR 141; (1922) 29 ALR 86; *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 185; [1969] ALR 577; (1969) 43 ALJR 247; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341; (1983) 45 ALR 609; (1983) 57 ALJR 236; (1983) ATPR 40-341; [1983] HCA 9; *Baker v Campbell* (1983) 153 CLR 52 at 123; (1983) 49 ALR 385; (1983) 57 ALJR 749; (1983) 83 ATC 4606; (1983) 14 ATR 713; [1983] HCA 39.

[19] For example *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635-636; (1990) 93 ALR 469; (1990) 64 ALJR 400; [1990] HCA 28.

[20] *John v Commissioner of Taxation* (1988) 166 CLR 417 at 451-452; (1989) 83 ALR 606; (1989) 63 ALJR 166; [1989] HCA 5.

[21] *Bropho v Western Australia* (1990) 171 CLR 1 at 18; (1990) 93 ALR 207; (1990) 64 ALJR 374; [1990] HCA 24.

[22] *Project Blue Sky* (1998) 194 CLR 355 at 384.

[23] *Project Blue Sky* (1998) 194 CLR 355 at 384 n56.

been a mainstay for the Courts and continues to be viewed as a critical aspect of statutory interpretation.[24]

The question of what rights are sufficiently fundamental to form part of the General Presumption is one that must be approached with care.[25] Chief Justice Spigelman has made an extra-judicial attempt to formulate a list.[26] Suffice to say, for the purposes of this article such an exhaustive survey is not necessary; only one subset of the General Presumption is relevant here: the presumptions and related principles concerning proprietary interests.

3. The Proprietary Presumptions

Two presumptions concerning property rights jointly form a subset of the General Presumption. The first High Court case to adopt explicitly the general presumption, *Clissold v Perry* (1904) 1 CLR 363; [1904] HCA 12[27], was concerned with two separate but linked presumptions: the presumption of statutory interpretation against the interference with vested property interests and the presumption against the alienation of proprietary interests without compensation. This latter 'presumption' is perhaps more accurately characterised as a fundamental principle of the common law. The former was directly on point in that case, and it was not until 1918 that the latter was explicitly enunciated in Australia through the adoption of the long line of English precedent to the same effect (together: 'Proprietary Presumption')[28]. The right to compensation is a logical consequence of the rationale behind the protection of

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[24] *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 414; (2001) 120 LGERA 120; (2001) 177 ALR 436; (2001) 75 ALJR 501; [2001] HCA 7 ('*Durham Holdings*'); *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 579; (2002) 192 ALR 561; (2002) 77 ALJR 40; [2002] HCA 49; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492; (2003) 195 ALR 24; (2003) 77 ALJR 454; [2003] HCA 2. *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 284; (2003) 198 ALR 100; (2003) 77 ALJR 1205; [2003] HCA 33; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329; *Thomas v Mowbray* (2007) 233 CLR 307 at 440; (2007) 237 ALR 194; (2007) 81 ALJR 1414; [2007] HCA 33; *Chang v Laidley Shire Council* (2007) 234 CLR 1 at 17; (2007) 154 LGERA 297; (2007) 237 ALR 482; (2007) 81 ALJR 1598; [2007] HCA 37; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 252 ALR 471 at 480 – 481.

[25] *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 298 (McHugh J); (2001) 178 ALR 218; (2001) 75 ALJR 626; [2001] HCA 14.

[26] Spigelman, n10, 23-24

[27] Though it was hinted at in an earlier case: *Clancy v Butchers' Shop Employees Union* (1904) 1 CLR 181 at 201; [1904] HCA 9

[28] *Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552 at 563; (1918) 25 ALR 49; [1918] HCA 75. See further *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* (1927) 38 CLR 547 at 559-560; [1927] VLR 150; [1927] AC 343; (1927) 33 ALR 78.

property: the legal system must ensure that a proprietary interest retains its value.[29]

3.1 The fundamental nature of the Proprietary Presumption

Shortly after *Clissold* Griffiths CJ reiterated the Proprietary Presumption in the context of unlawful arrest:

> It is always necessary in dealing with any law that alters the common law, and especially where the common law rights of the liberty of the subject or relating to property are concerned, to consider what was the previous law, and what were the apparent reasons for the alterations made, and then to see what reasons there were for altering the law, and what the legislature has done to remedy what it conceived to be defects in the law.[30]

As the emphasis of the then Chief Justice indicates, the Proprietary Presumption was considered to have an importance over and above the normal presumption favoring common law rights. This emphasis was reiterated by Gibbs CJ in *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 at 683; (1981) 37 ALR 613; [1981] HCA 65:

> [The General Presumption] certainly applies to the principles of the common law governing the creation and disposition of rights of property. Indeed, there is some ground for thinking that the general rule has added force in its application to common law principles respecting property rights.

The fundamental nature of the Proprietary Presumption stems from its history as the oldest protection of individual rights from the power of the state. As discussed by Kirby J in *Newcrest Mining v Commonwealth* (1997) 190 CLR 513; (1997) 147 ALR 42; (1997) 71 ALJR 1346; [1997] HCA 38 ('*Newcrest*'), the presumption was a core principle of the Magna Carta,[31] which itself may have been a re-expression of existing rights.

The presumption concerning the right to compensation upon the acquisition of land has a well established history in Australia. In *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77; [1942] ALR 265; (1942) 16 ALJR 181 it was said that the requirement in the Constitution for laws taking property to do so on 'just terms' is a:

> great doctrine established by the common law... and is in accordance with the Magna Carta, which 'protected every individual of the nation in the free

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[29] *Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 495 at 571-2; [1948] 1 ALR 145; *Mabo v Queensland* (1988) 166 CLR 186 at 226; (1988) 83 ALR 14; (1988) 63 ALJR 84; [1988] HCA 69 [Newcrest]; *The Commonwealth v WMC Resources Limited* (1998) 194 CLR 1 at per Kirby J at 81 and 102 (WMC Resources). See further Posner R, *Economic Analysis of Law*, 6th ed. (New York: Aspen Publishers, 2003) 57.

[30] *Nolan v Clifford* (1904) 1 CLR 429 at 444; [1904] HCA 15.

[31] *Newcrest* (1997) 190 CLR 513 at 659.

> enjoyment of his life, his liberty and his property, unless declared to be forfeited by the judgment of his peers or the law of the land.[32]

The status of the Proprietary Presumption as a canon of statutory interpretation coupled with the right to compensation for a taking in the common law, as noted by Pidgeon J in the Western Australian case *Battista Della-Vedova v State Energy Commission* (unreported decision of the Compensation Court of Western Australia: 22 December 1988 BCC 880828, approved in *R v Compensation Court of Western Australia; Ex Parte State Planning Commission and Another; Re Della-Vedova* (1990) 2 WAR 242 at 253) a case concerning the compulsory acquisition powers of the *Public Works Act 1902* (WA):

> The common law principles are reflected in s 51(xxxi) of the Australian Constitution empowering the Commonwealth to make laws with respect to the acquisition of property on 'just terms'. While this does not bind the State to do the same it shows a consistency with the common law principles. The common law principles would apply in this State unless abrogated by statute, which gives rise to the canon of construction referred to by Lord Atkinson in Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd [1919] AC 744 at p752:
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> > 'That canon in this: that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the legislature unless that intention is express in unequivocal terms.'
>
> The Public Works Act does not detract from these common law principles. On the contrary it aims to give effect to them in their widest sense and I would interpret this as a policy and intention of the Act.

The status of the property rights presumption has been further enhanced in more recent cases through principles of international law influencing the development of the common law. In *Mabo v Queensland* (1988) 166 CLR 186; (1988) 83 ALR 14; (1988) 63 ALJR 84; [1988] HCA 69, Deane J noted at page 230 that:

> Implicit in [the moral entitlement to own property] is the "right" to enjoy immunity from being "arbitrarily dispossessed of [one's] property" which is expressly recognized by Art. 17(2) of the Universal Declaration of Human Rights 1948.

In *Newcrest* Kirby J also considered Article 17 of the Universal Declaration of Human Rights should be influential in the interpretation of the just terms

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[32] *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77 at 104 per Rich J, with whom Latham CJ formed the majority and Latham CJ appeared to have agreed on these points. See also *Johnston, Fear and Kingham and the Offset Printing Co Pty Ltd v The Commonwealth* (1943) 67 CLR 314 at 327 (Starke J), at 329 (McTiernan J), at 331 (Williams J); [1943] ALR 278; (1943) 17 ALJR 160; *Minister of the State for the Army v Dalziel* (1944) 68 CLR 261 at 291; [1944] ALR 89; (1944) 17 ALJR 405.

guarantee in s 51(xxxi) of the Constitution.[33] The protection against arbitrary dispossession contained in the Universal Declaration and incorporated into Australian Common law stems from the socio-political importance of the security of property rights, and by extension the importance of the Proprietary Presumption [see for example comments of Kirby J in WMC].

3.2 The socio-political importance of the Proprietary Presumption

The fundamental nature of the Proprietary Presumption can be viewed as stemming from what McTiernan J once referred to as an important "rule of political ethics".[34] A liberal democratic society relies on the stability of private property in order to maintain a healthy economy and to ensure all citizens have the opportunity to develop their own vision of "the good life", a basic tenant of liberalism. This has been recognized as a core feature of our legal system on a number of occasions.[35] Professor Kevin Gray and Susan Francis Gray note that:

> English property law is accordingly pervaded by a strong bias in favour of commerciability, this was made clear in Lord Upjohn's memorable observation that '[i]t has been the policy of the lay for over a hundred years to simplify and facilitate the transactions in real property' (*National Provincial Bank Ltd v Ainsworth* (1965)). Lord Upjohn added, significantly, that it is 'of great importance that persons should be able freely and easily to raise money on the security of their property'.[36]

Furthermore the importance of the Proprietary Presumption is derived from the considerations of equality. No individual citizen should be singled out to bear a burden which ought to be paid for by society as a whole.[37] This proprietary reflection of the principle of equality has been held to be "basic and virtually uniform in civilized legal systems."[38], and considered a fundamental precept of Australian society.[39]

The presumption that parliament did not intend to interfere with property rights is essentially a recognition of the liberal foundations of the Australian state. No doubt the nature and understanding of the concept of property will change with the development of the law, as it has done so particularly with the rise of health, building, town planning and in the latter part of the last century, environmental regulation.[40] However, such developments cannot change the importance of the security provided by the Proprietary Presumption. There is no sign that the

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[33] *Newcrest* (1997) 190 CLR 513 at 658-659.
[34] *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 294-295.
[35] See *Newcrest* (1997) 190 CLR 513 at 657-661; WMC Resources at 81 and 102; *Durham Holdings* (2001) 205 CLR 399 at 414.
[36] Gray K and Gray SF, *Land Law* (London: England, LexisNexis UK, 3rd edition, 2003) 42; See further Posner, n27, 54-61.
[37] See further Gray, n2, 165-166.
[38] *Newcrest* (1997) 190 CLR 513 at 659.
[39] *Durham Holdings* (2001) 205 CLR 399 at 411.
[40] See Raff M, 'Environmental Obligations and the Western Liberal Property Concept', (1998) 22 *Melbourne Law Review* 657, 684-692.

liberal and market based foundations of our society are changing, or warrant reconsideration. Indeed, as the concept of property undergoes change through increasing regulation in the areas of planning and environmental law, it is even more important that only the clear words of Parliament are relied on to interfere with pre-existing proprietary interests. Actions supposedly in the public interest which are based on overly broad, ambiguous or inexact expression are apt not only to undermine the rule of law, but also the public's confidence in legal institutions, particularly if they are actions affecting private property.

4. The Proprietary Presumption in practice: the Fazzolari Case

The High Court Case of *Fazzolari* is one of the most recent examples of an application of the Proprietary Presumption. This case is a good example of how the presumption is meant to operate in practice. For a full appreciation of the issues at hand in the case we will refer in some detail to the provisions in the *Local Government Act* 1993 (NSW) ('Local Government Act'). These provisions illustrate the ambiguities which may arise in relevant legislation. The application of the principles to those ambiguities serves as an example of how they can be resolved by courts.

4.1 The relevant facts and legal issues

The Parramatta City Council (the Respondent) served notice to R & R Fazzolari (the Appellant) that they would be compulsorily acquiring their land. The Respondent had entered into a Public Private Partnership (PPP) with Grocon Constructor's Pty Ltd (Grocon) in order to effect the redevelopment of certain lands, a part of which the Appellant's land comprised. The Respondent planned to hold the land first on trust for Grocon and then transfer the land to the company, which would redevelop it for the purposes of the PPP. Grocon was to provide a combination of monetary and non-monetary consideration for the land.

Under the Local Government Act s 186(1), the Respondent has the power to compulsorily acquire land without the owner's approval. However s 188(1) provides that such an acquisition must have the owner's approval if it is for the purpose of resale. The principle behind s 188(1) is that if the government compulsorily acquires privately held land and then simply sells it to another private party the public purpose that justified the compulsory nature of the acquisition may be absent.

It was raised in argument by the Respondent that s 188(2)(a) of the Local Government Act applied to limit s 188(1) in that it provided that the owner's approval was not required where the land being acquired ('under this part') and resold adjoins or lies in the vicinity of other land acquired at the same time for a purpose other than the purpose of re-sale. In this case the Respondent had also used its compulsory acquisition powers to acquire two roads abutting the land to be redeveloped. The roads were already vested in the Respondent under the *Roads Act 1993* (NSW) ('Roads Act'), however the PPP required their acquisition so that they ceased to 'public roads' subject to the limitation's imposed by the

Roads Act. The PPP intended that parts of roads would be vested in Grocon for the purposes of redevelopment.

In response to this argument the Appellant argued that the Respondent's power to compulsorily acquire land it already owned came not from the Local Government Act (i.e. not 'under this part') but from s 7B of *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (the Just Terms Act) which provided as follows:

> An authority of the State that is authorised by law to acquire land by compulsory process in accordance with this Act may so acquire the land even if the land is vested in the authority itself.

Predominately the Just Terms Act deals with the terms and the methods by which acquisition under other acts must be effected. However, s 7B is different because it is one of the few sections which seems to ground a new and possibly seperate power. The respondent countered this by arguing that the section reached beyond the Just Terms Act to expand the powers existing in the Local Government Act itself. As it stands the Local Government Act itself does not provide for or anticipate the acquisition of lands already owned by the authority.[41]

Given the above there were two major questions for the court:

1. Was the acquisition of Appellant's land for the purpose of re-sale?

2. Even if the acquisition of the Appellant's land was for the purpose of re-sale did the acquisition of the abutting roads validate the acquisition?

Both of these questions arose out of ambiguities in the legislation. The first out of the ambiguity of the function of the term 'purpose' and the second out of the ambiguity of the purpose and effect of the s 188(2)(a) of the Local Government Act and s 7B of the Just Terms Act.

4.2 The Court's method of reasoning

The separate judgment of French CJ explicitly sets out a process of reasoning, left implicit in the joint judgment of Justices Gummow, Hayne, Heydon and Kiefel. His Honour explains that the correct approach to interpretation begins with establishing the Proprietary Presumption.[42] The initial premise is that without clear words to the contrary the legislature did not intend to interfere with private property rights. Therefore, if the task of interpretation requires a choice between two possible meanings of an ambiguous provision, the meaning which results in the least interference with private property rights is to be preferred.

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[41] *Fazzolari* (2009) 83 ALJR 557 at 570 (French CJ), at 576-577 (Gummow, Hayne, Heydon and Kiefel JJ). See in particular s 187(1) of the Local Government Act.

[42] *Fazzolari* (2009) 83 ALJR 557 at 567.

4.3 The judgments

The ambiguity which leads to the first question (above) stems from the argument that the literal meaning of the words of s 188(1) of the Local Government Act should be altered by reading in the adjective 'dominant' prior to 'purpose'. This argument was justified by the contention that the section was not meant to apply to a situation where the sale of the land was for the purpose of a development intended to benefit the general public. However, in applying the Proprietary Presumption both the Chief Justice and the joint judgment rejected that argument.[43] Section 188(1) does not read 'for the dominant purpose of re-sale', it reads 'for the purpose of re-sale', and given that a departure from the literal words of the statute would involve an interference with private property the literal meaning of the words is to be preferred. The Respondent did acquire the land for the purpose of selling it on to Grocon, and as such acquired the land for the purpose of re-sale. This interpretation does not counter parliamentary intent as it is presumed that parliamentary intent is not to interfere with private property rights. Our law does not contain the presumption that Parliament intends to benefit the public in spite of private property rights. Being well aware of the presumption in favour of private property rights, if Parliament had wished to favour the public interest in the form of PPPs over such rights it would have included the term 'dominant' prior to the term 'purpose'.

The ambiguity which leads to the second question (above) stems from the contention that unlike the majority of the Just Terms Act, s 7B should not 'reach beyond' the Just Terms Act to alter the power under s 186, but rather grounds a separate power in the Just Terms Act itself. This contention is supported by the fact that the Local Government Act itself does not anticipate an acquisition of lands already owned, and while most of the Just Terms Act deals with particulars and limits on compulsory acquisition, s 7B deals with a different form of compulsory acquisition altogether. Unlike the majority of the Just Terms Act the application of s 7B to alter pre-existing powers could have substantial effects on pre-existing property rights, as this case shows. Given this result, and the lack of clear guidance in either act as to how the ambiguity was to be resolved, both French CJ and the joint judgment preferred the interpretation of the Just Terms Act advanced by the Appellant, i.e. that the s 7B itself was the source of an authority's power to acquire land they already owned.[44] This resolution of the ambiguity was consequent on the lack of clear words negativing the Proprietary Presumption.

4.4 The aftermath

Resolving both ambiguities through the application of the Proprietary Presumption the court found for the Appellant. Two months after this judgment

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[43] *Fazzolari* (2009) 83 ALJR 557 at 568-569 (French CJ), at 574-575 (Gummow, Hayne, Heydon and Kiefel JJ).
[44] *Fazzolari* (2009) 83 ALJR 557 at 570 (French CJ), at 576-578 (Gummow, Hayne, Heydon and Kiefel JJ).

was handed down the NSW parliament amended the Just Terms Act by inserting the following:

> **7 Act not to empower authority to acquire land**
> (1) This Act does not empower an authority of the State to acquire land if it does not have the power (apart from this Act) to acquire the land.
> (2) The power of an authority of the State to acquire land under another Act is affected by sections 7A and 7B of this Act. Any such acquisition to which section 7A or 7B applies remains, for all purposes, an acquisition of land under and subject to that other Act.

That this amendment opposes the court's interpretation of s 7B does not mean that the court's process of reasoning in *Fazzolari* was questionable or the outcome incorrect.[45] These clear words of parliamentary intent were not present at the time of the decision. Regardless of any speculation that even at the time of the *Fazzolari* case the NSW Parliament operated under the assumption that s 7B should function as set out in the later amendment, parliamentary intent, as properly constructed through the words of the existing statute law, did not evince such an assumption. The Proprietary Presumption overruled any other assumption about parliamentary intent. Indeed, there is no extant presumption in the principles of statutory construction that parliament intended that the public interest, especially in the somewhat circumspect form of a public-private partnership, should override private property rights.

5. The American approach compared: *Kelo v City of New London*

To see the correct method by which the Proprietary Presumption applies it is useful to compare the approach taken in cases of public-private takings in the United States of America. The most important recent Supreme Court case in this area is *Kelo v City of New London* (2005) 545 US 469; (2005) 162 L Ed 2d 439; (2005 125 S Ct 2655 ('*Kelo*').

5.1 Kelo v City of New London

The City of New London (City) attempted to acquire compulsorily private land for the purpose of transferring it to a private not-for-profit development agency to carry out a public development for the purposes of rejuvenating the city's ailing economy. The pharmaceutical company Pfizer also announced it would build a 300 million dollar research facility directly adjacent to the proposed development. The City planned to lease most of the development to undetermined private parties.

The petitioners brought an action claiming that the taking of their properties would violate the 'public use' restriction in the Fifth Amendment of the American Constitution which provides:"...nor shall private property be taken for public use, without just compensation". The petitioners argued that as the City was transferring the property to a private developer and the main beneficiaries of the

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[45] cf. Ireland C, 'Should private property rights trump the public interest in renewal of the urban environment?' (2009) 16 LGLJ ?, ?.

development would be private parties, the taking was not for a 'public use'. The principal issue in *Kelo* was the construction of what constituted a 'public use'.

In a close decision (5-4) the court found in favour of the City. The majority argued that the purpose of the development in this case was one of public benefit, specifically economic development of the area. They argued that the public end may be just as well served by private interests as it is by public ownership.[46] In direct opposition, the dissenters argued that the majority's interpretation of the Fifth Amendment rendered the 'public use' requirement void as arguably every lawful use of private property could be said to generate some incidental benefit to the general public.[47] They contended that the main beneficiaries of the majority's decision are likely to be those with disproportionate influence and power in the political process, including large corporations, while the victims will be the relatively powerless individual home owners.[48]

This fundamental clash of philosophies drew, and continues to draw a lot of attention in the United States. Commentators and lobbyists from across the political spectrum have been critical, and many state courts and legislatures reacted by tightening their 'public use' restrictions on eminent domain.[49] *Kelo* was considered by the court of appeal in *Fazzolari*.[50] After a detailed analysis of what he considered to be the council's dominant purpose in acquiring Fazzolari's land Tobias JA concluded, contrary to the trial judge, that the council's dominant purpose was not resale:

> I refer to the primary judge's finding that the respondents' land was to be compulsorily acquired by the Council to provide it with new buildings for itself which Grocon was to construct, enabling it to retire substantial debt and to receive from Grocon a substantial payment with the ultimate result that its land and assets would be worth more because they would be located in a precinct of greater amenity than that which currently prevailed. For the reasons I have indicated, in my view this was not the Council's purpose in acquiring the respondents' land. It may have been its motive, but it was not its purpose.[51]

His Honour considered that the acquisition was integral to the development and that the primary object of the development was to "enhance the interests of the community of Parramatta and the wider public in rejuvenating and redeveloping a critical area within the Parramatta City Centre...".[52] As Tobias JA himself implies,[53] his analysis followed the same process and came to the same conclusion as the majority in *Kelo*.

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[46] *Kelo* (2005) 545 US 469 at 485-486.
[47] *Kelo* (2005) 545 US 469 at 501.
[48] *Kelo* (2005) 545 US 469 at 502.
[49] Lehavi A and Licht AN, 'Eminent Domain Inc' (2007) 107 Colum.L.Rev. 1705, 1705-1706.
[50] *Parramatta City Council v R & R Fazzolari Pty Ltd* (2008) 162 LGERA 1.
[51] (2008) 162 LGERA 1 at [174].
[52] (2008) 162 LGERA 1 at [171].
[53] (2008) 162 LGERA 1 at [167] – [174].

5.2 The approaches compared and distinguished

The major difference between the Fifth Amendment of the US Constitution and the relevant legislation in *Fazzolari* is that the former is part of a constitution. The approach of the American Supreme Court to constitutional interpretation involves a relatively significant focus on public policy, in that it requires the court to define the proper structure of the state and the powers of government. This involves the American Supreme Court in defining the place the rights of the individual within the socio-political framework. In contrast, the approach of Australian courts to legislative interpretation is to construct statutes in accordance with parliamentary intent. Certain presumptions with respect to fundamental rights are involved in this process of construction however these presumptions cannot override the clear words of Parliament. In Australia the ultimate decision on the place of fundamental rights of the citizen (save the few implied rights and constitutional guarantees in the Australian constitution) lies with Parliament in the exercise of its legislative functions. Where Commonwealth legislation is in issue, a number of cases which have interpreted the Propriety Presumption in the context of the Commonwealth legislative power in s51(xxxi) may be relevant. A number of these cases have already been cited. They are concerned with the exercise of legislative power by the Commonwealth.

It is important not to confuse the reasoning involved in an Australian court applying the General Presumption with the reasoning involved in an American court construing constitutional rights.[54] The former involves a court in resolving a legislative ambiguity in favour of fundamental rights, whereas the later involves the court in resolving the tension between the state and the individual or between two individuals. The former is predominately a question of law and the later is predominately a question of policy. No doubt, a court involved in statutory interpretation may at times be influenced by underlying considerations of policy, as is natural for any judge. One cannot pretend that judges merely declare the law, unaffected by their own values. Nevertheless, one cannot also pretend that the objective framework the law seeks to uphold does not guide the reasoning of an individual judge.[55]

When the law firmly holds that it is presumed that parliament did not intend to interfere with private property rights unless clear words are given to that effect, the law requires a court to resolve a legislative ambiguity in favour of private property rights. Indeed, to ignore in Australia the Proprietary Presumption and to delve into the underlying public policy involved in compulsory acquisition cases is for the courts to make un unwarranted foray into the public debate that should properly be carried out in Parliament.

6. Conclusion

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[54] cf. Ireland, above n 42

[55] See further Kirby M, 'Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty' (2006) 30 MULR 576, 578.

It is often tempting for the lawyer, interested in social policy and politics, to reduce legal questions to their socio-political core. It would be generally correct to say that this temptation must be resisted in all areas of law. Special mention must be made with respect to environmental and town planning law.

Developments in environmental and town planning law have provoked and no doubt will continue to provoke, substantial changes in concepts such as the 'public interest' and even 'property' itself. These developments must still be subject to the rule of law and be properly considered within the context of the fundamental legal principles underpinning the operation of the state. The presumption that parliament did not intend to interfere with property rights unless clear words to that effect are used is one of those fundamental legal principles. Together with the presumption that just compensation is payable upon the compulsory acquisition of land, it seeks to maintain the economic and social value of property in order to ensure a healthy economy and the continuation of the liberal freedoms of the state.

THE *TASMANIAN DAM* CASE AND SETTING ASIDE PRIVATE LAND FOR ENVIRONMENTAL PROTECTION: WHO SHOULD BEAR THE COST?

GLEN MCLEOD*

ABSTRACT

*This article will examine some fundamental legal issues arising from setting aside private land for the protection of the natural environment, by the use of laws, policy measures and administrative practice (**environmental and planning measures**). In particular, what limits apply to the use of environmental and planning measures before compensation is payable by the State or its agency, where the objective of those measures is to protect the environment? At what point does the use of environmental and planning measures become so inconsistent with the nature of private property that they effectively constitute a taking of an interest in land for which the law can require the State to pay the owner just compensation? The starting point for finding an answer to these questions will be the High Court decision in Commonwealth v State of Tasmania and others*[1] *(**Tasmanian Dam Case**); not because it was the first time the issue had arisen in Australia, but because of its contextual significance in regard to the growth of environmental law in this Country. Our examination of these issues will primarily be concerned with the effects of environmental and planning outside of the established statutory means of claiming compensation.*

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1 *Commonwealth v. State of Tasmania and others* (1983) 158 CLR 1.

I INTRODUCTION

Unlike the United States Constitution where its Fifth Amendment directly empowers citizens to protect their interest in property, citizens' property rights are only indirectly addressed in the Commonwealth Constitution.[2] The Commonwealth of Australia is empowered to make laws for the acquisition of property subject to the provision of just terms.[3] The High Court of Australia has held, in a number of decisions, that the emphasis in the Constitution is not on taking or extinguishment of private property, but on its acquisition, for the purposes of the Commonwealth.[4] This dichotomy occurs because an acquisition must confer a benefit[5] on the acquiring authority, in addition to taking an interest. That effectively narrows the scope of the 'just terms' proviso by shifting the emphasis to what has been gained by the public authority and away from the dispossessed party. The intended beneficiary of the proviso was presumably not the public authority but that is the result of the meaning ascribed to the term 'acquisition' by the High Court.

The Constitutional requirement of 'just terms' in a Commonwealth acquisition law, can be characterised as a manifestation of a fundamental or core legal right of the kind sought to be protected in the *Universal Declaration on Human Rights*[6] and the Constitution of the United States of America, with an ancestry that dating back at least to the Magna Carta

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2 *Commonwealth of Australia Constitution Act 1901* (Cth).

3 *Commonwealth of Australia Constitution Act* s 51(xxxi)

4 See, eg, Tasmanian Dam case 158 CLR 1, 144-5 (Mason J).

5 Ibid.

6 United Nations, General Assembly, *The Universal Declaration of Human Rights* (10 December 1948), Resolution 217 A (III).

of 1215.[7] This year, in commemorating the 800th anniversary of the Magna Carta, we can ask: to what extent should the Magna Carta apply to contemporary Australia, in particular to the relationship between environmental and planning measures and citizens' property rights? This is not a simplistic dilemma about private property verses the environment. On the contrary, the protection of the environment is unarguably in the public interest. The pertinent questions are, when does the protection of that public interest impinge upon a private person's property rights and how far can that intrusion go before the owner or former owner of the interest is entitled to compensation from the State for any loss caused by the impingement?

The State and Commonwealth manifestations of these issues differ to some extent, but the same underlying principles apply in both jurisdictions. References to the Magna Carta persist in leading High Court Cases concerning the Commonwealth's power to appropriate land and in Western Australia, the Magna Carta, still forms part of the State's law, according to the State's Law Reform Commission.[8] The part still in force contains a requirement that the State will not take the property except by 'due process of law'. The long tradition in English common law, which invests in the citizen some property rights, was received into

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7 *Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another* (1997) 190 CLR 513, 657-9 (Kirby J).

8 The Law Reform Commission of Western Australia *United Kingdom Statutes in Force in Western Australia* Project No. 75 Report (1994) 6, 21, 27 (LRC UK Statutes Report) 1.9. In particular Chapter 29 of that Magna Carta applies, enacted in 1297 by Act 25 Edward I; and enhanced by 28 Edward III in 1354. The 1354 Statute added a requirement that land may only be taken by 'due process of law', which is a component of and possibly the progenitor of the 'just terms' guarantee in the Commonwealth Constitution. See also Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 140.

and forms part of the common law of Western Australia.[9] Can the fundamental principles derived from these sources apply as a buffer between the citizen and environmental and planning law measures?

The whole area of compulsory takings and compensation in the context of environmental law was opened up by the Tasmanian Dam case, exposing for examination fundamental legal concepts in constitutional law, as well as deeper common law principles.

The growth in environmental law and policy at the Commonwealth and State levels, witnessed since the *Tasmanian Dam* case, may result in increased tension between environmental protection and property rights associated with land. Accordingly, there may be a concomitant increase in the application of the fundamental principles mentioned earlier in relation to the protection of property rights in land, in the context of environmental and planning measures.

II THE GROWTH OF ENVIRONMENTAL AND PLANNING MEASURES SINCE THE 1980S-WHO PAYS?

Until the early 1980s Australian land use regulation was the preserve of town planning law and policy. Land use planning and environmental law were primarily State matters.

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9 *Batista Della-Vedova & Ors. v State Planning Commission; Batista Della-Vedova & Ors v State Energy Commission* (1988), unreported decision of the Compensation Court of Western Australia: 22 December 1988 BCC 8800828 and relevantly approved and quoted in *R v. Compensation Court of Western Australia; ex parte State Planning Commission & Anor; re Della-Vedova* (1990) 2 WAR 242, 253 (Wallace J) (unanimous judgment of Full Court of Supreme Court of Western Australia). See also Carney, above n 8, 138.

If land was required for a public purpose, it was either reserved or taken compulsorily under a 'Public Works Act'. Compensation was payable by the acquiring authority. On private land, there was little statutory regulation of the clearing of native vegetation, although clearing would have required planning approval.[10]

The regulation of land use today remains a planning matter, but it is now overlaid with environmental laws and policies. The boundaries between planning and environmental law are no longer distinct. This is without even considering more recent concepts such as sustainable development and the emerging use of that concept, with intergenerational equity and the precautionary principle, in climate change law.[11]

The complexity of environmental and planning measures has muddied the simple concepts of reservation or taking for public use. Environmental and planning measures can sterilise the economic value of land, without any clear avenue to compensation for the landowner. Examples at the Federal level include the Commonwealth Department for the Environment's Environmental Offsets Policy.[12] In practice it is being administered to require large areas of land to be surrendered free of cost as the price for authorisations under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act**)**. Landowners are usually forced to agree or face delays or refusals from approval agencies. The areas demanded can bear little or no relation to the environmental

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10 *Palos Verdes Estates v Carbon* (1991) 6 WAR 223, 241 (Malcolm CJ).

11 See for example *Taralga Landscape Guardians v Minister for Planning* [2007] NSWLEC 59; David, Parry, 'Ecologically Sustainable Development in Western Australian Planning Cases' (2009) 26 *EPLJ* 375.

12 Department of Sustainability, Environment, Water, Population and Communities, Environment, Australian Government, *Protection and Biodiversity Conservation Act 1999* (Cth) *Environmental Offsets Policy* (October 2012).

issues relevant under the EPBC Act. If the power exists under the EPBC Act to demand offsets then questions arise as to whether 'as a legal and practical matter' what is being done amounts to the taking of land otherwise than on just terms. The operation of this Act has the potential to sterilise much undeveloped urban land, without a clear[13] mechanism through which landowners may claim compensation.[14]

In Western Australia, some examples of environmental and planning measures include:

1. Various wetland policies[15] and conditions applied to clearing permits under the *Environmental Protection Act 1986* (WA) (**EP Act**), which can effectively sterilise substantial areas of land free of cost or at least to sterilise those areas by constraining their productive use.

2. The widest of these measures is the State Planning Policy 2.8[16] which provides that conservation areas, in addition to land to be ceded free of cost for public open space, 'will be generally set aside free of cost', for

[13] Section 519 of the EPBC Act provides for the payment of reasonable compensation where the operation of that Act would result in the '…acquisition of property that would be invalid because of paragraph 51(xxxi) of the Constitution….'. The compensation can be claimed by an application to the Federal Court. The scope of this provision is not clear. As it depends for its application on the meaning ascribed to the term 'acquisition' in section 51(xxxi), its application in practice may be problematic for the reasons examined later in respect of that word.

[14] The effect will not only cost landowners but potentially, over a period of time, could lead to higher inner city land prices at a time when urban consolidation and denser development are regarded as important antidotes to the effects of car use and other activities on climate change.

[15] Examples include the: Western Australian Government, *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, Gazette No 55, 8 April 2005; Western Australian Government, *Environmental Protection (South West Agricultural Zone Wetlands)*, Policy Approval Order No 215, 28 October 1998: Western Australian Government, *Environmental Protection (Swan Coastal Plain Lakes)*, Policy Approval Order 1992.

[16] Prepared under section 26 of the *Planning and Development Act 2005* (WA), *Government Gazette, WA*, 22 June 2010, 2743 (SPP 2.8).

the purposes of urban bushland conservation[17] and not be taken into account in the calculation of the developable area for the calculation of a public open space contribution.

3. Town planning schemes may contain reserves which are dressed up as zones.

4. Conservation areas may be created by the operation of the environmental assessment process under Part IV of the EP Act. Sometimes developers are simply forced to give up land for environmental protection purposes free of cost in the subdivision process, to avoid protracted arguments with approval authorities.

A *Significance of the Growth of Environmental and Planning Law Measures*

The environmental objectives and effectiveness of these measures is not in question in this article. The principal issues are legal and economic, in particular the extent to which the measures mentioned, are lawful, when no provision, or no adequate provision, is made to compensate affected landowners for the economic effects of the measures. These phenomena are not confined to Western Australia and the Commonwealth.[18]

Many, environmental and planning law measures are not legislative in nature. They rely on the exercise of broad discretions and implicit power. It is the practical operation of the law, through environmental and planning measures, more than its legal form, which is often significant in this context. This does not diminish the legal consequences of the measures impugned, as was seen earlier in this article. There is generally no reference to established legal processes for takings or reservations, and

17 Clause 5.1.2.2 (vii) of SPP2.8.

18 See for example Suri Ratnapala 'Constitutional Vandalism Under Green Cover' (2009) Speech published on website of Property Rights Australia.

in Western Australia the landowners have no independent merits-based appeal rights. Their only recourse is to apply for relief in the courts. It is no exaggeration to suggest that the circumstances are somewhat resonant with the excesses of King John, which were in part responsible for the Barons forcing him to agree to and seal the Magna Carta.[19] By a 1354 amendment to and enactment of the Magna Carta, there was an added requirement that property can only be taken by 'due process of law'.[20]

The growth in environmental and planning law measures and the related issue of compensation for landowners was referred to by the Hon. Ian Callinan AC QC in an article in *The Australian Newspaper* on 3 January 2008[21]. In speculating on what might be the major new legal issue of the coming years, and the capacity of our system to deal with it, he said:

> 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.

Continuing, he said:

> 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.

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19 In their book *1215 The Year of the Magna Carta* Danny Danziger and John Gillingham (Hodder and Stoughton 2004) 123 explain how the declarations by the King that large areas of England were 'forests' effectively sterilised productive land and led to unrest.

20 See n 8 above and n 85 below.

21 The Hon. I. Callinan AC QC, 'For the Sake of Our Heritage, The Buck Must Stop Somewhere' *The Australian*, 3 January 2008, 10.

> It is a legitimate question: will proper compensation be available for the consequential involuntary reduction in value to freehold owners?

A key issue referred to by The Hon. Ian Callinan AC QC was the ambiguity surrounding the means of 'acquisition'. In this regard he said:

> '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 result, he said, is need for reform law, which he put as follows:

> 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.[22]

Despite this plea, there has been no substantive law reform in this area. As the Hon. Ian Callinan AC QC said, the issue is not about the desirability of conservation, but who should pay for the value which our society places on conservation.[23]

III THE COMMONWEALTH: 'JUST TERMS'

B *The Tasmanian Dam Case*

The historical context of the Tasmanian Dam Case is significant because it heralded over subsequent decades the development of Australia's current environmental law system.

Tasmania and much of the rest of Australia were divided socially and politically in 1982 and 1983[24] by a proposal to dam the Gordon River in Tasmania's South West. The dam was called the Franklin Dam and the project, 'Gordon below Franklin'. The effect would be the destruction of a large area of wilderness forest.

In 1983, the newly elected Hawke Government sought to prohibit the construction of the dam and set aside for conservation 14,125 ha of the forest, which had previously been recognised as national park under the

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22 Ibid. See also his dicta in *Commonwealth vWestern Australia* (1999) 196 CLR 392, 488, [282] (Callinan J).

23 See: *Commonwealth v Western Australia* (1999) 96 CLR 392, 458 [186].

24 It was central in a battle for the leadership of the Australian Labor Party between Bob Hawke and Bill Hayden, and played a part in Bob Hawke leading the Australian Labor Party to victory in the 1983 Federal election.

National Parks and Wildlife Act 1970 (Tas). In August 1982 the area was excised from the national park and vested in the Hydro-Electric Commission of Tasmania under the *Gordon River Hydro-Electric Power Development Act 1982*. There was a landmark High Court challenge to the State of Tasmania's enabling legislation, brought by the Commonwealth, which came to be known as the *Tasmanian Dam Case*.

We will examine the relevance of the *Tasmanian Dam Case* to an aspect of contemporary environmental law, namely the use of environmental and planning measures to set aside land for conservation purposes, without the payment of compensation. Other strands of argument and findings of the Court will not be examined here, but have been the subject of extensive examination, particularly in connection with the external affairs power of the Commonwealth Constitution.[25]

The battle lines were drawn in March 1983 when the *World Heritage (Western Tasmanian Wilderness) Regulations* (Cth) (Wilderness Regulations) came into effect. They prohibited, without ministerial consent, the construction of a dam or associated works, within that same 14,125 ha. The regulations were expressed to bind the Crown in right of the Commonwealth and State of Tasmania. Their primary purpose was to enforce the listing of the relevant land as a World Heritage Conservation Area.

In May 1983 the Commonwealth passed the *World Heritage Properties Conservation Act 1983* (Cth). Among other things, that Act contained

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[25] *Commonwealth of Australia Constitution Act 1901* (Cth) s 51(xxix). See: GE Fisher 'External Affairs and Federalism in the Tasmanian Dam Case' (1985) 1 *Queensland University of Technology Law Review* 157.

provisions relating to the payment of compensation to a claimant from whom the property was acquired by the operation of a scheme of legislation which included that Act and the Wilderness Regulations.

In the action brought in the *Tasmanian Dam Case* the Commonwealth sought to restrain the State of Tasmania and others from acting contrary to the Wilderness Regulations. The defendants counterclaimed that the legislation was beyond power and accordingly invalid. Among other things, it was argued by the State of Tasmania that the legislation in reality acquired land without providing for the payment of compensation on just terms and thereby contravened section 51(xxxi) of the Constitution. Various questions were referred to the Full Court of the High Court for determination.

By a majority of four to three the High Court held that the Commonwealth legislation was valid partly on the basis of the Commonwealth's external affairs powers under section 51(xxix) of the Constitution. The Tasmanian legislation, to the extent that it was inconsistent with the Commonwealth legislation was invalid under section 109 of the Constitution of the Commonwealth. The minority of 3 held that the Commonwealth legislation was invalid.

For now, we will concentrate on an aspect of the majority's decision. Because they held the legislation to be valid under external affairs power, they had to decide, unlike the minority, whether the legislation offended section 51(xxxi) of the Constitution, which is an express grant of power to the Commonwealth to make laws with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has the power to make laws.

Of the majority who had to decide on the application of section 51(xxxi), three held that the legislation was within power under section 51(xxxi). They said it was not an acquisition, merely a taking. In their view no interest was actually 'acquired' because the legislation under attack was simply a restriction on the use of property. No benefit accrued to the Commonwealth. The legislation may have sterilised the land, but the Commonwealth did not acquire anything. Section 51(xxxi) accordingly did not apply. The majority, therefore, did not have to decide whether the terms of the alleged taking were 'just'.

Deane J said that provisions of the *World Heritage Properties Conservation Act 1983* (Cth) and Wilderness Regulations offended section 51(xxxi). The interest 'acquired' was the benefit of the prohibition on developing the land. Further, the acquisition was not on 'just terms' because section 17 of the World Heritage Properties Conservation Act delayed unfairly the payment of compensation.

Of the others in the majority, Murphy J did not consider the section 51(xxxi) point in any detail. Mason and Brennan JJ gave the question more consideration. These judges concluded there had been no acquisition, therefore the 'just terms' provisions did not apply. Their views are representative of one stream of reasoning in the High Court as to what constitutes 'acquisition'. Deane J represents a contrary line of thought, as will be seen.

Tasmania had submitted that although the legislation does not attempt to divest title from the State to the Commonwealth, it so restricts the rights of the State and confers such rights on the Federal Minister, that there was in effect an acquisition of property. The State argued that there is a distinction between 'taking' property and 'regulation', this having been

developed in the United States and discussed by Stephen J in the Australian High Court case of *Trade Practices Commission v Tooth & Co Limited*.[26]

This was rejected by Mason J on the basis that just because Tasmania had rights which were extinguished or 'taken' it does not follow that there was an acquisition within the meaning of that term in the Constitution.

Like other Judges who have considered this question in the High Court, before and since the *Tasmanian Dam Case*, Mason J referred to the judgements of Holmes and Brandeis JJ in the United States case *Pennsylvania Coal Co v Mahon.*[27] In their oft-quoted judgements, Holmes and Brandeis JJ held that a restriction on the use of property deprives the owner of some right previously enjoyed, and is therefore an abridgement of rights in property without compensation. The consequence is that if the regulation of property goes too far, it constitutes a taking. There is no set formula to decide when regulation becomes a taking. It depends upon the 'facts and necessities' of each case.

Mason J[28] said, in the *Tasmanian Dam* case, that the American jurisprudence has no direct relevance to section 51(xxxi). In common with other judges who have considered this point in the High Court, he referred to *Penn Central Transportation Co v New York City*,[29] in which *The Pennsylvania Coal* case was explained on the footing that a State statute, that substantially furthers important public policies, may so frustrate distinct investment backed expectations as to amount to a

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26 *Trade Practices Commission v Tooth & Co Limited* (1979) 142 CLR 397, 413-5.

27 *Pennsylvania Coal Co v Mahon* (1922) 260 US 393, 415, 417.

28 *Commonwealth v. State of Tasmania and others* (1983) 158 CLR 1, 144-145.

29 *Penn Central Transportation Co v New York City* (1978) 438 US 104.

'taking'. The relevant provision in the Fifth Amendment of the US Constitution is:

> Nor shall private property be taken for public use without just compensation.

The emphasis in the Constitution, however, is not on taking or extinguishment of private property but on acquisition of private property for the purposes of the Commonwealth. It is a power giving provision with a proviso that acquisition must be on just terms. The emphasis is not on the right of the individual but the power of the State. There must, according to this Australian line of argument, be an acquisition whereby the Commonwealth or another gains an interest in property, however slight or insubstantial it may be. The majority of the judges who considered the section 51(xxxi) issue in the *Tasmanian Dam Case* said that there had been such an acquisition.

The interest need not be a recognised class of interest in property law and extends to 'innominate and anomalous interests' and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth.[30]

Deane J devoted some 10 pages of his judgment in the Tasmanian Dam case to the question of whether section 51(xxxi) had been breached. He said that section 51(xxxi) has assumed the status of a Constitutional guarantee.[31]

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[30] See the later discussion on *Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another* (1997) 190 CLR 1, 513; *Commonwealth of Australia v WMC Resources Limited* 194 CLR 1.

[31] *Commonwealth v State of Tasmania and others* (1983) 158 CLR 1, 282. See *Commonwealth of Australia v WMC* (1998*)* 194 CLR 1, 20 (Kirby J); *Fazzolari v Parramatta City Council* (2009) 237 CLR 603, 619-20 (French CJ).

He agreed with the majority that there is a difference between restrictions on the use of property and the acquisition of property. He went on to say, however, that:

> The benefit of land can, in certain circumstances, be enjoyed without any active right in relation to the land being acquired or exercised: see, e.g., Council of City of Newcastle v Royal Newcastle Hospital. Thus, if the Parliament were to make a law prohibiting any presence upon land within a radius of 1 kilometre of any point on the boundary of a particular defence establishment and thereby obtain the benefit of a buffer zone, there would, in my view, be an effective confiscation or acquisition of the benefit of use of the land… notwithstanding that neither the owner nor the Commonwealth possessed any right to go upon or actively to use the land affected.[32]

He referred to the judgment of Stephen J in *Trade Practices Commission v Tooth & Co Limited*.[33] In particular, he quoted Stephen J as saying:

> … far-reaching restrictions upon the use of property may in appropriate circumstances be seen to involve such an acquisition. That the American experience should provide guidance in this area is testimony to the universality of the problem sooner or later encountered whatever Constitutional regulation of compulsory acquisition is sought to be… imposed upon the free enjoyment of property rights. In each case the particular circumstances must be ascertained and weighed and, as in all questions of degree, it will be idle to seek to draw up precise lines in advance.[34]

Deane J proceeded to adopt this approach in the *Tasmanian Dam Case*.

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32 *Commonwealth v State of Tasmania and others* (1983) 158 CLR 1, 284

33 Above, n 17.

34 Ibid 414-5.

In referring to the legislation, in particular the Wilderness Regulations, he said:

> They effectively preclude development and what would, in an ordinary context, be described as 'improvement' of the land without the Minister's consent: no building or other substantial structure can be erected; no tree can be cut down or removed; no vehicular track can be established; no works can be carried out. The regulations apply indefinitely. The land remains vested in the HEC. The HEC, however, is not only prohibited, in the absence of a consent which there is every reason to believe will not be forthcoming, from building the proposed dam; it is, without such consent, effectively excluded from putting the land to any active use at all.[35]

Deane J's description from twenty-five years ago seems ahead of its time. As discussed earlier in this article, through delegated legislation and government policies of various kinds, there are now many people who have had conservation areas imposed on them to their detriment.

Deane J said that if restrictions of the kind, imposed in the Commonwealth legislation in this case, did not amount to an acquisition of property, 'the safeguard of section 51(xxxi) would be ineffective to preclude the Commonwealth from effectively dedicating the property of others to its purposes without compensation whenever such dedication could be achieved by the imposition of carefully worded restrictions upon the owner's use and enjoyment of his land.

He then went on to liken the environmental and planning measures in question to restrictive covenants:

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35 *Commonwealth v State of Tasmania and others* (1983) 158 CLR 1, 286.

> The benefit of a restrictive covenant, which prohibits the doing of certain acts without consent and which ensures that the burdened land remains in a state which the person entitled to enforce the covenant desires to have preserved for the purposes of his own, can constitute a valuable asset. It is incorporeal but it is, nonetheless, property. There is no reason in principle why, if 'property' is used in a wide sense to include 'innominate and anomalous interests', a corresponding benefit under a legislative scheme cannot, in an appropriate case, be regarded as property.[36]

This, of course, resonates with what the Hon. Ian Callinan AC QC was saying in his article, quoted earlier.

Deane J went on to say in the *Tasmanian Dam Case*:

> The 'property' purportedly acquired consists of the benefit of the prohibition of the exercise of the rights of use and development of the land which would be involved in the doing of any of the specified acts. The purpose for which that property has been purportedly acquired is the 'application of the property in or towards carrying out' Australia's obligations under the Convention.[37]

Having decided that there had been an acquisition, Deane J went on to consider whether the acquisition was on 'just terms'. What he said in this regard is interesting. Clearly, not every compensation provision will be 'just'. The formula in the *Tasmanian Dam Case* did not involve a judicial process for the ascertainment of the compensation. The assessment provisions would have been hard to apply and would take a long time to

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[36] Ibid 286-7; See also *Commonwealth v Western Australia* (1999) 196 CLR 392, 488 [282], where Callinan J applied similar reasoning.

[37] *Commonwealth v State of Tasmania and others* (1983) 158 CLR 1, 286-7. The Convention to which Deane J is referring is the *World Cultural and Natural Heritage Convention for the Protection of the World Cultural and Natural Heritage*.

complete in practice. They would have provided a considerable barrier to obtaining compensation. Deane J said:

> There is not, of course, anything intrinsically unfair in the Parliament providing a procedure for determining the quantum of compensation outside the ordinary judicial process. There is, however, something intrinsically unfair in a procedure which, in effect, ensures, unless a claimant agrees to accept the terms which the Commonwealth is prepared to offer, he will be forced to wait years before he is allowed even access to a court, tribunal or other body which can authoritatively determine the amount of the compensation which the Commonwealth must pay.

He held that the consequence of the failure to provide just terms rendered the regulations invalid.

In summary in regard to the Tasmanian Dam case, there is no doubt that the majority of the judges who considered section 51 (xxxi), took a conservative view of the scope of the provision when considered as a constitutional guarantee. The effect of that majority view would be to create a 'high bar' for anyone wishing to argue that particular regulation crosses the line between regulation and taking or 'acquisition'. However, such a view would lack nuance if it did not take into account other considerations, including:

- extinguishment or restrictions on rights in property may be analogous to a restrictive covenant;
- there is a difference between positive constitutional rights like the Fifth Amendment of the Constitution of the United States of America and legislative power dispensing provisions like section 51(xxxi) of the Australian Constitution;

- despite these differences, provisions such as the 'just terms' guarantee are derived from the same underlying principles from the Magna Carta and the common law.

Several other Commonwealth cases since the Tasmanian Dam case should be considered, before turning to the law and practice in Western Australia.

B *The Newcrest case*

Another wilderness, this time the Kakadu National Park, was the subject land in *Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another*.[38] The High Court in that case applied the *Tasmanian Dam Case* and considered a number of other authorities in which section 51(xxxi) was relevant. The Court found in favour of the plaintiff and struck down legislation under section 51(xxxi) of the Constitution.

The Commonwealth, by two proclamations made under the *National Parks and Wildlife Conservation Act* (*1975*) (Cth) (Commonwealth Act) included the plaintiff's mining leases within the area of the Kakadu National Park. The Commonwealth Act prohibited the carrying on of operations for the recovery of minerals. The same Act purported to exempt the Commonwealth from liability to pay compensation to any person by reason of that Act. Newcrest contended that the leases were still in force, and that therefore the Act was invalid.

Consistent with the *Tasmanian Dam Case*, the Court held by a majority of 4:3, that section 51(xxxi) operated as a fetter on the Commonwealth's ability to make laws for the purpose of discharging Australia's

[38] *Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another* (1996) 190 CLR 1, 513.

international treaty obligations, including the extension of the Kakadu National Park. A further and more substantial majority (6 to 1) held that the extension of the National Park over Newcrest's leases constituted 'sufficient derivation of an identifiable and measurable advantage [to the Commonwealth] to be an 'acquisition' for the purposes of section 51(xxxi). In doing that, they specifically referred to dicta of Brennan J's decision in the *Tasmanian Dam Case.*[39] This dictum is substantially the same as that of Mason J, which I have quoted above.

In the *Newcrest* case Brennan J also said, among other things:

> The Commonwealth's interest in respect of the minerals was enhanced by the sterilisation of Newcrest's interests therein. In my opinion, by the force of the impugned proclamations, the Commonwealth acquired property from Newcrest . . . the property consisted not in a right to possession or occupation of the relevant area of land nor in the bare leasehold interest vested in Newcrest but in the benefit of relief from the burden of Newcrest's right to carry on 'operations' for the recovery of minerals.[40]

Gummow J in *Newcrest* likewise, in quoting Dixon J in *Bank of New South Wales v Commonwealth*[41] said that Newcrest had been deprived of the 'reality' of proprietorship.'[42] He went on to say that '*...here there was an effective sterilisation of the rights constituting the property in*

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39 *Commonwealth v State of Tasmania and others* (1983) 158 CLR 1, 246-7.

40 *Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another* (1996) 190 CLR 1, 530.

41 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349.

42 *Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another* (1996) 190 CLR 1, 633.

question.[43] The constraints *'as a legal and practical matter' denied Newcrest of the exercise of its rights under the mining tenements*.'

Dawson and Toohey JJ came to similar conclusions. The dissenter on this point, McHugh J, took a restrictive view; that there was no gain to the Commonwealth and therefore no acquisition to trigger section 51(xxxi).

Finally, in regard to Newcrest, the judgment of Kirby J is significant because it resonates with statements of principle in a Western Australian case, considered later in this article.[44]

Kirby J in the *Newcrest* case was in the majority. Early in his judgement he describes the effect of the Commonwealth legislation and the proclamation referred to above and then says:

> Pause for a moment to reflect upon the result of the impugned legislation, if valid. It is one thing to expand a National Park for the benefit of everyone who will enjoy its facility. It is another to do so at an economic cost to the owners of valuable property interests in sections of the Park whose rights are effectively confiscated to achieve that end. Ordinarily, at least under Federal law, the expansion of areas for public use is carried out at the price of compensating justly those private individuals who lose their property interests in order to contribute to the greater public good. It is possible that the operation of the Constitution and the applicable Federal legislation might result in such an uncompensated acquisition. That, after all, could certainly occur, so far as the Constitution is concerned, in respect of the acquisitions of

43 Ibid 635.

44 *Batista Della-Vedova & Ors. v State Planning Commission; Batista Della-Vedova & Ors. v State Energy Commission* (1988), unreported decision of the Compensation Court of Western Australia: 22 December 1988, BCC8800828, 29.

> property under State law which is not subject to the 'just terms' requirement of section 51 (xxxi) . . . if the correct interpretation of the Constitution requires such a result, this court must give effect to it. It must do so whatever opinions might be held concerning the justice or fairness of obliging selected property holders to suffer uncompensated losses for the benefit of the community as a whole.
>
> Nevertheless, the result of such a course is so **manifestly unjust that the mind inclines against an interpretation** of the Constitution which has that consequence. At least it does so if another interpretation, which avoids it, is available.'[45]

Kirby J then went on to refer to an interpretive principle, namely, that where the *Constitution* is ambiguous:

> 'This court should adopt the meaning which conforms to the principles of fundamental rights rather than an interpretation which would involve a departure from such rights.
>
> Australian law, including its Constitutional law, may sometimes fall short of giving effect to fundamental rights. The duty of the Court is to interpret what the Constitution says and not what individual judges may think it should have said. If the Constitution is clear, the Court must (as in the interpretation of any legislation) give effect to its terms . . . however, as has been recognised by this court and by other courts of high authority, the inter-relationship of national and international law, including in relation to fundamental rights, is 'undergoing evolution'. To adapt what Brennan J said in *Mabo v Queensland* [No.2] 491, the common law, and the Constitutional law do not necessarily conform with international law. However, international law is a legitimate and important influence on the development of the common law in

[45] *Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another* (1996) 190 CLR 1, 639 – emphasis added.

Constitutional law, especially when international law declares the existence of universal and fundamental rights. To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law, including in so far as that law expresses basic rights. The reason for this is that the Constitution not only speaks to the people of Australia who made it and accept it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community.

One highly influential international statement on the understanding of universal and fundamental rights is the Universal Declaration of Human Rights. That document is not a treaty to which Australia is a party. Indeed it is not a treaty at all. It is not part of Australia's domestic law, still less of its Constitution. Nevertheless, it may in this country, as it has in other countries, influence legal development and Constitutional interpretation. At least it may do so where its terms do not conflict with, but are consistent with, a provision of the Constitution. The use of international law in such a way has been specifically sanctioned by the Privy Council when giving meaning to express Constitutional provisions relating to 'fundamental rights and freedoms'. Such jurisprudence has its analogies in the courts of several other countries. The growing influence of the Universal Declaration upon the jurisprudence of the International Court of Justice may also be noted.

The Universal Declaration states in Art. 17:

> 'Everyone has the right to own property alone as well as in association with others.
>
> No one should be arbitrarily deprived of his property.'

> While this Article contains propositions which are unremarkable to those familiar with the Australian legal system, the prohibition on the arbitrary deprivation of property expresses an essential idea which is both basic and virtually uniform in civilised legal systems. Historically, its roots may be traced back as far as the Magna Carta 1215, Art.52 of which provided:
>
> > To any man whom we have deprived or dispossessed of lands, castles, liberties, or rights, without the lawful judgement of his equals, we will at once restore these.[46]

He then referred to similar declarations in the French constitution, the United States constitution, the Indian constitution, the Malaysian constitution, the Japanese constitution and South African constitutions.

Kirby J went on to say:

> In effect, the foregoing constitutional provisions do no more than reflect universal and fundamental rights by now recognised by customary international law. Ordinarily, in a civilised society, where private property rights are protected by law, the government, its agencies or those acting under authority of law must not deprive a person of such rights without a legal process which includes provision of just compensation . . . when the foregoing principles, of virtually universal application, are remembered, it becomes even more astonishing to suggest that the Australian Constitution, which in 1901 expressed the unexceptionally recognised and gave effect to the applicable universal principle, should be construed today in such a way we should limit the operation of that express requirement in respect of some laws made by

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[46] *Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another* (1996) 190 CLR 1, 657-9. This provision was later extended by Statute: 28 Edward III in 1354. The 1354 Statute added a requirement that land may only be taken by 'due process of law'. See above, n 8.

> its Federal Parliament but not others. Where there is an ambiguity in the meaning of the Constitution, as there is here, it should be resolved in favour of the upholding of such fundamental and universal rights.[47]

This dicta is aligned with more recent High Court dicta, particularly that of French CJ in *Fazzolari Pty Ltd v Parramatta City Council*.[48]

The legal conclusions which can drawn from the Newcrest Case are similar to those which can be drawn from the WMC Resources Case, an exposition of which follows.

C *The WMC Resources Case*

Not long after the *Newcrest* case was decided, the High Court was given another opportunity to consider these issues. In the *Commonwealth of Australia v. WMC Resources Limited*[49] an exploration permit had excised from it, by the operation of the impugned Commonwealth legislation, an area in the Timor Strait, pursuant to a treaty between Australia and Indonesia. The case was decided by a 4-2 majority in favour of the Commonwealth. This was essentially the same High Court which decided the *Newcrest* case. This time Kirby J dissented with Toohey J. The majority held that the legislation was not a law for the acquisition of property. Essentially, the majority followed a line of cases which reflected the reasoning of the majority in the *Tasmanian Dam Case*.[50]

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47 *Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another* (1996) 190 CLR 1, 661. See also below, n 59.

48 *Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 610. See also above n 21, 22.

49 *Commonwealth of Australia v. WMC Resources Limited* (1998*)* 194 CLR 1.

50 *JT International SA v Commonwealth* (2012) 250 CLR 1; *ICM Agriculture v Commonwealth* (2009) 240 CLR 140; *Smith v ANL Ltd* (2000) 204 CLR 493; *Commonwealth of Australia v Mewett* (1997) 191 CLR 471; *Mutual Pools and Staff Pty Ltd v. Commonwealth* (1994) 179 CLR 155; *Georgiadis v Australia and Overseas Telecommunications Corporation* (1994) 179 CLR 297; *Health Insurance*

The decision they made in that case as to whether there had been the acquisition for a property right which benefited the Commonwealth right, which benefited the Commonwealth, differed from the call made in the Newcrest case. The majority held that the rights extinguished were not of a proprietary nature. The rights had no existence apart from the statute and were susceptible to modification or extinguishment. The rights extinguished did not create a reciprocal liability to the Commonwealth which would be converted into an advantage upon the rights being extinguished. Newcrest was distinguished on the basis that the rights under its mining lease were substantial rights, allowing the Company to use Commonwealth land for the extraction of minerals. Extinguishment of that right enhanced the property of the Commonwealth.[51]

Toohey J in dissent said that Commonwealth legislation granted immunity in favour of the plaintiff. It was a 'right'. It was identifiable, assignable, exclusive and valuable. Its extinguishment benefitted the Commonwealth.[52]

Gummow J noted that for a claim to be truly a 'right' it must *not* depend for its existence on the sufferance of the party against whom it is asserted.

He said that the analysis of whether or not the provisions attracted the Constitutional guarantee *'must proceed from a consideration of the nature*

Commission v Peverill (1994) 179 CLR 226; *Australian Tape Manufacturers Association Limited v Commonwealth of Australia* (1993) 176 CLR 480.

[51] *Commonwealth of Australia v WMC Resources Limited* (1998) 194 CLR 1, 17 (Brennan CJ).

[52] *Commonwealth of Australia v WMC Resources Limited* (1998)194 CLR194 CLR 1, 30.

and function of such permits, the structure of the . . . Act and the immunity the permits conferred . . .[53]

Kirby J did not agree with the conclusion of Gummow J. He referred to the legislative scheme:

> . . . conforming to what one would expect in national legislation of a country freshly claiming sovereign rights over its continental shelf and seeking to induce risk capital to explore for and exploit petroleum reserves as yet unknown. Introducing the Bill which became . . .the Act, the Attorney General . . . told the Parliament:
>
> > Today the exploration of Australia's offshore petroleum resources is a reality, or very soon it will be a substantial reality. For Government this has meant the devising of appropriate new legislative machinery.

He acknowledged expressly the need for assurances to investors if they were to be attracted to the nationally important task of petroleum exploration within the Australian continental shelf.[54]

Kirby J noted that every judge in the Federal Court in this matter had determined against the Commonwealth. He said that the right in question was 'definable, identifiable by third parties, capable in its nature of assumption by third parties, and [had] some degree of permanence and stability'. It therefore had the attributes of property.

He went on to enunciate principles relevant to section 51(xxxi), which may be summarised as follows:

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[53] *Commonwealth of Australia v WMC Resources Limited* (1998) 194 CLR 1, 73.

[54] *Commonwealth of Australia v WMC Resources Limited* (1998) 194 CLR 1, 83.

1. It is a Constitutional guarantee.

2. Rigid approaches to interpretation which would defeat the operation of the guarantee should be avoided.

3. The Commonwealth may not do indirectly what section 51(xxxi) would forbid if done directly.

4. The Court will look at the practical operation of the law as well as its legal form.

5. There is a danger in dissecting the words, that the achievement of the purposes of the paragraph as a guarantee, may be lost.

6. Interests which are inherently defeasible, 'however innominate and anomalous' can partake of the quality of 'property'.

7. A clear object of the Act which created the rights was to give the permitees a stable 'title' to the property rights.

He said that the existence of the permits is an impediment to the implementation of the treaty and removing the permit was an identifiable benefit or advantage to the Commonwealth. The sterilisation was imposed on the exercise of the respondent's rights in that area and was indistinguishable from the attempt to extinguish rights in the *Newcrest* case.

IV RETROSPECTIVE ON THE CASES - THE RESTRICTIVE VERSES THE LIBERAL

It can be seen that since the *Tasmanian Dam* case there has been effectively two lines of thought within the High Court, one restrictive and the other more liberal. In both the Tasmanian Dam case and the Newcrest cases, the High Court applied the principle that to come under section

51(xxxi) legislation must result in the acquisition of a positive benefit. Precisely what this means differs depending on who is applying the principle.

A factor affecting the divergence of views in particular cases is the approach the judges take to statutory interpretation. The passages quoted from the judgment of Kirby J in the *Newcrest* case show that he has a strong contextual approach. In S*hu-Ling Chang v Laidley Shire Council*[55] he described this approach as follows:

> Traditionally, the English law and its derivates (including in Australia) adopted a fairly strict, textual, literal, or 'grammatical' approach to interpretation. However, in more recent years, in part because of a growing understanding of how ideas and purposes are actually communicated by words this Court, English Courts and other courts of high authority throughout the common law world have embraced a broader contextual reading of statutory language and other texts having legal effects.
>
> Specifically, this Court has accepted that it is an error of interpretive approach to take a word or phrase in legislation and to read the word or phrase divorced from its immediately surrounding provisions.[56]

Although the High Court in its approach to section 51(xxxi) Court has gener/ally leaned towards a restrictive approach, in particular in regard to the meaning of the term ‘acquisition’, there is a strong liberal stream favouring the landowner, which may conceivably prevail as an incident of the development of the purposive, contextual approach to legislative interpretation, championed by Kirby J and others.

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55 *Shu-Ling Chang v Laidley Shire Council* [2007] HCA 37.

56 Ibid [43]-[44].

The liberal approach to statutory interpretation complements and reinforces the application of the liberal and traditional approach to property rights reinforced more recently by French CJ in the *Fazzolari v Parramatta City Council*.[57]

On the same theme Kirby J in the *WMC Case* said:

> One of the institutional strengths of the Australian economy is the Constitutional guarantee of just terms where the property interests of investors are required under Federal law. This Court should not undermine that strength by qualifying the guarantee. Neither the Court's past authority nor economic equity requires such a result. If it can happen here it can happen again and investors will draw their inferences.[58]

Similarly in *Smith v ANL Ltd*, where he said:

> The imposition of the imitation of power of the Parliament to enact laws with respect to the acquisition of property was a deliberate one. Generally speaking it has not been given a narrow construction. I judge the approach of the Court to the meaning of section 51(xxxi) not only to accord with the text of the Constitution but also with universal principles of human rights [Newcrest Mining 1997, 190 CLR 513 at 657-661] and, I believe, the expectations of citizens.[59]

A similar sentiment was expressed by Gleeson CJ in *Smith v ANL Ltd*,[60] when he said:

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57 *Fazzolari v Parramatta City Council* (2009) 237 CLR 603, 610. See above n 19, 20 and 37.

58 *Commonwealth of Australia v. WMC Resources Limited* (1998)194 CLR 1, 102.

59 *Smith v ANL Ltd* (2000) 204 CLR 493, 530 [104].

60 *Smith v ANL Ltd* (2000) 204 CLR 493.

> The guarantee…is there to protect private property. It prevents expropriation of property of individual citizens, without adequate compensation, even where such expropriation may be intended to serve a wider public interest. A government may be satisfied that it can use the assets of some citizens better than they can; but if it wants to acquire those assets in reliance upon the power given by section 51(xxxi) it must pay for them, or in some other way provide just terms for compensation.[61]

Differences in the nature of the impugned legislation also plays a part. The *Tasmanian Dam Case* was relevantly concerned with the sterilisation of land. The *Newcrest* and *WMC Cases* concerned different types of mining tenement.

The High Court was not prepared in a majority decision to regard as acquisitions the replacement of groundwater ground water bore licences with an aquifer licence[62] or the absence of space in packaging caused by the extinguishment of trademarks and other 'get up' in tobacco packaging.[63]

Smith v ANL Ltd Global concerned the extinguishment of an entitlement to claim damages after six months from the commencement of a statute. The majority of four characterised the legislation, to paraphrase Kirby J as extinguishing the rights of some and commensurately advantaging others.[64] The dissenters, Hayne and McHugh JJ held that there had been no 'legal or practical compulsion' for there to have been an acquisition.

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61 *Smith v ANL Ltd* (2000) 204 CLR 493, 501 [9].
62 *ICM Agriculture v Commonwealth* (2009) 240 CLR 140.
63 *JT International SA v Commonwealth* (2012) 250 CLR 1.
64 *Smith v ANL Ltd* (2000) 204 CLR 493, 530 [106].

The nature of the right in question, particularly if it has been created by statute can therefore be significant.[65]

The explanation for the apparent inconsistency between the cases perhaps also lies in the oft-quoted passage from the US *Pennsylvania Central* case, which also appears in the judgment of Brennan J in the *Tasmanian Dam Case*:

> This Court quite simply, has been unable to develop any `set formula' for determining when `justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.[66]

A similar view idea was expressed by Kirby J in *Smith v ANL Limited* when he said:

> Finding a touchstone to distinguish legislation which falls within, and that which falls outside, the requirements of s 51(xxxi) is not easy. No verbal formula provides a universal criterion.[67]

In conclusion, in the *WMC Case*, Kirby J distilled the application of section 51(xxxi) into seven principles. The factual differences between the cases only assists to some extent in explaining the different outcomes. There is no set formula of general application which could assist in explaining the outcomes of all cases. Nevertheless the deeper principles and that underlie section 51 (xxxi) can be identified. It will be seen that they resonate with deeper principles applicable in State jurisdictions.

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65 *JT International SA v Commonwealth* (2012) 250 CLR 1, 102, 107; *Wurridjal v The Commonwealth* (2009) 237 CLR 309.

66 See: (1983) 158 CLR 1 at 248; citing: (1979) 438 US 104, 124.

67 *Smith v ANL Ltd* (2000) 204 CLR 493, 529 [100].

V STATE CONSTITUTIONS, JUST TERMS AND THE MAGNA CARTA

State Constitutions do not carry the same just terms guarantee as the Commonwealth Constitution.[68] However, fundamental rights do not necessarily stem solely from Statutes, constitutional or otherwise. As Kirby J said in the *Newcrest* and *Smith v ANL Ltd*[69] cases, the Constitutional guarantee in the Commonwealth Constitution is arguably the expression of fundamental rights of the kind reflected in the *Universal Declaration on Human Rights*, with an ancestry that dates back at least to the Magna Carta. The Magna Carta itself was a restatement of English law as it existed at that time and therefore the rights it expresses were more ancient than 1215.[70] Blackstone said in his *Commentaries*[71] that the right to unmolested private ownership of property has been affirmed over the past millennium since the Magna Carta, including in the *Confirmatio Cartarum* 1297 (25 Edw 1); the *Bill of Rights 1689* (W&M2, c2) and more recently the *Act of Settlement 1701* (12 & 13 WIII c2). Winston Churchill in *The History of the English Speaking Peoples* said of the Magna Carta:

> Throughout the document it is implied that here is a law which is above the King and which even he must not break. This affirmation of a supreme law and its expression in a general charter is the great work of

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68 Standing Committee on Public Administration and Finance, Western Australian Legislative Council, It is not entirely clear that at a State Level, fundamental rights cannot operate to deny the legislature power in extreme circumstances, however specific the legislation may be. See Gerard Carney above n 8, 108-13. See also Law Reform Commission *The impact of State Government Actions and processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia Report No 7* (May, 2004).

69 *Smith v ANL Ltd* (2000) 204 CLR 493,529 See above n 46.

70 See Winston S Churchill, *History of the English Speaking Peoples* (Cassell 11th Ed 2nd Impression 1967) 199-202.

71 William Blackstone (1765) *Commentaries on Laws of England* Book 1, 125.

> Magna Carta; and this alone justifies the respect in which men have held it.[72]

For the King, the contemporary reader should read 'the State': that is, the executive arm of Government.

These principles, as they apply to modern land ownership, have recently been affirmed by French CJ and Kirby J in the passages referred to earlier.

The Magna Carta still stands as a statement of the law in Western Australia, according to the Law Reform Commission.[73] English common law (and statutes) where relevant, were received into and forms part of the law of Western Australia.[74] In any event, as affirmed by Kirby J in *Newcrest*, the common law is arguably not static and may express fundamental rights from international measures such as the *Universal Declaration on Human Rights*.[75]

Western Australia has a distinguished analysis of the common law in *Della-Vedova v State Planning Commission and the SEC*.[76] In that case,

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72 See Churchill above n 70.

73 The Law Reform Commission of Western Australian, *United Kingdom Statutes in Force in Western Australia*, Report, Project No 75 (October 1994) [1.9].

74 Gerard Carney, Op Cit, 138-40.

75 United Nations, General Assembly, *The Universal Declaration of Human Rights* (10 December 1948), Resolution 217 A (III). Also affirmed by Kirby J in C*ommonwealth v. Western Australia* (1999) 96 CLR 392. An objective of the 'just terms' requirement is to reflect 'a basic principle of fundamental civil rights': 196 CLR 392, 461 [194].

76 *Batista Della-Vedova & Ors. v State Planning Commission; Batista Della-Vedova & Ors. v State Energy Commission* (1998), unreported decision of the Compensation Court of Western Australia: 22 December 1988 BCC8800828 and relevantly approved and quoted in *R v Compensation Court of Western Australia; ex parte State Planning Commission & Anor; re Della-Vedova* (1990) 2 WAR 242, 253 (Wallace J) (unanimous judgment of Full Court of Supreme Court of Western Australia).

Pidgeon J (at first instance, which was upheld and approved on appeal) said that:

> The Crown is not entitled by virtue of the Royal Prerogative to take possession of a subject's property for reasons of State without paying compensation (8 Halsbury's Laws of England 4th Edition, para 920). [note: this reference is now volume 8(2) para 379 of the 5th edition].
>
> The common law principles are reflected in s 51(xxxi) of the Australian Constitution empowering the Commonwealth to make laws with respect to the acquisition of property on 'just terms'. While this does not bind the State to do the same it shows a consistency with the common law principles. The common law principles would apply in this State unless abrogated by statute, which gives rise to the canon of construction referred to by Lord Atkinson in Central Control Board (Liquor Traffic) v. Cannon Brewery Co Ltd [1919] AC 744, 752:
>
> > That canon is this: that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the legislature unless that intention is expressed in unequivocal terms.
>
> The Public Works Act does not detract from these common law principles. On the contrary, it aims to give effect to them in their widest sense and I would interpret this as the policy and intention of the Act [referring to the Public Works Act 1902].[77]

He proceeded to examine particular statutory provisions relating to the taking of land or interests in land relevant to that case, against the background of the above principles. He said that statutory provisions

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[77] *Batista Della-Vedova & Ors. v State Planning Commission; Batista Della-Vedova & Ors v State Energy Commission* (1988), unreported decision of the Compensation Court of Western Australia: 22 December 1988 BCC8800828 at 29 – emphasis added.

cannot deprive a landowner 'of a right they have at common law when the legislature has not abrogated the common law'[78].

Pidgeon J went on to hold that the claimants could claim compensation under the relevant statutory scheme, and importantly:

> If for any reason it could be considered that the Act [referring to the *Public Works Act 1902]* does not extend to incorporating this aspect of the claim in question then I consider it would exist at common law and has not been abrogated by statute. The common law is that if land is taken there is a right to compensation (*A-G v De Keyser's Royal Hotel [1920] AC 508*). The principles and method of compensation is determined by the Public Works Act which embraces the common law principles making it unnecessary in normal circumstances to consider them in compensation claims. The common law provides that where the statute authorising the taking does not provide a special tribunal to assess the amount of compensation it can be claimed in an action: (*Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd* (supra) at 752 and *Bentley v Manchester Sheffield and Lincolnshire Railway Co [1891] 3 Ch 222*).

Later in his judgment he applied the common law in coming to his decision.[79]

The principle which can be derived from the analysis of Pidgeon J in the Compensation Court,[80] is that the State cannot take property without

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78 *Batista Della-Vedova & Ors v State Planning Commission; Batista Della-Vedova & Ors v State Energy Commission* (1988), unreported decision of the Compensation Court of Western Australia: 22 December 1988 BCC8800828 29 and approved and quoted in *R v Compensation Court of Western Australia; ex parte State Planning Commission & Anor; re Della-Vedova* (1990) 2 WAR 242, 253 (Wallace J) (unanimous judgment of Full Court of Supreme Court of Western Australia).

79 *R v Compensation Court exp. State Planning Commission Re Della-Vedova (Supra)* (1990) 2 WAR 242, 253 (Wallace J).

compensating the owner of the property, on just terms, unless by statute Parliament specifically and clearly provides to the contrary. This is a fundamental right entrenched in the common law of the State and arguably forms part of its unwritten Constitution.

Why was such a fundamental right not expressly set out in the State Constitution? Although a full answer to that question could justify an examination beyond the scope of this article, there are two reasons which immediately present themselves. First, in comparison with the Commonwealth Constitution, the approach to drafting the State Constitution was understated. Some attribute the whole task to the then Governor Sir Frederick Napier Broome. A 'more nuanced suggestion' is that the work was done by the Governor and a number of eminent politicians, including the then Colonial Secretary in London.[81] Whoever it was, the process was not well recorded and the drafters were apparently not celebrated constitutional scholars.[82] It could be speculated that a drafting process dominated by leading members of the colonial executive may not by its nature be inclined to champion individual rights enforceable in the courts. Secondly, it is a feature of the state constitutions that generally, no attempt was made 'to incorporate all of the fundamental institutions and principles of the Westminster system of government'. Such an attempt would have been viewed as 'embarrassingly gauche'.[83] It was left to the Courts to apply the fundamental principles of the system.

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[80] The Compensation Court's jurisdiction was subsumed by the State Administrative Tribunal in 2005.

[81] Lee Harvey 'Western Australia's Constitutional Documents: A Drafting History' (2013) 36(2) *University of Western Australia Law Review* 49, 50.

[82] Ibid.

[83] Gerard Carney, Op Cit 29.

An examination of relevant High Court and House of Lords cases shows that the themes adopted by Pidgeon J in the *Della-Vedova* case, which are reflected in the decisions of Kirby J in the *Newcrest* and the *Commonwealth v Western Australia*[84] cases have antecedents in a number of other High Court, Privy Council and House of Lords cases.[85] These cases strongly support, as we have said, the entrenched common law rights to property with a guarantee against acquisition, otherwise than on just terms.

The principle mentioned by Pidgeon J is that for the common law rights to be revoked or varied, the legislation must be quite specific. This has been confirmed a number of times by the High Court, classically in *Clissold v Perry (Minister for Public Prosecutions)*.[86] As we have seen, the same presumption in favour of entrenched rights, was affirmed by Kirby J in the *Newcrest* case and French CJ in the Fazzolari case.

In *Minister of State for the Army v Dalziel*, Starke J said that where there is a gap in a regulation in that it does not provide for the payment of compensation which is reasonable and just, the government would nevertheless be liable to pay compensation by application of the common

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84 *Commonwealth v Western Australia* (1999) 96 CLR 392. See also Callinan J in the same case.

85 *Australian Apple & Pear Marketing Board & Anor v Tonking* (1942) 66 CLR 77, 104 (Rich J) with whom Latham CJ formed the majority and Latham CJ appeared to have agreed on these points (see 98, 99). Williams J appears to have endorsed this reason in *Johnston, Fear and Kingham and the Offset Printing Co Pty Ltd v the Commonwealth* (1944) 68 CLR 261, 291. The same principle was approved in *Minister of the State for the Army v Dalziel* (1944) 68 CLR 261, 291. The same principles were adopted by Starke and McTiernan JJ in the *Johnston Fear* case referred to above (at 327, 329). Similar principles have been expressed by English judges, in particular *A-G v De Keysers Royal Hotel* [1920] AC 508; *Burmah Oil Co Limited & Ors v Lord Advocate* [1965] AC 75.

86 *Clissold v Perry (Minister for Public Prosecutions)* (1904) 1 CLR 363, 373-4.

law principles.[87] Presumably, this dictum would have application where the relevant legislative provisions do not exclude the common law. Starke J repeated this principle in *Johnston Fear, Kingham and the Offset Printing Co v The Commonwealth*.[88] Whether the relevant statute does or does not exclude the common law will be a matter for the construction of the particular statutes. The cases cited stress that the exclusion must be clear and unequivocal.

There is, therefore, a significant body of authority which would support the contentions that the common law provides the rights I have mentioned[89]. As can be seen from the passage quoted above by Pidgeon J in *Della Vedova*, the rights can be asserted by an action in the State Supreme Court.[90]

Questions will always arise, of course, as to whether there has been a taking, and how compensation is to be calculated.[91] There could be disputes over the facts as to whether or not the subject matter is property and whether or not there has been a taking. In the 2003 Western Australian case of *Cornell v Town of East Fremantle*[92] it was held that restrictive heritage provisions in a town planning scheme, which effectively prohibited development except in unusual circumstances, constituted a prohibition on development for no purpose other than a public purpose and could therefore be the subject of a claim for injurious affection compensation under section 36 of the then *Metropolitan Region*

87 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 291.

88 *Johnston Fear, Kingham and the Offset Printing Co v The Commonwealth* (1941) 36 CLR 128. The same principle was affirmed in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 111.

89 Many of the cases are referred to in K Gray, 'Can Environmental Regulation constitute a taking at common law?' (2007) 24 *EPLJ* 161.

90 See above n 78, 79.

91 See above n 50, 78 and text reproduced in respect of to that footnote.

92 *Cornell v Town of East Fremantle* [2003] WASC 163.

Town Planning Scheme Act 1959 (WA). When this decision, together with examples such as buffer areas and others (cited for example by Deane J in the *Tasmanian Dam Case* and other judges, who have held that sterilisation constitutes acquisition)[93] are examined together, it is arguable that many of the policy and legislation-based restrictions in Western Australia to which I have referred may constitute a taking.

The common law rights referred to above are more akin to the entrenched right entrenched in the Fifth Amendment to the USA Constitution rather than the constitutional guarantee in the Australian Constitution because the common law principles are not in the nature of a power-giving provision subject to a condition, as in the case of section 51(xxxi) of the Constitution, for the benefit of the State. Rather, they are entrenched legal rights in favour of the individual, usually in opposition to the State.[94] This law binds the State, unless Parliament very clearly enacts otherwise. We have not yet seen these principles argued recently in a major Court case, let alone in the High Court, in regard to the de facto taking of land by Government for conservation areas. But given the economic importance which can attach to these issues, it may be just a matter of time before we have more case law on this subject.

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93 For example Callinan J in *Commonwealth v Western Australia* (1999) 196 CLR 392, 480 [267]. See also his comments at 484 where he refers to diminution in value being an acquisition.

94 It was suggested by Kirby J in the *Newcrest* case and Pidgeon J in the *Della Vedova* case that section 51(xxxi) is a particular expression more than a fundamental right.

VI CONCLUSION

The problem stated at the beginning of this article can be summarised by the following remarks of the Hon. Ian Callinan AC QC:

> 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.

Some of the issues relevant to this challenge have been referred to in this article. The limits applicable to the use of environmental and planning measures and determining when compensation is payable by the State, are unlikely to be straightforward and no set formula can provide guidance at the Commonwealth or State levels. There are, however, fundamental principles which are common to the Commonwealth and State jurisdictions which could be applied through their differing constitutional frameworks, to compensate landowners for loss in the value of land caused by environmental and planning measures

We can be reasonably certain that with the continuing importance and likely growth of environmental law and policy at the State and Federal levels, there will be a need to revisit some fundamental principles relating to the citizen and private property.

In a number of cases the High Court has grappled with the question of when do environmental and planning measures become an acquisition of property. The High Court cases deal with the questions of whether

legislation provides for an acquisition of property, and if so, was it on just terms. The application of concomitant principles under state law requires a resort to more fundamental common law principles which arguably underlie the operation of the Commonwealth and State law. The common foundation is the principle in the Magna Carta and the Universal Declaration on Human Rights, to quote Callinan J:

> Acquisition on just terms is synonymous…with acquisition according to justice and that means justice as administered by a court or tribunal fully and properly equipped to adjudicate on all matters and not subject to a truncated review or appellate process.[95]

This resonates with the 1354 statutory addition to the Magna Carta which required the taking of property to be in accordance with the due process of law.[96]

[95] *Commonwealth v. Western Australia* (1999) 196 CLR 392, 491 [291], [292]

[96] 28 Edward III. The 1354 Statute added a requirement that land may only be taken by 'due process of law' See n 8 above.