Arguments for Property Rights in Australia

[NB: This working paper may be read in the context of other material published at www.adverse-rezoning.info. It is presented as a research essay, and constructive comments or suggestions by readers with regard to the substance of the argument are welcome. This article is not legal advice. In making any legal decision, the advice of your legal practitioner should be obtained. Style note: Times font text indicates quotation.]

1.0 Introduction

What is ”property”? The Australian Law Reform Commission provides this handy summary:

> “ The term ‘property’ is used in common and some legal parlance to describe types of property that is both real and personal. ‘Real’ property encompasses interests in land and fixtures or structures upon the land. ‘Personal’ property encompasses tangible or ‘corporeal’ things—chattels or goods. It also includes certain intangible or ‘incorporeal’ legal rights, also known in law as ‘choses in action’, such as copyright and other intellectual property rights, shares in a corporation, beneficial rights in trust property, rights in superannuation and some contractual rights, including, for example, many debts. Intangible rights are created by law. Tangible things exist independently of law but law governs rights of ownership and possession in them—including whether they can be ‘owned’ at all.” (*ALRC Interim Report 127*, Chapter 7 (2015). Citations omitted.)

This paper focuses primarily on property interests in land.

What’s the problem? You own land, and a state government or its authority, often a council or planning authority, without any useful warning or good faith negotiation, adversely rezones, or by other legislative means impairs your right to use of your land, causing a loss in value and amenity, with no compensation provided for the resulting loss.

This legislative disease has been developing progressively in most Australian states through the second half of the twentieth century until today, so that it has come to constitute a sovereign risk which effectively constitutes a persistently insidious and random menace to innocent property owners. If this sounds a bit melodramatic to you dear reader, you are not an affected property owner. Indeed, its spread has rather been like a virus - developing silently and unnoticed until its nasty symptoms become evident - too late for the affected host to resist its onslaught. Unaffected bystanders keep away, unaware or uncomprehending.

Scores of published examples of astonished property owners - often isolated, and unknown to each other - affected in this way are provided at www.adverse-rezoning.info and considered below, for instance, at **3.0 The Normalisation of Injustice & Its Development**.

As pointed out by one author (McLeod, Glen, "The *Tasmanian Dam* Case and Setting Aside Private Land for Environmental Protection: Who Should Bear the Cost?" [2015] 6 *WAJ* 125 at 129):

> "Environmental and planning measures can sterilise the economic value of land, without any clear avenue to compensation for the landowner."

As shall be detailed below, such difficulties have also been noted by, for example, former High Court Justice Ian Callinan AC and the NSW Bar Association.

This paper is directed to those who understand the general nature of the problems being encountered by property owners and who are interested in finding explanations, and indeed, solutions.

1.1 A Confusion of Property Rights Laws

It is clear that any Australian state (or previously colony), has always had the sovereign power to alienate parcels of land from the Crown by making grants of freehold or leasehold interests in such land.

The state (or colony) has always retained the sovereign power to resume such granted interests, yet it is manifest that any subsequent uncompensated restriction imposed on a Crown grant is void in principle as being repugnant to the grant, where such subsequent restriction: either impairs the title owner's pre-existing right under the grant to use the land; or thereby causes financial loss.

Wilcox (infra at 277-278) in his 1967 text *The Law of Land Development in New South Wales,* writes that "Common sense and justice demand" that the "sacrifices" imposed on individuals should be compensated.

In the legal world, to state what might seem to be the obvious does not make it so. To find that it is so, a court has to be satisfied that such a view is supported by the body of law available to it.

None of the states has a specific constitutional provision that property owners should be compensated for loss or damage caused by the resumption or other legal impairment of their land ownership (eg., "adverse rezoning") by the State.

Equally, none of the states has a specific constitutional requirement that native title exists and must be recognised, with compensation paid for any extinguishment, but it does exist and is so recognised, and no state can escape the obligation.

How can these two things be simultaneously so?

In the *latter* instance, it can so exist simply because in the first instance, the High Court of Australia, on the basis of innovative legal reasoning, found native title to exist, and in combination with Commonwealth legislation, the states cannot legislate native title away, without having to provide compensation to the native title owners. In *Northern Territory v Griffiths* (*infra* at §19 & §20), the majority of the High Court characterised the legal framework as follows:

> §19 "It is necessary to begin by examining and considering the provisions of the *Native Title Act*. The *Native Title Act* recognises, and protects, native title and provides that native title is not able to be extinguished contrary to the *Native Title Act*; any extinction or impairment of native title can only be in accordance with the specific and detailed exceptions which the *Native Title Act* prescribes or permits.
>
> §20 The scheme of the *Native Title Act* reflects the context in which it was enacted – it operates upon native title rights and interests defeasible at common law but substantially protected against extinguishment, from 31 October 1975, by the *Racial Discrimination Act* 1975 (Cth) and, in particular, s 10(1) of that Act." (Citations omitted. This law is examined further at **4.2.**)

In the *former* ("adverse rezoning") common law title instance, it seems, the High Court has not been presented with a suitable case to consider. Hence, perhaps, the views of a former High Court Justice, Ian Callinan AC, as reproduced at www.adverse-rezoning.info and considered below at **4.5**.

While all States do have legislation which provides for compensation in cases of resumption of land for public purposes, they have no recognised constitutional obligation to maintain such laws and, more to the point, as the President of the NSW Bar Association, Phillip Boulten SC has accepted:

> "...while there are many aspects of government conduct that may adversely affect the use and enjoyment of privately owned land, these activities do not form part of "*acquisition law*."' (*Infra* at 4.)

The above mentioned example of contradiction in policy, where native title holders are necessarily entitled to compensation for deprivation of property rights, while holders of freehold or leasehold title at common law are not, is just one illogicality amongst many. Here is a brief illogicality listing.

(a) In 1948, Australia was actively involved in the composition and adoption of the *Universal Declaration of Human Rights* by the United Nations, including Article 17 thereof, which provides in part that: *No one shall be arbitrarily deprived of his property*. (Discussed *infra* at **4.1**.)

(b) In 2017, the Australian Foreign Minister wrote: "As a founding member of the United Nations, and one of only eight nations involved in the drafting of the Universal Declaration on Human Rights, Australia was, and is, of the view that human rights deliver peace, security and prosperity to Australia and the world....." (*Discussed infra* at **9.5**.)

(c) Today, notwithstanding the above, Australia has never adopted Article 17 UDHR into domestic law, except with respect to the possible effect of laws made by the Commonwealth only (not the States) in relation to the property of people with disabilities, and with respect to native title (discussed *infra* at **9.2**). Given that such human rights have not been made law with respect to people *without* disabilities and those who possess common law land title, a situation of "reverse discrimination" has been created.

(d) So, even though Australia describes itself as a model of human rights and was instrumental in the adoption of Article 17 UDHR by the United Nations General Assembly in 1948, the current position is, with respect to Article 17 in Australia is that it:

- effectively applies only to Commonwealth laws affecting people with disabilities, and to native title holders (and then only by means of treaties separate from Article 17 UDHR, with the same or similar provisions);

- does not apply with respect to Commonwealth laws affecting people without disabilities, so that (while not quibbling with the rights of people with disabilities in this respect) there is now also effectively discrimination in this regard against people without disabilities; and

- does not apply in any of the States (except very partially in Queensland), except with regard to native title, thus effectively discriminating against holders of granted title.

(e) Perhaps even worse, Article 17 of the UDHR, is not a "human right" as defined by the, the *Human Rights (Parliamentary Scrutiny) Act 2011*. (Discussed *infra* at **9.3**.)

(f) Australia has concluded free trade agreements (FTAs) with dozens of countries, each of which typically provides that if a citizen or entity of the trading partner has property expropriated by any government entity in Australia, the Australian Government shall provide compensation to the foreigner. This guarantee is not provided to Australian residents. (Discussed *infra* at **4.1**.)

(g) S. 51 (xxxi) of the Australian Constitution provides for "the acquisition of property on just terms" by the Commonwealth. The High Court has pointed out that the "deprivation of property" is wider in scope than "acquisition of property", because it is possible for a government to deprive an owner of property without actually acquiring anything for itself. (Discussed *infra* at **4.2**.) Accordingly, it can be seen that:

- there is a "deprivation of property gap" in Commonwealth law between what would be protected by Article 17, and the lesser scope of protection offered by s. 51 (xxxi); and

- given that there is no constitutional provision equivalent to s. 51 (xxxi) in the States at all, the "deprivation of property gap" in State laws is a yawning one and much more significant.

It is clear that this bundle of legal inconsistencies is in stark contrast to, and falls lamentably short of, Australia's proud boast about its championing of human rights, including in particular Article 17 of the UDHR. Australian owners of freehold and leasehold land (with only the limited exception of people with disabilities) do not have the protections many foreign property owners enjoy in Australia, or that native title owners have.

The current hodge-podge of laws relating to the deprivation of property rights gap exists due to a lack of focus over many decades by both legislators and the legal profession.

The most important of the values and principles underlying the Australian legal system are the dignity of the individual and equality before the law - but in so many cases of common law title, as shall become evident, such dignity and equality before the law is currently lost.

Even fundamental aspects of Crown grants of freehold and leasehold interests in land are being forgotten, as shall be made evident below.

So having stated what, to the lay property owner would seem to be the obvious, namely that compensation ought to be made by State governments in particular (or their authorities - councils etc., and the Commonwealth) where their rights to use their land have been reduced, what remains is to find the legal principles and strategies that would support such a view, to the satisfaction of a superior court. This working paper proposes to do just that. The journey's next chapters are:

1.2 Clarifying the Confusion: the Limits of State Powers

The broad plenary powers of the Australian states have been exemplified by the High Court's consistent rulings since Federation that s. 51(xxxi) of the Australian Constitution, which provides that the Commonwealth's power - to make laws with respect to "the acquisition of property" but only "on just terms" - does not apply to the states, and also, that there is no equivalent state provision. (See for example the *Durham Nominees* case (infra)).

Because, in each case that the above issue has been raised before the High Court, the plaintiff has been seeking to have s.51(xxxi) applied in some way to state laws, the High Court's focus has been on the lawful scope of that section: the High Court has not attempted to definitively conclude that there cannot be a basis of any kind other than s. 51(xxxi) which might indeed limit states' powers with respect to property: it has simply rejected the arguments put to it, so far.

As a consequence of this consistent line of decisions, legal (not judicial) opinion has adopted a pre-emptive view that the states have complete and unqualified power to acquire property on unjust terms. This notional pre-emption has served to direct attention away from exploring other bases upon which the states' powers with respect to property might be limited. In particular, it does not suggest any further questioning, such as:

(a) Does the Crown in right of a state/colony possess power to irreversibly prevent itself from acquiring property on unjust terms, or from arbitrarily depriving owners of their property rights?

(b) If so, has such power already been used so as to limit the relevant powers of the Crown with respect to interests in land?

Let's answer these questions!

Clearly, a state parliament has the power to enact legislation. It also has the power to subsequently amend or repeal that legislation. However, it must in principle be possible for a state to deny itself the power to repeal particular legislation, for if it cannot, that in itself would be a limitation on its power. There is no law of general application which prevents a parliament, within the scope of its plenary powers, from denying itself the power to repeal or alter existing, particular, law.

If this general reasoning is accepted, it begs the questions:

1. how can a state deny itself that power?

2. has it been done already? and,

3. has it been done with respect to property rights?

Because we are examining state powers here, note that the existence of s.51(xxxi) as such is irrelevant, given the High Court's rulings on the point (as discussed at **4.6**).

A state either has the power to deny itself the ability to change laws, or it does not. Possessing that power of self denial is a wider power than not, so an opinion held that it does not have that power of self-denial would have to point to a legal basis for that limitation.

In fact, this question is easily resolved by noting the many instances in which Australian states have denied or limited their own ability to change laws, including:

(a) passing legislation conjointly with other jurisdictions under the Crown, to such an effect;

(b) use of the manner & form requirements of double entrenchment, in legislation; and

(c) with respect to interests in land, the adoption of a system of tenure by Crown grant of freehold or leasehold.

Examples of colonies/states passing legislation jointly with other jurisdictions which result in new limitations on their legislative powers thereafter include:

1. the formation of the Commonwealth of Australia in 1901, where the colonies assumed the role of states in the context of a new entity, the Commonwealth of Australia, which now possessed, *inter alia*, specific heads of power in s. 51 and within that scope a limited legal supremacy via s.109;

1. (a) the ability of the states to refer powers to the Commonwealth under s. 51(xxxvii) of the Constitution deserves particular mention as an ongoing method of "self-denial";

2. the Australia Acts of the 1980's, which *inter alia*, terminated the right of appeal from state Supreme Courts to the Privy Council; and

3. the Offshore Constitutional Settlement ("OCS") of 1983 (although this was an example moving in the other direction), where the Commonwealth surrendered to the states jurisdiction over the sea and seabed within three miles of the baselines of the territorial sea, which it can only re-acquire subject to the "just terms" of s. 51(xxxi).

So, it is clear that states can and do deny themselves power to change laws. So, have they done it with respect to land tenure?

Of the three evident techniques possible, the answer is "yes" with regard to two.

1. The use of the manner & form requirements of double entrenchment, in legislation, has so far only been used with respect to constitutional procedures. In principle, it could be used for other purposes, such as entrenching human rights laws

with respect to property, which law could only be changed thereafter by referendum. However, this has not been done.

2. The cession of powers to the Commonwealth at Federation, including not only the s.51 heads of power, but also in particular conceding the ability of the Commonwealth to make laws which override those of a state due to the operation of s. 109 of the Constitution has since allowed the Commonwealth to prevent states from extinguishing or impairing native title without providing compensation. In the same way, the Commonwealth now has the ability to acquire, by use of s. 51(xxix) of the Constitution, the power, if it wishes, to require states to provide compensation for the impairment of common law title.

3. With respect to interests in land, the adoption of a system of tenure by Crown grant of freehold or leasehold, properly understood, must operate to prevent states from impairing such tenure without compensation, which obligation cannot be simply extinguished by legislation.

The rest of this paper explores:

- the legal basis for the identifying the self-imposed limitations of the powers of the states with respect to interests in land, and for the neglect of same;

- the potential role of human rights; and

- the relevant roles of the Commonwealth;

and in so doing, to identify potential remedies for landholders.

2.0 The Source of Land Ownership in Australian States

"One of the first and most important tasks of government in a newly settled colony is to work out the terms on which settlers shall be permitted to gain access to land. When the Australian colonies were founded there was no serious doubt about the rights of the Crown in regard to colonial waste lands. Title belonged originally to the Crown and private titles depended ultimately on Crown grant or on adverse possession. Until as late as 1842, there was no statutory restriction on the alienation of Crown lands in the Australian colonies, and the British government could control the management and disposal of colonial waste lands merely by executive fiat." (Enid Campbell, "Crown Land Grants: Form and Validity", (1966) 40 *ALJ* 35.)

The first land grant in NSW (and thus in Australia) was made by Governor Phillip on 21 Feb 1792. It served to "give and grant unto James Ruse, his heirs and assigns, to

have and to hold forever, thirty acres of land in one lot, to be known by the name of Experiment Farm....” (The complete document is reproduced in *Principles of the Law of Real Property in New South Wales*, Richard E. Kemp (1903) at 542.) By this Crown grant, freehold title, or an estate in fee simple, with respect to the said land, was alienated by and from the Crown.

To understand best what property rights with respect to land in Australia might actually be, reviewing the historical development of the relevant legal framework is essential. In this regard, an excellent outline is fortunately provided by Dr T.P. Fry and a lengthy extract is reproduced here. Dr Fry’s observations that impliedly relate to native title have been overtaken by more recent High Court decisions (eg., *Mabo v Queensland* (No 2) ("*Mabo case*") [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992)), but his historical observations are otherwise substantially unaffected by that development.

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I *The reception in Australia of the law as to freehold tenure.*

When Australia was annexed by the Crown, the Crown became the "ultimate" or "radical" owner of all land in Australia. Rights in respect of any land in Australia must therefore be derived either directly or indirectly from the Crown, or not at all.

.....Batman in 1835 thought that he had acquired title to land in and in the vicinity of what is now Melbourne by means of a "treaty" with the tribe of aborigines who at that time inhabited those areas, but found that no title to unoccupied lands ("waste" lands, as they were called) within the boundaries of the annexed territories could be acquired in any other way than by an express grant from the Crown. '

It was, likewise, impossible for anybody to acquire title to any Australian land merely by "squatting" on it. He had to obtain a grant, lease or licence from the Crown in respect of it, or he was a mere trespasser.

[Ed. - In the *Mabo (No.2)* case, it was observed in the High Court (per Brennan J. at 45):

> There is a distinction between the Crown's title to a colony and the Crown's ownership of land in the colony, as Roberts-Wray points out (74) ibid., p 625:
>
> "If a country is part of Her Majesty's dominions, the sovereignty vested in her is of two kinds. The first is the power of government. The second is title to the country ...

This ownership of the country is radically different from ownership of the land: the former can belong only to a sovereign, the latter to anyone. Title to land is not, per se, relevant to the constitutional status of a country; land may have become vested in the Queen, equally in a Protectorate or in a Colony, by conveyance or under statute ....."]

1. The Crown could have confined the title of the aboriginal natives of Australia to the lands they had previously possessed. subject only to the new paramount title of the Crown; but, in fact, it did not recognize any aboriginal legal rights to land on the Australian mainland. However, when the Crown became paramount landlord of the lands of Papua and New Guinea more than a century later, it confirmed the aboriginal natives of those Territories in their owner- ship of legal rights to the lands they had previously possessed, subject however to the new paramount title of the Crown.

2. (1913) 16 C.L.R., at p. 439.

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.....In 1828 the Imperial Parliament enacted the Australian Courts Act which, in Section 24, applied to New South Wales all the laws in force within the realm of England on 25th July 1828, " so far as the same can be applied within the said Colony." By virtue of the Common Law and this 1828 Act the English law as to land tenure was introduced into Eastern Australia, as far as it was applicable. A century of subsequent legislation by the various legislatures of Australia has developed a new system of land tenures in the various Australian States and Territories, so that it is now possible to say, with a very high degree of accuracy, that the constitutional supremacy of Australian Parliaments and the Crown over all Australian lands, as much as the feudal doctrines of the Common Law, is the origin of most of the incidents attached to Australian land tenures. This does not mean, however, that the law as to tenures has suffered an eclipse in Australia. The reverse is the case. Legislation has revitalised and developed it, and has given it an importance in modern Australian land law which it has not had in England at any time since the sixteenth century.4

No proprietary right in respect of any Australian land is now, or ever was, held, by any private individual except as the result of a Crown grant, lease, or licence and upon such conditions and for such periods as the Crown (either of its own motion or at the discretion of Parliament) is or was prepared to concede.....

3. A.-G. v. Br(}Wn, (1847) 2 N.S.W. S.C.R. App. 30, at p. 39.
•. Professor Maitland, indeed, once expressed the view that in modern English land law the doctrine

of tenure had become an almost useless survival: *Collected Papers,* vol. I., p. 196.
5. It is of interest to note in this connexion that in a Colonial Office Circular of January 1829 (Dr. Battye, *History of*

Western Australia, p. 87), dealing with grants of land to be made in Western Australia, it is stated that, .. Land thus granted will belong in perpetuity to the grantee, his heirs aI).d assigns, to be held in free and common socage, subject, however, to such

reservations and conditions as may be stated in conveyance."

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.....There should also be kept in mind as a general source of divergences and differences between English and Australian freeholds, the fact that, whereas most of the instruments by which English lands were first granted to the predecessors in title of the present Crown tenants have been lost, with the result that the incidents of socage tenure in England depend upon general rules' of the Common Law and upon evidence of the practice of the Crown and its Crown tenants, in Australia it is nearly always possible to refer to the precise words of the instruments of grant, and to any statute or ordinance modifying or supplementing the effect of those words.

It might prevent ambiguity if Australian freehold tenure were described simply as tenure by a Crown grant of freehold. This would emphasise that it is to the precise terms of each Crown grant, and to the provisions of relevant statutes, and not primarily to generalized rules of the Common Law concerning the incidents of socage tenure, that it is necessary to look in order to ascertain the restrictions in favour of the Crown imposed in the Crown grant upon the Crown tenant's rights to the land.

The reservations and conditions contained in each Crown grant are supplemented by certain statutes which have brought about the eclipse in every Australian State of the Common Law maxim *cujus est solus, ejus est usque ad coelum et ad inferos. ["whose is the soil, is his also up to the sky and down to hell -Ed.]* From these statutes will be learnt the precise extent to which that eclipse has resulted in a contraction in Australia of the Common Law rights of enjoyment which belong to freeholders in England.[6]

I I *The invention of Australian tenures of new types.*
The year 1846 saw the first step taken along a road which led to the subsequent invention of a multitude of Australian tenures of new types. In that year an Imperial statute authorized the making of Orders in Council. These were issued in 1847 in respect of New South Wales and 1850 in respect of Western Australia.

The 1847 Order in Council had a two-fold significance in the New South Wales of the day. It bought to an end the policy of concentration of settlement,7 which was to have been achieved by the Crown refusing

tY. A discussion of this topic is to be found in the writer's *F,eekold and Leasehold Tenancies of Queensland Land,* pp. 83·153.

7. South Australia and Western Australia did succeed in enforcing the policy of concentration Of settlement, and, as a consequence, freeholding is the normal method of landholding in those States.

to alienate the fee simple of, or to lease, any land outside" the nineteen counties" around Sydney or outside small areas around Hobart, Melbourne and Brisbane. It also introduced a system of Crown leasehold tenures which led to the whole of Australia being transformed in subsequent decades into a patchwork quilt of freeholdings, Crown leaseholdings, and Crown "reserves."

Before 1847, and especially during the "squatting age" in New South Wales between 1835 and 1847, many thousands of people left the "settled districts" and went into the back country beyond. These "squatters", as they came to be known, took possession of unoccupied land without having any right or title to it. Technically, they were trespassers, but the New South Wales legislature, faced with *a fait accompli,* enacted the 1839 Squatting Act which instituted a system of pastoral licences which, for a fixed annual licence fee, entitled their respective holders to occupy for pastoral purposes land outside the settled districts. The device of pastoral licences was, however, satisfactory neither to the squatters nor to the Crown. The 1846 Imperial statute, as implemented in New South Wales by the 1847 Order in Council, conceded most of the pastoralists' demands. Most pastoralists outside the settled districts thereafter held their lands on leases of 8 or 14 years duration, for low annual rents, a right of resumption being retained by the Crown and a right of pre-emption of the fee simple of the land, or part thereof, being granted to each of these Crown leasehold tenants.

The present States of New South Wales, Queensland, Victoria and Tasmania, have therefore had a common starting point in the evolution of Crown leasehold tenures. South Australia and Western Australia were destined to develop along similar lines, but from different starting points.

The 1847 Order in Council created new pastoral tenures. In 1861, Sir John Robertson secured the enactment in New South Wales (which, by then, had dwindled into its present boundaries) of a statute which introduced a new kind of agricultural tenure. This was called Selection tenure, but is more accurately described as "conditional purchase." It enabled a "cockatoo farmer" of the Colony to obtain a freehold title to his agricultural farm, after the payment (usually in instalments) of a prescribed purchase price, and after fulfilment of conditions such

as personal residence on his Selection for a prescribed period and the expenditure of a prescribed sum on making permanent improvements on the Selection. One of the essential features of this kind of tenancy is that, after a prescribed period of years, it changes its nature, as in a kaleidoscope, from a Crown leasehold tenure to a freehold tenure; and may therefore be said to be a "convertible" tenure. Until the conditions of purchase are fulfilled and the purchase is completed, it has many of the characteristics of a Crown leasehold tenancy with onerous incidents; afterwards it becomes an ordinary type of freehold.

Later, Selection tenure was introduced also into the other Australian colonies. It is still to be found, in various forms, and under various names, in each Australian State. Although originally an agricultural tenure, it became the prototype of other tenures, such as Miners' Homestead Leasehold tenures in Queensland, which are available for residential purposes in localities which are not necessarily agricultural in nature.

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The original type of pastoral leasehold tenures, those which originated in the 1847 Order in Council, imposed few incidents of tenure other than payment of annual rent-services. The agricultural Selection type of tenure had imposed onerous developmental and occupation conditions in addition to the payment of annual rent-services. In the course of time, similar conditions of development or occupation were imposed in respect of some of the pastoral tenancies. Queensland examples of this cross- fertilization are the Grazing Farm Selection tenures (first introduced by the Crown Lands Act 1884) and the Grazing Homestead Selection tenures (first introduced by the Crown Lands Act 1894).

The Crown leasehold principle has been applied not only to lands for pastoral and agricultural purposes, but also to those for mining, fishing, water utilization, residence and other purposes.

For example, mining lands, like pastoral lands, are mostly held on Crown leasehold or Crown licence tenures. The great Australian gold rushes of the 1850's and 1860's had led to the introduction of a system of gold-mining licences and gold-mining leases which, in their own way, were counterparts of the pastoral licences and pastoral leases of 1839 and 1847. The glamorized Eureka Stockade of 1854 was the result of opposition by goldminers at Ballarat, Victoria, to the imposition of a system of miners' licences similar to the "miners' rights" of to-day (but much more costly), and similar to the pastoral licences which had been imposed

upon"squatters" by the 1839 New South Wales Squatting Act. Their opposition did not secure the abolition of the system of Crown licences, indeed, in the course of time, Crown grants of mineral freeholds ceased to be made. In Queensland no grant of any mineral freehold has been made by the Crown since 1882, and, as a consequence, most Queensland mining lands are held from the Crown on various non-perpetual tenures, each of which imposes *(a)* a licence fee or annual rent, and *(b)* tenurial incidents designed to ensure that the Crown tenant continues to utilize and develop for mining purposes the lands which he holds.

Probably the zenith of the Australian system of Crown leasehold tenures was reached when there was evolved in the closing decade of the nineteenth century the first of the Crown perpetual leasehold tenures. By means of these tenures Crown tenants can obtain a title to a statutory perpetual term of years instead of a Common Law fee simple estate, this perpetual term of years usually being subject to important incidents of tenure to which freehold grants in fee simple are not subject.

Crown perpetual leasehold tenure was first introduced in Queensland in 1907. Since 1917 (with the exception of the three years from 1929 to 1931) it has been the policy of the Queensland Government not to make freehold grants of Queensland land, and during this period Crown perpetual leaseholds have been offered instead of freeholds. It is possible to obtain Crown perpetual leaseholds in New South Wales, but there is no bar to the acquisition of land in New South Wales on freehold tenure.

I I I *The Queensland system o f non-perpetual Grown leasehold tenures.*

Legislation during the century since 1847 has thus brought into existence in each Australian State a complex and diversified system of

Crown leasehold tenures. The development of these laws as to tenures has been most marked in New South Wales and Queensland.

The Crown leasehold principle, introduced during the Imperial period, was developed in scores of New South Wales statutes enacted after the grant of self-government in 1855 and of Queensland statutes enacted after Separation in 1859. The undoubted constitutional right of the Queensland and New South Wales Parliaments to create whatever tenures each think fit has been exercised actively. The result in each State, as Millard has said of New South Wales, is " a bewildering multiplicity of tenures. " 8 Gone is the simplicity of the modern English law as to tenures. Gone is the senile impotence of the tenurial incidents of modern English

law. New South Wales and Queensland are in the middle of an historical period in which the complexity and multifarious nature of the laws relating to Crown tenures beggars comparison unless we go back to the mediaeval period of English land law. The relevant laws in the other States of Australia are perhaps less complex and multifarious, in comparison with those of New South Wales and Queensland; but in no Australian State or dependent Territory are these laws nearly as simple as is the modern English law as to tenures.

Mr. Fyfe, Surveyor-General of Western Australia, who recently investigated the land tenures of all Australian States has said in his Report that Queensland's various Crown leasehold tenures "represent the most comprehensive system in operation in respect of country lands in Australia." Of all Australian States, Queensland is that in which the largest fraction of total area is held by Crown tenants on various kinds of non-perpetual Crown leasehold tenures,[9] and in which there exists a remarkable multiplicity of Crown leasehold tenures.

There are approximately seventy different kinds of Crown leasehold and Crown perpetual leasehold tenures in Queensland.

Details as to these are to be found in the writer's *Freehold and Leasehold Tenancies of Queensland Land,* and it is not proposed to enumerate them here or describe their individual characteristics. However, in the Table printed on next page, the major groupings of Queensland tenures are classified *(i)* according as they are perpetual or non-perpetual, and, *(ii)* if non-perpetual, according as they are or are not, at the option of the Crown tenant, " convertible" to freehold tenure.

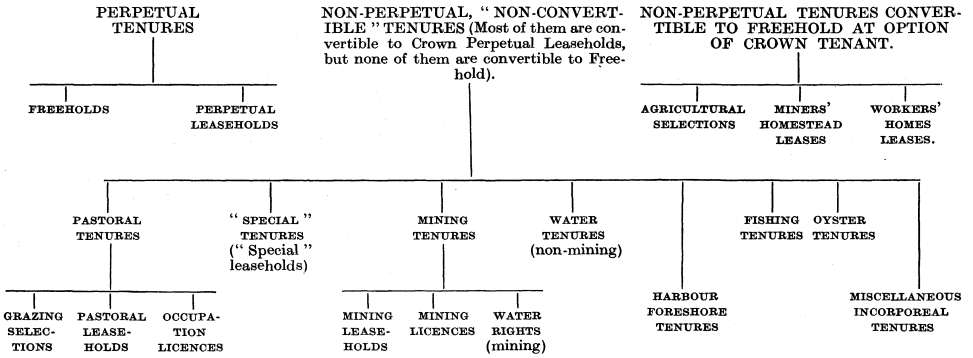
This Table is supplemented hereunder by a general analysis of the principal characteristics of Queensland's Crown Leasehold tenures. This analysis may also serve to convey some idea of the general characteristics of the tenures in each Australian State.

Crown leasehold tenures (with the anomalous exception of Crown perpetual leaseholds, which are to be discussed later) confer on the Crown tenants only a term of years, such as 1, 2, 10, 20, 28, 30, 40 or 50 years. These Crown tenants do sometimes retain their holdings for longer periods by virtue of a right (sometimes conditional, sometimes uncon-

8. *Millard on Real Property (N.S.W.),* (4th edn.), p. 474.

9. In contrast with the 8% of Queensland which has been alienated on freehold tenure or Is In process of alienation, is the 34% of New South Wales land and the 54% of Victorian land which is alienated or in process of alienation. Statistics for New South Wales further show that the area held in 1943 in that State under Crown perpetual leasehold tenures was 21,354,935 acres, compared with the 6,390,887 acres of Queensland land held under Crown perpetual leasehold tenures at the end of 1945.

TABLE : QUEENSLAND CROWN TENURES CLASSIFIED ACCORDING TO THEIR RESPECTIVE PERIODS OF DURATION AND ACCORDING TO THEIR " CONVERTIBILITY."



ditional), which is usually given them in their Crown Lease, or renewing or prolonging their original term, in respect of at least some part of the land they hold. However, in the absence of a statutory right to convert a non-perpetual Crown leasehold into a freehold, no Crown lessee can enlarge his term of years into a fee simple.

Another very important characteristic of the Crown leasehold tenures are the many tenurial incidents imposed upon Crown Lessees. These tenurial incidents are designed primarily to *(a)* provide revenue for use by the Queensland and Commonwealth Governments and the Local Authorities, *(b)* develop the productive capacity and economic value, and the civilized amenities, of lands throughout Queensland, and *(c)* prevent the rise of a class of absentee owners possessing undeveloped lands, which would hinder the policy of populating the country districts of Queensland.

Amongst these tenurial incidents are: *(i)* monetary exactions in the form of land taxation and Crown land rentals; *(ii)* developmental conditions (such as the erection and maintenance offences or other" improvements," or the eradication of noxious plants) necessitating the expenditure of money, or its equivalent in labour and materials; *(iii)* certain non- mining conditions, such as the condition of "personal

residence" and the less exacting condition of "occupation"; and *(iv)* mining conditions, such as the condition of labour-employment and that of continuous utilization. There might also be added to the list: *(v)* various rules as to the maximum areas which anyone person can hold on each particular kind of Crown leasehold tenure; and *(vi)* restrictions placed upon the Crown tenants' rights of alienating or encumbrancing their respective holdings.

In respect of monetary exactions, although there exists an apparent point of difference between freehold tenure and the various Crown leasehold tenures, it is to a great extent illusory on closer examination. In respect of each Crown leasehold an annual Crown rental is usually payable. Although no quit-rents are now payable to the Crown in respect of freeholds, any landowner who holds freeholds, the total capital value of which exceeds a specified sum, is obliged to pay annual land taxes which are not payable in respect of Crown leaseholds. A rose by any other name! Other monetary exactions imposed on land, such as "death duties", stamp duties, gift duties, and Local Authority rates, are usually payable on whatever tenure the land happens to be held.

The principle of periodical re-assessment of the Crown rents due from Crown lessees, led to the establishment in Queensland of an administrative tribunal of specialized knowledge charged with the function of re-assessing these Crown rents. An 1884 Act recreated a Land Board, which became the Land Court in 1897. Important additional functions, including land tax appeals, have been imposed upon it from time to time.

It is in respect of the non-pecuniary incidents of tenure that there exists a very marked contrast between freehold tenure and the Crown leasehold tenures.

Freeholds, like Crown leaseholds, are in Queensland subject to a requirement that noxious plants must be eradicated. There are, however, few if any other non-pecuniary tenurial incidents attached to freeholds.

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Certain of the Crown leasehold tenures are subject to developmental conditions which require the Crown tenant to erect fences, clear the land of prickly-pear or other noxious plants, employ labour on continuous mining development, or make various other miscellaneous types of improvements; and to maintain such fences, clearances and improvements when made. It should be mentioned that, in most circumstances, a Crown tenant has a right at the expiration of his Crown tenancy to

obtain compensation, or concessions of other kinds, for the improvements he has made on the land.

The conditions of personal residence and the less exacting condition of occupation form another important class of tenurial incidents. The *condition of personal residence* is performed by the continuous and *bona fide* residence of the Crown tenant personally on the holding during a specified period, usually of only a few years' duration. Only very occasionally and only in highly exceptional circumstances will any relaxation of this condition be permitted. The *condition of occupation* is performed by the continuous and *bona fide* residence on the holding of the Crown tenant personally or of a registered bailiff who would himself be qualified to become the Crown tenant of such a holding. Usually the condition of occupation, if applicable to a particular holding, is applicable for the whole period of the Crown lease, except in so far as part of such period may be subject to the condition of personal residence.

Very similar in its nature both to the condition of occupation and to the condition of development, applicable to non-mining tenures, is what we may call for the want of a better name the mining condition of continuous utilization. Land held on the various mining tenures must be utilized "continuously and *bona fide*" for the particular purpose or purposes for which they are respectively granted. Most, but not all, of the mining tenures impose a condition that the land must be continuously worked by the employment of a minimum number of workers specified by law.

Tenurial incidents constitute a very real menace to the continuance of any Crown tenant's right to his tenancy. For example, the conditions of continuous utilization and of labour-employment give an ephemeral character to the great majority of mining tenements, and the non-mining condition of occupation is one upon which a Crown perpetual leaseholder must needs look with apprehension.

In order to prevent the accumulation of unduly large areas of land in the hands of anyone Crown tenant, Queensland has adopted a policy of restricting the number and the total area of holdings. Sometimes a maximum is imposed upon the size of any single holding, a maximum number of holdings that anyone Crown tenant can hold is prescribed, and a further maximum is imposed upon the total area of land which the one Crown tenant can hold in Queensland in all of the holdings which he is permitted to hold on any particular tenure. These maxima vary, according to the particular tenure, from the 1/2 acre of Crown Perpetual Town Leaseholds to the 60,000 acres of Grazing Selections, whilst no maximum has been prescribed by Statute in respect of Pastoral Holdings under Part III of the Land Acts. With only a

few exceptions, it is the general rule that the imposition of a maximum in respect of a particular

tenure does not debar a Crown tenant from holding additional areas of land on other tenures, if the maximum in respect of each of those other tenures are not exceeded.

Before the second world war a freeholder was, in general, at liberty to deal with his holding in any way he liked and without having to obtain any administrative consents from the Crown, provided only that he conformed to the relevant rules of the general law applicable to such dealings. This old attribute of freeholds is in violent contrast with the system of close administrative controls which fetter the power of Crown leaseholders to deal with their holdings. The consent of a State Minister [10] is a pre-requisite for the validity of any *assignment* of a Crown leasehold; although there is usually no necessity to obtain such consent to a *sub-lease* or a *mortgage* of the holding if it is subject not to the condition of personal residence but only to the condition of occupation. During the second world war and the transitional post-war period, the necessity to obtain consents from a Commonwealth Minister, as part of a many-sided system of control of the economic affairs of the nation, has also fettered free- holders' freedom to deal with their holdings; but this development will probably prove to be of a merely temporary nature.

In all Australian States the laws as to tenures are evidence of a cogent and administratively enforced policy of making land serve as an instrument of national and social purposes. It will probably not be until current Australian ideals are abandoned by some future generation of Australians (and, it would seem, most political ideals are abandoned sooner or later) that the present systems of Crown leasehold tenures will collapse, as the feudal system of land tenures did in England progressively from 1330 to 1600.

IV *Comparison of Crown perpetual leasehold tenures and freehold tenure.*

Freehold tenure confers upon the Crown tenant, his successors and assigns, an estate in fee simple, which is usually said to confer "perpetual" title. "Tenant in fee simple," it is said in *Coke on Littleton's Tenures,* "is he which hath lands or tenements to hold for him and his heirs for ever." It is a rule of the Common Law which cannot be disproved by any mathematical or other argument, that a fee simple is a "larger" estate than any leasehold estate, however long the term of years conferred by the latter, even if it be lO,OOO or lOO,OOO years....."

Well, it's an interesting history. Key points which might be taken from it which are relevant to our concerns are as follows:

A. It is very clear from the operation of Crown grants during the 19th and into the 20th century, that a grant was a grant. Even if a grant was a leasehold rather than a freehold, the conditions and limitations which characterised the grant were clear to all from the outset. The type of grant carried with it certain entitlements, which could not and were not suddenly (or capriciously) diminished by planning or executive orders (except perhaps during the passing emergency of World War II). There were no surprises for property owners. Indeed, as Fry points out, the Crown was so scrupulous as to provide at the expiration of a Crown leasehold tenancy, a right of compensation, or concessions of other kinds, for improvements the leaseholder had made on the land. Equally, where the Crown attached conditions of conduct to a grant, the Government of the day was entitled to require performance of the conditions by the grantee.

B. It is very clear that there was great innovation in the design of grants to achieve social and planning objectives - there having been counted, as noted, approximately seventy different types of Crown leasehold tenures in Queensland - and that there was no practice of any Colonial or (later) State government arbitrarily impairing the scope or operation of a grant.

C. By the use of Crown leaseholds - generally of a defined length of time, Governments retained a flexibility in future planning without bad "surprises" - i.e., the avoidance of *ex post facto* imposition of rights to use the land - for leaseholders, or indeed freeholders.

D. There is no apparent record during this period of the Crown repudiating a grant - in whole or part - no doubt, one might deduce - because it was unthinkable, and because it could have fundamentally undermined confidence in the system of property ownership in Australia.

On this very point, in 1924, the Lands Department (Qld) found it necessary to publish "Leaflet H", entitled: *The Perpetual Lease System of Land Tenure*. It read as follows:

> "The popular mind has it that the Crown has the right to take the land from the lessee whenever it so wishes. No such right exists. So long as the lessee pays his annual rental and fulfils the conditions of the lease, the Crown cannot interfere with him. He is equally as secure in his title as if the land were held under freehold tenure. The Crown has no other means of regaining possession of the land than it has of regaining possession of freehold lands. In both cases the Crown can resume possession only by the operation of the laws for the resumption of any lands for public purposes. When these laws are put into operation the owners or lessees of land are entitled to compensation, which is determined by the Land Court,.... Cited by *Fry (supra* at 72).

Leaving aside the (for us irrelevant) issue of the precise legal difference between ”freehold” and “perpetual leasehold”, this is a very clear statement, which has the same progenesis of legal development as the other States, and which has not been rejected by any Court. It is clear and one might say, completely conventional.

Nearly a century earlier, in Sydney, when landowners were “adversely affected” by Surveyor General Thomas Mitchell’s proposed realignment of roads and boundary lines, which were proclaimed in 1834, the landowners “swamped the government with claims for compensation, leading subsequently to a select committee to untangle the web of claims and counterclaims. Private property interests won out.....” [Ashton P. & Freestone R., *Planning, Dictionary of Sydney*, 2008, http://dictionaryofsydney.org/entry/planning].

It is clear that landowners in 1834 would have agreed with the Lands Department (Qld) statement of ninety years later. Their shock and horror would have been also understandable due to the care which had been taken previously to issue Crown grants, where appropriate, with detailed conditions, which gave any prospective purchaser notice of planning limitations in advance. As noted in *The History of Property Law. Tutorial on Old System Title*, John P Bryson QC (13 June 2007) at 16:

> “Early Crown Grants contained conditions and reservations which could adversely affect a later owner. Reservations enabled the Crown to take land for roads or other public purposes; they usually reserved minerals, resources such as timber, and foreshore land. Grants in eastern Sydney sometimes included a condition that no building was to obstruct visibility of the Macquarie Lighthouse. There were conditions that no timber suitable for naval purposes was to be cut down.”

With respect to such Grants with conditions made from the early days of NSW settlement, four points might be noted in passing:

1. Already, the Crown was effectively designing and using grants as planning instruments;

2. The absence of any particular type of condition or reservation to a grant necessarily implies the right to such a use by the title holder. For instance, in the absence of the reservation of timber, or a prohibition on cutting down timber suitable for naval purposes, a Crown grant necessarily implied a right to do either.

3. There was great flexibility available to the Crown in the types of reservations and conditions which might be incorporated in grants of title, and each type of reservation or condition can be seen as a legal interest, and an aspect of title, which is in principle severable from other aspects of a title. It follows that if in any case, a condition or reservation is fixed to a grant by the Crown at some time after the fact, then that may be characterised as a partial resumption of the grant, the Crown

having resumed from the title holder that aspect of right previously held by him/her under the grant.

4. A feature of the Crown practice during early settlement (as with, for example, Queensland later in the nineteenth century), was that as reservations or conditions were included as part of a grant, notice of such was available to any prospective title holder from the very beginning: no surprises for anyone taking reasonable care to assess the property.

As a footnote to this general point about the axiomatic security of Crown land tenure, the reader might be reminded that the seriousness with which property rights were taken by the Crown was a key reason for the existence of Sydney and First Fleet itself, and it was of course reflected in the fact that NSW (and later all the other Colonies (except South Australia) - and including Norfolk Island) were founded as penal settlements for convicts who, more often than not, were convicted for committing property offences (such as theft or fraud), many famously trivial and sentenced to transportation to the other side of the world, often for periods of seven or fourteen years. Taking property without compensation was not accepted and the Crown enforced the policy diligently!

It might be noted that Crown grants have been generally acquired by purchase, often at auction, but that was not necessarily the case. From 1791 to 1831 Governor Phillip, and later Governor Macquarie, issued free grants of land on behalf of the Crown to encourage and advance settlement of the State: *NSW Land Registry Services* http://www.nswlrs.com.au/land_titles/land_ownership/crown_land.

Much later on, the Colonies adopted a practice of offering free land grants to migrants who paid their fares in full: for example, the *Immigration Act* 1872 (SA). The *Immigration Act* 1869 (Qld) provided, *inter alia*, that people paying for their own passages were entitled to 40 acres of land for each adult, provided they resided on it for three years and cultivated one-tenth of the area.

This was not an original idea - in 1618, in the Colony of Virginia, a shareholder of the Virginia company, Sir Edwin Sandys, decided to attract migrants by offering a "headright" of 50 acres to anyone who crossed the ocean at his own expense, and as much again for every adult he brought with him. "The lure of free land brought a stream of would-be settlers, most of whom died, but by the 1630s the flow of migrants outstripped the death rate from fever, and soon land was being bought and sold at five shillings... for fifty acres": *Measuring America*, Andro Linklater (2003) at 29, 33.

A century and a half later, after American independence was declared in July 1776, none other than Thomas Jefferson introduced a bill in (the State of) Virginia "to offer a 'head-right' grant of fifty acres to every landless immigrant who arrived in the state from overseas" (*Ibid.* at 55).

The reason for the cheap or free issuing of Crown grants in New South Wales was clearly understood and recognised by the Courts. In *Cooper v Stuart* (*infra* at 293), Lord Watson, for the Privy Council, observed:

> "The object of the Government, in giving off public lands to settlers, is not so much to dispose of the land to pecuniary profit as to attract other colonists."

In *Lord v The City Commissioners* (*infra* at 929), it was noted:

> "...in an infant colony....it was the manifest and avowed policy to encourage settlement and the cultivation of land by grants on the easiest and most favourable terms."

2.1 The Nature of a Grant

2.1.1 The Source of the Crown Grant Power

> "LETTERS PATENT *erecting Moreton Bay into a Colony, under the name of* QUEENSLAND, and appointing SIR GEORGE FERGUSON BOWEN, K.C.M.G., *to be Captain General and Governor-in-Chief of the same*.
>
> VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith to Our trusty and well-beloved SIR GEORGE FERGUSON BOWEN, Knight Commander of Our most distinguished Order of St. Michael and St. George, -greeting.....
>
> 5. And we do hereby give and grant to you, the said Sir George Ferguson Bowen, full power and authority, by and with the advice of the said Executive Council, to grant in Our name and on Our behalf, any waste or unsettled lands In Us vested within Our said colony, which said grants are to be passed and sealed with the Great Seal of Our said colony, and being entered upon record by such public officer or officers as shall be appointed thereunto, shall be effectual in law against Us, Our heirs or successors: provided nevertheless, that in granting and disposing of such lands you do conform to and observe the provisions in that behalf contained in any law which is or shall be in force within our said colony, or within any part of our said colony, for regulating the sale and disposal of such lands."

The above-quoted extract of Letters Patent dated 16 June 1859 (emphases are in the original), is one of the source documents in which the Constitution of Queensland is to be found pursuant to (according to Twomey, Anne, *The Constitution of New*

South Wales, Federation Press (2004) at 39): "... s 34 of *Australian Constitutions Act (No 2)* 1850 (Imp) 13 & 14 Vic, c 59; s 7 of the *Constitution Statute* 1855 (Imp) 18 & 19 Vic, c 54; and s 46 of the *Constitution Act* 1855, Sch 1 to 18 & 19 Vic, c 54."

This Queensland example of the immediate priority and power given with respect to the making of grants of land in a new colony demonstrates the importance of the subject to the Crown. The grant of authority in the Letters Patent also appears to authorise plenty of scope for using creative terms of "sale and disposal" of such lands, which as we have seen from the observations of Fry (*supra*), were very much exploited in the ensuing decades.

What the Letters Patent do not do, is to authorise the new colony of Queensland to revise the meaning of the term "grant" itself. Certainly, the terms (including reservations if any), relating to the grant of "any waste or unsettled" land might be varied significantly, but they nonetheless remain in the form and context of a grant.

To the extent that a document such as the Letters Patent might be considered to be a part of the Constitution of Queensland, then it would follow that the meaning of the term "grant" in this context would be constitutionally fixed unless expressly altered by legislation upheld by the judiciary. We have not examined this point with respect to all the Colonies/States, but pose the question here and analyse the case of Western Australia as an example, below, incorporating as it does the source of grant powers in New South Wales, which itself was the "mother" to all the other Australian Colonies, except South Australia.

In the case of Queensland, note also the following observations in Brennan J.'s *Mabo (No. 2)* case judgment (*supra* at para. 74):

> "In Queensland, the Crown's power to grant an interest in land is, by force of ss.30 and 40 of the Constitution Act of 1867 (Q.), an exclusively statutory power and the validity of a particular grant depends upon conformity with the relevant statute(134) Cudgen Rutile (No.2) Ltd. v. Chalk (1975) AC 520, at pp 533-534. *When validly made, a grant of an interest in land binds the Crown and the Sovereign's successors*(135) Halsbury, op cit, 4th ed., vol.8, par.1047 .....Therefore an interest validly granted by the Crown, or a right or interest dependent on an interest validly granted by the Crown cannot be extinguished by the Crown without statutory authority. *As the Crown is not competent to derogate from a grant once made(137), a statute which confers a power on the Crown will be presumed (so far as consistent with the purpose for which the power is conferred) to stop short of authorizing any impairment of an interest in land granted by the Crown or dependent on a Crown grant*. But, as native title is not granted by the Crown, there is no comparable presumption affecting the

> conferring of any executive power on the Crown the exercise of which is apt to extinguish native title." (Emphasis added.)

Below, the essential nature of Crown grants will be drawn out. A Crown grant might be considered "the grant of grants". Like any grant which has legal force, it shares a nature and characteristics which are governed by the common law. However, it has additional special characteristics, including its state/colony **constitutionality** and a full set of other characteristics namely:

alienation,

reservation (in relation to freehold title);

defeasance (also in relation to freehold title);

inapplicability of the rule against perpetuity;

resumption; and

repugnance (or **derogation**).

These six key characteristics, are to be found in the judgments of the common law - particularly but not limited to those of the Supreme Court of NSW and the Privy Council and the High Court - and read with the Letters of Instruction issued to the Governors of the Colonies at the time of their foundation.

The common law with regard to: the operation of Crown grants; and the interaction of these characteristics, has been entirely consistent since the formation of Australia's first superior court, the Supreme Court of NSW, in 1823. It is only with an understanding of these characteristics that their impact on the validity of state legislation which purports to impair property rights without compensation can be properly assessed.

2.1.2 The Unconstitutionality of Crown Grant Repugnance: eg., Western Australia

Examination of the authorities in this paper reveals that in so far as planning (or indeed, any other) legislation is repugnant to a Crown grant, that legislation is unenforceable, at least to the extent of the repugnancy, but is also unconstitutional. How so?

First, what is a constitution exactly?

In answering that question, the first impulse is to look for a Constitution Act, but if there is one, it is just part of the answer. Bearing in mind that the Constitution of the United Kingdom of Great Britain and Northern Ireland is indeed "unwritten", the "constitution" may be found in many places.

> "A Constitution generally establishes the institutions of government, confers powers upon them, and imposes limits on those powers. While the first real 'Constitution' for New South Wales came into force in 1855, earlier Acts of the Imperial Parliament and letters patent established the institutions of government and conferred limited powers upon them."(Twomey, Anne, *The Constitution of New South Wales* (2004) at 1.)

The Constitutional Centre of Western Australia indicates that the Western Australian Constitution is simply embodied in the *Constitution Act* 1889 (as amended) (at https://www.constitutionalcentre.wa.gov.au/Constitutions), with reference to the Australian Constitution, but this is a misleading oversimplification.

The High Court has provided guidance as to what actually constitutes a State Constitution, as for example per Brennan CJ:

> "The Constitution of a State at any time must be ascertained by reference to (i) its Constitution as at Federation; (ii) the overriding effect of the provisions of the *Commonwealth of Australia Constitution Act* and the Commonwealth Constitution; (iii) the modifications of the State Constitution that have been made either by Imperial legislation or State legislation provided, in the case of State legislation, it has been made in accordance with any relevant manner and form provisions of the particular State Constitution; and (iv) the *Australia Act* 1986."

More generally, as Twomey points out:

> "As Isaacs and Rich JJ noted in *McCawley v The King*, 'the Constitution of a colony….may be looked for wherever any provision is made for the Constitution

> of any of its great organs of legislation, judicature, or executive power'.[*McCawley v The King*, (1918) 26 CLR 9, per Isaacs and Rich JJ at 52….] It includes other legislation….and the common law [*Egan v Chadwick* (1999) 46 NSWLR 563, per Spigelman CJ at 566.]"(Twomey (*supra*) at 25.)

An example of such "other legislation" would be the Offshore Constitutional Settlement ("OCS") of 1983 (discussed below at **3.3.1.2.6**).

It is clear from this that the Western Australian Constitution, properly understood, goes well beyond the *Constitution Act* 1889. In this regard, we note also s. 57 "Existing law saved" of the Act which provides:

> "All laws, statutes, and ordinances which at the commencement of this Act are in force within the Colony shall until repealed or varied by any Act of the Legislature continue to be of the same force, authority, and effect as if this Act had not been passed, except in so far as the same are repugnant to this Act (in which case they are to that extent hereby amended and repealed as necessary)."

One "existing law saved" must be as contained in *Lieutenant-Governor Stirling's instructions*, 30 December 1828, issued from Downing St, which constitutes a foundational document for the Colony of Western Australia, and any statutory successor to those instructions. As such, it is part of Western Australia's Constitution, providing as it does, *inter alia*, for "determining the most convenient site for a Town, to be erected as the future Seat of Government" (at p. 3).

The *instructions* go into some detail with respect to the granting and reservation of land, and makes a distinction between "disposal", or land "granted away" and leases from the Crown for a term.

The passage most relevant for our purposes, namely the disposition of land and property rights, is reproduced here:

> "You will be called upon to weigh maturely the advantages, [DOCUMENT FOURTH PAGE ENDS HERE] which may arise from placing it on so secure a situation as may be afforded on various points of the Swan River, against those which may follow from establishing it on so fine a Port for the reception of shipping as Cockburn Sound is represented to be: and more effectually to guard against the evils, to be apprehended from an improvident disposal of the land in the immediate [DOCUMENT FIFTH PAGE ENDS HERE] vicinity of the Town, you will take care, that a square of three Miles (or one thousand nine hundred and twenty Acres) is reserved for its future extension, and, that the land within this space is not granted away (as in ordinary cases) but shall be held upon leases from the Crown, for a Term not exceeding twenty one years. You will, from the

commencement of the [DOCUMENT SIXTH PAGE ENDS HERE] undertaking, be observant of the necessity of marking out, and reserving for Public purposes, all those peculiar positions within, or in the vicinity of the projected Town, which, from natural advantages, or otherwise, will probably be essential to the future welfare of the Settlement.

In laying the foundations of any such Town, care must be taken to proceed upon a regular [DOCUMENT SEVENTH PAGE ENDS HERE] plan, leaving all vacant spaces which will in future times be required for thoroughfares, and as the sites of Churches, Cemeteries, and other Public Works of utility and general convenience.

You will cause it to be understood that His Majesty has granted to you the power of making all necessary locations of Land.

For your guidance, in this respect, ample instructions will, at a future period, be prepared. [DOCUMENT EIGHTH PAGE ENDS HERE] In the meantime I enclose a Copy of the Instructions of the Governor of New South Wales on this subject, to which you will adhere as closely as circumstances will admit.

You will bear in mind, that, in all locations of Territory, a due proportion must be reserved for the Crown, as well as for the maintenance of the Clergy, support of Establishments for the purposes of Religion, and the Education of youth, concerning which objects [DOCUMENT NINTH PAGE ENDS HERE] more particulars will be transmitted to you hereafter.

I think it necessary, also, to caution you, thus early (as Land on the Sea or River Side will, naturally, be the first to be located) that you must be careful not to grant more than a due proportion of Sea or River Frontage to any Settler. The great advantage to be derived from an easy Water Communication will of course not escape your consideration, and this advantage should be [DOCUMENT TENTH PAGE ENDS HERE] divided amongst as many Settlers as can conveniently benefit by their position in the vicinity."

The *instructions*, it can be noted, include a *Copy of the Instructions to the Governor of New South Wales (*the *NSW instructions)* which "to which you will adhere as closely as circumstances will permit". In this way, just as the instructions can be regarded as a Constitutional document for Western Australia, so also is incorporated therein the *NSW instructions* dating from 20 April 1787, over 40 years earlier, which had been composed by Lord Sydney and issued by King George III on the advice of his Privy Council.

"….granted unto you other acknowledgements whatsoever full power and authority to emancipate and discharge from their Servitude, any of the Convicts under your superindendance *(sic)*, who shall from their good conduct and a disposition to Industry, be deserving of favor; It is our Will and Pleasure that in every such case you do issue your Warrant to the Surveyor of Lands to make surveys of, and mark out in Lots such Lands upon the said Territory as may be necessary for their use; and when that shall be done, that you do pass Grants thereof with all convenient speed to any of the said Convicts so emancipated, in such proportions, and under such conditions and acknowledgements, as shall hereafter be specified . Viz To every Male shall be granted, 30 Acres of land, and in case he shall be married, 20 Acres more, and for every child who may be with them at the Settlement, at the time of making the said Grant, a further quantity of 10 Acres, free of all Fees, Taxes, Quit Rents, or, for the [DOCUMENT TWENTIETH PAGE ENDS HERE] space of Ten years, provided that the person to whom the said Land shall be been granted, shall reside within the same, and proceed to the cultivation and improvement thereof. Reserving only to us such Timber as may be growing, or to grow hereafter, upon the said Land, which may be fit for Naval purposes, and an annual Quit Rent of Bushel of wheat after the expiration of the term or time before mentioned. You will cause Copies of such Grants as may be passed to be preserved, and make a regular return of the said Grants to the Commissioners of Our Treasury and the Lords of the Committee of Our Privy Council for Trade and Plantations.

And Whereas it is likely to happen that the Convicts, who may, after their Emancipation, in consequence of this Instruction, be put in possession of Lands, will not have the means of proceedings to their Cultivation without the Public Aid; it is Our Will and Pleasure that you do cause every such person you may so emancipate, to be supplied with such a Quantity of Provisions as may be sufficient, for the subsistence of himself and also of this family for twelve months, together with an [DOCUMENT TWENTY FIRST PAGE ENDS HERE] assortment of Tools and Utensils, and such a proportion of Seed Grain, Cattle, Sheep, Hogs etc as may be proper, and can be spared from the general stock of the Settlement.

And Whereas many of Our subjects, employed upon Military service, at the said Settlement, and others who may resort thither upon their private occupations, may hereafter be desirous of proceedings to the cultivation and Improvement of the Land, and as we are dispersed to afford them every reasonable Encouragement in such an undertaking; It is Our Will and Pleasure that you do with all convenient speed transmit a report of the actual state and Quality of the Soil at and near the said intended Settlement, the probable and most effectual means of Improving and

> Cultivating the same and in what manner it can best be done and of the mode and upon what terms and conditions according to the best of your Judgements the said Lands should be granted, that proper Instructions and authorities may be given to you for that purpose."

There is no indication between either of these two documents of any variation in the conception or meaning of Crown grants of land. The legal nature of such grants is not sought to be stated in any detail at all - that is to be found in the Governors' implementation of the power and in the related common law, which itself, properly considered, forms part of the Constitution of Western Australia.

(Indeed, it might be noted that the absence of any attempt in any Letter of Instruction to codify or explicitly define "grant" as such, notwithstanding its fundamental importance in each Colony, was due to an inherent presumption that such was the role of the common law, if called upon to do so by litigants. This laconicism was replicated much later with respect to grants of money, in s. 96 of the Australian Constitution, composed at the end of the nineteenth century. Thus for example, in *Victoria v Commonwealth ("Second Uniform Tax Case")* (157) 99 CLR 575 at 604, 609, Dixon J. commented that s. 96 "...confers a bare power of appropriating money to a purpose and of imposing conditions....[I]t must be borne in mind that the power conferred by s 96 is confined to granting money to governments...." The Constitution does not attempt to define precisely what a grant is, and notwithstanding the existence of many High Court cases examining the role and context of s.96, it seems that the fundamental characteristics of what a grant is, has never been in question or required reiteration or clarification: the common law is so clear, it is presumed. Such fundamental characteristics are explored below at **2.1.3**.)

The key point to be deduced here is that the legal character of Crown grants of title (whether constituted in a Letter of Instruction or by force of a statutory power), including the associated common law, is properly considered as being part of the constitution of Western Australia, and consequently legislation repugnant to it must be unconstitutional.

This would be an additional, *a fortiori*, reason for courts to deny the enforceability of legislation being so repugnant.

Characterising such laws as being unconstitutional might in principle be simply overcome by the Parliament expressly altering that aspect of the constitution by legislation, but any such legislation would face the same difficulty in court of the mutual exclusion of the two alternative exercises of power, explained below at **4.4** as a paradox of omnipotence.

Such legislation would also effectively: abrogate the principle of "just terms"; reject the human rights embodied in article 17 of UDHR; impose a sovereign risk on all investors in land in Western Australia; and (to the extent that foreign investors of

Australian free trade agreement partner countries could recover losses caused by Western Australia from the Commonwealth) discriminate against Australian (including of course Western Australian) investors in Western Australia.

2.1.3 Historical Development of the "Grant"

The meaning and effect of a "grant" in relation to land in particular might be better understood by considering a background history of its development, which is succinctly outlined by Chambers, Robert, *An Introduction to Property Law in Australia*, IBC (2001) at 92ff:

> "The fee simple estate is the greatest right to land recognised at common law. "Fee" means that the estate is inheritable and "simple" means that it is not qualified in any way. Although it is now equivalent to ownership, we still refer to the owner of land as the owner (or holder) of an estate in fee simple. This can be explained by tracing the development of this estate.
>
> A fee simple estate is created by a grant of land to a tenant and her or his heirs. Originally this would create an estate that would last as long as the tenant and any of his or her heirs survived. On the death of the last heir the estate would come to an end and the land would escheat, meaning it would return to the Crown or lord, from whom the tenant held tenure.
>
> By the 13th century, it came to be understood that a grant to a tenant and her or his heirs did not give the heirs any right to the land. No one could know who the tenant's heirs would be until he or she died. Therefore, while the tenant lived, there were no heirs who could have property rights to the land. The estate in fee simple belonged wholly to the tenant and could be dealt with as he or she pleased.
>
> For example, a grant of land to Steve and his heirs would give Steve a right to possess the land, which would pass to his heirs if he died (or would escheat if he died without heirs). However, Steve was free to transfer that estate before he died. If he sold the estate to Joan and her heirs, Joan would get the fee simple and Steve's heirs would get nothing. After the transfer, the estate would no longer depend on the survival of Steve's heirs, but would continue for so long as her heirs were living. However, if Joan transferred the estate to Susan, it would then be measured by the lives of Susan and her heirs.

Another important change occurred when people gained the right to transfer their freehold estates by will (under the *Statute of Wills* 1540 and *Tenures Abolition Act* 1660). This means that a fee simple estate would not come to an end when the tenant died without heirs, so long as it passed to a beneficiary of the tenant's will...the estate would only escheat if there were no heirs and no one entitled to receive the estate under the tenant's will.

A further change was the abolition of escheat in every state and territory but Western Australia....if the tenant of a fee simple estate (outside Western Australia) dies without heirs and without disposing of the estate by will, it does not escheat, but is treated like all the tenant's other property rights and goes to the Crown as **bona vacantia** (ownerless goods). The right to possession of the land passes to the Crown, not because the estate has ceased to exist, but because it has become ownerless.....

It can be seen from this that grants of estates in fee simple in particular developed over the centuries and certainly by the late 18th and the 19th centuries when Australia was being colonised, the idea of such grants being virtually permanent in nature, outlasting generations of tenants, their heirs and purchasers alike, was very well established. Such is the nature of a grant of land as it would have been understood by Sir George Ferguson Bowen and his contemporaries."

The significance of the replacement of escheat by *bona vacantia* is also explained in *Australian Principles of Property Law*, 2nd ed., (2001), Samantha Hepburn at 44:

"One of the most important incidents of the doctrine of tenure which the Australian colonies inherited from the English system was the concept of escheat. Escheat essentially gave the Crown the right to the property of a deceased, intestate person without any heirs (*proper defectum sanguinis*) or in circumstances where the tenant had committed a crime. Today, the concept of escheat has been abolished and replaced by the [already existing] notion of *bona vacantia* (Lang's Act 1863 (26 Vic c 20)). *Bona vacantia* means that property may pass on to the Crown as 'property without an owner' rather than reverting to the Crown as ultimate owner. The eradication of escheat and its replacement with *bona vacantia* can be seen as an important watershed for the operation of tenure in Australia, indicating the altered character of the Crown's right to title. Under escheat, the Crown resumed control over land in which it had always had ultimate ownership, and therefore the title was reverted; under *bona vacantia*, the Crown acquires subsequent rights to the land because the deceased has left no heirs, and therefore the title is successive. *Bona vacantia* effectively means that the Crown acquires a new title rather than resuming control over property it had always owned." See

also: Enid Campbell, *Escheat and Bona Vacantia in New South Wales*, (1965) 38 ALJ 303

In short then, escheat was a form of passive resumption, but *bona vacantia* preserves the grant of title, ready for further transfer. Indeed, the nature and extent of the distinction might be realised in terms of the adoption by Brennan J. in the *Mabo No. 2* case of Professor Roberts-Wray's observation (as cited above at **2.0**) that with respect to her dominions:

> ".....the sovereignty vested in [Her Majesty] is of two kinds. The first is the power of government. The second is title to the country ...This ownership of the country is radically different from ownership of the land.."

In this sense, with respect to land, *bona vacantia* preserves both forms of sovereignty, and in escheat the land reverts solely to the former "ownership of country" type of sovereignty.

It is clear from the above generally, that the idea that a grant could be "diminished", or repudiated, without compensation for same, would fundamentally undermine the nature of the legal interest.

This point is, in a way, alluded to by Chambers (infra at 169-170) in the context of mineral rights in the States:

> "Australia adopted the rule of English common law that a grant of an estate by the Crown did not include gold and silver unless it was stated otherwise: see *Wade v NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177. The existence and nature of the Crown's right to gold and silver was debated at length in the *Case of Mines* (1567) 1 Plowden 310 at 336, 75 ER 472 at 510, where the court declared "that by the law all mines of gold and silver within the realm, whether they be in the hands of the Queen, or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore". This rule means that no grant of Crown land will include a right to gold or silver unless the grant specifically stated that the gold or silver was intended to pass to the recipient.
>
> ....Today a grant of land by the Crown does not include the mineral rights, unless they are specifically included as part of the estate. This is accomplished in each jurisdiction by a statutory reservation of minerals to the Crown.....
>
> The Crown's right to minerals in the earth is a property right. This is true even where the Crown has granted a fee simple estate, reserving only the mineral rights to itself. The Crown would not be free to enter that estate to explore for or take

those minerals without providing compensation to the owners of the fee simple for interfering with their right to possession of the land. [Yes, but no authority cited.] Therefore its right to minerals is only a right to possession of those minerals. Nevertheless, it is a property right which can be transferred to, and enforced against, other members of society....”

Having reviewed this brief history of Crown grants, an observation of the nature of grants in general might be made.

“A grantor having given a thing with one hand is not to take away the means of enjoying it with the other". This principle is quoted with approval by Lord Templeman in *British Leyland Motor Corporation v Armstrong Patents Ltd* [1986] AC 477:

As between landlord and tenant and as between the vendor and purchaser of land, the law has long recognised that "a grantor having given a thing with one hand is not to take away the means of enjoying it with the other" per Bowen L.J. in Birmingham, Dudley and District Banking Co. v. Ross (1888) 38 Ch. D. 295 at 313.

In Browne v. Flower [1911] 1 Ch. 219, 225 Parker J. said that:
"... The implications usually explained by the maxim that no one can derogate from his own grant do not stop short with easements. Under certain circumstances there will be implied on the part of the grantor or lessor obligations which restrict the user of the land retained by him further than can be explained by the implication of any easement known to the law. Thus, if the grant or demise be made for a particular purpose, the grantor or lessor comes under an obligation not to use the land retained by him in such a way as to render the land granted or demised unfit or materially less fit for the particular purpose for which the grant or demise was made."

These principles were followed in Harmer v. Jumbil (Nigeria) Tin Areas Ltd. [1921] 1 Ch. 200, O'Cedar.Ltd. v. Slough Trading Co. Ltd [1927] 2 K.B. 123, Matania v. The National Provincial Bank Ltd. [1936] 2 All E.R. 633 and Ward v. Kirkland [1967] Ch 194.

I see no reason why the principle that a grantor will not be allowed to derogate from his grant by using property retained by him in such a way as to render property granted by him unfit or materially unfit for the purpose for which the grant was made should not apply to the sale of a car. In relation to land, the principle has been said to apply:
‘beyond cases in which the purpose of the grant is frustrated to cases in which that

purpose can still be achieved albeit at a greater expense or with less convenience'; *per* Branson J in *O'Cedar Ltd v Slough Trading Co Ltd* at 127."

Consistently with such reasoning, in *Aussie Traveller Pty Ltd v Marklea Pty Ltd* [1998] 1 Qd R 1 at 8, McPherson JA observed, speaking for the Court on these points:

"It is.....well settled that under a lease of land, whether it is a formal demise or a mere tenancy agreement, there is on the part of the lessor an implied covenant or agreement not to derogate from the grant, and a further such covenant or agreement for quiet enjoyment by the lessee."

McPherson JA, sitting in the Queensland Court of Appeal, also referred to the binding authority of the High Court and continued:

"Speaking in [*O'Keefe v. Williams* (1910) 11 C.L.R. 171] of a lease by the crown, Griffith C.J. said (at 191) that, where the lessor contracted to give exclusive occupation of land, "there is to be implied an obligation in the nature of a promise not to disturb him in that occupation"; and (at 192) that the obligation so implied was "that the lessor shall neither disturb the possession himself nor authorise its disturbance by others". See also the reasons of Barton J., in the report of that case at 199–200; and of Isaacs J., at 211, who said that granting an exclusive right of possession "connotes that the grantor will not attempt to interfere with it".

These judicial observations go to the essential nature of a grant of property (which must include a land grant), namely that where the grant's purpose is purportedly impaired by the grantor, that impairment is inherently repugnant to the grant and cannot be allowed to stand - or if it does, then compensation must be made.

This indeed was the view taken in a water rights case by the Supreme Court of New South Wales in *Cooper v Corporation of Sydney* (1853) 1 Legge 765 at 771-772:

"...the Crown, or the Corporation of the City, representing the Crown in this matter, irrespective of any powers conferred by the Legislature, can have no right, which an individual in such a case would not have...[for] the Crown cannot derogate from its own grant". (The context of this case is outlined in *Sir Alfred Stephen: Third Chief Justice of New South Wales 1844-1873*, JM Bennett (2009) at 175-177.)

There is also consistent recent authority from the High Court (the *Native Title Act Case* (*infra* at 26):

"As Chitty says [A Treatise on the Law of the Prerogatives of the Crown (1820), p125]:

> the King cannot take away, abridge, or alter any liberties or privileges granted by him or his predecessors, without the consent of the individuals holding them.
>
> In particular, a grant cannot be superseded by a subsequent inconsistent grant made to another person [*Earl of Rutland's Case* (1608) 8 Co Rep 55a at 55b, 56a [77 ER 555 at 556-557]. Nor can a right to use land, if granted validly by the Crown, be recalled prior to expiry unless the right is qualified by a power of recall contained in the terms of the grant or is conferred by statute."

It might be observed that the common law right of compensation inherent in Crown grants as noted herein would be entirely consistent with Article 17 of the Universal Declaration of Human Rights http://www.un.org/en/universal-declaration-human-rights/ which was adopted by the General Assembly of the United Nations in 1948, by which time Crown grants had already been in use in New South Wales for about 150 years.

Speaking about property in general, not Crown grants of land in particular, a state can have the power to take away property without compensation, but subject to these qualifications, see: *The Commonwealth v. Hazeldell Ltd.* [1918] HCA 75; (1918) 25 CLR 552, at p 563:

> "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."

See also *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427 per Mason CJ, Brennan, Gaudron and McHugh JJ at 437: private rights are not abrogated by a statute unless clearly stated to do so.

This view is reiterated by Chief Justice French of the High Court of Australia in his speech extract reproduced below. For a detailed exposition of this presumption, see also: McLeod G and McLeod A, "The Importance and Nature of the Presumption in Favour of Private Property" (2009) 15 *LGLJ* 97.

The presumption may also be seen as an application of the principle of statutory construction, the "principle of legality", as outlined by the Australian Law Reform Commission (ALRC, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC IP 46)* (2014), Chapter 1 *Introduction—Protections from Statutory Encroachment,* at 1.24-1.32 & Chapter 6 *Property Rights—Principle of Legality,* at 6.22-6.24.) Suffice for current purposes to reproduce two observations. Firstly, that of Hoffman LJ:

> "....the 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." (*R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131.)

In its application to property rights, French CJ stated:

> "Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretive approaches where statutes are said to affect such rights. ... The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights." *R & R Fazzolari v Parramatta City Council* (2009) 237 CLR 603 at 618–619, [43].

An example of its application is provided by Brennan J. in his leading judgment in the *Mabo* case (*supra* at para 75):

> "....the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or by the Executive. This requirement.....flows from the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land".

While laws capable of impairing property rights often do not purport to create any right of compensation, such express intentions to broadly disqualify any pre-existing right to compensation arising from injurious affection caused by legislation are not a feature of, for example, state planning laws, as we shall see.

Another example of the making of grants since Federation is section 96 of the Australian constitution, which provides that the Commonwealth with the power to grant money to any state. These monetary grants can be "general grants" - i.e., untied, but these days are typically tied to certain terms and conditions (often legislative) that the states must adhere to in order to receive the grant. As these grants are linked to a particular purpose, they are known as 'tied grants'.

Provided the states agree to accept a grant and then comply with the terms and conditions, the grant cannot be revoked by the Commonwealth, one would expect (relying on the "grantor principle" cited above), unless it provided compensation to the state for the revocation, which would make such an exercise seem pretty

pointless. While there have undoubtedly been many discussions, even arguments, between the states and the Commonwealth about the terms and conditions of s. 96 grants over the years, revocation of a valid grant is not something that seems to have been attempted by the Commonwealth.

The same might be said for the idea that, a grant having been settled, the Commonwealth might purport to *ex post facto* add more conditions to the grant, thereby reducing its value to the grantee state(s). Quite apart from the possible operation of s.51(xxxi) of the Constitution (examined subsequently), such steps would in principle be repugnant to any grant and capable of being declared void.

The word "grant" in s. 96 seems to have been given its ordinary meaning, but an interesting point is made in *Victoria v Commonwealth ("Second Uniform Tax case")* [1957] HCA 54; (1957) 99 CLR 575, where Webb J. states at §14:

> "Section 96 gives power to make a grant of financial assistance to a State on terms and conditions; but naturally the terms and conditions must be consistent with the nature of a grant, that is to say, they must not be such as would make the grant the subject of a binding agreement and not leave it the voluntary arrangement that s. 96 contemplates."

So a grant may be subject to conditions (which is nothing new), but it is not a binding agreement - one might say contract - simply a voluntary binding arrangement. Perhaps, a grant might be distinguished from a contract by pointing out that in a contract, consideration flows both ways, but with a grant it only flows one way, from the grantor: any conditions which might be tied to the grant simply relating to the quantum of consideration from the grantor.

That characteristics relating to a grant may include a reservation, and repugnance, was used to explain aspects of the Australian Constitution by the High Court in the *Engineers' case* (*Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd (the Engineers'Case)* (1920),28 C.L.R.129, at p.154:

> ".....But it is a fundamental and fatal error to read sec. 107 as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in sec. 51, as that grant is reasonably construed, unless that reservation is as explicitly stated. The effect of State legislation, though fully within the powers preserved by sec. 107, may in a given case depend on sec. 100. However valid and binding on the people of the State where no relevant Commonwealth legislation exists, the moment it encounters repugnant Commonwealth legislation operating on the same field the State legislation must give way."

Thus the High Court characterised s. 51 of the Constitution as containing a "grant" of powers, and that to take effect, any reservation to the grant must be explicitly stated, and that state legislation which is inconsistent with relevant to Commonwealth

legislation is “repugnant” to it. Murphy J. reiterated the point in the *Tasmanian Dam case* (*infra*):

> “32. The grants of legislative power in the Constitution, s.51, are plenary. There is no reservation from any such grant unless the reservation is explicitly stated in the grant...”.

2.1.4 Crown Grants: Prerogative Rights, and Reservations

All Crown grants in the Australian colonies did not alienate the Crown’s ownership of “royal metals”, unless in a particular case, express provision was made to the contrary - and such an express provision did not ordinarily exist. In *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 186; [1969] HCA 28, Windeyer J observed:

> “The mining law of Australia begins with the gold rushes and the roaring days of last century. Gold, the 'royal metal', has always had a special position in law: a position which silver is perhaps entitled to share. Gold in the Australian colonies belonged always to the Crown, whether it was in Crown land or in lands alienated by the Crown. No express reservation was necessary to preserve the Crown's rights. They depended upon prerogative rights recognized by the common law. Thus gold did not pass by a Crown grant of the land in which it lies.”

The Crown’s prerogative right to retain ownership of minerals in its modern form developed from the 17th century and is explored in detail by the High Court in *Cadia Holdings Pty Ltd v State of New South Wales* [2010] HCA 27.

Although unlikely to arise in Australian circumstances, the Crown, at common law, also possesses the even more ancient prerogative right, to “treasure trove”. As Denning MR pointed out in *Attorney-General of the Duchy of Lancaster v G.E. Overton (Farms) Ltd* [1982] Ch 277 (the *Overton* case):

> “’Treasure trove’ has long been part of the law of England. It dates back to the time of Edward the Confessor in 900 A.D.”

In the *Overton* case, the jury at the coroner’s inquest into a hoard of Roman coins (*Antoninianii,* dating from the third century A.D., found in Lincolnshire) found that the hoard was a treasure trove, and thus the property of the Duchy (itself representing the Crown). However, as Denning MR pointed out, the “finding of the coroner’s inquest is not binding on the courts of law” (*ibid.*, at 281). After a review of centuries of authorities, Denning MR (with the concurrence of Dunn LJ and Oliver LJ.) concluded that:

> "the only test applicable is this: In order to be a gold or silver object as treasure trove, there must be a 'substantial' amount of gold in the object or a 'substantial' amount of silver. It will be for the coroner's jury to decide this question: 'What is 'substantial'?' (*ibid.*, at 285).

It would seem that there is a qualification to this conclusion. This was demonstrated in the different circumstances of the Sutton Hoo hoard where the coroner's inquest, held on 14 August 1939 at Sutton, England, found that discoveries were not 'treasure trove', because the people who buried them (1,300 years previously) had no intention of going back for them, the hoard evidently having been buried at the resting place of an Anglo-Saxon king. There was no evidence that the articles of silver and gold or any of them had ever been in ancient times hidden or otherwise concealed. (See generally: R. Howard Bloch, "Chapter 5 Treasure Trove", *A Needle in the Right Hand of God: The Norman Conquest of 1066 And the Making And Meaning of the Bayeux Tapestry* (2006); David Horspool, "The treasures of Sutton Hoo", *The Oldie*, March 29 2020; Isaac Schultz, "In England, Coroners Decide What Is Treasure and What Is Not", *Atlas Obscura*, December 12 2019; Norman E. Palmer, "Treasure Trove and Title to Discovered Antiquities", (1993) 2 *IJCP* 275.)

Note further:

> "Due to the Crown's perpetual interest in revenue, the coroner was often directed by special writ to hold inquests into any treasure trove that was found. A treasure trove comprises any gold or silver articles that have been concealed. If merely lost or abandoned, the finder is entitled to keep it. It is this issue that is decided at the inquest.....In New South Wales, the jurisdiction of a coroner to conduct an inquest into treasure trove derives solely from the common law, as no legislation to this effect has been enacted in the State". (Jill McKeough, "Origins of the Coronial Jurisdiction", (1983) 6 *UNSWLJ* 191 at 198.)

In the Australian context, the potential relevance of the common law relating to treasure trove might be the necessary implication that found hoards which do not contain abandoned "substantial" amounts of gold or silver and so are not the property of the Crown would include found objects of aboriginal origin. This point is considered further at **3.3.2.2**.

In contrast to the prerogative rights relating to royal metals and treasure trove, any reservation must be clearly specified in each Crown grant. The Crown may reserve, by this means, particular uses on a grant of title for itself. Here follow some examples.

In *Dixon v Throssell* [1899] 1 WALR 193, Dixon owned certain land within the Municipality of Bunbury which had originally been vested in Sir James Stirling by Crown grant. The Crown grant reserved to the town the right to resume one-twentieth of the land for the making of roads, bridges, canals, toe-paths or other works of public utility and convenience.

In New South Wales, the case of *Lord v The City Commissioners* (1856) 2 Legge 912, grants obtained by purchase from the Crown in 1823 related to land bounded by a creek (a tributary of Cook's River which flowed into Botany Bay), and included a reservation to the Crown of any quantity of water, and of any quantity of land not exceeding ten acres, for public purposes, provided that water mills on the creek should not be interfered with: *Sir Alfred Stephen: Third Chief Justice of New South Wales 1844-1873*, JM Bennett (2009) at 177.

It seems 1823 was a busy year for Crown grants giving rise to litigation in New South Wales (perhaps because the Supreme Court of New South Wales came into being in that year?). Lord Watson for the Privy Council observed:

> "His Excellency Sir Thomas Brisbane, then Governor-in-Chief of New South Wales and its dependencies, on the 27th of May, 1823, made a grant to one William Hutchinson, his heirs and assigns, of 1400 acres of land in the county of Cumberland and district of Sydney, 'reserving to His Majesty, his heirs and successors, such timber as may be growing or to grow hereafter upon the said land which may be deemed fit for naval purposes; also such parts of the said land as are now or shall hereafter be required by the proper officer of His Majesty's Government for a highway or highways; and, further, any quantity of water, and any quantity of land, not exceeding ten acres, in any part of the said grant, as may be required for public purposes; provided always, that such water or land so required shall not interfere with, or in any manner injure or prevent the due working of the water mills erected or to be erected on the lands and water courses hereby granted.'" : *Cooper v Stuart* [1889] 14 App Cas 286 at 288.

In *Campbell v Dent* (1864) SR (NSW) 58 at 61 and 63, Stephen CJ observed:

> "the land was granted by the Crown, subject to a *reservation* out of the same of (among other matters) all stone, gravel, indigenous timber, and other materials required for naval or public purposes....the intended reservation or exception, in the present case (independently of the consideration that it occurs in a grant by the Crown), is of a peculiar character. It is not of all indigenous trees, then or thereafter growing on the land, or of all the gravel, &c., forming part of the soil. Only so many and such of these are in terms reserved, as may be required-that is, may be requisite from time to time-for public purposes. There was, therefore, nothing specific or definite excluded, or sought so to be. The reclamation by the Crown would depend, wholly, on the contingency of the subject matter being found necessary to be used at some future time, for the public service. Until the happening of that contingency, which might never arise, there is nothing in the clause to restrain the most absolute enjoyment of the property. The uncertainty, however, does not, in our opinion, render the stipulation-for such in effect it

is-inoperative. The clause, on the contrary, appears to us to be a perfectly valid and effective one."

The absence of a right of compensation with respect to reservations was clearly stated in *Allen v Foskett* (1876)14 SCR (NSW) 456 at 460 that it "is clear that where a right of road is reserved in the grant, no compensation can be claimed".

It has been observed that the *Foskett* case is unique "in that the [New South Wales] government overlooked its right to obtain the road under the reservation and instead obtained it under a road Act which required compensation. The Court ruled that compensation was therefore required, even though it would not have been required if the government had acted under the reservation rather than the road Act": DL Ostler, *A Case of Non-Identical Twins - Comparing The Evolution Of Acquisition Law In Australia And The United States* (2011) Canb LR 66 at 104. (For a more irreverent exposition of these and related issues, see: Ostler's *alter ego*, Silas Flint, *The Government Took My Property! A Comparison of Acquisition Law in Australia and the U.S.*" (2014).)

Another, more recent example: in the late 1970's, Crown grants of freehold and leasehold were issued by the Governor of Western Australia which contained reservations of minerals and of petroleum, the details of which were examined closely by the High Court in *Commonwealth v Western Australia* (1999) 196 CLR 392. One aspect of the reservations was the ability to resume one-twentieth of the granted property (*Ibid.*, [1999] HCA 5 at §99):

"....the land so to be resumed shall not exceed one−twentieth part of the whole of the lands aforesaid, and that no such resumption be made of the part of any lands upon which any buildings may have been erected, or which may be in use as gardens, or otherwise, for the more convenient occupation of any such buildings, or on which any other improvements as defined by the Land Act, 1933, have been made, without compensation..."

Gummow J. (*Ibid.*, at §103) observed that the effect of the reservations

"was to qualify the enjoyment of the rights of ownership and exclusive possession which otherwise were conferred by the State [grantor] upon the Commonwealth [grantee]. For example, action authorised or permitted thereby would be an answer to an allegation of trespass...cf *The State of South Australia v The State of Victoria* (1911) 12 CLR 667; affd (1914) 18 CLR 115 (PC).]

In *Cooper v Stuart (supra*), the Privy Council made a number of useful observations about Crown grants and reservations with respect to land in New South Wales, viz.:

(a) a resumption, when carried into effect on the basis of a reservation, operates as a defeasance;

(b) a reservation does not constitute an exception repugnant to the grant and therefore void.

(c) the common law rule against perpetuities was inapplicable to Crown grants of land in New South Wales, or to reservations or defeasances in such grants;

The implications of these findings may be explored briefly.

With regard to (a) and (b), Lord Watson (*ibid. at 289-290*) stated:

> "An exception is that by which the grantor excludes some part of that which he has already given, in order that it may not pass by the grant, but may be taken out of it and remain with himself. A valid exception operates immediately, and the subject of it does not pass to the grantee. Their Lordships are of opinion that the grant to Hutchinson carried to him the whole 1400 acres, but subject to a defeasance as to 10 acres. The whole and every part of the lands granted vested, and have, from the 27th of May, 1823, to November 1882, been in the ownership and possession of the grantee or his representatives, subject to that provision, which the plaintiff describes in his statement of claim as a "reservation of a right to resume any quantity of land, not exceeding ten acres, in any part of the said grant." It is obvious that such a provision does not take effect immediately, it looks to the future, and possibly to a remote future. It might never come into operation, and when put in force it takes effect in defeasance of the estate previously granted, but not as an exception."

Sackville and Neave Australian Property Law, 10th ed., (2016) [5.128], observes:

> "In states where there is no express statutory exception for reservations in the Crown grant, the same result has been reached by administrative action. In New South Wales for example, certificates of title have long been endorsed to the effect that they are issued subject to the reservations and conditions, if any, contained in the Crown grant. The terms of the Crown grant are not mentioned on certificates of title subsequently issued in respect of the land. A searcher therefore cannot ascertain from the register book (the original certificate of title) what reservations or exceptions were contained in the Crown grant. In practice, no serious problem is caused, since the most common reservations or exceptions in the Crown grant relate to the Crown's right of resumption (now governed by legislation)...."

To the extent that Crown grant reservations remain, but are unidentified on certificates of title, one might nonetheless wonder about this apparently sanguine opinion - that reservations are now governed by legislation - and the possible extent

to which they nonetheless remain available to the Crown, to lawfully acquire property rights by defeasance without compensation - but without any actual cognisance by the modern owner. In such a case, effective notice would always have been available to any prospective owner who would ordinarily rely on a solicitor to identify such a risk in a timely manner. Any loss caused, by potential exercise of such a defeasance, to the unwitting owner might be (in theory anyway) prospectively passed to the the acting solicitor.

With respect to (c), the inapplicability of the rule against perpetuities with respect to Crown grants, Lord Watson observes (*Cooper v Stuart (supra*) at 294):

> "....assuming the Crown to be affected by the rule against perpetuities in England, it was nevertheless inapplicable, in the year 1823, to Crown grants of land in the Colony of New South Wales, or to reservations or defeasances in such grants to take effect on some contingency more or less remote, and only when necessary for the public good."

While the Crown may (leaving aside for the moment issues of compensation) resume a grant at any time, the perpetual nature of a Crown grant of freehold tenure (in particular) makes it virtually indestructible by a grantee or subsequent title holder. This is a most fundamental aspect of the appeal of the legal artifice created by a Crown grant, which is referred to in the vernacular as "real estate". The title may be mortgaged, leased, made subject to licence by agistment, entailed, bequeathed, made subject to equitable interests, sold, etc. etc., but through all such developments, it persists.

The only exception to this indestructibility would seem to be where the title can escheat (in Western Australia), which might be characterised anyway as a passive type of resumption.

In other words, the only way for an owner to terminate a Crown granted estate would be to die with an unencumbered estate, without heirs and no will, in Western Australia - most unlikely. Thus the title granted by the Crown is indestructible for practical purposes, in contrast to other instruments such as contracts.

Having seen above some examples of reservations in Crown grants, the existence of a right to compensation by the landowner for impairment by the Crown of its enjoyment of *unreserved* title is demonstrated by cases where the Crown has sought to rely on defeasement pursuant to a reservation, sometimes unsuccessfully.

In *Ex Parte Smart* [1867] 6 SCR 188 (NSW), there was no valid reservation. The Registrar General of New South Wales, under the *Real Property Act*, 26 Vic., No. 9, issued a certificate of title with a clause endorsed thereon, reserving or purporting to reserve "any lawful rights incident to the alignment of streets or roads abutting on the land". However, there was no grant or other deed, under which the applicant claimed, in which any such reservation was contained.

The Supreme Court of New South Wales was unanimous in finding that this was a case of jurisdiction being exceeded. At 193, Faucett J. states:

> "I think the words were inserted without any authority whatever. The certificate when issued is conclusive evidence of the title of the proprietor. Where a grant of certain land has issued, the grantee and those claiming under him are entitled to a certificate following the terms of the grant, and nothing more. The commissioners are not entitled to insert in the certificate any additions or restrictions which are not contained in the grant.....The insertion of the memorandum complained of is a cloud on the title, and a purchaser is unwilling to have anything to do with the land upon which there is any such cloud." The Registrar General was ordered to cancel the certificate, and to issue a new one in the same terms, but without the offending clause.

In *Dixon v Throssell* (*supra*), a Crown grant dating from the early 19th century reserved to the town the right to resume one-twentieth of the land for the making of roads, bridges, canals, toe-paths or other works of public utility and convenience. Circa 1899, the Crown resumed a portion of the land for the purposes of a botanical garden. The landowner objected.

The Supreme Court of Western Australia unanimously found that the Crown had no right to resume for the purposes of a botanical garden under the reservation contained in the grant. For instance, Hensman J.(at 195):

> "The Crown Grant gives no power to take away part of the land granted for Botanical Gardens; it only contains a proviso that the land may be taken for roads, bridges, etc., and other works of public utility and convenience... a Botanical Garden is neither a road nor such a work as is specified there as "works of public utility and convenience," which I understand to mean works of the same nature as roads, canals, etc., all works which are necessary for the development of the country, and so that it maybe inhabited by the people."

S. 9 of the *Land Resumption Act*, 58 Vic., No. 33 provided that "When any land is taken under the authority of this Act the whole of which the Crown is entitled to resume under the powers in the Crown Grant....no compensation shall be paid for that land." Because the Court found that the Crown could not resume for the purposes of a botanical garden under the reservation contained in the grant, the owner was entitled to compensation.

So *Dixon v Throssell* is a case where the Crown resumed land outside the scope of the reservation and accordingly had to pay compensation. Relevant legislation did not attempt to deprive the landowner's right to compensation for resumption of land for a purpose not within the reservation.

Reference to the Privy Council decision ten years earlier in *Cooper v Stuart* (*supra*), reveals that the courts paid attention to the particular meaning of the words in each reservation. The landowner must have got the shock of his life when on his land in1882, which was the subject of a grant in 1823 which contained a reservation "for public purposes", officers authorised by Governor Loftus took possession of a parcel of ten acres pursuant to that reservation, fenced it off, and excluded the landowner, for use as a public park. In that case, the reservation wording differed from that in *Dixon v Throssell*, and the Privy Council agreed that a public park was a "public purpose".

Another type of situation is one where, the Crown exercises its reservation rights, but also resumes adjacent land not so reserved. JM Bennett (*supra* at 177-178) provides the context for a case which ended up in the Privy Council: *Lord v Commissioners for City of Sydney* (1859) 12 Moo PC 473, 14 ER 991. Before reaching the Privy Council, in *Lord v The City Commissioners* (1856) 2 Legge 912, grants obtained by purchase from the Crown in 1823 included a reservation to the Crown of any quantity of water, and of any quantity of land not exceeding ten acres, for public purposes, provided that water mills on the creek should not be interfered with. In 1856, in addition to exercising its rights under the reservation, the City Commissioners, in pursuance of statutory powers, resumed the whole of an adjacent creek and some adjoining parcels of land, forcing a water mill to be closed. Compensation was paid to the plaintiffs for the land resumed (not the reserved land defeased) and the loss of motive power to smaller mills on the creek, but the plaintiffs were not satisfied with respect to sums paid for the resumed land. On appeal to the Privy Council, the higher compensation awards were affirmed:

> "The City Commissioners thus had to pay an astronomical sum to satisfy Sydney's insatiable thirst for fresh water, while, in the process, extinguishing the initiative of pioneer industrialists" (JM Bennett *supra* at 178).

JM Bennett (*supra* at 167) comments that:

> "Looking at the variety of cases entertained by the Supreme Court in the period 1844 to 1856, one is struck by the relatively large number of actions concerning land". "Flint" (supra at chapter 4) observes that whereas the USA had no Crown grant cases at all other than in Pennsylvania, in Australia, "there were (*sic*) a significant number of Crown grant cases throughout the 1800s - fully 20% of the Australian acquisition cases in the 1800s. The number of Australian Crown grant cases in the decades of the 1800s remained remarkably consistent. There were four such cases in the 1820s (the decade between 1821-1830 inclusive) three in the 1830s, four in the 1840s, four again in the 1860s, three in the 1870s, five in the 1880s and one in the 1890s.These numbers are the author's best estimate based on his personal, detailed review of the cases in the reported digests for all the Australian states, and also Australian newspaper reports of cases."

It seems very clear from such observations that there was a significant amount of litigation with regard to land, and grants of land, during the 19th century. Notwithstanding that, it is not evident that the courts had any doubt that while reservations of property use, and prerogative right, might be exercised by the Crown without compensation to title holders, resumptions of property uses otherwise made carried with them an obligation by the Crown to compensate the title holders so affected.

Just as the background of a moonlight night might reveal by silhouette the existence of some thing - an owl, a cat burglar, or a skyscraper - so might the existence and enforceability of the prerogative right and reservations serve as a background to reveal the precise form and existence of a grantee's compensable title. The key point of the Crown's use of its prerogative right, and reservations, is to enable it to exercise those rights to the exclusion of the title holder, without payment of compensation. If the balance of the titleholder's entitlements associated with the use of the land was not in principle compensable on deprivation by the Crown, then the Crown's exercise of prerogative right and the use of reservations would lose all practical meaning. That would be so, because in such a circumstance, where the Crown might at any time assert a right to any aspect of enjoyment of a property without compensating the title holder, the use of prerogative right or reservations would be mere, non-limiting, indications of future intentions and nothing more.

Indeed, in the absence of a right to compensation for a resumption not authorised by reservation or prerogative right, the use of Crown grants, ostensibly as a form of title not subject to the rule against perpetuity, would be nothing more than a sham. Fry's "tenure by a Crown grant of freehold" would in effect be little more than "a form of permissive occupancy at the will of the Crown" (to use a phrase adopted by Mason C.J, McHugh J. and Dawson J. in relation to native title in the *Mabo (No. 2)* case (*supra* at 23)). The Crown would be in such circumstances be in the role of a mere "indian giver".

3.0 The Normalisation of Injustice & Its Development

3.1 The Initial Development of Town Planning in Australia - A Brief Outline

In 1916, New York, New York, USA adopted a process called “zoning”, to help regulate development, initially in Manhattan. There was a legitimate need for land planning, especially in such a densely occupied and rapidly growing city. American property law is very different from Australian property law - for a start, they did away with the Crown in the revolution of the 1770’s. Rather than explore American property law here, it may suffice to say that, like many other American innovations, the spreading concept of zoning and town planning eventually (it seems via Great Britain and New Zealand in this case) reached Australia and, local planners facing the prospect of an ever rising population, adopted the idea. The first major use of the concept was the creation of the County of Cumberland - a large area in and around Sydney, after the Second World War.

Ashton & Freestone (ibid.) write:

> “Released in 1948 but not legally gazetted until 1951, the County of Cumberland Planning Scheme was once described as 'the most definitive expression of a public policy on the form and content of an Australian metropolitan area ever attempted'. [25] With some inspiration from the famous London plans by Patrick Abercrombie, the County Scheme introduced land use zoning, suburban employment zones, open space acquisitions, and the green belt to Sydney. The Main Roads Department supplied a ready-to-go expressway network. Yet, despite the best intentions, the Cumberland County Council was an overall failure. It met strenuous opposition from property owners and by the mid-1950s had 22,000 claims against it for 'injurious affection' arising from County zoning.”

Wow - 22,000 claims. Of course, Australian governments had to plan for future land use, so their exploration of new methods was entirely justified. However, the concept of zoning was a legally foreign idea to the Crown grant structure which had evolved in Australia. Being of foreign (even if British) origin didn’t make it bad, but from a legal viewpoint, it potentially had a fundamentally alien legal premise, which if not reconciled with the existing structure of the law of property in the States (i.e., not be within skeletal framework of Australian law, as it has been said), might produce undesirable results.

One might deduce from the above that this disconnection indeed is what has happened, to the cost of many. To draw such a conclusion though, what is the evidence?

Prior to reviewing the development of town planning in Australia, the reader might be reminded that (lest it be thought that no planning existed prior) extensive developments in planning (though the word "planning" seems not to have been used) had been achieved, evidently without injurious affection, as Fry ([1947] *supra* at 163) states :

> "....The undoubted constitutional right of the Queensland and New South Wales Parliaments to create whatever tenures each think (*sic*) fit has been exercised actively. The result in each State, as Millard has said of New South Wales, is 'a bewildering multiplicity of tenures'.....New South Wales and Queensland are in the middle of an historical period in which the complexity and multifarious nature of the laws relating to Crown tenures beggars comparison unless we go back to the mediaeval period of English land law."

Wilcox, M.R., *The Law of Land Development in New South Wales*, Law Book Co., (1967) details the development of town planning law in Australasia (at 181ff, citations omitted):

> The first true town planning legislation in Australasia was the *New Zealand Town Planning Act* 1926. The Act was obviously modelled upon the English legislation....Curiously it was the less populous States which pioneered town-planning legislation in Australia. The first Australian legislation to provide for planning schemes on private land was the Western Australian *Town-Planning and Development Act*, 1928.....It was closely modelled on the New Zealand Act of 1926...the first town-planning Act in Queensland was the *City of Mackay and Other Town-Planning Schemes Approval Act* of 1934.....Tasmania entered the town-planning field in 1944 with its *Town and Country Planning Act*. The scheme of the Act followed that of the other states.....[with also in same year, the] *Town and Country Planning Act,* 1944 of Victoria.....Not until 1955 [in South Australia] was statutory provision made for a comprehensive development plan for Adelaide...
>
> .....it is obvious that the basic scheme of legislation in the United Kingdom, in New Zealand and in the other Australian states (sic.) is similar. That scheme was adopted by the New South Wales legislation of 1945.
>
> .....In New Zealand and in each of the other States (*sic*.), other than South Australia, the original intention was that planning schemes should be prepared by a single local council for its own area: even where, as in Victoria, there was, from the outset, provision for a joint scheme this remains true - the local council was the planner for its area. Save in the special case of Queensland (where the whole metropolitan area of its capital city Brisbane was within the area of a single local authority, the Brisbane City Council), time proved that such local control was not

> enough; at least in the capital cities a regional or metropolitan authority was necessary to plan for the city as a whole: in each case such an authority has been created, sometimes tentatively and with the idea of limiting it to planning functions, and has remained to enforce the regional scheme. This was also done in New South Wales, with the constitution of the Cumberland County Council. Significantly, however, the provision was included in the original Act: sooner rather than later. The result is that New South Wales, whilst late into the town-planning field, has been one of the first States to provide a comprehensive plan for its major metropolitan area.....
>
> ...No survey, however brief, of town-planning in Australia could omit reference to Canberra: the most completely planned, most beautiful and fastest growing major city in the Commonwealth. However, whilst Canberra may form a model and an inspiration for the planner, it is of little assistance in considering the legal problems raised under the New South Wales Act. *There were no problems of private ownership: Canberra is a new city built upon lands owned by the Commonwealth. Land has not been granted by the Crown in fee* [emphasis added - Ed.]: it has been leased, normally for lengthy terms, upon covenants restricting the use of the land.There is thus no need for a statutory planning scheme. In the case of leases for business purposes (including residential flats) it is usual for the Commission to specify the permissible size and form of the building which may be erected. The Commonwealth, through the National Capital Development Commission, prepares its own plan before granting leases and then grants leases whose provisions ensure compliance with that plan. Compliance is ensured by the Commonwealth as lessor - there is no need for a "responsible authority".

Bearing in mind the existence of s. 51 (xxxi) of the Constitution, which provides for "..... the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;".....then if the Commonwealth were ever so minded to adversely limit the use of a parcel of land in the Australian Capital Territory (or other Commonwealth Territory), the scope for sovereign risk posed by the Commonwealth would be limited to the more narrow property rights gap (compared to any State) that lies between the scope of s.51(xxxi), and Article 17 of the UDHR.

3.2 Crown Grants, Estates in Fee Simple & Town Planning Law

What is the express legal relationship between the Crown grants of land in freehold or leasehold, and town planning legislation in the States? Precious little apparently.

Take the authoritative textbook of Mr Wilcox (supra), *The Law of Land Development in New South Wales,* which contains approximately 700 pages of dense prose. The references to Crown grants and the relationship between town planning laws and the pre-existing laws of property are scant, to say the least. His observations with respect to common law rights amount to this (at Chapter 1):

> "At common law a landowner who was desirous of subdividing his lands or of opening a new public road through them was perfectly free to do so. He required the consent of no-one. He subdivided by conveying different parcels of land to different purchasers and the subdivision was as good as his title to convey."

(Some observations by Callinan J. in *Western Australian Planning Commission v Temwood Holdings* [2004] HCA 63 at [147] expand on some practical matters relating to common law subdivisions, including having the co-operation of the Crown or local authority, and a degree of supervision by the Registrar of Titles, under the Torrens system.)

Apart from Wilcox's observation (see above) that in Canberra, "Land has not been granted by the Crown in fee", that's it! That's all! That's the sum total, evidently, of the amount of thought put into the relationship between State property law and town planning law. This is not to pick on Mr Wilcox, but (to the contrary) to make the point that if that's all that can be found in a detailed, scholarly, authoritative text on the field of town planning in Australia, it obviously was not considered worthy of attention by practitioners or lawmakers either.

In his book, Mr Wilcox provides much detail about provisions for compensation made by various State town planning Acts. The repeated assertions by Mr Wilcox (see below) that property owners adversely affected by town planning decisions, zoning and the like, should be compensated for their losses are not accompanied by any observation as to whether there was any legal basis for this view, other than the observation that (supra., at 277-278): "Common sense and justice demand" that the "sacrifices" imposed on individuals should be compensated. It is seemingly taken as self-evident. Maybe it is, but absolutely no attention is paid as to upon what legal basis a State must provide compensation in such circumstances. The subject is just unexplored.

The role of "common sense and justice" in the making of judgments can be real, but is limited, as exemplified by the observations of Owen J. in *Burns v Allen* (1889) 10 LR NSW Eq. 218. Owen CJ Eq. (he seems to have been promoted as the case

proceeded!?) considered a reservation in a Crown grant of 75 acres of land at Tom Ugly's Point of "a road of 100 feet on the banks", but with a coastline which was described (at 218) as "rocky and impracticable for road-making except at great expense". At 221, he cited with approval *Lord v Commissioners for the City of Sydney* 12 Moo. P.C. 475:

> "..their Lordships do not intend to differ from old authorities in respect to Crown grants, but upon a question of the meaning of words the same **rules of common sense and justice** must apply, whether the subject-matter of construction be a grant from the Crown or from a subject, it is always a question of intention to be collected from the language used with reference to the surrounding circumstances". (Emphasis added.

It might be noted in passing that the judgment also followed the Privy Council decision in *Cooper v Stuart (supra)* relating to the legal character of Crown grants and reservations.)

These cases demonstrate that judicial "rules of common sense and justice" do exist (and are not merely a vague slogan), but apply in a limited manner, as principles of interpretation. Such "rules of common sense and justice" will not be applied where the intent of legislation is clearly to the contrary - as too often seems to be the case, as may be deduced from many examples provided in this paper.

More recently in, 2013, in a speech (reproduced more fully below), the then Chief Justice of the High Court of Australia did make some evidently relevant extrajudicial observations, some of which are:

> "Acquisition is not the only way in which property rights can be affected by the exercise of public power. They may also be affected by 'acts of government that do not directly or formally touch the property in question, but which nevertheless damage its value and enjoyment'. This is what is sometimes called 'injurious affection'. Compensation for compulsory acquisition and injurious affection by State or Territory governmental action depends upon statute law. *The question arises why is such compensation provided for by parliamentary enactment when it is not constitutionally required? One answer is that respect for property rights is a deeply embedded aspect of our legal tradition. It is also an aspect of our culture*. It was reflected in the film 'The Castle' and the immortal line 'tell them they're dreaming'. [Emphasis added.]
>
> Darryl Kerrigan's assertion of his property rights was reflective of the common law's protective approach to property rights generally."

Well, that's something. Poor old Wilcox pre-dated Darryl Kerrigan, so couldn't cite him as an authority!

Looking further afield, there is a real dearth of evidence of any considered legal opinion with respect to town planning legislation and its interaction with Crown grants and the latter's legal character.

Nineteenth century cases relating to alienated Crown land (as cited above) sometimes considered an interaction between Colonial legislation and Crown grants, but it is a clear feature in such cases that relevant legislation did not intend to repudiate any grant, but simply to complement it. The *Foskett* case (*supra*), might be regarded as an early example where the government forgot its rights under a Crown grant reservation, and was saddled with having to pay compensation under its own legislation, when it was not necessary under the grant reservation. There was in that case no issue as to a repudiation of the grant to the detriment of the title holder.

The earliest "land acquisition" legislation in Australia, *An Act to authorize the resumption or occupation and use of any Lands required for purposes of Military Defence and to make Compensation to the Owners thereof*. 1854 Vic No. 10 NSW provided in the Preamble: "...whereas it is proper that compensation should be awarded and paid to the owners of such lands for such resumption occupation taking or use thereof and for any damage thereto..." The Act clearly recognises the "proper" imperative to compensate owners for any imaginable impairment of their property rights whether permanent or temporary, complete or partial.

Twentieth century town planning legislation does not specifically address the relationship between it and Crown grants of land. The principal land acquisition statutes in Australia are listed by MS Jacobs, *Law of Compulsory Land Acquisition*, 2nd ed., (2015) at 26. At 27, the author writes: "Most of these Acts provide for the right to acquire, the relevant acquisition procedure and for the payment of compensation".

It may be said that to the extent that these statutes provide for compensation for resumption of any granted land, they are consistent with the legal character of such grants, and do not repudiate them. However, there being no express attempt to reconcile the scope of such legislation with the legal scope of entitlement inherent in any grant, it is perhaps not surprising that a gap might be found between the coverage of the acquisition statutes and the extent of legal interests attaching to the grants. This "acquisition law gap" as described by the NSW Bar Association, which thereby assumes away the very existence of that gap, is the cause of significant and ongoing uncompensated losses by too many landowners.

3.2.1 Disconnection between Crown Grants of Title & Planning Law: An Example

A recent State Administrative Tribunal decision (*Two Rocks Investments Pty Ltd and Western Australian Planning Commission* [2019] WASAT 59) demonstrates the disconnection which has existed and continues to exist between planning law and Crown grants of title.

The case was new, in that it that the developer is required to cede land necessary for the maintenance of a receding foreshore to the State (free of cost and without any payment of compensation), along with the land actually now vulnerable to coastal processes, as a condition of subdivision or development approval. However, in requiring land to be given up with no compensation as a condition of a subdivision approval, it is consistent with High Court authority: *Lloyd v Robinson* (1962) 147 CLR 142. at 154-155.

Having said that, neither decision has taken account of the possible repugnance of the relevant Western Australian legislation and its consequent administrative decisions to the landowners' Crown grants of title.

In the *Lloyd* case, the High Court considered the effect of the *Town Planning and Development Act* 1928-1959 (W.A.) at 154-155:

> "The Act at its commencement took away the proprietary right to sub-divide without approval, and it gave no compensation for the loss. But it enabled landowners to obtain approval by complying with any conditions which might be imposed, that is to say which might be imposed bona fide within limits which, though not specified in the Act, were indicated by the nature of the purposes for which the Board was entrusted with the relevant discretion: see Swan Hill Corporation v. Bradbury (1937) 56 CLR 746, at pp 757, 758 ; Water Conservation and Irrigation Commission (N.S.W.) v. Browning (1947) 74 CLR 492 . If approval is obtained for the subdivision of one area of land by complying with a condition which requires the giving up of another area of land for purposes relevant to the subdivision of the first, it is a misuse of terms to say that there has been a confiscation of the second. For the giving up of the second a quid pro quo is received, namely the restored right to subdivide the first. It may be that the quid pro quo is inadequate, and that the landowner, though under no legal compulsion to give up the second area of land if he chooses to forego the idea of subdividing the first, is nevertheless under some real compulsion, in a practical sense, to submit to the loss of it because of the importance to him of obtaining the approval. But there is no room for reading the Act down in some fashion by appealing to a principle of construction that has to do with confiscation. If the Board has performed its statutory duty by giving approval to the subdivision

> subject only to conditions imposed in good faith and not with a view of achieving ends or objects extraneous to the purposes for which the discretion exists, the inescapable effect of the Act is that the landowner must decide for himself whether the right to subdivide will be bought too dearly at the price of complying with the conditions."

Thus, the Court found that the quid pro quo for the restored right of subdivision to the landowner (namely conditions attached to the subdivision approval) may be inadequate under the Act, with no remedy being available to the landowner.

It might be noted that it was not put to the Court that the Act, in taking away the proprietary right to subdivide and replacing it with a restored right to subdivide subject to conditions, could effectively constitute an impairment, being a partial resumption of the Crown grant of title, which without compensation would be repugnant to the grant.

The *Model Subdivision Conditions Schedule*, WA Planning Commission May 2019 notes the influence of an English case (at 4):

> "The State Administrative Tribunal (SAT), and other appeal bodies in Australia have adopted the approach taken in *Newbury DC v Secretary of State for the Environment* (1981) AC578 when considering the validity of specific conditions. That decision held that, in order to be valid, a condition must:
>
> - be imposed for a planning purpose;
> - fairly and reasonably relate to the development for which permission is given; and
> - be reasonable, that is, be a condition which a reasonable planning authority, properly advised, might impose."

These three tests have thus been accepted as statements of general principle, but as noted by the Privy Council (*Cooper v Stuart* (*supra* at 294)) land law in the Australian States cannot be equated to English law because of the nature of Crown grants: see **2.1.4**.

This consideration is material to the third test - of reasonableness. If the taking away of the proprietary right of subdivision by the Crown (without compensation) is repugnant to the Crown grant of title, and the restoration of a right to subdivide subject to conditions is inadequate to eliminate the repugnance - for example, because one of the conditions is that a significant portion of the land be forfeited to the Crown – then the repugnant condition could hardly be said to be "reasonable" on

any proper advice: the condition must fail, or the landowner must be entitled to compensation for same.

That such an argument may not be available in England is not something that English judges should be expected to take notice of in an English case about English land.

It might also be noted that the 1962 case does not consider that any inadequacy of the “quid pro quo” might lack sufficient support by an express legislative intention to deprive the property owners of such rights without compensation, given the general common law presumption in favour of private property (in relation to which the existence of Article 17 of the *UDHR* might be considered one consideration). Also in 1962, there was not as yet any acknowledgement by the High Court (in any case law) of the existence of native title - times change!

It is submitted that *Lloyd v Robinson,* having failed to consider the implications in relation to a compensation arising from repugnance to any Crown grant relating to the land in question, and possibly also by failing to address the aforementioned common law presumption in favour of private property ownership - which points of law do not seem to have been put to the Court - could only be relied upon as being authority for the point that where an authority imposes a subdivision approval condition requiring the ceding of land without payment of any compensation to the owner, such condition does not amount to “expropriation” because the owner retains the option of not ceding the land by choosing not to proceed with the development.

One might wonder why such behaviour by the government authority is actually not akin to extortion, but regardless of that, the *Lloyd* case is, in short, arguably very limited authority for the Western Australian Planning Commission or other authority to rely upon.

In this regard, we also direct attention to the reasoning of Callinan J.’s dissenting judgment in the *Temwood* case (*supra* at 52-58) where he disputes the correctness of the *Lloyd* case.

3.3 Uncompensated Losses by Landowners

While town planning legislation generally made some provision for compensation to owners adversely affected by town planning decisions due to unfavourable rezonings etc., in practice the result has often been very different.

Wilcox (supra at 206):

> "The object of a planning scheme is to so regulate the use of land as to improve the area generally - aesthetically, socially, and economically. But, inevitably, some individuals must sacrifice for the common good. This they may do because their land has been reserved for a public purpose or zoned for a less profitable one, It is proper and, in a democratic system almost essential, that the community as a whole compensate them for their individual loss....."

At 277-278, Wilcox repeats and expands on this:

> "The essence of town-planning law is the subordination of the interests of the individual land-owner to those of the community as a whole. In a different way, this is true of most law. However, in contrast to most other fields of law, the restrictions imposed by [town planning] law do not fall impartially on all. On the contrary the very zoning which denies one owner the most economic use of his land, and thereby depresses its value, may substantially appreciate the value of his neighbours' land, differently zoned to permit that use. The law of supply and demand is most relevant to land values, especially in growing land metropoles.
>
> Fortune, therefore, dictates that some individuals shall incur substantial sacrifice in the common good while others will not only share the common gain but glean a substantial individual windfall as well."

Writing with respect to NSW legislation introduced in 1945, Wilcox notes that compensation is provided for "in certain cases", but then notes (at 278):

> "In New South Wales the compensation funds have been so limited that compensation rights have almost disappeared. (The injustice to individuals is obvious....) *The elaborate structure remains but the fact is that, in the fifteen years since the first town-planning scheme was prescribed in new South Wales* (The first prescribed scheme was, of course, the County of Cumberland Planning Scheme Ordinance which came into force on 27th June, 1951.), *there is not one single reported case where compensation has been awarded by a court."* [Emphasis added - Ed.]

Ashton & Freestone (supra)) write:

> "....Yet, despite the best intentions, the Cumberland County Council was an overall failure. It met strenuous opposition from property owners and by the mid-1950s had 22,000 claims against it for 'injurious affection' arising from County zoning."

So, there were 22,000 claims (and one can fairly infer that many other landowners affected did not proceed to make a claim), and not a single instance of court awarded compensation.

In the absence of any evidence to the contrary, one has to deduce that precious few, if any of these or subsequent losses, claimed or unclaimed, was ever resolved by appropriate compensation, and they remain unresolved.

Fricke QC (infra) observed:

> "In the 1970's ....many persons had been denied any right to compensation or the possibility of enforcing acquisition of land which they could not use for any effective private purpose."

Of course, it's not just a matter of statistics. Real people are affected by these injustices. Chief Justice French observed in the aforementioned speech, that :

> "....as a member of the Claremont Town Council and a member of its Town Planning Committee in the 1970s. That experience gave me the beginnings of an awareness that planning issues are complex and can stir deep passions."

Deep passions indeed. They rarely seem to be published, but in this context, the behaviour of the hunger-striking of farmer Peter Spencer in southern NSW does not seem to be crazy at all. Just desperate.

Another more extreme example of property rage, as a matter of interest, is recounted by Western Australian lawyer John Wickham (*infra*):

> So far in Western Australia we have avoided such scandals in England as the Crichel Down Affair or the case of Mr Ramfield, a case where the Central Electricity Authority had unofficially upheld an owner's representations as to the route of supply line, but its officers went ahead with the original plan any way. Mr Ramfield took defensive measures. These included guard dogs, bulls, booby-traps with sawn-off shot guns, a patrol of ex-army armoured cars and extensive barbed-wire entanglements. The "piece de resistance" was a minefield so cunningly laid that the authority had access to the agreed alternative route but any

> attempt to carry out construction on the original route would result in everyone being blown sky high.

It sounds like this chap was a former soldier, but in any case one might imagine many frustrated and empathetic property owners cheering him on, even if they would not venture to so act themselves. Such an unusually elaborate response to perceived injustice points to the deep passions which might be aroused in the context of planning decisions observed by Chief Justice French.

Having said all that, Queensland has, it is said uniquely, provided for (limited) compensation, since 1997, for injurious affection for changes to planning schemes or policies under the *Integrated Planning Act (Qld),* and previously, as far back as 1934 under the former *Local Government (Planning and Environment) Act 1990 (Qld)* at 23-25. Maybe someone was taking the Land Department of Queensland's previously mentioned "Leaflet H" seriously!

It should also be noted that Part 4 Division 2 of the *Planning Act* 2016 (Qld) actually provides for compensation to landowners where an "adverse planning change" reduces the value of an interest in premises, "premises" being defined to include a building or other structure, or land with or without a structure thereon (s. 30).

This legislation would appear to be quite consistent, in general terms, with the common law requirement to compensate for a partial resumption of the Crown grant of title as constituted by an adverse planning change. Indeed, consistent with this, s. 34 of the Act provides for the recording of compensation made on title.

Having said that, the *Planning Act* provisions for compensation relate only to planning instruments dating from 2016, and not to other legislated impairments, such as heritage listings, vegetation management, and planning legislation prior to 2016.

With regard to the last-mentioned limitation, an unremedied injustice perpetrated by Queensland - even with the resentful concurrence of the High Court - provides a compelling example. See in particular the observations of Callinan J and Kirby J in the *Chang* case (*infra)* as cited below.

We note also that in recent years, some remedial steps in this are have been taken in Western Australia and Victoria.

Under the *Planning and Development Act 2005* (WA), compensation claims for the value reducing effect of public purpose reservations (under planning schemes) can be made: by the seller of land, if they owned the land at the time the reservation was imposed; or by the landowner when a development application is adversely determined due to the reservation. A recent High Court case shed some light on the operation of the scheme for compensation: *Western Australian Planning Commission v Southregal Pty Ltd & Wee; Western Australian Planning Commission v Leith* [2017] HCA 7 [1].

Notwithstanding this, the potential for extensive injustices has remained in Western Australia: see for example the analysis provided in "Property Rights in Western Australia: Time for a changed direction", Louise Staley, *Institute of Public Affairs* (July 2006).

In Victoria, it is accepted that a restriction on the ability to use or develop land for a particular purpose may have significant financial consequences for the owner if permission to use or develop is refused. In such case, a landowner may be able to claim compensation from an acquiring authority under the *Planning and Environment Act 1987* (Vic). Under the Act, an owner or occupier of land may claim compensation from the acquiring authority for financial loss suffered as a natural, direct and reasonable consequence of:
- land being reserved for a public purpose under a planning scheme, as well as under a proposed amendment to a planning scheme;
- a declaration of the Minister for Planning that land is proposed to be reserved for a public purpose;
- access to land being restricted by the closure of a road;
- a refusal by a responsible authority to grant a permit to use or develop land on the ground that it 'is or will be' needed for a public purpose.

Again, the existence of such protections is far from comprehensive. For example, in 2018, the Victorian Heritage Council issued permanent heritage protection orders with respect to Melbourne's Festival Hall with no compensation to be paid to the owner (ironically a QC and his family) for any financial loss: "Permanent heritage protections stop demolition of Festival Hall", Clay Lucas, *The Age*, 20 November 2018.

It is recognised (*cf.*, again, the list compiled by MS Jacobs *supra* at 26) that each State has made laws to govern the resumption of land for public purposes, for example: the *Land Acquisition (Just Terms Compensation) Act 1991* NSW. These laws generate their own controversies, but at least they are a mechanism for compensation when properties are resumed. That's the point though - they only apply to land which has been entirely "resumed" and not to land uses which have been newly prohibited (effectively, being partial resumptions, although not legislatively recognised as such except in the context of native title), the said land thus being injuriously affected by planning instruments. As has been expressed in NSW in particular: "these activities do not form part of '*acquisition law*'" (*Submission of the New South Wales Bar Association To The Just Terms Compensation Legislation Review*, (2013) Phillip Boulten SC, President at 4.)

Having briefly reviewed above, the gradual development of legislation and associated injustices in NSW between the 1940's and the 1970's, the unfortunate contemporary consequence which has developed in NSW since then is outlined by Gadens Lawyers:

"**Question: Q: A draft local environment plan for our area proposes to downzone certain areas from residential to parkland meaning in years/decades to come those residents will have to move out of their homes. Can a decision to downzone be challenged, or are Council within their rights to do this?**

Answer: Ultimately, there is no right of appeal in relation to downzoning. Downzoning occurs when the State Government or Council changes a local environment plan (LEP) or another environmental planning instrument to reduce the future development potential of a site.

Landowners could argue that the zoning lacks merit and agitate for Council to change its mind or lobby the State Government to block or reverse the decision. This was done very effectively in the Warringah Local Government Area last year, when many residents lobbied long and hard over a Council proposal to downzone their land to E3 (Environmental Management), resulting in Minister Hazzard deferring the rezoning of the relevant lands and requiring a strategic review to be conducted. Nevertheless, it now seems likely that much of those lands will be downzoned – the residents in that case may have won the battle but lost the war.

Importantly, there is no ability to appeal the merits of the decision in the Land and Environment Court (although, as with all changes to planning instruments, depending on the circumstances, it may be possible to mount a purely legal challenge to a proposed downzoning based on procedural or technical defects). Landowners do not 'own' theoretical development potential. This means neither the State Government, nor a Council, is obliged to compensate a property owner just because the critical development potential that might have been available under a LEP is lost.

Typically downzoning occurs in the following ways:

• An outright change in the zoning, for example, from a general business zone to a light industrial zone.
• The zone remains the same but the standards change, for example, the permitted building height is reduced.
• The land is rezoned exclusively for a public purpose use (such as for open space, a national park, a cemetery, a public hospital or school or a railway).
• A building or feature on the land is listed as a heritage item.
• The land is given an additional designation (on top of the zoning) through the adoption of a new map. For example, it could become part of a heritage conservation area or be identified in a biodiversity map.

Landowners that experience an outright downzoning will often still have 'existing use' rights, as well as the protection given to existing development consents by section 109B of the *Environmental Planning and Assessment Act* (**the Act**).

In general terms an 'existing use' is the use of a building, work or land that is lawfully commenced, but subsequently becomes a prohibited use under an environmental planning instrument (such as a LEP). The Act and the *Environmental Planning and Assessment Regulation* (**the Regulation**) allow existing uses to continue. Clause 41 of the Regulation allows, with some restrictions, existing land uses to be enlarged, expanded or intensified, altered, extended, rebuilt, or to be changed to another use. However a development application would need to be lodged.

This means that, in general terms, a change in zone from residential to parkland will not require existing homes to be demolished or for people to move out.

Additionally, section 109B of the Act provides that development can be carried out in accordance with a development consent which is in force, despite any later provision of a planning instrument prohibiting the development. This is important. Unrealised development potential in a LEP is not protected from a downzoning, but the development potential that is the subject of a development consent is protected (unless the consent has lapsed).

In terms of compulsory acquisition of downzoned land (by government authorities), where land is rezoned exclusively for a public purpose use (such as for open space, a national park, a cemetery, a public hospital or school or a railway), the relevant public authority will not necessarily acquire land straight away. The relevant public authority normally only commences acquisition once it decides that the land is actually required and funds are available. This may be many years after the land was downzoned for the public purpose.

In recognition of the potential injustice this may cause, the *Land Acquisition (Just Terms Compensation) Act 1991* (**the Just Terms Act**) sets out a process which governs if and when landowners can compel the relevant public authority to acquire their land. However, it is necessary for 'hardship' to be demonstrated. This can be difficult, particularly for companies.

In general terms, to require a public authority to acquire land it is necessary to show that the land cannot be sold, or cannot be sold at market value, and that the

> individuals involved need to sell the land for pressing personal, domestic or social reasons, or to avoid a substantial reduction in the owner's income.
>
> The state government powers to downzone land are very broad. We suspect that there would be more outrage about the nature of these powers, but for the fact that, at any given point in time, only a small number of property owners are affected." ("Ask Gadens", *Planning Institute of Australia*, July 2013. Underlined emphases added.)

The statement by Gadens that "Landowners do not 'own' theoretical development potential" is true to the limited extent that the Act does not create such an ownership right, but so what? As noted at **[3.4]**, the High Court has repeatedly stated that an estate in fee simple, or freehold, confers "the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination". The Crown has already granted landowners actual (more than "theoretical") development potential, which right requires no supplementation by the Act at all. The question is, whether or not the removal of such ownership rights under the Act without compensation is valid. As shall be explained in detail in this paper, it's certainly a breach of human rights, as well as being repugnant to the Crown grant of freehold and as a consequence, must be unlawful.

It might be said, with respect, that the Gadens outline is a good summary of the legislative position in NSW and would be typical of the views NSW planning lawyers generally. However, no attention is paid to other laws which might, inconsistently with the Act, be acted upon to grant rights of compensation to property owners for injurious affection:

- no attention is paid to possible interaction between the legislation and the law of tenure - in particular, Crown grants of title;

- no attention is paid to the breaches of human rights (discussed at **[4.1 & 9.0]**) imposed by the legislation;

- no comparison is made with s. 51(1) of the *Native Title Act* (Com) which provides for an entitlement on just terms to compensation to the native title holders for "any loss, diminution, impairment or other effect on their native title rights and interests", i.e., for impairments which do not amount to "acquisition" (discussed at **[4.2])**; and

- no thought is given to the discrimination against Australian citizens (vis a vis most foreigners) by the operation of Investor State Dispute Resolution (discussed at **[4.1]**).

Further, the legal corollaries of Gadens' *status quo* opinion are self-evidently untenable (discussed at **[7.1]**).

The limited application of the *Just Terms Act* as explained by Gadens was a subject of the above mentioned 2013 "acquisition law gap" submission to the NSW government by the Bar Association of NSW, which was ignored by the government and continues to be unremarked by legal practitioners.

Gadens' suspicion "that there would be more outrage about the nature of these powers, but for the fact that, at any given point in time, only a small number of property owners are affected" is, even on the basis of only published examples, evidently well founded. The only proviso to that might be that very often, numerous property owners are actually affected, but they are not necessarily known to each other: individually, they are relatively isolated. The possibility of collective action, in any form, is not revealed to them.

There is no sign that legal practitioners in general (with honourable exceptions including the NSW Bar Association, the Law Council of Australia, Ian Callinan AC and McLeod Legal), do more than read the legislation like a bible - or indeed, a washing machine instruction booklet - accepting it at face value, instead of questioning its underlying validity in a general legal context, and informing clients of the extent of unjust & discriminatory injustice being imposed upon them, which collectively, they might work to remedy. Injuriously affected landowners are being let down by legislators, but also by the legal profession. This is not new. It has been happening for decades.

Other published examples of uncompensated damage are scattered through the literature and see also www.adverse-rezoning.info. Here are some illustrative examples:

A. The President of the NSW Bar Association in 2013 (*supra* at 4) cited the High Court *Durham Holdings* case *(infra)* and noted: "the *Mining and Petroleum Legislation Amendment (Land Access) Act 2010* (NSW) ... retrospectively extinguished important property rights of farmers, notwithstanding those rights had been earlier recognised by the Supreme Court. [Brown v Coal Mine Australia; Alcorn v Coal Mine Australia Pty Ltd (2010) 76 NSWLR 473.]"

B. See reference to: "the economic effect of the *Native Vegetation Conservation Act 1997* (N.S.W.) in the Moree Plains Shire where it is argued that land values have been reduced by 21% and farm incomes by 10%. By 2005 it is estimated that farm incomes will be down by 18%.": *Taking Farmers' Property Rights Seriously and Just Compensation On Their Taking*, Pape Bryan, Australian Centre for Agriculture and Law, UNE (2003).

C. In *Chang v Laidley Shire Council* [2007] HCA 37, as Kirby J. explains (at paras.1 to 3):

“The [subject] appeal concerns the interpretation of successive provisions of Queensland planning law affecting a parcel of land at Blenheim in South-East Queensland.

Under earlier provisions of the planning law, the land in question could, with the requisite approval of a development application, have been reconfigured (in the old language "subdivided") into lots of a modest size. After supervening changes to the planning law, reconfiguration as sought was prohibited. In these proceedings, the owners of the land have been seeking to recover what they claim is their entitlement to statutory compensation, accrued before that change took effect.

The owners' claim has been rejected (so far successfully) on the basis that, although the compensation sought was available for a time, it was removed by an amendment to the planning law which rendered the development application invalid.”

Kirby J. continues (at §84, §85): “the appellants have identified an unfairness flowing from the drafting technique that was used, in effect, to destroy their surviving entitlement to make a viable DA(SPS).....the change was effected by stealth. (See also reasons of Callinan J at [125] .) The parliamentary process did not operate as it is intended, so that those who were depriving people, such as the appellants, of their entitlements and expectations, shouldered the responsibility and assumed public accountability for the amendments which they enacted. (See *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131: "the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost"; approved in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30] per Gleeson CJ, and in my own reasons in *Daniels Corp* (2002) 213 CLR 543 at 582 [106].)

It might be noted that above, Kirby J. refers the reader to the reasons of Callinan J. in the same matter - indicating his concurrence. Callinan J.’s judgment might fairly be considered to be a very fine piece of indignant *obiter dicta*. From the point of view of this working paper, it really deserves to be reproduced in full:

CALLINAN J. It is with regret that I find myself obliged to agree, subject to what I set out below, with the reasoning and conclusion of Hayne, Heydon and Crennan JJ, regret, I hasten to say, not because of any perceived deficiency in the reasoning of their Honours, but because the relevant statutory language, whether unintentionally, or deliberately and cynically, necessarily does take away the appellant's valuable proprietary and statutory rights, suddenly and without compensation.

I refer to the appellants' right to subdivide their land as a proprietary one at common law, because that is the language of Kitto, Menzies and Owen JJ in *Lloyd v Robinson* (1962) 107 CLR 142 at 154 with respect to freehold land. That proprietary character was not lost because the appellants, before October 2004, might need to seek the approval of the respondent to undertake a subdivision, as, on the rezoning of the land to Rural Residential "A" in 1992, subdivisional approval, subject to reasonable and relevant considerations only, was a virtual certainty. That this is so is confirmed by a letter sent by the respondent to the appellants on 18 May 2000 which relevantly reads as follows:

> "I advise that as the property is currently zoned Rural Residential 2 'A', subdivision is possible creating allotments ranging from 4,000m to 7,900m2 provided that an overall average of 6,000m2 is maintained.
>
> However ... whilst the Planning Scheme provides for subdivision of the subject land, the provision of infrastructure and developer contributions may impact any decision to further develop the land.
>
> As part of any development approval, [the] Council's Planning Scheme requires that a reticulated water supply be provided including external mains and headworks charges, bitumen access and internal road network including kerb and channel, contributions to bus shelters and parks and recreation.
>
> However, the final conditions which would be imposed could only be determined upon lodgement of a development application.
> ...
> [signed]
> MANAGER PLANNING SERVICES"

By definition, a subdivision is a reconfiguration of the land.

> (s 1.3.5 Integrated Planning Act 1997 (Qld):
> "In this Act –
> ...
> **reconfiguring a lot** means –
> (a) creating lots by subdividing another lot; ...")

Both zoning and an approval to subdivide run with the land.

> (s 3.5.28 *Integrated Planning Act* 1997 (Qld):
> "(1) The development approval attaches to the land, the subject of the application, and binds the owner, the owner's successors in title and any occupier of the land."

> See also *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 81 ALJR 352 at 385 [159], 386 [163] per Callinan J; 231 ALR 663 at 705, 706.

Although the States are unfortunately not constitutionally bound to provide just terms on the compulsory acquisition of property, (In 1988, as one of 4 proposals, the others of which were far less agreeable, and none of which could be dealt with separately rather than compositely, the following Constitutional changes were rejected in a referendum held pursuant to s 128 of the Constitution:

> "Question 4
> A Proposed Law: To alter the Constitution to extend the right to trial by jury, to extend freedom of religion, and to ensure fair terms for persons whose property is acquired by any government.")

by long practice and convention, sensitivity to the disparity between State and subject, and historical respect for property and like rights, (See Coke, *The Third Part of the Institutes of the Laws of England*, (1809) ch 73 at 161:

> "a man's house is his castle ... for where shall a man be safe, if it be not in his house?"

The principle may however have more ancient origins, with some scholars pointing to a passage in the *Pandectae (lib. ii. tit. iv. De in Jus vocando)*, one part of the *Corpus Juris Civilis* as the basis. rarely do they fail so to provide.

See also the Fifth Amendment to the US Constitution:

> "nor shall *private property* be taken for *public use* without just compensation".)

rarely do they fail so to provide. [Bold added for easier reading. The “rarely” view may be questioned in the light of published evidence at www.adverse-rezoning.info and elsewhere in this paper, but this point is either irrelevant to the thrust of the argument, or indeed makes the argument more compelling.]

Indeed, since at least 1936 planning legislation has so provided in respect of the sorts of events which have happened here (s33(10) *Local Government Act* 1936 (Qld)). It is on the basis of such rights, and the expectation of compensation for their destruction or impairment, that transactions take place, plans are made, money expended, and people order their lives. To destroy legislatively such a valuable right,

here to subdivide, in some apprehended public interest is one thing, but to exonerate the public from paying the deprived landowner is entirely another, and unacceptable thing. What the public acquires or enjoys the public should pay for.

It seems to me that to take away completely, by a few strokes of the legislative pen, the appellants' right to seek to have, and undoubtedly in substance to have, their land subdivided, is to do much the same as was done by the Commonwealth Parliament by the *Seafarers Rehabilitation and Compensation Act* 1992 (Cth) considered by this Court in *Smith v ANL Ltd* (2000) 204 CLR 493. Mr Smith however had the right to just terms as mandated by s 51(xxxi) of the Constitution. The appellants here unhappily do not. Increasingly prescriptive, restrictive, intrusive and even wrong-headed planning and heritage (See for example the oppressive and entirely unjustified heritage listings considered and rejected in *Advance Bank Australia Ltd v Queensland Heritage Council* [1994] QPLR 229 and *Reelaw v Queensland Heritage Council (No 2)* [2004] QPEC 79.) legislation and instruments, which go far beyond what a modern law of nuisance, taking account of denser populations, closer settlements, burgeoning industries, and other contemporary conditions could possibly insist upon, should not, as I fear they oppressively are, be used as a cloak to reduce, or extinguish valuable rights of, or attaching to, property.

"Cloak" is an especially apt term here because, instead plainly and openly, of legislatively declaring that the various changes to zoning and uses within the designated area or region, will not attract compensation, that result is achieved by the device, clumsy and obscurantist, of a "properly made application" and the fiction of an application which is not to be treated as an application in fact and in law. If it were at all possible sensibly and properly to read the legislation as conferring a right to compensation upon the appellants I would be glad to do so. I cannot do that, but I can surely at least commend to the legislature the restoration to the appellants, and others similarly affected, of the right to compensation to which historically and morally they are entitled.

I would join in the orders proposed by Hayne, Heydon and Crennan JJ."

D. The Law Council of Australia has submitted to the Australian Law Reform Commission (ALRC) that "the lack of any constitutional or general protection from acquisition other than on just terms under State constitutions or statutes' amounted to 'a significant gap in property rights protection.....In some cases, this has resulted in States compulsorily or inadvertently acquiring or interfering with property rights, without any corresponding compensation for the right-holder": ALRC, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Report 129)* (2016), Chapter 20 *Property Rights—Real Property,* at 20.21.

E. In the 2004 *Temwood case (supra* at 53-54*)*, Callinan J. observed:

"Although town planning Acts had been enacted in Australia from time to time in various rather rudimentary forms, sophisticated and detailed town planning enactments and procedures have only gradually evolved[149] and, I would suggest, come to be well understood in this country in the last 30 or so years. During that period there has been a great increase in population, and in the development and subdivision of land to accommodate it. Over those years many instances have been noted of aggressive action, even impropriety, and excess of power on the part of planning authorities in regulating that development and subdivision[150]. Even the most cursory resort to planning law reports will throw up examples of that[151].

149 See Fogg, *Australian Town Planning Law: Uniformity and Change*, 2nd ed (rev) (1982) at 11-31.

150 *Prentice v Brisbane City Council* [1966] Qd R 394; *Brisbane City Council v Mareen Development Pty Ltd* (1972) 46 ALJR 377; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170. A commission of inquiry (conducted by Bennett QC and established on 3 October 1966 by the Governor in Council of Queensland) inquired into the planning activities of the Brisbane City Council, a planning authority under Queensland enactments. The report of the Inquiry was made on 10 April 1967. It recorded many instances, not only of aggressive, but also of highly unreasonable and unlawful conduct by the Brisbane City Council in imposing conditions on subdivisional approvals or in refusing approvals altogether: see Queensland, Bennett QC, *Report of the Brisbane City Council Subdivision Use and Development of Land Commission*, June 1967 at 68-72.

151 See for example: *Finlay v Brisbane City Council* (1978) 36 LGRA 352; *Corsi v Johnstone Shire Council* (1979) 38 LGRA 316; *Carroll v Brisbane City Council* (1981) 41 LGRA 446; *Allsands Pty Ltd v Shoalhaven City Council* (1993) 78 LGERA 435; *Trehy & Ingold v Gosford City Council* (1995) 87 LGERA 262; *Western Australian Planning Commission v Erujin Pty Ltd* (2001) 115 LGERA 24; *Ben-Menashe v Ku-ring-gai Municipal Council* (2001) 115 LGERA 181."

F. Consistent with Callinan J's above observation with regard to demonstrated aggression, impropriety and excess of power by planning authorities, is the

experience in NSW as recounted by a planning lawyer in 2020 in "Rezoning appeals in the Land and Environment Court: Overcoming arbitrary development prohibitions", Mills Oakley - Aaron Gadiel, (July, 2020):

> "The fate of urban development efforts in NSW is closely linked to rezoning (or other changes in planning controls). This because, in Sydney and NSW, there is a strong emphasis on prescriptive controls.
>
> For example, planning systems in some other jurisdictions might provide for, say, eight different types of standard zones in total. In NSW, there are 35 standard zones, including eight different types of business zones alone.
>
> This means that development proponents can often face inflexible prohibitions that stop land being put to its highest and best use.....
>
> ....the current process for securing a rezoning of land is complex and time consuming. There are many opportunities for the process to head off-the-rails. There is considerable risk and cost for a development proponent.
>
> This is why the government says that it takes an average of 579 days to finalise a rezoning or change a decision on planning controls (in our experience, many proposals take much longer)....
>
> In our experience, rezoning decisions are often dealt with in an arbitrary way by public authorities — without any real attempt to justify decisions to block proposed changes."

This law firm's experience exemplifies a culture of impunity which has developed in state land use authorities, which demonstrably increases business costs for no observable benefit to anyone. The systemic "inflexible prohibitions" and "arbitrary" decisions thus aggravate the woes of landowners and as a consequence, pointlessly add to costs passed onto property buyers generally, from first home buyers upwards.

The uncompensated losses by landowners due to the legislated impairment of their property is demonstrably substantial, on the published evidence. And then there are the unpublished examples.....

Indeed, few of the personal stories of the victims of such legislative behaviour are ever published. *NuCoal seizure by NSW casts pall over US tariff talks*, Chris Merritt, The Australian, March 9, 2018 reveals the cost to just two families:

"NuCoal shareholder Peter Harvey, who lost $110,000 due to the expropriation, complained last month to NSW Attorney-General Mark Speakman about the impact of the decision on his disabled daughter.

Eliza Harvey, 18, has Angelman's syndrome, an extremely rare genetic disorder that leaves people with developmental delays, intellectual disabilities and limited mobility.

Until now, Eliza's story has not formed part of the debate about the NuCoal expropriation but Mr Harvey has reluctantly agreed to have her story told in public.

'I have kept my story out of the media for as long as possible. If we could have won the battle without it, I would have preferred to have kept it under wraps. But we have got to the point now where it needs to be told,' he said.

In a letter to Mr Speakman, he said his Newcastle-based family had been treated unjustly.

> 'My family had purchased the shares as an investment to eventually build a group home for my severely disabled daughter to ensure she was not a burden to the state of NSW upon my wife and I passing,' Mr Harvey wrote. 'Your government has effectively eliminated that opportunity for Eliza and her three siblings to have independence.
>
> 'I am not a criminal. I am certainly not a big fish but I am an honest family man trying to future-proof my daughter's quality of life.
>
> 'To suggest, infer or legislate that no compensation will be offered to NuCoal shareholders is outright discriminatory, unfair, grossly unjust and politically flawed and you need to address it.
>
> 'I implore you to think about all the innocent mum-and-dad investors that have had their money stolen by the actions of the O'Farrell government."

The family of another NuCoal shareholder, Darrell Lantry, lost $600,000 because of the expropriation.

Mr Lantry said he was still annoyed that Mr O'Farrell had played down the potential losses for innocent shareholders by describing investing in listed companies as similar to gambling.

> The expropriation placed the Lantry family in financial difficulties. It left them with an investment loan that was secured by their home, and holdings in a mining company that were practically worthless.
>
> > 'This is like someone coming in to your house and stealing everything," he said.
>
> When the company's share price collapsed, he said he had to explain to friends that it was not due to any mismanagement but was entirely due to the actions of the state government.' "

We note in passing that to the extent that Eliza Harvey, as a person with disabilities, might have had a beneficial interest in the devalued shares, and accordingly suffered a loss as described by her father, Peter Harvey, it would seem in the circumstances that the Crown in right of the NSW Government, breached Article 12(5) of the Convention on the Rights of Persons with Disabilities ("CPRD") which was adopted and proclaimed by General Assembly resolution 61/106 of 13 December 2006 ratified by Australia 17 July 2008, which provides:

> "Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that **persons with disabilities are not arbitrarily deprived of their property**. (Emphasis added.)

In such circumstances, it would seem that Eliza Harvey would, by Australian adoption of the CPRD, properly be entitled to compensation for her loss. However, notwithstanding the ratification of the CPRD and its adoption (including Article 12(5)) at Commonwealth level by the operation of the *Human Rights (Parliamentary Scrutiny) Act 2011* as explained at **9.2** (infra), it has not been adopted so as to be operable at State level, and so would remain unenforceable in New South Wales - a cruel irony for her and any other people with disabilities so affected.

G. Another type of property rights deprivation might be described as the "bureaucratisation of private property rights", caused by a proliferation of land use regulations. Essentially, the private property owner, for many purposes, is converted into being an arm of the public service bureaucracy, with compliance costs also being borne by the landowner. One example described by the Productivity Commission illustrates this:

> "**One farmer's experience when trying to improve environmental outcomes**

The owner and operator of a large cotton farming business on the Macintyre river in southern Queensland told the Commission about his experience dealing with regulatory agencies and local councils when trying to improve environmental outcomes on his property. A recent flood event led to frog spawning and an increase in the water bird population on the farmer's property. The farmer sought to prolong this natural event by adding water from his farm to the natural flow. Timing was critical because, in order to benefit the bird population, the water from the farm needed to arrive before the natural flow dried up.

It took the farmer six weeks to negotiate with multiple agencies (at considerable cost) before permission was granted to supply water for this ecological application. The lengthy delays reduced the effectiveness of the water flow. According to the farmer, each agency was focused exclusively on its area of responsibility and they were unable to work together. For example:

- the authority in charge of stock routes initially rejected the proposal due to its potential to cause erosion, while the local council was concerned with flood risk
- the farmer had to build a pipeline under a main road to reduce the risk of erosion as well as increase the capacity of the culvert (to allow water flow) that was already in place
- a temporary weir was built at the head of this pipeline to make it more effective, but had to be removed following a complaint from a local resident.

The farmer reported that he had to convince an environment authority of the merits of the proposal. He hired a zoologist to monitor bird species before and after the flow. The farmer was also required to design the activity to fit within the regional irrigation management plan, and to gain permission from other landholders. He was also required to test the water quality before and after the flow.

According to the farmer, the environment agency insisted that the project be labelled as a 'pilot' so that it did not form a precedent committing them to similar projects in future. The farmer, however, would like to do similar projects more efficiently in future.

Although the flow did eventually take place, its biological effectiveness was reduced by the delay. The experience left the farmer with a sense that regulatory agencies exist to inhibit rather than enable innovative projects.

Source: Productivity Commission case study interview (appendix C).)
Productivity Commission 2016, *Regulation of Australian Agriculture*, Report no. 79, Canberra at Overview p. 19.

3.3.1 Seaside Swindling & the *Coastal Management Act* (NSW)

3.3.1.1 Background

An organisation representing waterfront landowners along the coast of NSW has been created out of a common grievance, expressed for example in this media release:

> "The NSW State Coalition Government proclaimed its long awaited Coastal Management Act 2016 on 28 March 2018 and launched the legislation with a low-key media release.
>
> According to the NSW Coastal Alliance, the legislation is deceptive and will ultimately "rip coastal communities apart". The NSW government had the option of setting sea level rise trigger points and deferring any punitive planning action until those trigger points were reached. Instead, it elected to allow local councils to frame a hodgepodge of sea level rise policies based on a wide range of futuristic projections. Now it is obliged to implement a policy of climate change adaptation based on either "mitigation and defensive adaptation" or "planned retreat" now known as "managed realignment". Planned retreat being a policy of coastal surrender that restricts development, destroys property values and ultimately results in property being resumed by the state without compensation.
>
> The owners of properties identified as "vulnerable to coastal hazards" under the new Act will have their futures decided in Coastal Management Programs (CMP's) developed by their local council. On the surface, the new Act appears to provide for mitigation planning that might involve anything from beach nourishment and dune reconstruction to engineered defences like revetment walls. In fact, the directions provided in the Coastal Manual, the government's refusal to acknowledge the entitlement of climate change affected property owners to compensation, and the appointment of a Coastal Council biased towards coastal retreat, sets the scene for "managed realignment" up and down the NSW coastline. Managed realignment being the new bureaucratic buzzword for planned retreat.
>
> The Alliance points out that the last seven years of coastal management under a NSW State Coalition Government has been a demonstration of its ultimate objective of coastal retreat. It quotes examples from Byron Bay to the Eurobodalla where defensive engineering solutions have been rejected or delayed,

and unpalatable tactics employed to sterilise the development potential of waterfront land. It even extends to the expropriation of land affected by tidal inundation, without any compensation being offered.

At the same time as the state government is conniving to surrender coastal properties to the sea without compensation, it is collecting billions of dollars in coal mining royalties. It blames fossil fuel usage for causing the projected cataclysmic sea level rise but refuses to share the booty with those in its own State who will be worst affected by the fall-out...."
"NSW Coastal Alliance Slams New Coastal Management Act", NSW Coastal Alliance Media Release, 15 April 2018)

It seems that the NSW government policy of "managed realignment" (formerly "planned retreat") relies on the imposition of restrictions on private landowners, including adverse rezonings, sterilising the development potential of waterfront land, rejecting or delaying defensive engineering solutions, and "expropriation" of land affected by tidal inundation, all without payment of any compensation for losses imposed on owners by such planning decisions.

Proceeding on the assumption that aggrieved landowners would hold title by Crown grant of freehold in most cases, or otherwise by Crown grant of leasehold, such restrictions imposed on land use by the Crown would not appear to fall within the terms of any reservations or conditions, and so derogate from such grants, unless compensation were paid. In any case, any sense of "common sense and justice" with respect to losses being imposed on landowners seems to have been missing. Landowners feel swindled. So what's the government dynamic here?

A 2016 letter from the Minister for Planning to the General Manager of the Eurobodalla Shire Council includes an "Advice to the Minister for the Planning (*sic*) on the draft Wharf Road North Batemans Bay CZMP - Recommendations" by the NSW Coastal Panel which recommends that the Minister (*inter alia*):

"- Commends Eurobodalla Shire Council for preparing a CZMP for this coastal hotpot area which presents a good strategic pathway forward for managing this problematic area that builds on the recent E2 Environmental Conservation and W1 Natural Waterways re-zonings within the subject area;
- Commends Eurobodalla Shire Council for committing to a CZMP that will return this precinct to public ownership....."

and further notes that:

"....Action 1 of the implementation strategy.....seeks to "make application for the purchase of tidal and sub-tidal private properties and beaches at Wharf Road". It

is the view of the Coastal Panel that the judgement in *ENVIRONMENT PROTECTION AUTHORITY v. ERIC SAUNDERS [1994] NSWLEC 187 (29 November 1994)*, offers the view that submerged lands automatically revert to the Crown and therefore are not required to the acquired (*sic*). This should be correctly reflected in the CZMP"

It is clear from these extracts that:
- adverse rezonings of private land have been made, which would have the effect of substantially reducing the market value of any affected land;
- there is an intention to return the land to public ownership; and
- the Council is advised not to offer to acquire "submerged" lands (which the owners have presumably been forbidden to protect) on the purported legal basis that the land would "automatically revert to the Crown".

Clearly, there is not a scintilla of concern expressed with regard to property owners for their impaired property rights, and that the prospective avoidance of having to pay any compensation or for acquisition of property, is a matter for all-round commendation. That, for example, the arbitrary deprivation of property rights is a breach of human rights, was not a consideration.

The NSW Coastal Panel was, with the Coastal Expert Panel, replaced by the NSW Coastal Council in 2020, which entities have been constituted under the *Coastal Management Act 2016* (NSW). The objects of the Act are provided in section 3:

"**3 Objects of this Act**
The objects of this Act are to manage the coastal environment of New South Wales in a manner consistent with the principles of ecologically sustainable development for the social, cultural and economic well-being of the people of the State, and in particular:
(a) to protect and enhance natural coastal processes and coastal environmental values including natural character, scenic value, biological diversity and ecosystem integrity and resilience, and
(b) to support the social and cultural values of the coastal zone and maintain public access, amenity, use and safety, and
(c) to acknowledge Aboriginal peoples' spiritual, social, customary and economic use of the coastal zone, and
(d) to recognise the coastal zone as a vital economic zone and to support sustainable coastal economies, and
(e) to facilitate ecologically sustainable development in the coastal zone and promote sustainable land use planning decision-making, and
(f) to mitigate current and future risks from coastal hazards, taking into account the effects of climate change, and

(g) to recognise that the local and regional scale effects of coastal processes, and the inherently ambulatory and dynamic nature of the shoreline, may result in the loss of coastal land to the sea (including estuaries and other arms of the sea), and to manage coastal use and development accordingly, and
(h) to promote integrated and co-ordinated coastal planning, management and reporting, and
(i) to encourage and promote plans and strategies to improve the resilience of coastal assets to the impacts of an uncertain climate future including impacts of extreme storm events, and
(j) to ensure co-ordination of the policies and activities of government and public authorities relating to the coastal zone and to facilitate the proper integration of their management activities, and
(k) to support public participation in coastal management and planning and greater public awareness, education and understanding of coastal processes and management actions, and
(l) to facilitate the identification of land in the coastal zone for acquisition by public or local authorities in order to promote the protection, enhancement, maintenance and restoration of the environment of the coastal zone, and
(m) to support the objects of the *Marine Estate Management Act 2014*."

None of the thirteen particularised objects, and nor the general objects, of the Act purport in any way to acknowledge the pre-existing rights of common law title holders, which by the very nature of coastal management planning, stand to be the people most directly affected by actions taken pursuant to the Act.

Attention might also be paid to s. 25:

"25 Functions of NSW Coastal Council
(1) The NSW Coastal Council has the following functions:
(a) to provide advice to the Minister on any matter referred to the Council by the Minister relating to the following:
. (i) the Minister's functions under this Act,
. (ii) the compliance by local councils with management objectives and the coastal management manual in preparing and reviewing coastal management programs,
. (iii) performance audits of local councils' coastal management program
(b) at the request of the Minister, to provide advice to another public authority on any matter referred to the Council by the Minister relating to coastal management issues,
(c) any other function conferred or imposed on it by or under this Act.
(2) In exercising its functions, the NSW Coastal Council:

(a) is to have regard to the objects of this Act, and

(b) may seek independent expert advice on technical, scientific, legal and policy matters."

Thus, the Coastal Council may seek independent legal advice, having regard to the objects of the Act, which do not include potential adverse impacts on common law title holders.

In such a legislative context, it is no wonder that the concerns of the NSW Coastal Alliance property owners, namely that the imposition of restrictions on private landowners, including adverse rezonings, sterilising the development potential of waterfront land and the like, without payment of any compensation for losses imposed on owners by such planning decisions, are blithely ignored in the above-quoted correspondence. Even the possibility of injurious affection being caused to landowners is not contemplated.

3.3.1.2 The *Saunders* case, ACCARNSI and Errors of Law

Having said that, the most interesting aspect of this correspondence is the citation by the Coastal Panel of a 1994 Land and Environment Court case which "offers the view" that "submerged lands automatically revert to the Crown". A reading of the judgment, as we shall see, neither finds, nor holds, nor "offers the view" of any such thing. This raises the question: where did this interpretation of the *Saunders* case, and its purported relevance, come from?

It turns out that the *Saunders* case is relied on extensively in two articles which address legal issues arising from rising waters caused by climate change:

(1) "Principles and Problems of Shoreline Law", *ACCARNSI Discussion Paper – Node 1 Coastal Settlements*, J Corkill (2012) - prepared with a grant from the Australian Climate Change Adaptation Research Network for Settlements and Infrastructure (ACCARNSI), one of eight networks within the National Climate Change Adaptation Research Facility (NCCARF); and a similar article by the same author,

(2) "Ambulatory boundaries in New South Wales: Real lines in the sand" (2013) 3 (2) *Property Law Review* 67

To provide these papers with some context, note this autobiographical extract by the author, who:

"is a postgraduate student at the School of Law & Justice, Southern Cross University, Lismore NSW. His research area is property law and the impacts of

> global climate change, particularly higher sea levels, increased storminess and greater coastal erosion, on public and private land bounded by tidal waters.
>
> [He] held executive positions on the North Coast Environment Council Inc and was active in the NSW Land and Environment Court, NSW Parliament and in the media as a 'public interest advocate' during the 1990s. He was an executive member and later Deputy Chair of the Nature Conservation Council of NSW and represented NCC NSW as a non-government member of the Coastal Committee of NSW from 1990-1997 and the Coastal Council of NSW from 1999-2003.
>
> Acknowledgement and Thanks: The preparation of this paper was made possible by a grant from the Australian Climate Change Adaptation Research Network – Settlements and Infrastructure, (ACCARNSI) through the Griffith Centre for Coastal Management at the Gold Coast campus, Griffith University, Queensland, Australia." (ACCARNSI, *Ibid*. at ii.)

We shall refer principally to the ACCARNSI article. The position taken in ACCARNSI might be put briefly in the following terms:

(a) a State (and its councils) can prohibit a property owner from taking steps to protect his/her land from rising waters;

(b) as waters encroach upon the land, the owner loses title to such land;

(c) title to the land then passes to the State (i.e., the Crown); and

(d) no compensation of any kind is payable to the affected landowner at any time for the landowner's loss.

A substantial body of law is cited in support of these propositions, including in particular one NSW case: *Environment Protection Authority (EPA) v Saunders and Leaghur Holdings PL* (1994) 6 BPR 13,655 ("*Saunders* case").

The ACCARNSI article contains, as shall be shortly explained, ten errors of law. No doubt more might be identified by a closer analysis, but in any case, ten such errors are already more than enough to refute the Coastal Panel's "view" of the *Saunders* case which was relied upon by the Minister, to act to the uncompensated detriment of landowners.

3.3.1.2.1 Error of Law #1 - Doctrine of Accretion

ACCARNSI (at 34), states: "Ambulatory natural boundaries supplant and rescind surveyed boundaries. This statement of principle makes explicit less concise rulings

of the courts." In other words this ACCARNSI "principle" has no direct common law authority, but is merely inferred by the author.

"Ambulatory" natural boundaries implicitly refers to the doctrine of accretion. In an Australian case which arose in the birthplace of Torrens Title, South Australia, the doctrine of accretion was described by Lord Wilberforce, delivering judgment for the Privy Council in *Southern Centre of Theosophy Incorporated v The State of South Australia* [1982] 1 All ER 283 (the *Theosophy* case):

> "...This is a doctrine which gives recognition to the fact that where land is bounded by water, the forces of nature are likely to cause changes in the boundary between the land and the water. Where these changes are gradual and imperceptible..., the law considers the title to the land as applicable to the land as it may be so changed from time to time. This may be said to be based on the grounds of convenience and fairness. Except in cases where a substantial and recognisable change in boundary has suddenly taken place (to which the doctrine of accretion does not apply), it is manifestly convenient to continue to regard the boundary between land and water as being where it is from day to day or year to year. To do so is also fair. If part of an owner's land is taken from him by erosion, or diluvion (*i.e.*, the advance of the water) it would be most inconvenient to regard the boundary as extending into the water; the landowner is treated as losing a portion of his land. So, if an addition is made to the land from what was previously water, it is only fair that the landowner's title should extend to it. The doctrine of accretion, in other words, is one which arises from the nature of land ownership from, in fact, the long-term ownership of property inherently subject to gradual processes of change. When land is conveyed, it is conveyed subject to and with the benefit of such subtractions and additions (within the limits of the doctrine) as may take place over the years. It may of course be excluded in any particular case, if such is the intention of the parties. But if a rule so firmly founded in justice and convenience is to be excluded, it is to be expected that the intention to do so should be plainly shown...
>
> ...changes caused by human action (other than deliberate action of the claimant) are within the doctrine of accretion...
>
> ...The requirement for imperceptibility has been in the English common law from the time of Bracton who derived it from Justinian. It is for "*latens incrementum..quod ita paulatim adjicitur, quod intelligere non possis, quo momento temporis adjiciatur*".....
>
> ...One naturally searches for a reason or rationale for the requirement that the process be gradual and imperceptible, but this proves elusive....whatever is the true explanation of the rule - and there may well be more than one reason for it -

> what is certain is that it requires a distinction to be made between such progression as may justly be considered to belong to the riparian owner, and such large changes or avulsions as should more properly be allocated to his neighbour. Since there is a logical, and practical, gap or "grey area" between what is imperceptible and what is to be considered as "avulsion", the issue of imperceptibility or otherwise was always considered to be a jury question..."

In *Verrall v Nott* (1939) 39 SR(NSW) 89 at 99, reference was made by Nicholas J to a boundary of the property in question at Manly NSW "being ambulatory, [so] the doctrine of accretion may apply under the circumstances of this case." *Ibid.*, at 98: "the land is described as bounded on the south by North Harbour. In the Crown grant, the boundary is given as the " shores of North Harbour." Quite clearly, the boundary with Sydney Harbour was not a "right line" boundary and so the case cannot be used to support the statement that "ambulatory natural boundaries supplant and rescind surveyed boundaries".

ACCARNSI (at 35) also cites another case in support of the above proposition (*Doebelling v Hall* (1925) 274 SW 1049, 41 ALR 382), but it is an American case. where there is a very different system of land law from that of NSW, or Australia - and in the absence of adoption by any Australian court on the point, that decision should be disregarded as being of no legal authority in Australia.

Even the Privy Council *Theosophy* case (*supra & infra*), cited by ACCARNSI, does not support the proposition that "Ambulatory natural boundaries supplant and rescind surveyed boundaries".

Lord Wilberforce (the *Theosophy* case at 5) distinguished the facts of the *Theosophy* case from those before Sir Robert Megarry V.C., in *Baxendale v. Instow Parish Council* [1981] 2 W.L.R..1055:

> "This case exemplifies the possibility, to which attention has previously been drawn, that applicability of the doctrine of accretion may be excluded by the use of clear words. It was concerned with a strip of foreshore, the question being whether what was conveyed was a moving strip - moving with changes in the level of tides - or a fixed strip, a different type of question from that now before the Board. The learned judge held, relying on the plan which gave a considerable amount of topographical detail in the shape of roads, railways or buildings with an appearance of some precision, that the grant was of a fixed strip....the facts...were clearly very different from those of the present case."

The point clearly being made here by the Privy Council is that where there is a right line boundary which is clearly not intended to be a water boundary as such, the doctrine of accretion does not apply (even if the right line boundary originally coincided with the water boundary).

In contrast, the question on the facts before the Privy Council was whether or not the land in question was granted with a water boundary according to all the relevant documents available:

> "...there is no logic or reason, in their Lordships' opinion, in distinguishing a case where where a property is described as bounded by water from one where the relevant map shows beyond doubt that a water boundary is intended."

It would seem to be clear that the *Theosophy* case finding, that a map can be found to denote that the property was bounded by the sea, and therefore potentially subject to the doctrine of accretion, has been misinterpreted by ACCARNSI to mean that any boundary which becomes submerged is to be subject to the doctrine of accretion. Such a misinterpretation is thus an error of law.

3.3.1.2.2 Error of Law #2 - Scope of Torrens Title

ACCARNSI (at 35) cites the statement of Bannon J in the *Saunders* case that: '...where the boundary is a fixed boundary, the title is open to correction or amendment if land is gained or lost by accretion or erosion... Defined boundaries make no difference.' as support for the proposition that: "Even where a property originally had a 'right-line' boundary defined by survey, measurements are not ultimately definitive of the location of the legal boundary."

But what is the "legal" boundary? ACCARNSI, unlike Bannon J, is failing to observe that there are here two related - but undoubtedly different - instruments and definitions of title with respect to the same land: i.e. the certificate of title as per the Torrens Title system as operated under the *Real Property Act* 1900 (NSW) (and comparable legislation in other States); and the Crown grant of title e.g., of an estate in fee simple (or freehold land).

The long title of the *Real Property Act* 1900 (NSW) is *An Act to consolidate the Acts relating to the declaration of titles to land and the facilitation of its transfer*.Torrens title is a land registration and land transfer system, in which a State creates and maintains a register of land holdings, which serves as the conclusive evidence (termed "indefeasibility") of title of the person recorded on the register as the proprietor (owner), and of all other interests recorded on the register.

Torrens title has been hugely successful and widely adopted over time because the increased confidence and ease in conveying title, compared to old system title, not only significantly reduced legal costs, but increased property market economic efficiency.

As a method of land registration and transfer, Torrens title did not eradicate existing common law title: "old system" title continued to exist unless transferred to the new

system. A land interest need not be registered, subject only to the proviso that it does not then benefit from the conveyance indefeasibility of Torrens title.

While the Torrens system can certify title and provide confidence and efficiency in the conveyance of title, it does not ***create*** title. The basis for title of private land in the states stems from Crown grants of freehold or leasehold interests. It is the existence of these grants in the first place which provide a basis for any landholding to be registered. Similarly, take the example of a caveat of an interest (which caveat acts to prevent any transfer) being lodged on the property register: the partly lodging the caveat would have to demonstrate to the satisfaction of a court if challenged by the title holder, a genuine legal or equitable basis for the caveat.

Reference has already been made to *Ex Parte Smart* (*supra* at **2.1.4**) to an instance where the registrar makes an alteration to title which is within the scope of the *Real Property Act*, but is not done validly on the basis of the common law title (looking to the legal interest of the landowner as provided for by the Crown grant): the Supreme Court of NSW ordered the Registrar General to cancel a certificate of title and to issue a corrected replacement.

S. 3 of the *Real Property Act* 1900 (NSW) defines “land” to include “watercourses”, but not land submerged by the sea. Here, the term “real property” should be interpreted in the context of the Act. “Land” and “real property” may have different meanings in other contexts: for example, land submerged by the sea might still be described as “land” if it is part of a Crown grant of title.

It might be that land submerged by the sea was excluded from s. 3 of the *Real Property Act* 1900 (NSW) because a view was taken at the time that NSW had no ownership of the seabed. However, the inclusion of “watercourses” as “land” demonstrate that the State considered the allocation of allotments of underwater title to be practicable. Since the Offshore Constitutional Settlement (discussed below), there would appear to be no reason why s. 3 of the *Real Property Act* could not be amended to include land under the territorial sea and internal waters.

Be that as it may, the observations of ACCARNSI with respect to amendments on the certificate of title can be read in this larger context. Given that “land” for the purposes of the *Real Property Act* does not include land below the sea, Bannon J would seem to have had to conclude, as he did, :

> “The Torrens system only guarantees title to existing land, the subject of the Certificate of Title, being land within the State of New South Wales.....The above considerations incline me to the view that in spite of the Certificates of Title ...there was no land in the subdivision extending beyond High Water Mark.....Those Certificates of Title need to be corrected pursuant to s.42 of the Real Property Act, 1900.”

The justification for this alteration is simply that it is required by the effect of the Act, without any necessary reference to the doctrine of accretion. Perhaps, where the title

relates to land that is completely under sea water, it would be more correct not to alter the Certificate of Title, but to cancel it, as it no longer relates to (s.3) "land". (Alternatively, in cases where there was no intention in a grant to have water as a boundary - i.e., the boundaries of the grant are fixed and survive at common law regardless of the submersion of the land later in time, it might perhaps be argued that, bearing in mind that the State's seabed sovereignty, it was sufficient that the land was *Real Property Act* "land" at the time of certification, and that the registration should, notwithstanding the subsequent inundation, be therefore maintained.)

Having said that, this application of the *Real Property Act* does not affect the Crown grant itself, which subject to other considerations which have nothing to do with the *Real Property Act,* remains on foot: effectively, in this example the property owner retains old system title to the granted land, and the land's boundaries remain as per the grant unless or until some common law or legislative rule is found to apply to the contrary.

To quote Fry (*supra* at **2.0**):

> "No proprietary right in respect of any Australian land is now, or ever was, held, by any private individual except as the result of a Crown grant, lease, or licence and upon such conditions and for such periods as the Crown (either of its own motion or at the discretion of Parliament) is or was prepared to concede...." *Dr. T. P. FRY. B.O.L. (Oxon.). S.J.D. (Harv.). Senior Lecturer in Law in the University of Queensland,* LAND TENURES IN AUSTRALIAN LAW [1947] ResJud 158

The failure by ACCARNSI to distinguish between the definition of "land" under the *Real Property Act,* and "land" as defined in a Crown grant is a fundamental error of law.

3.3.1.2.3 Error of Law #3 - Crown Grant Interpretation

ACCARNSI (at 29) puts this proposition: " Land 'lost' to the sea, below HWM, by gradual erosion or diluvion, ceases to be real property, and reverts to the Crown."

One might ask, if such land ceases to be real property, how can it revert, as real property, to the Crown? The statement is completely illogical, unless "real property" is interpreted to mean "land" as defined by s. 3 of the *Real Property Act* (NSW). In that limited sense submerged land is no longer "land". However, as we have seen above, unless the relevant Crown grant of title clearly indicates that a water boundary is intended, the boundary will not move (except for the limited purposes of the *Real Property Act*).

Lord Wilberforce's observation (cited above) in the *Theosophy* case might be repeated:

> "When land is conveyed, it is conveyed subject to and with the benefit of such subtractions and additions (within the limits of the doctrine) as may take place over the years. It may of course be excluded in any particular case, if such is the intention of the parties. But if a rule so firmly founded in justice and convenience is to be excluded, it is to be expected that the intention to do so should be plainly shown..."

Given that we have already noted the Privy Council's finding that where a fixed boundary, rather than a water boundary, is intended with respect to a grant, the doctrine of accretion does not apply, Lord Wilberforce's statement here can be fairly interpreted to mean that an in the case of land with a water boundary in particular, the doctrine of accretion can be excluded by the parties, if their intention is clear. The corollary of this statement is that where there is a fixed boundary which by its very nature excludes the operation of the doctrine of accretion, no such expressed exclusion of the doctrine is necessary - it would be superfluous.

In the *Theosophy* case, Lord Wilberforce observed (*supra,* at 6) that: ..the doctrine of accretion was not excluded by the terms of the Perpetual Lease". (The landowner was the registered proprietor of a perpetual lease from the Crown of some 500 acres of land.) This is an example of a court, quite properly, looking to the legal interest of the landowner as provided for by the Crown grant, rather than merely referring to the Torrens system certificate of title.

As noted at **2.1.4**, the Privy Council had already found, early in the 19th century, that unlike in England, Crown grants of interests in land in NSW were not subject to the rule against perpetuities. Lord Watson observed (*Cooper v Stuart* (*supra* at 294):

> "....assuming the Crown to be affected by the rule against perpetuities in England, it was nevertheless inapplicable, in the year 1823, to Crown grants of land in the Colony of New South Wales, or to reservations or defeasances in such grants to take effect on some contingency more or less remote, and only when necessary for the public good."

These special characteristics of land title in NSW (and similarly in other Australian States) from those in England (or for that matter in the USA) need to be taken into account before citing their cases as authority - the failure to do so constituting a fallacy to which, as shall become evident, ACCARNSI has succumbed.

While the Crown may (leaving aside for the moment issues of compensation) resume a grant at any time, the perpetual nature of a Crown grant of freehold tenure (in particular) makes it otherwise indestructible (except with a very limited exception in Western Australia, where escheat has not been abolished). This is a most fundamental aspect of the appeal of the legal artifice created by a Crown grant. The title may be mortgaged, leased, made subject to licence by agistment, entailed,

bequeathed, made subject to equitable interests, sold, etc. etc., but through all such developments, it persists.

Even the abolition of escheat in NSW in 1863 and its replacement with *bona vacantia* (as explained at **2.1.3**) can be seen as a method of retaining the existence of the grant, even when there is no longer an owner.

It follows that *unless a land title granted by the Crown is expressed to be bound by water (and there is also therein no clear exclusion of the doctrine of accretion)*, its boundaries are indeed fixed, regardless of whether the land becomes submerged or not. A Crown grant does not (usually) warrant the quality of land, and any particular parcel might turn out to be barren, swampy, subject to flooding or rockfalls, or become infested with snakes or locusts or termites or rabbits or cactus or cane toads, so if it happens to gradually submerge beneath a nearby sea, that's just another of the uncertainties associated with being a landowner.

As explained below, legislation by the States (and Northern Territory and the Commonwealth) implementing the Offshore Constitutional Settlement means that NSW has title to subsea land below the low water mark, so the submersion of granted land does not take it beyond the State's sovereign capacity to honour, or indeed, make new grants.

It is clear that even though such submerged land is not registrable under the *Real Property Act* (NSW) as it currently stands, the owner retains title under the common law unless or until it is resumed by the Crown.

Of course, land which has become submerged would ordinarily suffer a loss in market value as a consequence. Further, if it is correct that the submerged land could no longer be registered under the Real Property Act (no longer being "land" according to s. 3), its effective reversion to old system title would add to the costs of conveying, making the asset (ironically perhaps) more illiquid, with an additional depressing effect on the property value. Having said that, the fact of reduced property value is irrelevant to the existence of title.

Further, given that any Crown grant in NSW was issued by the Crown in right of NSW (and *a fortiori* that the now submerged land remains within State's sovereign control), any assertion by the Crown (State) that now-submerged land was to revert to the Crown merely by virtue of the submersion, without compensation being made, would be unenforceable as being:

(a) repugnant to the grant; and

(b) estopped. (That is, the Crown, having made the grant in perpetuity, could not now argue the opposite, namely that the grant was not made in perpetuity. See further below: **6.1 Proprietary Estoppel**.)

(It would also be in breach of Article 17 of the *Universal Declaration of Human Rights*, which has however no legal effect with regard to land in NSW. See for example: **9.0**)

In short, the ACCARNSI statement that land lost to the sea reverts to the Crown is wrong in law, except in particular cases where a Crown grant of land is expressed to be bound by water (and there is also therein no clear exclusion of the doctrine of accretion): it is only in those particular circumstances that the doctrine of accretion can apply. Even in these cases, the landowner has the common law right, flowing from the Crown grant, to take steps to preserve the land from inundation: *Warringah Council* case (infra), in which case any fact of accretion would not arise..

3.3.1.2.4-5 Errors of Law #4 & #5 - Escheat

ACCARNSI (at 32-33) opines that: "Land reverts to the Crown under the principle of escheat. Because the title of land lost below HWM through erosion or diluvion, reverts to the Crown, it is likely that this transfer occurs through the principle of 'escheat', a mechanism of land transfer in the feudal system of land tenure, now described as 'the doctrine of tenure'." (Legal Online citations omitted.)

This view is based on two errors of law:

(a) more than a century before the *Saunders* case, escheat was abolished in NSW and replaced by *bona vacantia viz.,Lang's Act (1863)*; and

(b) escheat (like *bona vacantia, but in a different way)* related to the passing of ownerless title, not the passing of extinguished title.

These points of law are already explained above at **2.1.3**.

It must be clear that land, purportedly lost to by a landowner to the Crown, cannot as claimed by ACCARNSI, revert to the Crown under the "principle of escheat". It is a concept in relation to NSW land which is not only completely inapplicable, but also completely abolished.

3.3.1.2.6 Error of Law #6 - Offshore Constitutional Settlement

ACCARNSI (at 28-29) claims: "Lands under coastal waters **are held in trust by the Crown for public uses.**" (Emphasis in original.) Some American and old English cases are cited for this proposition, but none from Australia. The inference is that the "public interest", whatever that might be, excludes the possibility of any granted "private interest".

The legal position is that an Australian State is not bound by any such doctrine. Pursuant to the Offshore Constitutional Settlement legislation (explained below), a State has title to the seabed to the limits of the territorial sea. Further, it can legislate as it chooses with respect the public and/or private use of the seabed and sea, provided that it is "for the peace, order and good government" of the State and does not conflict with validly enacted Commonwealth legislation.

See for example *Union Steamship Company of Australia Ltd v King* (1988) 62 ALJR 645, (a case heard before the Offshore Constitutional Settlement) where the High Court, in a unanimous judgment, found that the power conferred on the States to make laws for their own peace, order and good government was plenary in nature and capable of extraterritorial application. Although, for that power to be validly used, some link or nexus between the between State legislation purporting to have offshore effects and the State had to be established, that test could be satisfied by even a remote or general connection. (See also more generally Cullen (*op. cit.* at 101-102).)

The law of seas and submerged lands in Australia has been eventful.

Recent history in the field has been briefly summarised by the majority High Court judgment in *The Commonwealth v Yarmirr Yarmirr v Northern Territory* [2001] HCA 56 at 30-31 (the *Yarmirr* case):

> "At federation, the territorial sea off the coast of Australia, recognised by international law, extended three nautical miles from low-water mark (*Bonser v La Macchia* (1969) 122 CLR 177 at 190-192 per Barwick CJ, 201-202 per Kitto J, 209 per Menzies J, 213 per Windeyer J.). In international law, waters on the landward side of the baseline of the territorial sea form part of Australia's internal waters (*Convention on the Territorial Sea and the Contiguous Zone*, Art 8). For much of the 20th century it was thought that the States had some sovereign or proprietary rights in respect of the territorial sea – the area from low-water mark to three nautical miles out to sea. In the *Seas and Submerged Lands Case* (1975) 135 CLR 337 it was held, however, that the boundaries of the former colonies ended at low-water mark and that the colonies had no sovereign or proprietary rights in respect of the territorial sea. Thereafter, the Commonwealth and States arrived at the offshore constitutional settlement that was reflected in, among other Acts, the *Coastal Waters (Northern Territory Powers) Act* 1980 (Cth) ("the NT Powers Act") and the NT Title Act....
>
> By s 5(a) of the NT Powers Act the legislative powers of the Northern Territory Legislative Assembly were extended to the making of
>
> "all such laws of the Territory as could be made by virtue of those powers if the coastal waters of the Territory, as extending from time to time, were within the limits of the Territory".

By s 4(1) of the NT Title Act (which commenced operation more than 12 months after the NT Powers Act (The NT Powers Act commenced operation on 1 January 1982 and the *NT Title Act* commenced on 14 February 1983) it was provided that:

"By force of this Act, but subject to this Act, there are vested in the Territory, upon the date of commencement of this Act, the *same right and title to the property in the sea-bed beneath the coastal waters* of the Territory, as extending on that date, and *the same rights in respect of the space* (including space occupied by water) *above that sea-bed, as would belong to the Territory if that sea-bed were the sea-bed beneath waters of the sea within the limits of the Territory*." (Emphasis in original.)

Similar legislation was passed with respect to the States (*Coastal Waters (State Powers) Act* 1980 (Cth) and *Coastal Waters (State Title) Act* 1980 (Cth)) and was "designed largely to return to the States the jurisdiction and proprietary rights and title which they had previously believed themselves to have over and in the territorial sea and underlying seabed" (*Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340 at 358). Although the Northern Territory stood in a position different from the States, the terms of the offshore constitutional settlement were extended to it."

Professor Stuart Kaye in "The offshore jurisdiction of the Australian states", *Australian Journal of Maritime and Ocean Affairs* (2009) Vol 1(2) at 38-39 explains further:

"In 1979, the negotiations [between the Commonwealth and the states] concluded in the Offshore Constitutional Settlement (OCS)...The OCS proceeded from the High Court and the *Seas and Submerged Lands Act* position that sovereignty over all offshore areas (aside from those that were part of a state at Federation) was vested in the Commonwealth. However, the OCS surrendered to the states jurisdiction over the sea and seabed within three miles of the baselines of the territorial sea. This allowed the states to maintain the traditional control they had enjoyed over the territorial sea prior to the Seas and Submerged Lands Act, without the necessity of altering state boundaries.

The OCS was achieved by means of conjoint state and Commonwealth legislation, and came into effect in 1983."

It has further been observed (Cullen *infra.* at 109-110):

"In essence, what the [OCS] settlement attempts to do (probably successfully from a constitutional point of view) is:

1. Give the states a virtually unfettered ability to make laws having effect in adjacent internal waters and the traditional 3 nautical mile territorial sea (collectively defined in the settlement as 'coastal waters');

2. Give the states title to their coastal waters *without* actually extending the boundaries of any state; and

3. Put the whole settlement effectively beyond any risk of dismantling by a future federal government hostile to it."

Interestingly, Cullen cites an extract of a parliamentary debate in the Senate, where the shadow Attorney-General Gareth Evans made a penetrating point with respect to title:

"...Nor I might add, has the Commonwealth ever to my knowledge articulated clearly its motives in passing this titles legislation [pursuant to the OCS], but it must be said that the Victorian Attorney-General, Mr Haddon Storey, rather let the cat out of the bag when he said in the Victorian Parliament, when this request legislation was going through, that its real object was to entrench the settlement which comes before the Parliament at the present time by putting the Commonwealth in a position where it had divested itself of a proprietary right so that if it ever subsequently tried, by legislation, to re-establish its proprietary rights - the ownership over the seabed, it would be confronted with another section of the Constitution, section 51(xxxi),which states that in respect of any compulsory acquisition of proprietary rights the Commonwealth has to pay just terms to the State from which it has acquired the property in question." - Richard Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes* (1990) at 123-124.

(The Attorney-General's observation might however be qualified with respect to the theoretical possibility of a valid use of the Australian Constitution's s.51(xxix) external affairs power over the seabed, without re-establishing any proprietary rights, which would not trigger the operation of s.51(xxxi) to pay compensation: *Tasmanian Dam* case (*infra*).)

In short, a State has sovereignty with respect to inland waters at common law - and, since the implementation of the OCS, with respect to the territorial sea and any adjoining internal waters, which are outside the boundaries of the State, it has jurisdiction to make laws having effect thereto and can assert title to the seabed.

It is clear that the ACCARNSI assertion that: "Lands under coastal waters **are held in trust by the Crown for public uses**" has no basis in any of this law.

3.3.1.2.7 *Saunders* case Curiosities & More Errors of Law (#7, #8, #9, #10)

The *Saunders* case was actually a criminal matter, with different burdens of proof from those in a civil matter, which cases relating to waterfront rights and the doctrine or accretion typically are. A key issue was whether those charged were occupiers of the land in question for the purposes of the *Clean Waters Act* (1970) NSW.

It is in this context that Bannon J considered it necessary to examine questions of title (*Saunders* case at 17):

> "The questions of title referred to were not addressed by Counsel. However, the Court dealing with prosecutions on criminal charges must consider every hypothesis consistent with innocence whether addressed by Counsel or not."

Ordinarily, a landowner would be expected to defend his title at every turn, but curiously, in this case, a finding of extinguishment of title might serve to demonstrate (within the context of the criminal charge) an absence of occupancy, and result in a not guilty verdict. So, it would seem that the defendants, for the purposes of this case, would have been gratified to be found to have had no title.

In exploring the question of title, Bannon J, as noted previously, relied ultimately on the *Real Property Act* to find that the submerged properties concerned were no longer "land" as defined by the Act, which finding was relevant to him in deciding the issue of occupation. Bannon J's observation with regard to the limited scope of his findings as to title should be noted (*Saunders* case at 18):

> "While the above conclusions may not be binding in civil proceedings as to title, or in a possessory action between the Crown and the defendant, they are necessary in deciding the question of occupation."

This might be taken as another way of saying that his conclusions on the topic of title should not be presumed to be authoritative in civil cases.

Indeed, as we have already noted, on the subject of title, the *Real Property Act* is only a part of the story. As to other aspects relating to the issue of title, Bannon J, with respect, seems to have been confused and wrong, and was apparently not assisted in this by the prosecutor, who could have seized some advantage in doing so.

In this regard, we note Bannon J's reliance on two paragraphs by Jacobs J in the *Seas and Submerged Lands* case (*Saunders* case at 16-17) and the High Court's finding in that case that "the territories of the Australian States end at Low Water Mark". Curiously, he has quoted Jacobs J, whose judgment was in a minority (2-5), in a judgement 175 pages in length, and which had already, at the time of his judgment, been rendered obsolete in material respects for over a decade by the OCS legislation. His Honour's lack of understanding of this and the irrelevance of the *Real*

Property Act, with respect, is confirmed by his statement that: "The definition of "seas of the State" in s.4 of the Act appears to be based on an erroneous assumption."

S. 4(5) of that Act provided:

> (5) In this section:
>
> "seas of the State" means:
>
> (a) the territorial sea adjacent to the State, and
>
> (b) the sea on the landward side of the territorial sea adjacent to the State that is not within the limits of the State.

The reader might recall from the above exposition of the law of seas and submerged lands in Australia that this is precisely the sort of language to be expected in legislation, and so there is no "erroneous assumption" by the State of NSW here. The *Saunders* case, having been heard in 1995, would not have had the benefit of the High Court's *Yarmirr* case summary (reproduced above), but still, the new laws were known and well established: for example, Cullen's analysis (*op. cit.)* had been published in 1990.

Bannon J also seems to have misunderstood an important aspect of the *Theosophy* case: (see *Saunders* case at 17):

> "The Torrens system was intended to provide certainty as to title, but not to otherwise displace those parts of the law of property dealing with the gaining or loss of title by accretion or diluvion. Defined boundaries make no difference. *Southern Centre of Theosophy Incorporated v State of South Australia* 1982 AC 706 at 716, 717. "

The first sentence concerning the Torrens system is clearly correct, but the second seems to demonstrate a misunderstanding of the *Theosophy* case. As we have seen above, the Privy Council was making the point that if a defined boundary in a grant indicated, in all the circumstances, that the boundary was intended to be bound by water, then the doctrine of accretion would apply, but if it was simply a defined boundary, not intended to be necessarily bound by water, then the doctrine would not apply. Bannon J fails to observe this distinction.

Given such a series of errors of law, and any reliance on the *Saunders* case as authority for the proposition that any "right line" boundary which becomes submerged, beyond the territory of the State would cause the title to be lost to the Crown, as ACCARNSI seems to do, would be completely misplaced.

The *Saunders* case was appealed by one defendant: *Environment Protection Authority v Leaghur Holdings Pty Limited* Unreported, Court of Criminal Appeal

(NSW), Allen, Sully and James JJ, 26 June 1995. Extracts and commentary in relation to it may be found in: Lachlan Roots, Freehill Hollingdale & Page Sydney, *Pollution - Occupiers and the Definition of "Pollution" in the Clean Waters Act*, Australian Environmental Law News (1995) Issue No. 3 at 41-42.

According to Roots:

> "Bannon J held that because the relevant land had been lost to the waters of Bateman Bay, Leaghur, although the registered proprietor, was no longer the occupier of that land for the purposes of the Act and accordingly could not be guilty of failing to have complied with the written notice issued pursuant to section 27A of the *Clean Waters Act* 1970 (NSW).....
>
> ...The issue in the case essentially became whether there was evidence before Bannon J from which it could be inferred that there was a reasonable possibility that Leaghur was not the occupier of the relevant land encompassed by the written notice.
>
> The Court held that there was evidence raising such a reasonable possibility, namely, that the land had been lost to the sea as a result of a gradual and imperceptible erosion and that the land so taken reverted, in accordance with common law principle, to the Crown: see *Southern Centre of Theosophy Incorporated v State of South Australia* (1982) AC 706 at 720. Allen J stated:
>
> > "The very loss of lands to the sea ordinarily raises a reasonable possibility that the loss has been occasioned by gradual and imperceptible erosion. No doubt there would be circumstances in which it would not raise that as a reasonable possibility... But it is manifest in the present case that the reasonable possibility of loss by gradual and imperceptible erosion was raised by the evidence of the loss of the lands. That possibility raised by the evidence was one on which reasonable doubt could be rested as to whether the company was the occupier of the land lost to the sea. The requirement of section 27(2) of the *Pollution Control Act* 1970 of evidence having been given 'to the contrary' in respect of occupation was satisfied, casting upon the [EPA] the burden of proving occupation to the criminal standard... [I]n the present case, as ownership of the land as evinced by the registered title was the only matter relevantly connecting the company to the land, evidence tending to put in doubt the fact of ownership tended to put in doubt also the fact of occupation, hence satisfying the requirement of subsection 27(2) of the *Pollution Control Act* section at pp 8-10."
>
> Given that the company had satisfied the evidentiary onus in section 27(2) of the Pollution Control Act 1970 (NSW), it then became incumbent upon the [appellant]

> EPA to prove that the company was nonetheless still the occupier of the land. Being unable to do so, it was clear that the appeal could not succeed on this point."

Given that the appeal was focused on the issue relating to "occupancy" for the purposes of the applicable pollution legislation, the Appeal Court's finding of a mere "reasonable possibility" that Bannon J's findings as to title held water was all that was needed to decide the issue - and such a limited finding can hardly be regarded as a final authority on the general topic of the scope of the doctrine of accretion. Doing so must be in itself considered to be an error of law (#7).

In short, reliance on the *Saunders* case as authority for the proposition that any "right line" boundary which becomes submerged, beyond the territory of the State would cause the title to be lost to the Crown, as ACCARNSI seems to do is based, *inter alia*, on Bannon J's errors of law, namely that:

#8 - reliance was placed on Jacobs J's observations which had in material respects been rendered obsolete by Offshore Constitutional Settlement legislation;

#9 - "seas of he State" as defined in s. 4 of the *Clean Waters Act* was considered to be an "erroneous assumption", when it was not;

#10 - the failure to understand the distinction made in the *Theosophy* case that a defined boundary in a grant may, according to the particular circumstances of each grant, indicate either a water boundary, or a fixed boundary, that latter of which would remain fixed regardless of changing water levels, whereas the former would ordinarily be subject to the doctrine of accretion.

These errors of law by Bannon J. would not necessarily have changed the result of that case, namely that there was a reasonable doubt that the defendant was an "occupier" for the purposes of the legislation.

However, this legal rubble of ten identified errors of law provides no sound foundation for the authority as asserted by ACCARNSI.

3.3.1.3 Right to Preserve Land, and Compensation

The *Saunders* case has been cited by ACCARNSI (at 37) to support the proposition that "If the whole of the area of a land title bounded by water is eroded away so that no remnant of it remains, the whole title is lost by the private property owner" The sections above have discussed how such a statement can be misleading in law.

It might be noted that there is nothing in the doctrine of accretion to prevent an owner from taking action to stop the land from being taken by erosion, any more than if the

land is threatened by sudden events. Indeed, in the *Saunders* case (at 20), Bannon J observed:

> "*It appears extraordinary that attempts to protect land from the sea by placing groynes of rubber tyres in the water amount to pollution within the meaning of the Act. Property may be lost in the absence of a licence to protect it. However, that appears to be a consequence of the Act, one which I think requires the attention of the Legislature.*"

Reference might also be made to another case where Warringah Council sought a mandatory injunction requiring the demolition of a seawall erected by a property owner. The Court refused to grant the injunction and allowed the wall to stand. In *Warringah Council v Franks & Ors* [1999] NSWLEC 65, Bignold J held:

> "...the first Respondent in so acting to protect his property, was doing no more than what other beachfront owners had apparently done to protect their properties from damage by avulsion by the sea during the significant storm events experienced at Collaroy/Narrabeen beaches in the 1960s and 1970s....what the Respondent did....appears to be indistinguishable from what other beachfront landowners have done over the past decades to protect their valuable properties from storm damage caused by the sea, inasmuch that in the emergency conditions then prevailing, seawalls have been erected without regard to the relevant planning laws....
>
> ...In my judgment, to grant the Council's claim in its amended class 4 application to a mandatory injunction requiring the immediate removal of the seawall would involve a manifestly disproportionate remedy for the admitted breach of the *EP&A Act*, and may involve an outcome that is unintended (namely the restoration of the beachfront to its threatened and damaged state caused by the storm which prompted the first Respondent to cause the seawall to be erected.)"

Clearly, the owner had a right to protect his land and the court would not allow a breach of planning law to prevent him from doing so: see **4.5.2** below for more detail on this point.

3.3.1.4 Conclusions As to Seaside Swindling

Common law title owners of freehold and leasehold property have been complaining about impairment of property rights caused by the operation of the *Coastal Management Act 2016* (NSW). A pattern of behaviour reported by landowners, and apparently corroborated by Ministerial correspondence, involves:

- adversely rezoning properties, which has the effect of reducing property values (and by inference, their subsequent resumption valuation;

- preventing landowners from performing defensive works on waterfront properties;

- the adoption of faux legal advice that any such undefended and inundated land shall necessarily revert to the Crown, consequently avoiding any need to adopt a process of resumption or compensation; and

- no right of a fair hearing being granted to affected landowners.

The Act of Parliament governing coastal management makes no provision for recognition of injurious affection, much less compensation for same resulting from the operation of the Act. Consequently, it is no surprise that neither the Minister, nor his advisory Coastal Panel, nor the local Council, and nor the climate change activist (funded by the Commonwealth Government) evince any concern whatsoever for any injurious affection caused to landowners. To the contrary, the Minister and the advisory panel consider the exercise to be worthy of commendation.

The concern of the Minister for Local Government, the Hon. J.J. Cahill M.L.A., in 1945, for “money to be used to compensate those whose lands have been injuriously affected”, and the similar concerns of textbook writers in the following decades (see **3.5**) have been completely forgotten. That the arbitrary deprivation of property rights is a breach of human rights, is not a consideration.

There has never been an elected government in NSW (or any other Australian jurisdiction) which has campaigned for office on the basis that it would legislate to restrict land uses, while leaving the associated costs to be borne by uncompensated private landowners - yet that is what is being done. There is an element of subversion which is undeniable.

The Coastal Panel, in adopting the *Saunders* case as a basis for avoiding compensation to property owners, give no appearance of having sought the advice of an “independent legal advisor” as contemplated by the Act: the ACCARNSI document was created by a climate change activist, and a review by a legal practitioner would have quickly revealed some of its legal fallacies. There is also no evidence that the Minister sought the advice of the Crown Solicitor, which avenue must have been available to him. In this way, the competence of the Coastal Panel and the Minister with respect to the seeking of sound, independent legal advice with respect to an important legal issue must be questioned.

Notwithstanding that decisions approved by the Minister were based on bad legal advice, the opaqueness of the administrative process (in this instance involving the Minister, the Coastal Panel, the Council and the Activist) makes it substantially invisible, or impenetrable, to affected landowners: the public availability of correspondence such as in this instance is not automatic, or readily accessible. (For example, how does one know to search for correspondence, the existence of which is not known to one?)

It should be noted that the views of the NSW Bar Association supporting the right to compensation on just terms for the deprivation of property rights, made in 2013 (as noted at **1.1**, **3.3** and **4.1**), have been completely ignored by the NSW government, on the evidence of the subject 2016-dated correspondence.

The practising legal profession (other than the Bar Association) has also failed landowners by simply taking the legitimacy of the *Coastal Management Act* (and indeed other like legislation adversely affecting property rights without compensation such as adverse rezoning more generally, vegetation management restrictions, Ramsar and other environmental restrictions, heritage buildings, aboriginal heritage, koala regulations etc.) at face value, when they should have either:

1. used the existing law of tenure to challenge laws made by the Crown repugnant to Crown grants (the basis for this argument being made through the course of this paper); and/or

2. adopted a practice of warning prospective land purchasers about sovereign risk: namely that, whatever uses might be possible at the time of purchase, there is a risk that at any time in the future, the state government (and even the Commonwealth government purportedly relying upon its external affairs power) might introduce new restrictions (even in ways not currently contemplated) purporting to prevent many such uses, without the payment of compensation. In short, solicitors should be warning client land purchasers of the sovereign risk of future injurious affection.

Courts are not in a position to introduce cases for hearing, but rather can only hear those matters and arguments presented to them for decision. Given this essential limitation of power, and the fact that courts have not been presented with cases challenging planning and like legislation on the basis of Crown grant repugnance, they have had, accordingly, no opportunity to follow existing authorities on the issue.

It would be fair to infer that solicitors have not in the past warned client land purchasers of the sovereign risk of future injurious affection. This group of purchasers would include seaside landowners in NSW. It is because of this failure, and the manifestly unexpected, unjust and oppressive uncompensated restrictions placed on landowners by the NSW Parliament, its Minister and bureaucracy, as the result of an essentially subversive process that has never had any specific electoral validation, that “seaside swindling” would be a justified sentiment understandably held on the part of landowners.

Hence the strident objections of the above-quoted NSW Coastal Alliance media release.

The culture of impunity evident in the treatment of landowners pursuant to the Act is the consequence of a jurisprudential void (explained at **3.5**ff). This void, like a celestial black hole, has sucked common sense and justice, and human rights, beyond the event horizon into an abyss of unfathomable oblivion.

3.3.2 Heritage Protection - Buildings, & Aboriginal Heritage

Since the early 1970's, there has been a gradual, but extensive spread of legislative controls over private land, extending beyond the usual scope of town planning, but legislatively modelled on it, which has generally not been accompanied by any provision for compensation for consequent losses suffered by unlucky landowners. Not all landowners are adversely affected: essentially it is just a proportion who are stricken by the resulting "lottery of losers". The just-discussed *Coastal Management Act* 2016 (NSW) is an example.

Such restrictions on land use are by and large intended for the public benefit, and in that sense may be considered to be very desirable. Where they relate to Crown land, or alienated land where the Crown holds title, their costs are automatically borne by the public and there is no issue of injustice. However, where they are imposed on alienated lands held privately, then without compensation, any associated cost is borne by the randomly affected landholders, rather than the public, who are the intended beneficiaries. It is this apparent injustice which is the concern here - not the land protections themselves.

Some of these legislative controls might be grouped in terms of: heritage buildings and public spaces; and aboriginal heritage. It is not intended here to provide a detailed history of these, but to provide a brief outline of their nature and development and indicate the scope of injustices being perpetrated.

3.3.2.1 Heritage Protection - Buildings & Public Spaces

Heritage protection of buildings is not new, having existed since the formation of the National Trust in NSW in 1945. Prior to the early 1970's, it seems to have been concerned with government buildings, and privately owned buildings occasionally bequeathed to the Trust.

In the post-World War II period, but particularly into the 1960's, there was extensive building development in cities. For example, the construction of the freeways to the north of the Sydney Harbour Bridge required the demolition of a very large area of nineteenth century terrace houses in the North Sydney area. No one thought anything of it. They were old, and the new freeways - still an essential part of today's transport infrastructure - were the way of the future, and tunnelling technology was underdeveloped and hugely expensive.

By the early 1970's, there had been sufficient development, to cause the stock of old commercial and residential buildings to diminish, and the developing relative scarcity of architecturally significant examples began to attract attention. Should it all go?

It was in this general context that a group of middle class ladies resident in harbourside Hunters Hill decided that they wanted to save Kelly's Scrub from development. Having had no success going through the "normal channels", they turned to a working class communist union leader - the now (not until then) famous Mr Jack Mundey - to see if he could assist. The story is recounted as follows:

> "In September 1970, James and 12 other neighbours gathered at All Saints parish hall and christened themselves the 'Battlers for Kelly's Bush'. The group, which the Hunters Hill Council would dismiss as "13 bloody housewives", elected [Betty] James as President,.... Most of the women were lifelong Liberal Party voters who had never been involved in politics.....
> .....The President of the Builders Labourers Federation (BLF) met with The Battlers and went to the BLF executive, who supported them in principle. The trade union support resulted in the first "Black Ban" called for by the BLF over an area of land (on June 16/1971)(Pitt, 2011). Black Bans would later become known as "Green Bans" for their active pursuit of of the maintenance of green space.
> .....With the Union Green Ban in force, [the landowner] A,V. Jennings were eventually forced to sell the land to Hunter's Hill Council" (Extracts from: New South Wales Office of Environment and Heritage, "Kelly's Bush Park - History")

The key point of this story, for our purposes, was that the Crown, prior to preserving the land to remain undeveloped, (compulsorily) acquired the privately owned land for value - there was no legislation depriving the property owner of the use of the land with no compensation.

According to the National Trust (NSW):

> ".....Jack Mundey and the BLF led the green bans movement in the 1970s.....The movement saved the following areas and their built heritage from destruction:
>
> - The Rocks
> - Woolloomooloo
> - Darlinghurst
> - Glebe
> - Redfern
> - Newcastle
> - Various heritage buildings in Sydney's CBD
> - Kellys Bush Park in Hunters Hill
> - Centennial Park and the Botanical Gardens"
>
> ("The National Trust (NSW) pays tribute to Jack Mundey", News - NSW, 13 May 2020.)

It seems that, far from actively seeking to develop a heritage protection movement, Mundey initially became involved in heritage preservation on the initiative of local

residents at Hunters Hill, and then found himself, as leader of a union involved in construction (and demolition) projects, to have a *de facto* veto power over site demolitions. He was on the cusp of a wave of rapidly changing community thinking about the nature of developments and heritage protection, and surfed it. Sentiment changed so quickly that government was left in his wake for quite some time.

On one hand, the legality of maintaining green bans to maintain the *status quo ante* would have been highly questionable. On the other, was the possibility that developers could, by quickly demolishing particular sites, achieve a *fait accompli,* regardless of the merit of the particular circumstances.

From a developer's viewpoint, the rapid transition to a movement to protect heritage could be seen to have constituted an unwelcome (at least in the short to medium term) turn in the market, but the development industry is well experienced in unexpected market developments, for example: rising interest rates; oversupply of housing or office developments; union industrial action, and the like.

A key difference between this "change in the market" and all the other types however is that, with the subsequent validation by state governments of the use of heritage listings to inhibit development, without compensation, property owners suddenly found, often to their cost, that their ownership rights were truncated, or "sterilised".

Notwithstanding that Jack Mundey was a proud communist, there does not appear to be any indication at all that not compensating private property owners for losses was part of his agenda: his focus was simply to preserve properties for the time being until government took control of the process. To the extent that state governments have opted to use heritage listings, without provision for compensation to adversely affected owners, in the decades since then, that has been the exclusive responsibility of those governments.

Heritage protection laws spread rapidly through the states and the Commonwealth during the 1970's:

> "Formal Australian Government involvement in the conservation of historic heritage places dates from the mid-1970s when, following the Hope Committee of Inquiry into the National Estate (CoI 1974), the Australian Heritage Commission was formed (in 1976).... Reflecting, in part, the Constitutional division of powers, there were no legal restrictions imposed by the Australian Government on private owners in the way they managed, maintained or disposed of listed properties. However, restrictions were imposed on the actions of Australian Government Ministers..... the current [2006] three-tier framework was introduced in 2004.
>
> State and Territory government involvement in the conservation of historic heritage places also dates from the mid-1970s, with the passage of separate legislation to identify and protect significant heritage places and the environment;

commencing with Victoria and quickly progressing to New South Wales and South Australia. Arguably, it was political activism in the 1960s and 1970s — in the form of 'green bans' and the like, stopping bulldozers from demolishing old buildings in major cities — that finally led to governments adopting more formal arrangements, with mechanisms for the identification, protection and conservation of historic heritage places." (Productivity Commission 2006, *Conservation of Australia's Historic Heritage Places*, Report No. 37, Canberra at 2. ("PC Report". Further details of laws administered at Commonwealth, state and local government levels are detailed in the report.))

The PC Report notes a key distinction between "planning" and "heritage" controls:

"While there are many common elements, there are also fundamental differences between the ways planning controls and heritage regulatory controls are applied at the local level. Planning uses zonal controls applying *common* restrictions on all properties within a designated area. Heritage controls, by contrast, apply added restrictions selectively to individual properties, irrespective of zone." (PC Report (*ibid*. at xxii)).

Four types of costs associated with heritage protection legislation identified in the PC Report can apply to private property owners:

"For many historic heritage places, contemporary use and enjoyment, and ongoing adaptation and development by the owners (government and non-government (private)) are compatible with and provide sufficient incentives for the continued conservation of their cultural values. However, for some places conservation of their heritage significance necessarily involves costs to individuals and the community. These costs include:

- the costs of the heritage regulatory systems;
- the added costs above normal repairs and maintenance for conservation of the heritage features;
- costs of the compromises to contemporary use and enjoyment to retain them; and
- the opportunity cost of forgone development opportunities otherwise permitted for the property.

Where the places are government-owned, governments, as representatives of their communities, can directly consider such costs and weigh them against the cultural benefits conservation of the places provides to their communities. Where places

are privately-owned, the owners have limited ability to capture the wider community benefits of conservation." (PC Report (*ibid*. at xix-xx)).

It is further bluntly concluded that: "For privately-owned places, the existing arrangements are often ineffective, inefficient and unfair." (PC Report (*ibid*. at xviii)).

As The Hon. Ian Callinan AC has observed even more bluntly:

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

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

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

Laws to that effect have the further salutary result of discouraging excessive and indiscriminate listings." (Callinan (*supra*).)

Callinan's final point in that passage was in fact verified in the PC Report which found that "some in the community have an incentive continually to seek more listings as they do not bear the costs of conservation" (Finding 7.4 of PC Report (*supra* at 172)).

Some concrete examples of the types of losses alluded to by Callinan were provided in the PC Report (supra at 171) as follows:

"Box 7.3 **Cost of heritage listing**

Don Brew highlighted the additional maintenance costs of conserving a heritage property:

> ... I just went through in replacing a slate roof and doing some joinery work, I think I spent something like $70,000 to $80,000. In a straightforward house that would have been maybe 30 or 40. So there is about a $40,000 differential. You could almost say twice the cost just to maintain the house faithful to its original structure. (DR trans., p. 130)

The Property Owners Association of Victoria discussed the impact of listing in Stonnington:

> In Stonnington, these heritage orders have seriously devalued the properties compared to previous real valuations by over 25% on average. The foremost valuer Herron Todd – an international firm – has ... measured the devaluations specifically for 300 properties in Malvern, and in many cases, the losses exceeded $100,000 in 1998 dollars. After the mortgage, all their assets – gone. (sub. 134, p. 5)

A number of inquiry participants provided an independent valuation of the impact of listing on the value of their property. For example, Saman Rahmani:

> I purchased this house in good faith in October 1998 with no indication of any potential heritage listing. This house was and is the perfect candidate for demolishing and rebuilding. I would never have purchased this house if there was the slightest hint that it would have heritage significance ... I have since obtained an official valuation for my property. It clearly indicates that if it becomes listed as a heritage item its value will drop by $170,000. (sub. DR214, pp. 1,3)

Diana Anderson:

> My Mother and Father worked very hard to buy the land and build the property which was completed in the early 50's. Dad has since died and Mum lives there alone. ... We had some independent Real Estate Agents value the property with and without the Heritage listing on it, and they estimate that Mum will lose approximately $500,000 when she sells it, because of the heritage listing. (sub. DR202, p. 2)

David Miller, speaking about the Victor Harbour RSL Clubrooms:

> We have had appraisals by two separate land agents in the local town; they have said that the value of the property with the heritage listing in place, as you see it now, is in the vicinity of $500,000. If we didn't have the heritage listing on there, given that it's on the main boulevard right in front of the seashore, they start talking 1.2, 1.3, 1.4, 1.5 million dollars. (DR trans., p. 316)

John and Janet Boyd:

> ... we engaged the services of a fully qualified property surveyor at a cost of $700. His valuation put the value without heritage listing at $720,000, and with heritage listing at $600,000, a reduction of $120,000. (sub. DR373, p. 1)"

Below is a more recent example of a heritage listing causing loss to the property owner (extracted from Clay Lucas, "Permanent heritage protections stop demolition of Festival Hall", *The Age*, 20 November 2018):

> "A plan to demolish Festival Hall and build apartments on the site of the West Melbourne music and sports venue may have been foiled by permanent protections being granted by heritage authorities.....
>
> The Victorian Heritage Council has issued a decision that the building – which covers a sprawling 4100-square-metre site within easy walking distance of the CBD, Docklands and North Melbourne – cannot be easily demolished....
>
> If you go in there and look at the urinals they said must be saved, you would just scratch your head," said Chris Wren QC, a prominent planning barrister, and a one of the major shareholders of Stadiums Pty Ltd, the company that owns Festival Hall.
>
> The company wants approval from Melbourne City Council for 179 apartments across two towers, one nine level and the other 16. The firm has previously flagged it would sell the site if it got approval for the project.....
>
> Asked what the next step for the venue was, Mr Wren said: "I'm buggered if I know."
>
> He said the building could not make a profit in the long term. "The red line is catching up to the black line, and will [overtake] it very shortly."
>
> Melbourne's other major venues, including Margaret Court and Rod Laver arenas, were getting massive injections of public funding. "Private enterprise cannot compete," Mr Wren said."

In this particular case, the absence of compensation for having a heritage listing imposed might be seen as adding insult to injury, the decline in business and profitability of Festival Hall having been in large part due to the development of publicly funded alternative venues. Unlike the building of alternative government-funded venues however, the imposition of the heritage listing directly relates to the land tenure of the owners.

3.3.2.2 Aboriginal Heritage Protection

This is a slightly newer and developing area of heritage protection relating to land use. According to the Australian Government Department of Agriculture, Water and the Environment ("Indigenous heritage laws" webpage) :

> "Generally Australia's state and territory governments are responsible for the protection of Australia's Indigenous heritage places. All states and territories have laws that protect various types of Indigenous heritage.
>
> The Commonwealth is responsible for protecting Indigenous heritage places that are nationally or internationally significant, or that are situated on land that is owned or (managed by the Commonwealth. This protection operates under the *Environment Protection and Biodiversity Conservation Act 1999*."

(The scope of potential invalidity of the EPBC Act in relation to its application with respect to freehold and leasehold land is examined in detail at **8.0**.)

(The extent of such legislation at the Commonwealth, state and territory levels of government is indicated, as it relates to Geoscience Australia's fieldwork activities, in: "Cultural Heritage Legislation (Indigenous and non- Indigenous) Guidelines", *Australian Government Geoscience Australia*, 17 August 2018.)

Currently:

> "Numerous State governments are actively progressing cultural heritage law reform in their own jurisdictions. Not unexpectedly, progress is uniformly slow as policy makers seek to balance the interests of all stakeholders." ("Native Title Year in Review 2019 - What is happening in the Indigenous cultural heritage space in each State?", *Ashurst*, 28 apr 2020,)

As with other areas of heritage protection, the protection of aboriginal heritage may rightly be considered as being highly desirable. However, where protection of such heritage on privately owned land is provided for in legislation, legislators may once again be tempted to create a "lottery of losers", where seemingly random landowners find their ability to use their land suddenly being restricted, for a public benefit, but without any compensation being offered.

An example of this is provided by *Mehmet v Carter* [2020] NSWSC 413 (the "*Mehmet* case"), as summarised by Ashurst (*ibid.*):

> ".....the NSW Supreme Court [in Equity] considered whether the existence of Aboriginal objects on land (within the meaning of the *National Parks and Wildlife*

Act 1974 (NSW) (NPW Act) is capable of constituting a defect in title. The answer is a firm yes, depending on the object's nature and location. The Court's conclusions were based on the fact that an Aboriginal object is property vested in the Crown due to the operation of the NPW Act and because of the potential development constraints that may arise from their presence under the NPW Act. The significance of the Court's assessment in this case, was that the vendor's refusal to respond substantively the purchaser's inquiries regarding the Aboriginal objects amounted to a repudiation of the sale contract, entitling the purchaser to terminate. The Court also considered that the purchasers would have been entitled terminate the contract. This is because the development constraints arising from the undisclosed presence of one particular Aboriginal object on the land amounted to a substantial and material defect in title. Vendor beware!"

Thus, the existence of "Aboriginal objects" on land, being capable of constituting a defect in title, seems to have been sufficient to discourage the purchaser from completing a contract for purchase of the land, which the Supreme Court in Equity agreed to validate.

This brings to mind the words of another Supreme Court of NSW judge, Faucett J in *Ex Parte Smart (supra)* in 1867:

"....any additions or restrictions which are not contained in the grant [are].... a cloud on the title, and a purchaser is unwilling to have anything to do with the land upon which there is any such cloud."

The Supreme Court, unlike in the much more recent *Mehmet* case, ordered the "cloud" be removed.

Further, as already noted above, the Supreme Court of New South Wales in *Cooper v Corporation of Sydney* (*supra*) held:

"...the Crown, or the Corporation of the City, representing the Crown in this matter, irrespective of any powers conferred by the Legislature, can have no right, which an individual in such a case would not have...[for] the Crown cannot derogate from its own grant".

Of these three judgments of the Supreme Court of NSW, the key difference between the two authoritative nineteenth century cases and the *Mehmet* case, was that in the latter, counsel for the vendor did not submit to the Court for its attention that the *National Parks and Wildlife Act* 1974 (NSW), in relation to its purported application to Aboriginal objects on the said land, was not effecting a defeasement pursuant to any reservation in the Crown grant, and so was unenforceable because the Crown cannot derogate from its own grant. The Court in the *Mehmet* case did not purport to

overrule previous Court authority: rather, it was completely oblivious to it. Such is the power of the jurisprudential void (explained at **3.5**ff) to leave unwanted clouds intact.

Another reaction to the legal arrangements relating to Aboriginal heritage protection, this time in Victoria, is this rather colourful opinion of "Kenneth":

> "People should be aware that Western Australia is not the only state that has draconian legislation that can remove the rights of a legal land owner to the quiet enjoyment of their property without any right of compensation or any right to challenge the change in status of the land. In Victoria, the Aboriginal Heritage Regulations 2018, introduced by the Andrews government, allows any aboriginal or associated person to claim that any piece of land in Victoria has aboriginal cultural significance. Such a claim triggers a process that immediately and severely limits the allowed uses of the land and places onerous obligations on the land owner. It often has the effect of destroying all or most of the commercial value in the land. The claimant of cultural sensitivity has no obligation to provide proof of the claim often relying on some totally unsupported claim of verbal history.The burden of proving that the land is not significant falls totally on the land owner while the government fully supports the claimant. If the land owner continues to use the land as they may have for generations, they run the risk of unknowingly committing a very serious crime, with the possibility of going to jail and paying an enormous fine. The only solution often for the land owner is either to pay the person's organisation that made the original claim a very high fee to perform a cultural heritage assessment or commence a very expensive and difficult legal battle against the full weight of the Victorian government as the act behind these regulations specially states that the person making the claim is to be believed and that they have no obligation to prove their claims. Most amazingly, the land owner commits a serious crime if they even tells (*sic*) anyone, including the press, as to why the lands (*sic*) was considered of cultural sensitivity. The legislation also specifically denies the land owner any right of compensation. I will let you form your own view of the result of such disgusting law."
>
> ("Kenneth" Comment on : "Palmer skirts WA to launch $30b claim", *The Australian*, 14 Aug 2020.)

Given the thin provenance of the commenter, notwithstanding his clear exposition and compelling rhetoric, we might peruse the said Act and Regulations before forming our own view.

The *Aboriginal Heritage Act* 2006 (Vic.) is designed to protect Aboriginal cultural heritage and Aboriginal intangible heritage, and related matters, in Victoria: see Section 1.

There is provision for acquisition of private land by the Crown which may subsequently granted as an estate in fee simple to an Aboriginal party:

"**31 Acquisition of Aboriginal place**

(1) The Minister may acquire, by agreement or compulsory acquisition, any land that contains an Aboriginal place if the Minister is satisfied that—

. (a) the Aboriginal place is of such cultural heritage significance to Aboriginal people that it is irreplaceable; and

. (b) no other practicable arrangements can be made to ensure the proper protection and maintenance of the Aboriginal place.

(2) Subject to subsections (3) and (4), the **Land Acquisition and Compensation Act 1986** applies to a compulsory acquisition by the Minister under this section and for that purpose—

(a) the **Aboriginal Heritage Act 2006** is the specified Act; and
(b) the Minister is the Authority.

. (3) Despite anything to the contrary in the **Land Acquisition and Compensation Act 1986**, land acquired by the Minister under this section vests in the Crown.

. (4) A person is not entitled to compensation under the **Land Acquisition and Compensation Act 1986** or this Act for the value of an Aboriginal object or Aboriginal ancestral remains on or under the surface of the land acquired under this section.

32 Grant of land

. (1) The Governor in Council, on behalf of the Crown, may grant to any registered Aboriginal party or other Aboriginal person or body for an estate in fee simple any land acquired under section 31.

. (2) A Crown grant under this section is subject to any terms, conditions, covenants, exceptions, reservations and limitations that the Governor in Council may determine.

. (3) This section applies despite anything to the contrary in the **Land Act 1958**."

There is also a provision for tax and rate remissions:

"191 Tax and rate remissions

. (1) This section applies if the Minister believes on reasonable grounds that the conditions of—

(a) a cultural heritage agreement; or

(b) an ongoing protection declaration—

so restrict the purposes for which a person may use land that compliance with the agreement or declaration is not economically feasible.

. (2) The Minister may make either or both of the following orders—

. (a) an order remitting the whole or any part of the land tax payable by the owner of the land under the **Land Tax Act 1958**;

. (b) an order remitting the whole or any part of any rates payable in respect of the land.

. (3) The Minister cannot make an order under subsection (2)(a) unless the Treasurer agrees to the order being made.

. (4) Before making an order under subsection (2)(b), the Minister must consult with the relevant rating authority.

. (5) The Minister cannot make an order under subsection (2)(b) unless one of the following agrees to the order being made—

(a) the rating authority; or

(b) the Minister administering the legislation under which the rating authority is constituted."

Section 191 is interesting in that it contemplates (rightly, one might say, when the general compliance requirements of the Act are considered) that compliance with heritage protection instruments might be "not economically feasible". While the remission of land tax and rates would no doubt be welcome, that is likely to remedy only a small part of economic loss suffered, and it would only be at the discretion of the Minister at the end of the long rigmarole specified in s. 191.

While the Minister may choose under s. 31 to compulsorily acquire property, for which compensation would be paid, a landowner cannot require acquisition, raising the prospect of many owners being stuck with injuriously affected properties and no compensation therefor: there is no other provision for compensation apparent in the Act.

In terms of bureaucracy, the Act introduces: "Cultural Heritage Management Plans"; "Cultural Heritage Agreements"; "Cultural Heritage Land Management Agreements"; "Cultural Heritage Audits"; "Stop Orders"; "24-Hour Stop Orders"; "Interim Protection

Declarations"; and "Ongoing Protection Declarations". The extent of potential disruption to a landowner's quiet enjoyment by the unexpected imposition of such compliance complexity and its associated outlays and disruption is manifestly very significant.

The Act also creates numerous criminal offences in relation to the above, and other matters, which would apply to (among others) landowners on their own land.

The end result for the landowner can be a "cloud on the title", with no compensation paid:

"**76 Registration of cultural heritage agreements**

. (1) This section applies if a cultural heritage agreement relating to land contains a provision requiring its registration under this section.

. (2) The Secretary must apply to the Registrar of Titles for the registration of any cultural heritage agreement that relates to an activity on land other than Crown land and to which the owner of the land is a party.

. (3) An application under this section must be in a form approved by the Registrar of Titles and include a copy of the cultural heritage agreement to which it relates.

. (4) The Registrar of Titles must make a recording of the cultural heritage agreement in the Register kept under the **Transfer of Land Act 1958**.

77 Effect of registration

After the making of a recording in the Register kept under the **Transfer of Land Act 1958**—

. (a) the burden of any covenant in the cultural heritage agreement runs with the land affected; and

. (b) the Secretary or the relevant registered Aboriginal party may enforce the covenant against any person deriving title from any person who entered into the covenant as if it were a restrictive covenant despite the fact that it may be positive in nature or that it is not for the benefit of any land of the Secretary or the relevant registered Aboriginal party."

Without going into the *Aboriginal Heritage Regulation* 2018 in detail, the potential scope for uncompensated disruption to property owners is indicated by Regulations 45 and 46 (below)

Division 5—High impact activities

45 Purpose

The purpose of this Division is to specify high impact activities.

Note

Under regulation 7, a cultural heritage management plan is required for an activity if all or part of the activity area is an area of cultural heritage sensitivity and if all or part of the activity is a high impact activity.

46 Buildings and works for specified uses

(1) The construction of a building or the construction or carrying out of works on land is a high impact activity if the construction of the building or the construction or carrying out of the works—

. (a) would result in significant ground disturbance; and

. (b) is for, or associated with, the use of the land for any one or more of the following purposes—
(i) aquaculture;
(ii) a camping and caravan park;
(iii) a car park;
(iv) a cemetery;
(v) a child care centre;
(vi) a corrective institution;
(vii) a crematorium;
(viii) an education centre;
(ix) an emergency services facility;
(x) a freeway service centre;
(xi) a hospital;
(xii) an industry;
(xiii) intensive animal husbandry;
(xiv) a major sports and recreation facility;
(xv) a minor sports and recreation facility;
(xvi) a motor racing track;
(xvii) an office;
(xviii) a place of assembly;
(xix) a recreational boat facility;
(xx) a research centre;
(xxi) a residential building;
(xxii) a residential village;

(xxiii) a retail premises;
(xxiv) a retirement village;
(xxv) a service station;
(xxvi) a transport terminal;
(xxvii) a utility installation, other than a telecommunications facility, if—

. (A) the works are a linear project

that is the construction of an overhead power line with a length exceeding one kilometre or for which more than 10 power poles are erected; or

. (B) the works are a linear project that is the construction of a pipeline with a length exceeding
500 metres; or

(C) the works are a linear project with a length exceeding 100 metres (other than the construction of an overhead power line or a pipeline with a pipe diameter not exceeding 150 millimetres); or

(D) the works affect an area exceeding 25 square metres;

(xxviii) a veterinary centre; (xxix) a warehouse;
(xxx) land used to generate electricity, including a wind energy facility."

But wait - there's more - the rest of Division 5 up until Regulation 58!

Whatever the specific concerns as expressed above by "Kenneth", it is clear from a perusal of the Act and Regulations that the worthy objective of preserving aboriginal heritage has been set up so as to potentially create, for a wide range of randomly affected landowners, very significant cost burdens and land use impairments, with no compensation therefor.

The potential costs to landowners are of the four types identified in the PC Report (*supra*) in relation to building heritage regulation. Once again we see a situation where there is no provision for compensation to any landowner for his involvement in mandated bureaucratic processes (such as making Cultural Heritage Management Plans), or for direct interference in his ability, and potentially the ability of any successor in title, to use the property in the desired manner, causing a capital loss in the value of the property.

Given that the making of Crown grants of freehold and leasehold in general long pre-dated aboriginal heritage protection laws, it is most unlikely that any land use impairments purportedly authorised by the *Aboriginal Heritage Act* and Regulations could fall within any freehold reservation, or leasehold condition, to any Crown grant, and indeed, neither the Act nor the Regulations purport to defease any such reservation, or rely on any such condition.

It might be noted in passing that the Colony of Victoria only came into being in 1851, and prior to that, as part of NSW, it was also directly governed by (from its formation

in 1823) the authority of decisions of the Supreme Court of NSW in relation to the nature and effect of Crown grants, which decisions have never been overruled.

In these circumstances, (and given the non-applicability of the Crown prerogative of treasure trove (discussed below)), the Crown is derogating from its own grants, so any enforcement of the Act or Regulations, including both civil and criminal provisions, against landowners with respect to their land, must be invalid.

To avoid derogation and consequent invalidity, the Act should provide - as an example - that, where an area of aboriginal heritage is believed to exist:

(1) all bureaucratic requirements, including for example, the creation of Cultural Heritage Management Plans, should be funded, or reimbursed, by the government;

(2) during the (probably time-limited) assessment period, the landowner be reasonably compensated for any inconvenience, interruption to, or consequent deferment of, other uses of the land, at the time of the disruption - not paid say five years later; and

(3) in the event that the site is determined to be worthy of permanent preservation *in situ*, that either: it be resumed by the Crown pursuant to existing compulsory acquisition legislation; or a suitable easement or other interest be noted on the title, in return for compensation being paid to the landowner.

As well as avoiding derogation of the Crown grant, such arrangements would:

- accord with “common sense and justice”;

- avoid the breach of human rights otherwise committed by the arbitrary deprivation of property rights;

- eliminate the sovereign risk posed by the Act and Regulations as they currently stand; and

- consequently increase the confidence of land buyers to invest in land for the future.

One further point relevant to aboriginal interests is what might be called the “karma consideration”; there is a risk that the omission of compensation to Victorian common law holders for any losses incurred under the *Aboriginal Heritage Act* might in turn disadvantage any native title claim made in Victoria pursuant to s. 51(1) of the *Native Title Act* (Com.).

As shall be explained in more detail at **4.2**, s. 51(1) of the *Native Title Act provides* for an entitlement on just terms to compensation to the native title holders for "any loss, diminution, impairment or other effect on their native title rights and interests".

However, to establish a right of compensation for impairment of native title, the native title holders have to show that such uncompensated deprivation is discriminatory compared with common law title owners. If the common law title holders have in fact no such rights, there is no discrimination if the native title holders are also deprived of those rights.

Thus, if native title holders in Victoria were to make such a claim, it would be open to Victoria, as a defence, to rely on the *Aboriginal Heritage Act* to demonstrate that common law title holders were not compensated for any "loss, diminution, impairment or other effect" with regard to aboriginal objects, and that accordingly, failing to compensate native title holders for "loss, diminution, impairment or other effect" was not discriminatory.

In this way, with respect to "loss, diminution, impairment or other effect", if care was taken in the *Aboriginal Heritage Act* to compensate common law title holders, then this would support the corresponding right of compensation to native title holders under the *Native Title Act*. Conversely, no common law title compensation = no native title compensation. Karma!

3.3.2.2.1 Coronial Jurisdiction

As noted at **2.1.4**, a coroner has jurisdiction at common law to conduct an inquest into treasure trove. It would appear that no legislation to the contrary has been enacted in any state, including Victoria.

For example, the *Coroners Act* 2008 (Vic.) makes no reference to the conduct of inquests into treasure trove. S. 19A of the *Aboriginal Heritage Act* 2006 (Vic.) refers to the coroner's role in relation to Aboriginal ancestral remains:

> **"19A Transfer of Aboriginal ancestral remains to Council by coroner** A coroner who has reported to the Council that a body is, or is likely to be, Aboriginal ancestral remains must, as soon as practicable, transfer the remains into the custody of the Council.
>
> **Note**
>
> A coroner is required under sections 16A and 23(4) of the **Coroners Act 2008** to report to the Council if, in investigating a death, the coroner believes that the body is, or is likely to be, Aboriginal ancestral remains, or if a preliminary examination performed by a medical investigator determines that the body is, or is likely to be, Aboriginal ancestral remains."

However, the Act makes no reference at all to the coroner's role in relation to "Aboriginal objects", defined to exclude "Aboriginal ancestral remains" in s. 4(1):

Aboriginal object means—
(a) an object in Victoria or the coastal waters of Victoria that—

. (i) relates to the Aboriginal occupation of any part of Australia, whether or not the object existed prior to the occupation of that part of Australia by people of non- Aboriginal descent; and

. (ii) is of cultural heritage significance to Aboriginal people generally or of a particular community or group of Aboriginal people in Victoria; or

(b) an object, material or thing in Victoria or the coastal waters of Victoria—

. (i) that is removed or excavated from an Aboriginal place; and

. (ii) is of cultural heritage significance to Aboriginal people generally or of a particular community or group of Aboriginal people in Victoria—

but does not include—

(c) an object that has been made, or is likely to have been made, for the purpose of sale (other than an object made for barter or exchange in accordance with Aboriginal tradition); or

(d) Aboriginal ancestral remains..."

While the Act proceeds make provision for the handling of aboriginal objects, it does not purport to supersede or abolish the coroner's common law treasure trove jurisdiction. Given the common law presumption in favour of private property (discussed at **9.4.3.2.**), and the complete absence of any reference to it in the *Aboriginal Heritage Act,* a court would not find the common law relating to treasure trove, including the coronial jurisdiction, to have been abolished by the Act.

By way of contrast to the *Aboriginal Heritage Act*, the *Treasure Act* (1996) UK was clearly expressed to abolish inconsistent common law relating to treasure trove and the coroner's common law jurisdiction in the United Kingdom.

So, it would seem that the common law jurisdiction of the Victorian coroner with respect to treasure trove continues to exist, alongside the *Aboriginal Heritage Act.*

No doubt the Victorian government could abolish this common law right if it wished, but in any case, it might be asked: what implications might its existence to date hold for private landowners - i.e. those who hold freehold or leasehold title to land where aboriginal objects are found to exist?

Now, aboriginal society was not known to have the knowledge of smelting, or an interest in making gold or silver objects, so a hoard of aboriginal objects would not in practice qualify to be owned by the Crown by prerogative right of treasure trove. It would, in principle, be possible for a coroner to conduct an inquest into a hoard of aboriginal objects to formally determine that it was, or was not, treasure trove.

The clear consequence of there being no prerogative right to the objects is that at common law, the landowner would own the aboriginal objects (unless there was a reservation (re freehold) or a condition (re leasehold) to the contrary in the original Crown grant, which is most unlikely). Such ownership must be considered to be an entitlement directly being part of the Crown grant.

This would serve to defeat any argument that found aboriginal objects are somehow not the property of the landowner. Further, any legislative attempt to deprive the landowner of such property without compensation, as in the *Aboriginal Heritage Act,* would be repugnant to the Crown grant.

In case this result were to be viewed as a bad thing for aboriginal heritage, there is nothing to prevent the government from compulsorily acquiring same, as long as the property owner is compensated for the objects and any related sterilisation of land etc. Doing the right thing can work out for the best: in the case of the fabulous Sutton Hoo hoard in the UK (see **2.1.4**), the landowner, who was found to be the owner by a coronial inquest, gave everything to the British Museum.

3.4 The Nature of Resumption

> "It is evident that the acquisition of property is of little benefit, unless accompanied with a prospect of retaining it without interruption. Without a good title such a prospect is spoiled, and the power of alienation greatly hampered. In other words a good title to the land is an essential part of the ownership of it." (Kemp (*supra*) at 501.)

This is true of both freehold and leasehold title, the latter usually distinguished by its limitation to a term, or being subject to conditions. (Cf., for example: *Crown Lands Alienation Act* NSW (1861) No 26a).

A similar point has been made repeatedly by the High Court:

> "Security in the right to own property carries immunity from arbitrary deprivation of the property....." (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ. in *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 437, cited in the majority judgment of *Northern Territory v Griffiths* (*infra* at §71)).

Hence, to the extent that property rights are subject to arbitrary deprivation, the Court accepts that the owner no longer possesses security in his right to own property.

The "most valuable incident" of an estate in fee simple (i.e. freehold):

> "is one that is now inseparable from it, *the unfettered right of alienation,* and along with this is the *right of free enjoyment*. Such estates are also liable to *involuntary alienation*.
>
> **Right of free enjoyment.** As a tenant in fee simple may alienate his estate at his pleasure, so he is under no control in his management of the lands, and may enjoy and deal with his property to the fullest extent as he pleases, but so nevertheless as not to affect injuriously the rights of others (*Sic utere tuo ut alienum non laedas*.) Thus he may open mines (provided these have not been reserved to the Crown), cut timber and commit waste of all kinds, grant leases of any length, charge the lands with the payment of money to any amount, and build over them at his pleasure." (Emphases in original. Citations omitted. Kemp (*supra*) at 67.)

This right of free enjoyment is not unbounded:

> "He many not, however, erect a building so that the roof overhangs another's land, not set up any occupation which is a menace to his neighbour's health or comfort. The right of building is also regulated to some extent by statute." (Citations omitted. Kemp (*supra*) at 85.)

With regard to involuntary alienation of an interest in land by an owner, Kemp notes ((*supra*) at 86):

> "**Involuntary Alienation of Lands.** Fee simple estates are also subject to involuntary alienation. This liability arises most commonly in consequence of debts owing either to the Crown, or to a subject by some deceased tenant, but it may also arise through a *lis pendens,* or in some instances through resumption by the Crown."

Involuntary alienation of lands by the last-mentioned method, resumption, is the topic of interest here.

Given that the Crown grant itself constitutes an alienation of land title by and from the Crown in favour of the title holder and his successors, then thereafter, the compulsory deprivation of any aspect of that title - or it might be said, any interference with the right of free enjoyment associated with that title - would constitute an involuntary alienation of title.

Any involuntary alienation of title constitutes a diminution of the right of free enjoyment by the title holder and, that right having been granted, would also be a derogation from the grant by the Crown as grantor, unless either: defeased within the scope of a reservation to the grant (being freehold - or in the case of leasehold, exercised within the terms of a condition); or accompanied by compensation.

Any diminution in the right of free enjoyment may thus be fairly described in the Crown grant context as a "resumption". A resumption may be made compulsorily, in which case it is an involuntary alienation, or in some circumstances be made by voluntary agreement, so the alienation would thus be voluntary.

It may also be noted that a diminution in the right of free enjoyment would constitute a fetter on the right of alienation by the title holder.

A "resumption" in principle should relate to the reversion, or re-acquisition, of any particular entitlement associated with a grant to and by the Crown. It need not be a formal re-acquisition of the complete title, or be limited to the use of the term, as currently used, with regard to the compulsory acquisition of land for construction of public infrastructure. It could include any entitlement that "runs with the land". Grants of freehold and leasehold tenures carry with them a bundle of legal entitlements, and the mere fact that a resumption is made of some of these entitlements, and not all, does not mean that there has been no resumption - only that there has been a partial resumption.

With respect to common law proprietary rights, the High Court has specifically recognised "the common law's conception of property as comprised of a 'bundle of rights'": *Northern Territory v Griffiths* [2019] HCA 7 at 27. (The High Court's ready recognition of the existence of a wide variety of usage rights is also discussed *infra* at **4.2** and **9.4.1**.)

Demonstrating the continuing flexibility which can be applied to the recognition of rights and interests, the High Court observed that:

> "rights and interests were essentially usufructuary, ceremonial and non-exclusive.....perpetual and objectively valuable in that they entitled the [native inhabitants] to live upon the land and exploit it for non-commercial purposes." (I*bid.*, at 27).

In this regard, we also note these instances of rights and interests found in relation to land in the native title context:

> " Mansfield J found that the native title rights and interests affected by the compensable acts consisted of the following non-exclusive rights exercisable in accordance with traditional laws and customs of the Claim Group:

. (1) the right to travel over, move about and have access to the application area;

. (2) the right to hunt, fish and forage on the application area;

. (3) the right to gather and use the natural resources of the land such as food, medicinal plants, wild tobacco, timber, stone and resin;

. (4) the right to have access to and use the natural water of the application area;

. (5) the right to live on the land, to camp, and to erect shelters and structures;

. (6) the right to engage in cultural activities, to conduct ceremonies, to hold meetings, to teach the physical and spiritual attributes of places and areas of importance on or in the land and waters, and to participate in cultural practices related to birth and death, including burial rights;

. (7) the right to have access to, maintain and protect sites of significance on the application area; and

. (8) the right to share or exchange subsistence and other traditional resources obtained on or from the land and waters (but not for commercial purposes)." (*Northern Territory v Griffiths* (*supra* at 5)

It is not suggested here that such rights are necessarily typical of common law title, but simply that the nature of rights and interests with respect to land which are associated with title can be many and varied, and that the removal of any such right is an impairment of the title.

Indeed, in 1998, the High Court cited with approval Isaac J's 1923 observation with respect to an estate in fee simple, or freehold, as conferring:

"the lawful right to exercise over, upon, and in respect to, the land, **every act of ownership which can enter into the imagination**." [Emphasis added. *Fejo v Northern Territory* [1998] HCA 58.]

To quote the majority joint judgment ((at. §43) which identical point was made by Kirby J. (at §93), to make the point unanimous):

"..An estate in fee simple is, "for almost all practical purposes, the equivalent of full ownership of the land" [20] and confers "the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the

imagination." [21] It simply does not permit of the enjoyment by anyone else of any right or interest in respect of the land unless conferred by statute, by the owner of the fee simple or by a predecessor in title.

20 *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635 at 656, per Deane, Dawson and Gaudron JJ. See also *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 80, per Deane and Gaudron JJ.

21 *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 42, per Isaacs J, quoting *Challis's Real Property*, 3rd ed (1911), p 218. See also *Minister for the Army v Dalziel* (1944) 68 CLR 261 at 298, per Williams J and *Wik Peoples v Queensland* (1996) 187 CLR 1 at 176, per Gummow J."

"Every act of ownership which can enter into the imagination" is clearly compatible with, and evocative of, the right of free enjoyment, and the idea of numerous potential rights of use - a "bundle" of rights - with respect to a property, where the owner possesses common law title.

More recently, in *Northern Territory v Griffiths* (*supra* at pp 26-27 para 67 per Kiefel CJ Bell J Keane J Nettle J Gordon J), the High Court once again acknowledged the great breadth of rights associated with freehold title, AND explicitly recognised that a lesser power exercisable over land by an owner will ordinarily cause the land to have a lesser economic value:

"At common law, freehold ownership or, more precisely, an estate in fee simple is the most ample estate which can exist in land[101]. As such, it confers the greatest rights in relation to land and the greatest degree of power that can be exercised over the land [102]; and, for that reason, it ordinarily has the greatest economic value of any estate in land. Lesser estates in land confer lesser rights in relation to land and, therefore, a lesser degree of power exercisable over the land; and, for that reason, they ordinarily have a lesser economic value than a fee simple interest in land.

. 101 See Amodu Tijani [1921] 2 AC 399 at 403; Royal Sydney Golf Club v Federal Commissioner of Taxation (1955) 91 CLR 610 at 623; [1955] HCA 13; Megarry and Wade, The Law of Real Property, 8th ed (2012) at 52; Honoré, "Ownership" in Guest (ed), Oxford Essays in Jurisprudence (1961) 107. See also Fejo v Northern Territory (1998) 195 CLR 96 at 151-152 [107]; [1998] HCA 58.

. 102 See The Commonwealth v New South Wales (1923) 33 CLR 1 at 42, 45; [1923] HCA 34; Minister of State for the Army v Dalziel (1944) 68 CLR 261 at 285; [1944] HCA 4. See also Yanner v Eaton (1999) 201 CLR 351 at 365-366 [17]; [1999] HCA 53."

We have seen previously how, from the early days of settlement in NSW, grants of freehold - and after the formation of Queensland in particular, grants of leasehold - were commonly issued with reservations or conditions, which could vary significantly in nature and type. It is clear that in making such grants, the Crown had no difficulty in characterising the limitations imposed by such reservations or conditions - and

conversely the remaining uses which were not so limited - as separately identifiable aspects of title. Clearly, a waiving of a condition could in principle be made by the Crown at some later time, with or without consideration from the landholder. Similarly, the Crown might choose never to exercise its reservations in defeasement of title.

It also follows that a "resumption" of legal interests, though frequently made by a formal legal process resulting in a transfer of legal title back to the Crown, can in principle take effect in other forms. For example, the imposition of an Interim Development Order, restricting uses of some land - being an impairment of rights, or "which purports to diminish that security of enjoyment" possessed by holders of title granted by the Crown (as expressed in *The Native Title Act Case* (*infra* at 25) - is effectively a resumption of legal interests to the extent of the new restriction.

Indeed, it might be said that (putting the use of reservations aside), any legislative or regulatory instrument which has the effect, subsequent to the original grant of title, of limiting the proprietor's use and enjoyment of the subject land (or, interfering with the "right of free enjoyment"), is in the nature of a defeasement of title, with its necessary consequences of an entitlement of the title holder to compensation or rectification.

What matters in these instances, is the substance of the legal effect on the scope of the title, not whether, for example, a restriction has formally been placed on the title itself, by means of a caveat etc. The fact that nothing has been noted on the title might make the restriction less easily discoverable, but the legal consequence for the property owner is no less real.

This point is expressed in an analogous situation by Callinan J in *Smith v ANL Limited* [2000] HCA 58 at §168:

> "After the enactment of the legislation to ensure placement of the region of the Franklin River in Tasmania upon the World Heritage List, that region remained in exactly the same natural state, and title to it continued to reside in the State of Tasmania, as it had before that enactment. But in proprietary terms it had assumed a quite different character. It had become an area of land from which almost all of the conventional, commercially exploitable attributes had been stripped or rendered highly conditional. In short, almost all of the components of the sum of the property rights had been effectively taken away. To use the language of Gaudron and Gummow JJ in the present matter [at 22], there was also "an effective sterilisation [of many] of the rights constituting the property in question". And the same might be said, to only a slightly lesser degree, of the effect of the Regulations under consideration in *The Commonwealth of Australia v The State of Western Australia* ("the *WA Mining Act Case*") ((1999) 196 CLR 392 at 480-484 [268]-[270] per Callinan J.)"

The general point might be imagined literally by reference to a layer cake, of the usual round shape. Imagine the cake as representing the legal rights or interests in some land. The cake might be (vertically) cut into roughly triangular segments. Each segment might be likened to a subdivided lot of land, with its own title. If a state were to acquire, or resume that lot, or piece of cake, it could do so under its compulsory acquisition laws which have existed now for over a century, and provide compensation.

However, imagine now that the cake is sliced, not vertically, but horizontally, with the top layer being removed. The top layer is still cake (i.e., legal rights or interests in the land), but compulsory acquisition legislation does not apply because the cake owner still has the bottom of the cake. The obvious point is, that the upper layers of the cake are still cake, and if the owner is deprived of them, it is still a deprivation even though the slice is not vertically cut to the base. At the time when compulsory acquisition legislation was first introduced, no-one imagined the planning possibility of cutting the cake horizontally, so they did not provide for that possibility.

One might further imagine each successive layer of the cake being sliced off, until only the very bottom layer were left: and to paraphrase Callinan J.: title to it continued to reside in the owner, but it had become an area of cake (land) from which almost all of the conventional, commercially exploitable (i.e., edible) attributes had been stripped or rendered highly conditional. In short, almost all of the components of the sum of the cake (property rights) had been effectively taken away.

The analogy of the layer cake might itself be demonstrated by an early Crown grant issued by Sir Thomas Brisbane (cited at **2.1.4**) which provided, in part, to reserve: "such timber as may be growing or to grow hereafter upon the said land which may be deemed fit for naval purposes".

Essentially the Crown reserved the right to harvest uncultivated crops of suitable (not all) timber. In doing so, it did not purport to reserve the land itself upon which the trees grew. Accordingly, if the Crown at some later time exercised its right to ownership of the timber, by defeasement of said reservation (and accordingly without payment of compensation to the owner for that timber), the landowner would nonetheless retain ownership of the land upon which the trees had been standing. Once such trees had been harvested, the landowner would be free to use that portion of the land as he wished: there was no extinguishment of title with respect to that portion of land.

In this way, the trees "fit for naval purposes" might be seen as a layer of the cake, and as evidence that the Crown considered vegetation, and its handling and nature, as an identifiable legal interest associated with title.

3.5 The Rule of "No-Law"?

Above, we have already pointed out the scant attention paid to the relationship, or lack thereof, between settled property law and the relatively new and experimental field of town planning law, and the unexplored legal bases for a right of compensation for adversely affected property interests. In this context the "rule of no-law" comes to mind as an apt description of the situation.

The term was coined by John Wickham (later Wickham J. of the Supreme Court of WA) to describe the lamentable situations arising as a consequence of that State's town planning laws - which, the reader might recall, was, in common with other States, substantially based on New Zealand and English laws.

Wickham, John --- *Power Without Discipline The 'Rule of No - Law' in Western Australia: 1964* [1965] UWALawRw 4; (1965) 7(1) University of Western Australia Law Review 88 at 97:

> "Our statutes provide for the "rule of no-law" varying from rights without remedies, through no rights at all to inadequate rights or inadequate remedies.."
>
> At 95-96: "...a topical example of the "rule of no-law" in Western Australia and which directly affects the interests of individuals is contained in the Metropolitan Region Town Planning Scheme Act 1959-1962 [MRTPSA]. The procedure is laid down by section 31.....The interesting thing about this procedure is that it is dressed up with some democratic trappings: the publication of the scheme, the right of objectors to be heard, the laying of the scheme before the Houses and the right of the Houses to disallow. The untutored might think that this provides an example of the Rule of Law. Actually, it is an example of some artificial legal flowers being planted in an arid area of no-law....If Parliament proclaims the rule of "no-law" then administrators and ministers can do nothing but make the best of it."

Mr Wickham was arguing for a better system in WA, but a point which can be taken from his views is that there was much confusion and potential for unremedied injustice in the development of land planning in WA. He comments (at 91) that the:

> "legal profession has been largely inert because it has continued to believe in some vague way in the existence of the Rule of Law - to put faith in a myth of uncertain and perhaps no content. We have declined to enter the public arena and instead are loyal to a spook."

Perhaps that could equally apply to the situation of concern here.

Justice Michael Barker of the Federal Court of Australia has pointed out (at Barker M., *Background to the establishment of the State Administrative Tribunal of Western Australia*, at Town planning law – past, present and future Conference to mark 80 years of town planning law in Western Australia (1989)) that when:

> "....the Town Planning and Development Act 1928 [WA] (TP Act) [a predecessor to the MRTPSA, savaged by Mr Wickham - Ed.] took effect in 1929, it was one of the first of its kind in Australia. Town planning was then a very new discipline. The world then, as now, no doubt was an exciting place.....The TP Act followed the model of a 1926 New Zealand planning act, which in turn was modelled on a 1909 British Act."

Is it any wonder, that this new WA law, based on foreign models, none of which had experienced the Australian developments in Crown grants as the basis of legal titles, seemed to float in a separate legal universe?

In a context where the consensus is that land owners adversely affected by the new (i.e. since the mid-20th century), complex and essentially experimental town planning laws and practices should be compensated - but if the compensation system is inadequate or is practically non-functional, it's just a fact of life to be accepted because there is no constitutional and therefore no legal duty for States to provide such compensation, then the failure to adequately compensate (or indeed, to avoid unnecessarily adversely affecting) landowners seems like the pretty inevitable result.

As Ian Callinan AC QC, former Justice of the High Court of Australia observed, "For the sake of our heritage, the buck must stop somewhere", *The Australian - Summer Living* at 10, 3 January 2008 (as reproduced at www.adverse-rezoning.info).

This type of development might be exemplified by taking a closer look at the County of Cumberland and subsequent experiences in NSW, where provision for compensation was made, but never took place. Why not? Wilcox provides some more detail on the subject (supra at 278):

> "...Part XIIA....includes Div. 9, which provides for payment of compensation in certain cases, and Div. 10 which enables betterment charges to be collected from the owners of land benefited by prescribed schemes.
>
> In introducing the *Local Government (Town and Country Planning) Amendment Bill* in 1945 the then Minister for Local Government, the Hon. J.J. Cahill M.L.A., made much of these provisions. He said of them: "it is provided in the bill that such schemes may contain provision for the recovery by the councils of a proportion of the increased value of the land brought about by the scheme - called "betterment". When hon. members receive the bill I invite them to pay this provision particular attention because it is something that has been discussed by

reformers in the past. Where the operation of a town-planning scheme improves land values the owner of the land is not to receive the full advantage of the extra value added to it by this public service. Provision is made in the bill for the major portion of the increase in value to be taken by the council, and for the money to be used to compensate those whose lands have been injuriously affected, or to further the schemes that the councils have prepared." *New South Wales Parliamentary Debates*, vol. 176 at 1720-1721.

Both Divisions are elaborately designed - but their practical value has been very limited. Betterment charges are only payable if individual prescribed schemes so provide: to date only four have done so and in no case have the responsible authorities actually recovered betterment. Individual owners have ben allowed to retain the whole of their unowned capital increment - to the jeopardy of the financial viability of the schemes. Without betterment, revenue compensation funds are bound to be small: they may only remain solvent if claims are restricted. In New South Wales the compensation funds have been so limited that compensation rights have almost disappeared.

The injustice to individuals is obvious. Of equal importance is the prejudice to the scheme itself through the inability of responsible authorities to deal firmly with existing non-conforming uses. Where the compensation fund is inadequate it is politically impossible to terminate substantial non-conforming uses: termination is only tolerable to the community where adequate compensation is properly available. The result has been that the majority of the present prescribed schemes make no provision for termination of non-conforming uses - whatever their effect upon the locality and the scheme. The present schemes are blueprints for future development but are of little value in unravelling the chaos of the past.

The elaborate structure remains but the fact is that, in the fifteen years since the first town-planning scheme was prescribed in New South Wales, there is not one single reported case where compensation has been awarded by a court.

The story is briefly continued by Fricke, G.L. QC, *Compulsory Acquisition of Land in Australia*, 2nd ed., Law Book Co. (1982) at 114-115, where he refers to the *Environmental Planning and Assessment Act 1979* whereby:

"the repeal of the provisions in respect of injurious affection and betterment will remove a significant difficulty and inconsistency reflected by the practice which had developed under the former Act. Whereas planning schemes provided compensation for injurious affection [but as we have seen already, while it provided for such compensation, none was actually made -Ed.] and in recent yours an opportunity [not with any obligation, absent compensation! -Ed] to require the

> relevant authority to resume the affected land, Interim Development Orders did not. In the 1970's planning authorities attracted no doubt by the procedural simplicity of the making of an Interim Development Order, had consistently utilised them as a means of permanent planning control. In these circumstances many persons had been denied any right to compensation or the possibility of enforcing acquisition of land which they could not use for any effective private purpose.

Observations which might be made about this experience are:

1. It is clear that at the time of the creation of the County of Cumberland, the State legislature presumed that owners who were injuriously affected by planning schemes (or, we would prefer to say, where planning schemes operated as defeasements) were entitled to compensation. It is not known if this presumption was based on the view that it was:

- an inherent consequence of the legal impairment of the grant; and/or

- a matter of "common sense and justice"; and/or

- consistent with Article 17 of the Universal Declaration of Human Rights, which had recently been adopted (in 1948) by the UN General Assembly under the direction of NSW QC and former High Court justice, 'Doc" Evatt; and/or

- politically necessary to avoid unpopularity.

Whatever the basis for the presumption, it is worthy of note that this pioneering town planning legislation did in fact exist with that very presumption. Such a presumption would also have been entirely consistent with Fry's previously cited "bewildering multitude of tenures" which had no recorded history of creating injurious affection or a corresponding need for compensation. Perhaps the experience of Sir Thomas Mitchell in Sydney in 1834 was long remembered!

2. Due to the failure of the betterment taxation scheme, there was in practice no funding available for compensation for injurious affection (a strange legal term which might seem to bear comparison with the negative social behaviour of "passive aggression", both of which concepts can have unfortunate consequences largely invisible to non-participants).

In passing we note that in *Marshall v Director-General, Department of Transport* [2001] HCA 37 at para. 32, the majority judgment of the High Court referred to Harman LJ's description of "'injurious affection' as a piece of jargon. It is more than that. It is a neat, expressive way of describing the adverse effect of the activities of a resuming authority upon a dispossessed owner's land. Reference to it in disparaging

language does nothing in our view to assist in the elucidation of what it involves. The use of this common expression serves well to distinguish the statutory right from the common law claim in nuisance."

3. Wilcox notes that as a consequence "the majority of the present prescribed schemes make no provision for termination of non-conforming uses", but of course, then and after, some property owners did have substantial newly non-conforming uses terminated, to their uncompensated cost.

4. The failure to compensate injuriously affected property owners became "normal" in subsequent NSW planning legislation and the topic neglected. The development of the (ab)use of Interim Development Orders as permanent planning instruments, as noted by Fricke (supra), confirms the practical development by State authorities of the dropping of even any pretence that affected owners should be compensated.

5. There was no express provision in the (1940's and subsequent) State legislation to the purported effect that injuriously affected property owners should not be compensated.

The failure to effectively use betterment as a revenue raising measure should not be surprising. It might be regarded as a type of capital gains tax, but a normal capital gains tax has these characteristics:

- clear purchase value
- clear purchase date
- clear sale value
- clear sale date
- tax payable only out of proceeds of sale. No sale - no tax payable.

Betterment tax is vastly more complicated, inefficient and expensive to administer because:

- betterment value is not received in cash by the owner, so if the tax is to be paid in a timely fashion, it has to be paid by forced sale of property (in itself a down-driver of values), or by incurring debt (with interest payments possibly being borne by a non-cash income producing asset), or securing funds from other sources unrelated to the land; and

- the betterment value has to be separated out from other land value affecting events - easier said than done - there is no market transaction value - and over what time frame should the betterment value be calculated? This answer might also vary for different situations. There is endless scope for argument about what the correct betterment value might be, especially compared to a straight capital gains tax; and

- if the betterment tax is deferred until the eventual (unforced) sale of the land, which might be many years into the future, so deferring revenue benefit to the State,

landholders will typically add the value of the tax to the price of the land, so that the tax will be passed on to the eventual land users - such as first home buyers!

The *Australia's Future Tax System: Report to the Treasurer- Part Two: Detailed Analysis 2009 "Henry Review"* at Box E4-2 noted that:

> "in practice, betterment taxes can increase the uncertainty associated with land development....[and]... can involve lengthy disputes".

It's no wonder there was no revenue received from betterment. King Louis XIV's Finance Minister, Jean-Baptiste Colbert, famously declared that "the art of taxation consists in so plucking the goose as to obtain the largest possible amount of feathers with the smallest possible amount of hissing." Well, imposing a betterment tax might be compared to trying to pluck a goose with a live hand grenade inside....

In practice, governments are better off collecting revenue associated with increased economic activity resulting from betterment, such as council rates, stamp duty and GST.

Notwithstanding all this, and the repeal of the provisions in respect of injurious affection and betterment in NSW in the 1970's, a betterment tax has been re-introduced in NSW, but with new euphemisms: variously "value capture" or "profit capture" in the context of "voluntary planning agreements". Worse, this has been done without any concept at all that such "value capture" might be directed to pay compensation for injurious affection. In *Green light for value capture in planning agreements – taking the 'voluntary' out of VPAs,* Aaron Gadiel & Anthony Whealy, Mills Oakley (2016), it is observed that:

> "The NSW Government has given its official seal of approval to the push by local councils to 'capture' a share of development profits through planning agreements (often referred to as voluntary planning agreements or VPAs)." Mills Oakley also point out "the problems with 'value capture' arrangements [that] were set out in the Federal Government's independent Henry Tax Review in 2010".

For the full detail of the Byzantine-like complexity of the State practice note outlined by Mills Oakley, we refer the reader to their article. We simply note some of their most relevant observations here, namely that:

> "In a nutshell, the Government has acknowledged that there is 'growing concern' that the development industry is being 'held to ransom by some councils'....[and that the Government's statement of policy was in response] to 'growing concerns the process is pushing up new apartment prices'.
>
> Developer industry groups have been critical of the way in which many local councils have been using (or misusing) planning agreements. In essence,

> developer representatives have argued that (in many instances) planning agreements are being used to simply tax perceived profits, rather than overcoming infrastructure or conservation problems. For example, many developers have found that once an offer is made, the Council may simply ask for more money — often for example a 50% share in the profits of the development — and will threaten to otherwise stall or oppose the planning proposal entirely....
>
> Remarkably, the state government is not proposing to make compliance with its practice note mandatory for any local councils or state government agencies (even when it is finalised).
>
> Despite the broad powers available to the Minister for Planning, the draft direction merely requires local councils to 'have regard' to parts of the practice note. The direction will not even be issued to state government agencies.
>
> Local councils will be free to adopt their own policies that are inconsistent with the practice note. Each time they negotiate a planning agreement they will need to consider the practice note, but will have the discretion, if they wish, not to follow it and instead follow their own local policy."

So, in a strategy which would seem worthy of *Yes Minister*'s Sir Humphrey Appleby, who famously exemplified the "capture" of ministers by their public servants, the NSW minister would seem, in this case, to be deflating concerns about rising apartment prices and complaints by developers by producing a "practice note" directing councils etc. to be "reasonable", but simultaneously noting that they can ignore it. In other words, he has said some reassuring things to settle people down, but nothing has really changed.

To extend Colbert's metaphor, it would seem that in response to uncomfortable screeching by industry geese, the minister has recommended to councils that they only pluck feathers from geese who voluntarily agree to be plucked, but that in the absence of any real voluntary agreement, they can ignore his direction and pluck the geese involuntarily anyway.

Sir Humphrey would have been delighted, and Colbert appalled.

In the context of the longer history of injurious affection and betterment tax, the sad conclusion is that in NSW, the failures in the 20th century have not been followed by failure now, but even worse, by ignorance and duplicity. Regardless of the inefficiency of betterment tax, Wilcox (supra), Fricke QC (supra), and even the Hon. J.J. Cahill (supra) - on the basis of their published observations - would have been dismayed that a betterment tax, or "value capture" would have been used in the 21st century, without any concern for using any proceeds to compensate injuriously affected property owners.

A key point of principle governing all policy here is that the failure of the State to source revenue to compensate property owners injuriously affected by property schemes does not of itself absolve or excuse the State from failing to do so where such loss is by virtue of a repudiation, or a partial repudiation, of a Crown grant. If a State is not, one way or another, in a position to provide such compensation, it should remove, or avoid the injurious affection (or, as we might say, the *de facto* defeasement, or derogation). If the injurious affection is not socially valuable enough for the State to pay for, it shouldn't be imposed - a position that had been actually achieved by the States/Colonies in the 19th and 20th centuries, prior to town planning legislation. This point might be seen to be accentuated by the fact that, in more recent years, the introduction of the more economically efficient capital gains tax and GST have provided the States with significant revenue flows from betterment and other causes of increase in land value and investment, so that States have in fact had new revenue available to assist with compensating for injurious affection, quite apart from so-called "value capture".

Hence, political and ethical considerations, and possibly legal presumptions, generally caused the States to initially include provision for compensation in cases of adverse rezoning. However, over time, as provisions for compensation failed, without any significant political cost to governments, affected landowners, tending to be isolated and newly impoverished, and in the absence of any clearly expressed juridical reconciliation between the nature of Crown grants as legal instruments on the one hand, and planning legislation on the other, it seems that a sort of amnesia developed with respect to these issues on the part of legislators and lawyers generally.

Given such a failure of legal analysis, the High Court's clear general rulings that there's no constitutional requirement for States to provide compensation might have been, unintentionally, an aggravating factor. (For more detail on this point, see: **4.6**.)

A further example of this collective "amnesia" might be provided by a textbook in the field: *Land Acquisition: An examination of the principles of law governing the compulsory acquisition or resumption of land in Australia*, D. Brown, 5th ed., (2004). It is riddled with fallacies, as follows.

Fallacy (a) At 5 it is stated: "Resumption is concerned with one principal activity and its consequences: the compulsory eviction of a landowner from the property and the payment of compensation to the owner for the loss of the land."

This might be correct as being the focus of acquisition legislation, but evidence in this paper demonstrates that entitlements of a landowner under a Crown grant may be of many different kinds (*cf.* the types of uses described in grant reservations), and impairment of any of those short of eviction is effectively a resumption of grant entitlement to the extent of that impairment (*i.e.*, a defeasement). In terms of the

nature of the legal instrument of a Crown grant, resumption can be partial, and not necessarily the all-or-nothing event of an eviction. By defining "resumption" in terms of eviction, all other types of resumption by a State (*e.g.*, Boulten SC's "acquisition law gap") are being assumed away.

Fallacy (b) At 1 it is stated: "...when privately owned land is taken, its owner must be fairly compensated. There must be the occasional exception to this principle but the various legislatures have enacted legislation to ensure that dispossessed landowners are fairly compensated."

Again, what about affected landowners who are not evicted, but are dispossessed of a significant portion of their granted property rights? What about the *Chang* case (*supra*) where the High Court described the State Government's behaviour to deny compensation as "stealth"? What about the numerous reported instances at www.adverse-rezoning.info? These are not mere "occasional exceptions". It might be noted that by the time of publication of Brown's textbook, the significant and troubling concerns expressed by earlier authors (Wilcox and Fricke (*supra*)) have been totally overlooked.

Fallacy (c) At 14 it is stated: "The law of land acquisition is the creation of statute."

It is true that the practice of land acquisition is being governed by statutes, but this statement ignores the role of Crown grants and the extensive common law relating to them, particularly through the nineteenth century, and thereby assumes away any need to consider the relationship and disparity between them and the potential implications of same. Use of the term "land acquisition" itself assumes away the underlying legal act of "resumption" which applies to all granted title. Further, it utterly fails to recognise the constitutional character of Crown grants and related common law (as explained at **2.1.2**).

Fallacy (d) At 15 it is stated: " Formal title to land depended upon a grant being made by the Crown to owners and occupiers. The relationship between the Crown and holders of land made under the relevant land laws was that of contract. The grant was in essence a contractual document."

The characterisation of a Crown grant as a contractual document is wrong, and indeed a trivialisation and fundamental misunderstanding of the nature of title provided by a Crown grant. A Crown grant is not a contract (or for that matter a mere chattel or a building), but a legal instrument not limited by the common law rule against perpetuity - in other words it is a perpetual title which can only be absolutely terminated by a complete resumption by the Crown. It is an aspect of its perpetual nature that compensation must be paid on any termination by resumption (except in the rare case of passive resumption in the form of escheat, in Western Australia). Unlike a contract between parties which which may be subject to conditions, a Crown

grant may be subject to a defeasement, which is a separate instrument from the grant, exercising the Crown's reservation of some aspects of the title contained in the grant. Contracts cannot contain defeasements, only conditions. Now, it may be that where a Crown grant is made to a grantee for free, there is no contract, merely a grant granted - whereas, where the Crown grant is purchased, yes, there is a purchase contract, but the Crown grant itself is not a contract. Where the grant of title is (and often is) transferred to subsequent title holders, there is in each typical case a purchase contract, but still, the Crown grant itself is not a mere contract.

Again, a fundamental misunderstanding of the nature of Crown grants serves to trivialise them as mere contracts, a consequence being a presumption of lesser legal importance for such grants.

Fallacy (e) At 16 it is stated: "The terms of reservation clauses giving the Crown the right to resume part of the land granted varied."

Indeed, reservations did vary, but they did not "give the Crown" the right to resume part of the land: the Crown always retained the right to resume all or any part, or indeed any particular conceivable use, of the granted land, reserved or not reserved. Reservations retained a right by the Crown to *defease* the reserved part of the grant at any time into the future, without compensation - as opposed to a bald resumption, which did not, by definition, relate to a reservation and which always presumptively attracted compensation.

By confusing reservations with resumptions not made pursuant to reservations, the fundamental distinction with regard to the landholder's entitlement to compensation is trivialised, misunderstood and made easily dismissible.

(Fallacy f) At 13 it is stated: "...courts will presume that legislation - federal, state or territory, or subordinate rules or regulations made under such legislation - does not amend the common law to derogate from important rights enjoyed under that law, except by provisions expressed in clear, unequivocal language: *Durham*...177 ALR at [28]. The High Court has stressed this principle on numerous occasions...."

That's true enough, but where is the planning (or other) legislation which, in such a manner, expressly repudiates an owner's right to compensation for the resumption of any aspect of the owner's entitlement pursuant to a Crown grant? Where are the cases where courts have been asked to decide the effect of such express legislative provisions? There aren't any, because given that the nature of Crown grants is now - as shown in the above paragraphs - fundamentally misunderstood and consequently dismissed as of being no real continuing relevance, why would any legislator bother?

To be fair to the author of this textbook, this is a failure of the legal profession in general, of which Brown's text is just a relevant example - or as Wickham (supra) put

it in the WA context, the "legal profession has ... continued to believe in some vague way in the existence of the Rule of Law - to put faith in a myth of uncertain and perhaps no content."

Another textbook of recent times, *Law of Compulsory Land Acquisition*, 2nd ed., MS Jacobs (2015) at 1, describes the term "resumption" merely as a label. There is a discussion of the jurisprudential basis for "resumption", but it totally ignores: Australian common law cases considered in this paper on the point; and the fact that the existence of "resumption" as an essential aspect of the Crown grant - which, as indicated elsewhere in this paper, was found by the Privy Council to have a unique character in New South Wales (and by implication, in the other subsequently formed Australian Colonies) rendering jurisprudential speculation in foreign (even UK) jurisdictions somewhat moot.

This above-mentioned failure of the legal profession can extend, with respect, to the High Court. For example, in the *Chang* case (supra at 15), Kirby J states:

> "...for decades (since at least 1936), provisions had existed in various forms entitling the owners of interests adversely affected by supervening changes in planning law to apply for redress.....
>
> ....Such statutory provisions reflected the Queensland Parliament's attempt to balance the public interest in a principled development of planning law against the impact which changes in planning law inevitably have on the value of individual interests in land. The hypothesis behind the successive statutory provisions was that ratepayers generally should contribute to reasonable compensation of individuals who suffer loss as a direct result of supervening changes. In this way, the legislative provisions, carried into the 1997 Act, were designed to ensure overall fairness."

His Honour's observations might be regarded as a completely fair and accurate summary of that particular situation, but the point is that the legislative basis for providing compensation at all is attributed to a mere "hypothesis". In the context of planning law, the whole common law history of land title as it relates to Crown grants in Queensland, including also its constitutional character, and (as it was previous to separation) New South Wales, has been reduced to and replaced by, in this particular judgment - without discussion - a mere "hypothesis".

The ALRC, in its report - *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Report 129)* (2016) - completely failed to consider the existence or potential relevance of Crown grants in the States, even in Chapter *20 Property Rights—Real Property.* While the ALRC's focus on Commonwealth laws might have excused it from a focus on State laws, including the operation of Crown grants of title, it does canvass other areas of common law in relation to the States -

for example, the right to exclude others from private land - so, such an excuse for omission could only be regarded fairly as a thin one.

The apparent “amnesia”, or blind spot, even extends to Australia’s official diplomacy, as explained at **9.1 Australian Government Fallacies.**

Thinking like this amongst practitioners, which assumes away the gap between legislative acquisition law and the pre-existing and still existing title by Crown grants would explain why the States would cause (even if unintentionally) huge financial damage to large numbers of isolated landowners over a period of decades and get away with it. So far.

A dreadful example of this, with respect, is provided by The Honourable Justice Mahla L. Pearlman, AM, Chief Judge of the Land and Environment Court of New South Wales in her *Keynote Address, NSW Coastal Conference* 14 November 2001. Pearlman CJ states, *inter alia*:

> “The Land and Environment Court came into operation on 1 September 1980. It is a superior court of record with rank and status equivalent to the Supreme Court in the hierarchy of courts in New South Wales.
>
> The establishment of the Land and Environment Court was part of the early evolution of environmental law in New South Wales. The growing amount of comprehensive and specialised environmental legislation in the 1970's in the areas of planning and environmental pollution created the necessity for a specialist court with specialist knowledge and expertise. In the second reading speech in the Legislative Council concerning the package of legislation which established the new environmental planning system, the Minister for Planning and Environment, the Hon D P Landa, said of the Court that it "*... will have a vital role to play in the task of judicial interpretation of the new legislation and its operation*" Hansard, 21 November 1979, 3355.
>
> .....In class 1, the Court is dependent upon the applicant for the development to invoke the Court's jurisdiction. The exception is when there is designated development, whereby a person who is an objector to a development can appeal to the Court, even if the applicant and the council have reached agreement. The extent to which the Court can even review a development is therefore dependent upon a process that brings a matter to the Court's attention.
>
> More than any other court in the justice system of New South Wales, except perhaps the Industrial Relations Commission, the Land and Environment Court operates in a political context. Its planning and environment decisions affect not only the parties to the case, but have implications for the whole community, and

> for future generations. Furthermore, the cases which the Court hears do not involve disputes between citizen and citizen; they involve disputes between citizens and the government. In particular, they often involve disputes between private property owners with private (and often development) interests, and councils or other public authorities with public (and often environment protection) interests.
>
> .....The Court is continually engaged in a balancing act of these often fundamentally competing interests within the particular planning context that governs the development application in question. The Court itself does not set policy, nor lobby for the reform of the law, nor act as a planning or environmental consultancy, nor undertake research. It does not have a preference between development and environment, other than to uphold the law.
>
> The means through which the Court should resolve these competing interests is sometimes said to be through the implementation of 'ecologically sustainable development' or ESD, which is enshrined as an objective in the Environmental Planning and Assessment Act 1979."

At no point in her speech does Pearlman CJ allude to, or imply, much less clearly state, a view consistent with that of French CJ of the High Court (*infra* at **4.2**) that the "approach to the interpretation of statutes has been stated more than once in the High Court. It can be regarded today as a particular aspect of the principle of legality — a a *principle which says that laws are not to be interpreted as interfering with common law rights and freedoms generally unless that interpretation is required by the clear words of the statute*."

According to Pearlman CJ, the Land and Environment Court is engaged in "a balancing act" between development and the environment. No reference is made to any need to specifically consider interference with pre-existing common law property rights in making decisions, and the possible need for compensation. Indeed, it is remarkable and dreadful that the NSW Land and Environment Court has operated in complete ignorance of the never overruled decisions of its sister, the Supreme Court of NSW, or of appeals from that court to the Privy Council (as cited for example at **2.1.4** above). There is no express provision in the *Environmental Planning and Assessment Act* which purports to overrule that common law, and even if such a view were taken, it has never been tested in the Land and Environment Court or the Supreme Court.

Article 17 of the *Universal Declaration of Human Rights*, which provides in part that "*No one shall be arbitrarily deprived of his property*" has been fully supported diplomatically by Australia in the seven decades since its inception (see **9.0** and **1.1**), and the fact that it has nonetheless not been adopted into Australian or NSW law

does not prevent it from being a standing rebuke to those legislators and judicial officers who fail to give it any consideration whatsoever in a jurisdiction which involves disputes solely "between citizens and government" as Pearlman CJ puts it. (We presume that non-citizens are in fact not as such excluded from the jurisdiction.)

It is said that "the fish rots from the head". Pearlman CJ's expression of guiding principles for the Land and Environment Court does not see impairment of property rights without compensation as a wrong, but merely as another factor to be balanced against other interests. This is perhaps not surprising given that the Minister for Planning and Environment, the Hon. DP Landa, mentioned by her Honour above, who introduced legislation to establish the Court in 1979, presided over the use of Interim Development Orders as a result of which, as noted by Fricke QC (supra): "many persons had been denied any right to compensation or the possibility of enforcing acquisition of land which they could not use for any effective private purpose". The Land and Environment Court was not created to address such injustices.

Having said that, this is not to say that individual judges of that Court necessarily take property rights so lightly. For example, see *Warringah Council v Franks & Ors (infra* at **4.5.2**). The key point here is that the governing ethos of the NSW Land and Environment Court is amnesiac with respect to the nature of common law property rights attached to Crown grants of title. Indeed, this foundational flaw in the constitution of that court might be considered to be its "original sin", which has never been acknowledged or remedied. A legal baptism of sorts would seem to be in order.

One can see how unsuspecting landowners, whose land becomes injuriously affected by a planning instrument, discover gradually to their astonishment that the search for compensation will be swallowed up in a never-ending kafkaesque, progressively impoverishing, administrative tangle of "non-law" - a world away from "common sense and justice". This jurisprudential void might be likened to a voracious galactic black hole, sucking the property rights of innocent property owners beyond the event horizon into an unfathomable oblivion.

A published example of this type of struggle may be found at *Ralph Lauren 57 v Byron Shire Council* [2016] NSWSC 169. The Council had performed beachfront work which evidence showed caused erosion of the landowners' properties at Belongil Beach, and then sought to prevent the owners from protecting their land.

Legal action against the Council spanned six years. Although the factual dispute could be explained quite briefly, Hidden J (*ibid.*, at §3) described the proposed pleading as "lengthy and complex" and indeed it details a complicated administrative maze of adverse regulatory developments with respect to the affected land. This case was perhaps unusual in that as well as challenging the adverse rezoning imposed by the Council, there was a credible claim by the plaintiffs with respect to

nuisance and/or negligence by the Council. This, and the fact that at least fourteen landowners banded together to challenge the Council in court allowed sufficient success to achieve the right to protect their own land and obtain some damages.

Thus, it took at least fourteen landowners with a common cause six years of litigation to prevent them from being forced to stand by and watch their land being washed away as a result of Council works. One might fairly speculate that if only two or three landowners had been affected, they would not have had the resources to mount such a legal challenge, and their rights, including those under the Crown grant of freehold title, would have been quietly and unjustly extinguished, without compensation of any kind.

Ironically perhaps in light of the above, it might be argued by a State that a court should not agree, in any particular case, to the making of compensation by a State with respect to injurious affection caused by planning instruments because it would "open the floodgates" to litigation against the State.

The old "floodgates" argument is a pretty weak one, because the larger the prospective "flood", the greater the sum of past and prospective injustices the court is being asked to ignore.

Also, given that: the motto of the English monarchs 'Dieu et mon droit' (God and my right), in recognition of the reception of the British common law in Australia, is routinely displayed in Australian courts; and the monotheistic Abrahamic religions of Judaism, Christianity and Islam prominently feature floods as a purifying force (think of Noah's Ark surviving the great flood and the destruction of the Egyptian army by the inundation of the Red Sea), a court might well take the view that the use of the "flood" metaphor does not support its proponent's argument as something necessarily to be avoided.

Be that as it may, a couple of supplementary observations might be made on the point.

1. Particularly in a growing economy, with a growing population, such as Australia, most planning decisions should result in betterments for landholders. It should be only in a small minority of cases (even if this still generates large numbers) that landholders are adversely affected. So a sense of proportion might be adopted here.

2. In the case of NSW as an example, according to the NSW Land Registry Services website (2018) at *Land Ownership*:

> "Crown land is owned and managed by State Government and accounts for almost half of all land in New South Wales."

So nearly half of all land in NSW is unalienated from the Crown. It would be open to the State to negotiate compensation in the form of land rather than cash, and even if there were, say, 22,000 parties to be compensated, the State would have more than ample resources to meet any claims - or, it might be said, earth to manage any flood.

4.0 Right to Compensation - Supporting Considerations

The laziness of the argument that State governments do not have a duty to compensate landowners for impairments in the use of their title because such duty is not entrenched in any state constitution is simply and amply exposed by the legal existence of native title land, in all states. No state constitution provides for, contemplates, or mandates the existence of native title. Yet it exists. And the states cannot make laws to stop it existing without providing compensation to the native title owners, whose title is thereby adversely affected or terminated.

As the late Professor Julius Sumner Miller might have asked: *How is it so?*

4.1 High Court of Australia - Some Property Principles: External Affairs Strategy

The short answer is because, initially on the application of Eddie Mabo and his supporters, the High Court found a set of principles and circumstances which caused it to be so. If the States attempt to ignore this common law, any aggrieved person can seek relief in the courts.

Essentially, the Commonwealth was able to rely on its Constitutional external affairs power to legislate the *Racial Discrimination Act 1975* (Cth) which gave effect to the *International Convention on the Elimination of all Forms of Racial Discrimination.* To the extent that the said Act was inconsistent with State laws, it would prevail over them due to the operation of s. 109 of the Constitution.

Neate G., *Indigenous land rights and native title in Queensland: A decade in review* (2001) at 7 points out:

> "The significance of [s. 109] for Aborigines and Islanders was demonstrated in two native title cases. In *Mabo v Queensland (No 1)* a majority of the High Court held that the *Queensland Coast Islands Declaratory Act 1985* (Qld) (which purported retrospectively to abolish all such rights and interests as the Murray

> Islanders may have owned and enjoyed in relation to the Murray Islands) was inconsistent with section 10(1) of the *Racial Discrimination Act 1975* (Cth). In *Western Australia v Commonwealth* (The Native Title Act case) the High Court held that the *Land (Titles and Traditional Usage) Act 1993* (WA) was inconsistent with section 10(1) of the *Racial Discrimination Act 1975* (Cth) and was invalid to the extent of the inconsistency because of section 109 of the Constitution. [Citations omitted.]

The inability of a State to acquire native title rights without paying compensation exists in spite of a clear general principle to the contrary with respect to property interests, as enunciated by the High Court: see points 1 and 2 for example.

1. In *Durham Holdings Pty Ltd v The State of New South Wales* [2001] HCA 7 at 56, Kirby J. (in his minority judgment) pithily expressed the High Court's view: "....so far as the powers of a Parliament of a State of Australia to permit the acquisition of property without the payment of compensation are concerned, a long line of opinions in this Court upholds the existence of that power". [*Pye v Renshaw* (1951) 84 CLR 58 at 79-80; *Minister for Lands (NSW) v Pye* (1953) 87 CLR 469 at 486; cf *P J Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 at 405.]

2. Section 51(xxxi) of the Constitution provides no protection from the States: for example, in *P J Magennis Pty Ltd v Commonwealth* [1949] HCA 66; (1949) 80 CLR 382, Williams J states: "9. Section 51 (xxxi.) of the Constitution applies only to legislation of the Commonwealth Parliament and does not invalidate State legislation which does not provide just terms."

In spite of these very clear and settled statements of law, native title holders have such protection against acquisition without compensation, while holders of freehold and leasehold title do not.

If a State ignores the Racial Discrimination Act decisions, any aggrieved party can go to court and seek relief on the basis of the High Court decisions. The fact that there is no State constitutional requirement to provide compensation does not matter at all - it's irrelevant!

In the same way, if the Commonwealth were to use its external affairs power to validly legislate, say, the *Universal Declaration of Human Rights,* which provides that one of the fundamental rights is that no person should be arbitrarily deprived of his property, then to the extent that a State law were inconsistent, it would be invalidated by the operation of s. 109 of the Constitution, so that the Federal law prevailed.

With a competent execution of such a strategy, it should be possible for the Federal Government to make legislative behaviour by any State which is not subject to a just acquisition law, and so inflicts uncompensated losses on property owners, a thing of the past. Forever.

Indeed, it would seem that given the increasing proliferation of so-called free trade agreements ("FTA's" - they are really preferential trade agreements, but that's another story), between Australia and foreign countries, the Federal Government might well need to ratify such property rights for the purpose of fiscal prudence.

This is because, in order to placate foreign concerns about sovereign risk in Australia, the Australian government is taking responsibility for any acts of the Australian States that contravene an FTA, including expropriation without compensation. This is true of the FTA's with the USA, Singapore and Hong Kong, and prospectively with many more countries. So, if a State engages in such nefarious activity - and it is clear that with the High Court's stated position some frequently do - the Federal Government will have to pay compensation to the foreigners, with in all likelihood no recourse to the offending State(s).

This damage is already happening - in NSW, Queensland and Western Australia in particular. Let us consider the NSW example in more detail, as it is more advanced.

In January 2014, the NSW Government expropriated a Doyles Creek coal exploration licence without compensation. In *The Australian*, 24/3/2018, legal commentator Chris Merritt wrote:

> "This state [NSW] stole private property owned by Americans, banned them from seeking redress in court and based this decision on reports that suppressed inconvenient evidence and smeared an innocent man."

Mr Gordon Galt, Chairman of an affected company, NuCoal Resources, commented in *The Australian* on 9/2/2018 in an article entitled *US will not join TPP while NuCoal expropriation case lingers*, that:

> "US shareholders of ASX-listed NuCoal Resources, which held the Doyles Creek asset, have been, and still are, demanding the Australian government allows them to enter arbitration in the International Court of Justice to seek compensation from the Australian government.
>
> "The reason the Australian government is on the hook over the expropriation is not obvious, but under the existing FTA between the US and Australia, the Australian government took responsibility for any acts of the Australian states that contravened the FTA. So even though the NSW government was the "expropriator" of the asset, it is the Australian government that has to pay. Several meetings have been held on this matter between the governments of Australia and the US and more are planned. It is difficult to see how Canberra can avoid its responsibility in this case."

According to Australian Government – Department of Foreign Affairs and Trade "Investor-state dispute settlement (ISDS)" – Circular 2019:

> "Investor-state dispute settlement (ISDS) is a mechanism in a free trade agreement (FTA) or investment treaty that provides foreign investors, including Australian investors overseas, with the right to access an international tribunal to resolve investment disputes. A foreign investor in Australia, or an Australian investing overseas, can use ISDS to seek compensation for certain breaches of a country's investment obligations. For example:
>
> • obligations setting parameters on expropriation of a foreign investor's property".

In this case, it seems that to progress further trade negotiations, the Federal Government might have to provide the American shareholders compensation for their loss caused by the State of NSW's expropriation - but in this scenario, any Australasian or other shareholders (other than Singapore or Hong Kong owners, who have similar provisions in their FTAs) would not be compensated.

What a ridiculous state of affairs! A state of affairs where Australian shareholders would end up as second class citizens compared to Americans, in their own country! Not only that, but the Australian Government has, perhaps naively, put itself in the position of being a sovereign risk insurer for losses caused by State expropriations - and the cover's premium free! (Except in the long run, by taxpayers.)

Given that the Americans take a very dim view of uncompensated expropriations, and also that any Australian Government wants to generally progress trade relations with the USA, it would be logical for the Australian Government to offer, as part of any Trade Agreement, to give effect to an international convention on property rights as a term of the trade agreement. The Australian Government could then present such a development to voters not only as being inherently just, but also as a step to achieve a more favourable trade agreement with the USA. Win! Win! To the extent that such a "concession" might be more than the Americans would actually require, it would of course be open to the Australian negotiators to use that as a bargaining chip to extract some other concession from the USA, whatever that might be….

More to the point is another potential benefit offered by this strategy, which is highlighted by the NuCoal case. Under current arrangements, if the Australian Government, under FTA terms, ends up having to compensate American shareholders for their loss, it would seem that it would have no recourse of its own against the State government for its loss. Thus, it would seem that the existing FTA agreement with the USA (and any others like it) exposes the Australian Government to potentially significant unfunded and unexpected losses the future. For example, if the 2018 Queensland land clearing legislation affects any land in which American (or Hong Kong or Singaporean or other FTA) entities have a legal interest, it would seem that they could claim compensation from the Australian government. This is a real and substantial financial risk for the Australian Government going forward (the NuCoal case alone could cost the Australian Government hundreds millions of

dollars), but if the Australian Government were to ratify an international convention as proposed above, it would eliminate this financial risk.

To obtain an indication of the scale of foreign ownership of land, reference may be had to the *Register of Foreign Ownership of Agricultural Land* published by the AustralianTaxation Office.

Whether or not this tactical opportunity presented by the negotiation of FTAs is taken up, the above strategy, if implemented, would ultimately render all State legislation which is not an acquisition law, to an international humanitarian standard, unenforceable.

It might be noted that as well as protecting the rights of property owners in the States, it would bring those rights into broad consistency with native title holders, as well as rounding out existing protection of property rights in the Territories which are significant, but tightly limited by the High Court's conservative interpretation of "acquisition" in s. 51(xxxi) of the Constitution.

A practical difficulty for plaintiffs which must be acknowledged, is that conducting ISDS claims is expensive - say USD100,000+ per claim. Proceedings are managed by the World Bank Group - International Centre for Settlement of Investment Disputes.

There is yet another politically relevant reason supporting any Federal Government initiative to adopt Article 17 of the *Universal Declaration on Human Rights ("UDHR")*. This is due, as it were, to the Australian *provenance* of the *UDHR,* which was created and adopted with the active participation of Australia, and substantially under the direction of Labor Party luminary 'Doc' Evatt. According to the Australian Human Rights Commission https://www.humanrights.gov.au/publications/australia-and-universal-declaration-human-rights/:

> "Australia was a founding member of the UN and played a prominent role in the negotiation of the UN Charter in 1945. Australia was also one of eight nations involved in drafting the Universal Declaration.
>
> This was largely due to the influential leadership of Dr Herbert Vere Evatt, the head of Australia's delegation to the UN. In 1948, Dr HV Evatt became President of the UN General Assembly. That same year he oversaw the adoption of the Universal Declaration.
>
> ....Dr HV Evatt was a prominent figure in Australia politics during the middle of the 20th century. Prior to coming to the UN, he had been a judge of the High Court, Attorney-General and Minister for External Affairs. Dr HV Evatt was renowned for being a champion of civil liberties and the rights of economically and socially disadvantaged people."

'Doc' (or 'Bert') Evatt, as well as helping to draft the *UDHR*, was leader of the Australian Labor Party (and leader of the opposition) from 1951 to 1960, and was subsequently Chief Justice of New South Wales. Although he was a Labor leader during a particularly difficult time for the Labor Party - i.e. which time encompassed the 1955 split, Evatt is not perhaps historically held in such high regard in the Labor Party as some other Labor leaders. (Still, his main political opponent, Sir Robert Menzies was a pallbearer at his funeral in 1965.) Having said that, it would be fair to say that the *UDHR* (including Article 17) was, to the extent of Evatt's active and substantial involvement prior to his becoming leader, an achievement which the modern Labor Party could not deny or repudiate.

The proposed adoption of Article 17 of the *UDHR* by the Australian Government, which Article has such a positive Australian *provenance*, and the associated (external affairs and s.109) course of action offer such a confluence of potential benefits for property owners, the Australian government and international trade, that - to lapse for a moment into the contemporary vernacular - it's adoption should be a no brainer.

Indeed, the only logical political opponents to the adoption of Article 17 would be those whose behaviour the Article seeks to prohibit in the first place - i.e., those in favour of arbitrarily depriving others of their property, including taking property without compensation. Another possibility for opposition might be sheer timidity.

It might also be noted at this point that the equivalent of the Article 17 UDHR right not to be arbitrarily deprived of property, is possessed by "persons with disabilities", by virtue of Article 12(5) of the *Convention on the Rights of Persons with Disabilities* ("CPRD"), which as discussed later in this paper, has already been ratified by the Australian Government on 17 July 2008. So it would seem, extraordinarily enough, that Article 17 only needs to be ratified to the extent that it applies to people <u>without</u> disabilities, in order to allow the Commonwealth Government (with or without the agreement of the States) to pass legislation adopting these property rights into domestic law with respect to every property owner in Australia, with or without disabilities.

The proposed external affairs-s.109-property-rights strategy is not that complicated in principle, but has not been considered it seems, simply because no-one has thought of it before, notwithstanding the Racial Discrimination/Native Title precedent.

Be that as it may, it is perhaps doubtful that the success of such a strategy would have any retrospective application - possibly applying only to current and future state legislation. To the extent that justice for past wrongs would thereby be eluded, the argument below in relation to the nature of Crown grants, could provide a remedy.

Before proceeding to that, further consideration might be given at this point to the *Universal Declaration of Human Rights,* as to its potential suitability for ratification by the Commonwealth Government. In this regard, we reproduce an extract from the considered opinion of Phillip Boulten SC, for the NSW Bar Association (*supra* at 1 - 4, emphases in original):

"2. This submission advances three general propositions to be taken into account in the consideration of reforms to just terms compensation legislation for the compulsory acquisition of property:

a) *First*, the reform of Just Terms Compensation Legislation should acknowledge and reflect that property rights are human rights.....

b) *Secondly*, Just Terms Compensation Legislation should provide for compensation for the compulsory acquisition by the State of New South Wales (or by any State agency, authority or statutory corporation) of all species of property, and not just the acquisition of real property rights or interests.....

c) *Thirdly*, ...there is a strong case for amending the State's Constitution so as to include an appropriate guarantee that private property rights or interests will only be acquired on just terms.

Property rights are human rights

3. The right to own property, and the right not to be arbitrarily deprived of property, are human rights. Article 17 of the Universal Declaration of Human Rights (UDHR) provides:

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

4. Nations may regulate the property rights of individuals, but must do so according to the rule of law and in accordance with international obligations.

5. An acknowledgement of human rights stated in Article 17 of the UDHR provides important context for the formulation of a set of principles to guide the process for how the acquisition of real property should be dealt with by government.....

7..... legislation and regulations that permit the compulsory acquisition or expropriation of property should acknowledge and reflect the human rights at stake, including ensuring administrative justice to affected property owners by enactment of provisions that:

a) operate fairly (such as by affording procedural fairness to affected persons, and applying consistent rules to similar cases).....

b) be capable of rational application (such as by containing clearly defined matters which have to be taken into account, or disregarded, when a decision is made to acquire property rights or interests). The conferral of statutory powers to acquire property rights or interests should be confined to particular purposes.....

Extension of Just Terms Compensation Legislation to other species of property

8. Just Terms Compensation Legislation should provide for compensation for the compulsory acquisition by the State of New South Wales (or by any State agency, authority or statutory corporation) of all species of property,and not just the acquisition of real property rights or interests.....

12.....the processes and protections that are continued and developed for the acquisition of real property should be capable of application to the acquisition of other species of property.....

14.....while there are many aspects of government conduct that may adversely affect the use and enjoyment of privately owned land, these activities do not form part of 'acquisition law'...

15. The [NSW Bar] Association considers that there is a strong case for amending the State's Constitution so as to include an appropriate guarantee that private property rights or interests will only be acquired on just terms."

The NSW Bar Association thus has taken a clear stance in support of Article 17 of the *UDHR*. However, it would seem unlikely that NSW in particular, or any other State making a practice of trampling on such rights, would go to the trouble and inconvenience of changing the State constitution on the subject. (Note however the *Human Rghts Act* (Qld)2019 (discussed subsequently) which takes a hesitant step in that direction.)

The suggestion that "acquisition on just terms" should be a standard adopted might also seem, with respect, unnecessarily restrictive given the High Court's established narrow interpretation of s.51(xxxi) of the Australian Constitution. For example, in general terms if a government were to merely destroy a property right without thereby "acquiring" an interest for itself, then no compensation would be payable, which would seem to be significant diminution of the scope of Article 17: for High Court decisions on this, see below under the heading **4.6 - S. 51 (xxxi) of the Constitution - A Red Herring**. Having said that, it might be speculated that in the context of political possibilities in NSW, the Association was aiming too high already!

It is proposed here that the Association's references to Article 17 should be considered by the Federal Government in relation to its possible ratification. See: **9.0 - Adopting UDHR Article 17 as Domestic Law - Implementation Considerations.**

At this point, the *Human Rights Act* 2019 (Qld) might be noted. S. 24 contains a replica of Article 17 UDHR. S.108 provides that the Act applies to pre-existing legislation as well as future legislation. However, there is no provision to invalidate Acts or "statutory instruments" which breach human rights. Instead, s.53 provides:

> "The Supreme Court may, in a proceeding, make a declaration (a ***declaration of incompatibility***) to the effect that the court is of the opinion that a statutory provision can not be interpreted in a way compatible with human rights".

Such a declaration could then be brought to the attention of Parliament. To the extent that vegetation clearing, heritage and other legislation restricting owners' pre-existing land usage rights without compensation are "arbitrary deprivations of property", there would thus seem to be scope for such property wrongs to be clearly exposed by declarations of incompatibility in the State Parliament. The operation of the Act would be, in principle, subsidiary to any subsequent Commonwealth legislation enacted which covered the field.

Such a limited adoption by Queensland has been criticised as undermining international human rights standards: Fowler, Prof. Mark, "State charters undermine global human rights", *The Australian*, 16 April 2019. The *Human Rights Act* (Qld) is reviewed in more detail at **9.4 - Property Rights and the *Human Rights Act* (Qld) 2019: A new right of action for damages?**

Note also that the equivalent of the Article 17 UDHR right not to be arbitrarily deprived of property, seems, according to the High Court, to have been adopted into Australian law by virtue of the adoption of Art. 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (the "Discrimination Convention") scheduled to the *Racial Discrimination Act* (Com.)

Article 5(d)(v) of the Discrimination Convention lists as a human right: "The right to own property alone as well as in association with others" which is identical to Article 17(1) UDHR, but does not expressly include Article 17(2).

Nonetheless, in *Western Australia v Commonwealth (Native Title Act Case)* [1995] HCA 47; 1995 185 CLR 373, the High Court, affirmed its observations in the *Mabo [No. 1]* case:

> Discrimination in the enjoyment of the human rights to own and to inherit property which attracts the operation of s 10(1) of the *Racial Discrimination Act* was discussed in *Mabo [No 1]*. In that case, Brennan, Toohey and Gaudron JJ said [78] :
>
> Section 10 of the *Racial Discrimination Act* is enacted to implement Art 5 of the Convention and the "right" to which s 10 refers is, like the rights mentioned in Art 5, a human right — not necessarily a legal right enforceable under the municipal law. The human rights to which s 10 refer include the right to own and inherit

property. In the development of the international law of human rights, rights of that kind have long been recognised. Thus, the Universal Declaration of Human Rights 1948, Art 17 included the following: "1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property." (The word "arbitrarily" has been interpreted to mean not only "illegally" but also "unjustly": see Meron (ed), Human Rights in International Law: Legal and Policy Issues (1984), vol 1, p 122, fn 40.)

Although the human right to own and inherit property (including a human right to be immune from arbitrary deprivation of property) is not itself necessarily a legal right, it is a human right the enjoyment of which is peculiarly dependent upon the provisions and administration of municipal law. Inequality in the enjoyment of that human right may occur by discrimination in the provisions of the municipal law or by discrimination in the administration of the municipal law or by both.

And Deane J said [79] :

the moral entitlement to own property alone as well as in association with others and the moral entitlement to inherit which are referred to in Art 5 of the International Convention are "rights" for the purpose of the guarantee against racial discrimination contained in s 10 of the *Commonwealth Act*. Implicit in those moral entitlements is the "right" to enjoy immunity from being "arbitrarily dispossessed of [one's] property" which is expressly recognised by Art 17(2) of the Universal Declaration of Human Rights 1948. The second point to be made about s 10 is that the section is not to be given a legalistic or narrow interpretation. As its opening words ("If, *by reason of* ") make clear, it is concerned with the operation and effect of laws. In the context of the nature of the rights which it protects and of the provisions of the International Convention which it exists to implement, the section is to be construed as concerned not merely with matters of form but with matters of substance, that is to say, with the practical operation and effect of an impugned law. (Footnoted citations omitted.)

Given the Court's observation that the *Racial Discrimination Act* not only imported the human "right" of Article 5(d)(v) in particular into Australian law with respect to racial discrimination, but also the "implicit" right to enjoy immunity from being arbitrarily dispossessed from one's property, then it may be concluded that Article 17(2) of the UDHR would also be given similar legal effect.

In this regard, judicial notice of community attitudes consistent with the UDHR might also be noted. In *Resort Management Services Ltd v Noosa Shire Council* [1966] QCA 441, [1997] 2 QdR 291, Fryberg J. observed:

"It is trite to observe that the effects of the repeal of a statute may be both draconian and arbitrary. Section 20 of the *Acts Interpretation Act* 1954 exists to counter such effects. It reflects some **fairly deeply held social attitudes in our community**, **including** (among others) **the idea that people should not be arbitrarily dispossessed of their entitlements without proper compensation, at least when the deprivation does not operate equally throughout the community**; and that when society regulates the activities of individuals, those rules should not be changed in such a way that those who are in the middle of an activity are disadvantaged by comparison with the remainder of the community. Those themes in my view run through the decided cases relating to s.20 and its equivalents in other jurisdictions." [Emphasis added.]

So, now to proceed to the nature of grants, and the potential for common law revision to protect property rights, which does not rely on legislative action by State of Federal Governments, and which might operate with retrospective effect.

4.2 High Court of Australia - Some Property Principles: Recognising Grant Power

Familiarisation with at least some of the High Court's general views as to property rights would seem to be essential.

As a preliminary point, attention may be drawn to Neate's (supra at 18) observations which touch on the nature of freehold land grants in particular:

"In *Fejo v Northern Territory* (1998) 195 CLR the Court decided that a valid grant of unqualified freehold title extinguished completely and for all time the native title rights and interests of indigenous Australians in respect of that land. [*Fejo v Northern Territory* (1998) 195 CLR 96 at paragraphs 43, 45, 55-58 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ: paragraphs 95, 105-108, 112 per Kirby J.] Six of the justices wrote, in relation to decisions from courts in the United States, Canada and New Zealand:

'Although reference was made to a number of decisions in other common law jurisdictions about the effect of later grants of title to land on pre-existing native title rights, we doubt that much direct assistance is to be had from these sources. It is clear that it is recognised in other common law countries that there can be grants of interests in land that are inconsistent with the continued existence of native title; the question in each case is whether the later grant has had that effect. In some cases the answer that has been given in other jurisdictions may have been

affected by the existence of treaty or other like obligations. Those considerations do not arise here. In this case, the answer depends only upon the effect of a grant of unqualified freehold title to the land.' " [Citations omitted.]

What implications does the High Court's view - that a valid grant of unqualified freehold title extinguished completely and for all time the native title rights and interests of indigenous Australians in respect of that land - have with respect to the characterisation of the nature and effect of a freehold grant itself? Though the grant might be provided in consideration of a sum of money, the grant itself is not a mere contract - it is a grant. Once created, it continues to exist for the benefit of heirs and successors, until resumption by the State, if any, or ever.

As to the High Court's general views as to property rights, there is probably a large number of possible starting points, but some extracts of Brennan J.'s Judgment in the *Mabo (No. 2)* case below seem most apposite. The judgment outlines: the Court's reasoning process; the existing legal principles which it finds to be relevant; and how those principles apply to native property rights, or the lack of them.

Although many observations in the judgment are made with respect to the forms of native title, it could hardly be said (and it is not said) that, *a priori*, freehold title granted by the Crown of itself carries a lesser entitlement, or is less secure, than native titles. To this extent, many observations favourable to the existence and integrity of native title could be said to apply to the integrity of title made by virtue of Crown grants.

Mabo v Queensland (No 2) [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992)
Mabo No 2 - Brennan J

"29. In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. Australian law is not only the historical successor of, but is an organic development from, the law of England. Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies. It is not immaterial to the resolution of the present problem that, since the Australia Act 1986 (Cth) came into operation, the law of this country is entirely free of Imperial control. The law which governs Australia is Australian law. The Privy Council itself held that the common law of this country might legitimately develop independently of English precedent (19) See Australian Consolidated Press Ltd. v. Uren (1967) 117 CLR 221, at pp 238, 241; (1969) AC 590, at pp 641, 644. Increasingly since 1968 (20) See the Privy Council (Limitation of Appeals) Act 1968 (Cth) and see the Privy Council (Appeals from the High Court) Act 1975 (Cth), the common law of Australia has

been substantially in the hands of this Court. Here rests the ultimate responsibility of declaring the law of the nation. Although this Court is free to depart from English precedent which was earlier followed as stating the common law of this country (21) Cook v. Cook [1986] HCA 73; (1986) 162 CLR 376, at pp 390, 394; Viro v. The Queen [1978] HCA 9; (1978) 141 CLR 88, at pp 93, 120-121, 132, 135, 150-151, 166, 174, it cannot do so where the departure would fracture what I have called the skeleton of principle. The Court is even more reluctant to depart from earlier decisions of its own (22) Jones v. The Commonwealth (1987) 61 ALJR 348, at p 349; 71 ALR 497, at pp 498-499; John v. Federal Commissioner of Taxation [1989] HCA 5; (1989) 166 CLR 417, at pp 438-439, 451-452; McKinney v. The Queen [1991] HCA 6; (1991) 171 CLR 468, at pp 481-482. The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed. It is not possible, a priori, to distinguish between cases that express a skeletal principle and those which do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.

42....Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights (68) See Communication 78/1980 in Selected Decisions of the Human Rights Committee under the Optional Protocol, vol.2, p 23 brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the

indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands. It was such a rule which evoked from Deane J. (69) Gerhardy v. Brown (1985) 159 CLR 70, at p 149 the criticism that -

'the common law of this land has still not reached the stage of retreat from injustice which the law of Illinois and Virginia had reached in 1823 when Marshall C.J., in Johnson

v. McIntosh (70) (1823) 8 wheat, at p 574 (21 US , at p 253), accepted that, subject to the assertion of ultimate dominion (including the power to convey title by grant) by the State, the 'original inhabitants' should be recognized as having 'a legal as well as just claim' to

retain the occupancy of their traditional lands'.

43. However, recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system....."

Deane and Gaudron JJ.....

"11. Lord Denning, speaking for the Privy Council in Adeyinka Oyekan v. Musendiku Adele(122) (1957) 1 WLR 876, at p 880; (1957) 2 All ER 785, at p 788, said:
'In inquiring ... what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it: and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law'.

That case was concerned with the position in a Colony established by cession and the above passage needs to be modified to take account of the fact that, as has been seen, the Crown had no prerogative right to legislate by subsequent proclamation in the case of a Colony established by settlement. Otherwise, the "guiding principle" which their Lordships propounded is clearly capable of general application to British Colonies in which indigenous inhabitants had rights in relation to land under the pre-existing native law or custom. It should be accepted as a correct general statement of the common law. For one thing, such a guiding principle accords with fundamental notions of justice. Indeed, the recognition of the interests in land of native inhabitants was seen by early publicists as a dictate of natural law(173) See, e.g., Wolff, Jus Gentium Methodo

Scientifica Pertractatum (trans. Drake), (1934), vol.II, pp 155-160, ss308-ss313; Vattel, The Law of Nations or Principles of the Law of Nature, London, (1797), pp 167-171; F. de Victoria, De Indis et de Jure Belli Relectiones, (ed. Nys, trans. Bate), (1917), pp 128, 138-139; Grotius, Of the Rights of War and Peace, (1715), vol.2, Ch.22, pars 9, 10. For another, it is supported by other convincing authority(174) See, generally, the cases referred to by Professor McNeil in his landmark work, Common Law Aboriginal Title, (1989), pp 173-174, 183-184 and 186-188 applying to a wide spectrum of British Colonies, including a long-standing New Zealand(175) See Reg. v. Symonds (1847) NZPCC 387, at pp 391-392 case and recent Canadian cases(176) See Calder v. Attorney-General of British Columbia (1973) 34 DLR (3d) 145, at pp 152, 156, 193-202; Guerin v. The Queen (1984) 13 DLR (4th) 321, at pp 335-336. In this Court, the assumption that traditional native interests were preserved and protected under the law of a settled territory was accepted by Barwick C.J. (in a judgment in which McTiernan and Menzies JJ. concurred) in Administration of Papua and New Guinea v. Daera Guba(177) [1973] HCA 59; (1973) 130 CLR 353, at p 397; see, also, Geita Sebea v. Territory of Papua [1941] HCA 37; (1941) 67 CLR 544, at p 557 as applicable to the settled territory of British Papua."

Back to Brennan J....

"84.....In Queensland, these powers are and at all material times have been exercisable by the Executive Government subject, in the case of the power of alienation, to the statutes of the State in force from time to time. The power of alienation and the power of appropriation vested in the Crown in right of a State are also subject to the valid laws of the Commonwealth, including the Racial Discrimination Act. Where a power has purportedly been exercised as a prerogative power, the validity of the exercise depends on the scope of the prerogative and the authority of the purported repository in the particular case.

89...By granting the lease, the Crown purported to confer possessory rights on the lessee and to acquire for itself the reversion expectant on the termination of the lease. The sum of those rights would have left no room for the continued existence of rights and interests derived from Meriam laws and customs. [Ed. - *A point which might be drawn here is that a reason for using a lease is that the Crown wishes to "acquire for itself the reversion expectant on the termination of the lease"-IT HAS NO SUCH RIGHT OF REVERSION FOR A GRANT OF LAND IN FEE SIMPLE. An arguable corollary of this is that if the Crown grants, say a 5 acre zoning and wishes to "acquire a right of reversion" to some degree, say to 100 hectares, then it should make the zoning - at the time it is created - explicitly subject to a term - eg., a period of time, or to the exercise of the right of zoning by*

the grantee & successors within a designated period. Failure to do so is (arguably) a failure by the Crown to acquire (or preserve) a right of reversion.]

***British Leyland Motor Corp & Ors v Armstrong Patents Company Ltd & Ors [1986] UKHL 7 (27 February 1986) URL: *http://www.bailii.org/uk/cases/UKHL/1986/7.html* Cite as: [1986] FSR 221, [1986] 1 All ER 850, [1986] 2 WLR 400, [1986] UKHL 7, [1986] ECC 534, [1986] RPC 279, (1986) 5 Tr LR 97, [1986] AC 577"

In the speech extract reproduced below, Chief Justice French might fairly be said to reflect a predisposition by the High Court to protect property rights: French, Robert, C.J., A.C., *Property, Planning and Human Rights* Planning Institute of Australia, National Congress 2013: (NB: emphases are added.)

"Property rights and interests are valued and protected in the legal tradition of the common law, which is part of the Australian legal tradition. They are also protected to varying degrees by statute law, limiting the purposes for which property can be affected by planning decisions, and providing compensation for compulsory acquisition and injurious affection....

Property rights in Australia are protected by the Constitution to the extent that acquisition of property by the Commonwealth must be on just terms. There is no such constitutional protection in respect of the acquisition of property by State governments or authorities under State law. Nevertheless, each of the States and Territories has laws providing for the acquisition of land for public purposes or public works and for compensation to be paid to the owners of acquired land.[7]

Acquisition is not the only way in which property rights can be affected by the exercise of public power. They may also be affected by 'acts of government that do not directly or formally touch the property in question, but which nevertheless damage its value and enjoyment'. This is what is sometimes called 'injurious affection'.[8] Compensation for compulsory acquisition and injurious affection by State or Territory governmental action depends upon statute law. *The question arises why is such compensation provided for by parliamentary enactment when it is not constitutionally required? One answer is that respect for property rights is a deeply embedded aspect of our legal tradition. It is also an aspect of our culture.* It was reflected in the film 'The Castle' and the immortal line 'tell them they're dreaming'.[7]

Darryl Kerrigan's assertion of his property rights was reflective of the common law's protective approach to property rights generally. That approach was

forcefully stated by William Blackstone who endeavoured in the 18th century to set out, in what became a classic treatise, the common law of England. His work also greatly affected the development of the law in the United States. Blackstone regarded the right of property as an 'absolute right, inherent in every Englishman'.[9] He wrote:

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land.[10]

Recognising however, that the legislature could enact laws to override the common law, he said:

In this, and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.[11]

What Blackstone said spoke to another age but also speaks, although in more muted tones, to ours. The common law favours interpretations of statutes which minimise the effects upon property rights. Very early in the history of the High Court the first Chief Justice, Sir Samuel Griffiths, said that:

it is a general rule to be followed in the construction of Statutes ... that they are not to be construed as interfering with vested interests unless that intention is manifest.[12]

9 William Blackstone, *Commentaries on the Laws of England*, (University of Chicago Press, Chicago and 10 London, 1765) vol 1, 134.
10 Ibid 135.
11 Ibid.

12 *Clissold v Perry* (1904) 1 CLR 363, 373 (Griffiths CJ), 378 (Barton and O'Connor JJ concurring). Recently cited in *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 619 [42] (French CJ).

That approach to the interpretation of statutes has been stated more than once in the High Court. It can be regarded today as a particular aspect of the principle of legality — a *principle which says that laws are not to be interpreted as interfering with common law rights and freedoms generally unless that interpretation is required by the clear words of the statute. The principle is one which we share with the United Kingdom. It has been explained in the House of Lords as requiring that Parliament 'squarely confront what it is doing and accept the political cost'.*[13] *Parliament cannot override fundamental rights by general or ambiguous words*. The rationale of the principle is that, in the absence of clear words, the full implications of a proposed statute may pass unnoticed:

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.[14]

The general principle finds its application in the requirement, affecting the extinguishment of native title, that native title is not to be taken as extinguished by legislative or executive actions unless they are inconsistent with its continuing survival. Thus the grant of freehold title has been held to effect extinguishment. The grant of pastoral leases under statute was held in the *Wik* decision not to do so.[15]

In thinking about the application of this common law principle to the extinguishment of native title rights and interests, it is important to bear in mind that those interests, although originating in traditional laws and customs, are property interests recognised as such at common law and, since 1993, under the NTA. They are also rights protected by the NTA in relation to future dealings which might affect them. Although they have a special character they fall within the general framework for the protection of property rights and interests in the context of planning law and practice which I have outlined. It is of course true that the protection of native title rights has a particular significance and raises practical challenges for planning decisions in regional and rural areas. The statutory framework provided by the NTA puts a premium on negotiation and the use of such tools as Indigenous Land Use Agreements to enable decisions about the use of land and waters to be made in a way that accommodates so far as

possible, the continuing existence of native title rights and interests and puts in place mechanisms for the practical management of co-existing rights.

The requirements of administrative justice and the common law principles protective of property rights are applicable to indigenous and non-indigenous interests alike. There are complexities attached to all aspects of planning law and practice. Native title is one of those.

What all of this tells us is that planning law and practice is not a field for the fainthearted or the blinkered specialist. It exists within the general framework of administrative justice which seeks to ensure that public power is exercised lawfully, fairly, rationally and intelligibly. It is exercised within the framework of constitutional and statutory constraints and the great traditions of the common law applicable to the way in which our laws are interpreted and applied to all Australians in striking a balance between the public interest and the legitimate interests of individuals, communities and corporations in the use and enjoyment of their property."

While acknowledging that the Chief Justice's observations, being merely extrajudicial, would thus carry less weight in a formal legal sense than if they had been made in a judgment to explain a decision, there can be no doubt that they would be substantially indicative of the sentiments of the Court as a whole.

Having said that, attention should also be paid to the High Court's views in *Durham Holdings Pty Ltd v The State of New South Wales* [2001] HCA 7, which were succinctly expressed at (2001) 20 AMPLJ at 10:

"The Universal Declaration of Human Rights provides that one of the fundamental rights is that no person should be arbitrarily deprived of his property. This is an accepted international standard and translates into paying just terms compensation for a compulsory acquisition of property.

The High Court of Australia has stated in *Durham Holdings Pty Ltd v NSW* - that this fundamental right is not part of the common law of Australia. There continues to be a common law presumption that adequate compensation will be paid for the compulsory acquisition of property but that presumption can be rebutted by legislation."

The Justices of the High Court were very clear. The majority at §7 write:

"The applicant also contends in this Court that the legislation in question is invalid because the Parliament of New South Wales lacks power to enact laws for the acquisition of property without compensation. There are numerous statements

in this Court which deny that proposition. [*The State of New South Wales v The Commonwealth* ("the *Wheat Case*") (1915) 20 CLR 54 at 66, 77, 98, 105; *P J Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 at 403, 405, 416, 419; *Pye v Renshaw* (1951) 84 CLR 58 at 78-80; *Minister for Lands (NSW) v Pye* (1953) 87 CLR 469 at 486; *Mabo v Queensland* (1988) 166 CLR 186 at 202; *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 58 [149].]"

In his separate judgment, Kirby J. made the same point at §17 & §56:

"Normally, in Australia, where property is compulsorily acquired in accordance with law, the property owner is compensated justly for the property so acquired. Australian society ordinarily attaches importance to protecting ownership rights in property. The present application was brought to test the constitutional right of a Parliament and Executive Government of a State of the Commonwealth to depart from the foregoing norms. The applicant asked this Court to consider whether, under the Act and the Arrangements, properly construed, the State had acquired its property and, if so, whether such laws were beyond the State's lawmaking powers.

....so far as the powers of a Parliament of a State of Australia to permit the acquisition of property without the payment of compensation are concerned, a long line of opinions in this Court upholds the existence of that power. [*Pye v Renshaw* (1951) 84 CLR 58 at 79-80; *Minister for Lands (NSW) v Pye* (1953) 87 CLR 469 at 486; cf *P J Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 at 405. "

So, it would seem that notwithstanding all the previously expressed fine comments by Brennan J., French C.J.. *et alia* about the High Court's respect for property rights in principle, it is very clear that the High Court will not impose a duty on a state to pay compensation for expropriated property rights, as it was invited to do in the *Durham* case, on the basis (as unsuccessfully argued) that the State of NSW had no such power.

Kirby J.'s view taken in the High Court is in apparent violent contrast to his own general observations about property rights, made extrajudicially (*Foreword: The Law of Resumption and Compensation in Australia*, Marcus Jacobs QC (1998)):

"The capacity of a sovereign to acquire a subject's property is as ancient as organised human society. But in the place of confiscation by rapacious kings and war lords, civilised communities have developed complex rules to control and regulate compulsory acquisition. In the English legal tradition, to which our legal system is heir, the principle that property should not be confiscated except in accordance with law, can be traced to Magna Carta. In Article 52 of that document of 1215, King John promised:

‘To any man whom we have deprived or dispossessed of lands, castles, liberties or rights, without the lawful judgment of his equals, we will at once restore these’.

There you have the two concepts that have been refined by the many subsequent statements of basic principle: the requirement of authority of law and the obligation of restoration and proper satisfaction.

In the French Declaration of the Rights of Man and of the Citizen of 1789, the formulation took on the colour of a basic civil right. Article 17 provides:

‘Property, being an inviolable and sacred right, none can be deprived of it except when public necessity, legally ascertained, evidently requires it, and on conditions of a just and prior indemnity’.

There can be little doubt that this formulation influenced James Madison when he was drafting the *Bill of Rights* for the United States Constitution. The Fifth Amendment provides that:

‘No person shall be ... deprived of ... property without the due process of law; nor shall private property be taken for public use, without just compensation’.

The formulation in turn influenced the Founders in the provision they made in 51 (xxxi) of the Australian Constitution. However, that governs only acquisitions under federal law. An attempt to extend its protections to the Australian States was rejected by the electors in thee bicentennial referendum of 1988. [Footnote: Proposed new s 119A. See T Blackshield, G Williams, B Fitzgerald *Australian Constitutional Law and Theory* 1996, at 974. The proposed law was joined with other more controversial proposals. 68% of the electors voted against the amendment of Only 20% voted for the amendment.]

The notion of providing fair compensation to those whose property is resumed by the state and affording a legal regime for the procedures of resumption, the avenues of redress and challenge and of compensation has remained on the national and international agenda. The Universal Declaration of Human Rights now in its fiftieth year, declares in Article 17:

‘ 1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property’.

Putting flesh on these concepts, of proper legal procedures and fair compensation, is the purpose of a great deal of lawmaking: legislative and judicial.”

An observer might be excused for wondering if, when contrasting these observations of Kirby J. with those he made in the *Durham Holdings* case (above, which even included (at 21) a reference to: "The statutes by which the Crown [i.e., King Henry VIII validly] appropriated the lands of the monasteries in England"), he were some sort of judicial Dr Jekyll and Mr Hyde character, the apparent contrast in views in and out of Court, being so great. Perhaps it is possible to reconcile the two views by concluding that the states' power to deprive owners of property without compensation is pre-Enlightenment in nature, and increasingly anomalous in the modern democratic world.

The line of argument being put in this working paper is however clearly distinguishable from that considered in *Durham*. Firstly, the rights extinguished in that case were not evidently grants in fee simple or of leasehold. Secondly and more importantly, our argument does not rely on some general fundamental right which has been found by the High Court not to exist. To the contrary, it relies on the states' (and formerly as colonies) creation and use of Crown grants as instruments of alienation - with respect to which there has been no attempt at express revocation - and perhaps also, to the extent that the exercise of the grants power constitutionally provided in Letters Patent etc. cannot as a constitutional matter be revoked - as the basis for rights of compensation.

Having said all that, the High Court appears, more recently, to have adopted a position which does not address the view taken by Kirby J. in the *Durham Holdings* case *(supra)* that "....a long line of opinions in this Court upholds the existence of that power"- i.e. of a State to acquire property without compensation.

In *Northern Territory v Griffiths* (*supra* at 29-30), the majority of the Court states:

> "The point made in both the *Native Title Act Case* and *Ward* was that, although native title rights and interests have different characteristics from common law land title rights and interests, and derive from a different source, native title holders are not to be deprived of their native title rights and interests without the payment of just compensation any more than **the holders of common law land title are not to be deprived of their rights and interests without the payment of just compensation**. Equally, native title rights and interests cannot be impaired to a point short of extinguishment without payment of just compensation on terms comparable to the **compensation payable to the holders of common law land title whose rights and interests may be impaired short of extinguishment**. (Bold emphases added.)

With regard to native title, the source of the rights expressed here is clearly explained by the Court, and underpinned by the *Racial Discrimination Act* and its adoption of the Discrimination Convention. However, no equivalent source of human rights

adopted into domestic law with respect to common law land title is cited, and nor is Kirby J's "long line of opinions" to the contrary in the High Court addressed.

In outlining these principles, the Court seems to rely on a presumption that common law land title holders whose rights are impaired would receive compensation, but as mere impairment was not an issue in the *Griffiths* case, that presumption was not tested. The existence of Northern Territory legislation which provided for compensation to common law titleholders in the case of extinguishment was sufficient to answer the issue in that particular case.

The Court's view that the holders of common law land title would be entitled to compensation for *impairment* of their property rights short of extinguishment is not supported by any explicit line of reasoning, other than an apparent presumption that something exists like the Preamble and s.51(1) of the *Native Title Act* provide to native titleholders:

> "The Preamble goes on to state: "[j]ustice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms ... must be provided to the holders of the native title....s51(1) providing for an entitlement on just terms to compensation to the native title holders for "any loss, diminution, impairment or other effect of the act on their native title rights and interests" (emphasis added). (*Ibid.*, at 13 & 19.)

The difficulty is of course that so often, no such provisions exist for the benefit of common law title holders, so to that extent any such presumption must be misplaced.

Indeed, to take the example of Western Australia, the High Court, and native title holders, might be in for a shock if the Court is presented with a claim for compensation for impairment of native title rights, because it is highly likely that Western Australia could argue that no such rights existed (and to the extent that some such provision is made, it is illusory in fact) for the holders of common law land title in the State - which is amply demonstrated in numerous public submissions to the *Inquiry into Private Property Rights* 2019-2020: see http://www.parliament.wa.gov.au/Parliament/commit.nsf/WCurrentNameNew/EAC7164535ACDCB2482584180007BB24?OpenDocument#Submissions

In short, for native title holders not to be deprived of a right of compensation for impairment of native title, they have to show that such deprivation is not discriminatory compared with common law title rights: thus if the common law title holders have in fact no such rights, there is no discrimination if the native title holders are also deprived of those rights. Put another way, native title holders now have a common interest with common law title holders for the latter to have such rights.

4.3 Understanding Property Rights Referendum Arithmetic

In passing, it might be noted that both Callinan J in the *Chang* case (*supra*), and Kirby J in the above *Foreword (supra)* passage recall a relevant 1988 referendum question, which was rejected, the reported figures being 69% No and 20% Yes:

> "Question 4
> A Proposed Law: To alter the Constitution to extend the right to trial by jury, to extend freedom of religion, and to ensure fair terms for persons whose property is acquired by any government.")

Their Honours might be excused for being somewhat bemused about this statistic. After all, it might be taken on notice that if householders were individually asked if they were in favour of any law preserving a government right to acquire their property on unfair terms, the overwhelming answer would be: NO! So, why did only 20% vote in favour of the proposition put? The answer is largely arithmetical, but also relates to poor questionnaire design.

In any field of research where people are asked questions, a fundamental element of good questionnaire design is to keep it simple. The unintentional confusing of respondents will lead to poor quality survey results.

For example, if one has to find answers on three different topics, the correct approach would be to ask a question about one topic at a time.

If however, the three topics are combined into one “yes or no” question, the usability of results will instantly decline. For those who answer “yes” to the combined question, it might be clear that their answer to all three parts of the question is “yes” - but on the other hand, some who only agreed with one or two questions might feel compelled to answer “yes” anyway to achieve their preferred ‘yes”result for the one or two preferred. For those who answer “no”, are they so voting because they reject one option only - and if so, which one? - or two options only - and if so which two? - or all three options? Thus is the clarity of data, which would have been obtained by asking three separate questions, lost.

However, even worse, the inclusion of three questions in one will definitely increase the complexity of the question, and with complexity comes increased risk of respondent confusion - for example, the respondent has to:
1. decide whether agreeing with two means an overall “yes”, or is strictly speaking a “no”; or
2. perhaps whether the inclusion of three different items itself suggests an agenda of the proponent which escapes and so troubles the respondent; or,
3. focus quickly on three apparently unrelated items, which is itself confusing.

This sort of thing will increase the rate of noes significantly above what it would have been had the questions been separated.

Having said that, a simple piece of arithmetic can show why even where a good majority of voters were willing to vote yes on each of three questions, the combination of the three into one question would cause the majority to disappear.

So, imagine three referendum questions, each of which is supported by a majority - say 70% of voters. In this example, 70% of voters would vote “yes” to each of the three questions. Success and glory for the referendum proponents!

Now, what happens when the three topics are combined into one question? 70% of voters are happy with one topic, 70% with the second, and 70% with the third, but to answer “yes” in this referendum situation, one really needs to support all three topics. So, in this example, what proportion of voters would support all three topics? The answer: 70% x 70% x 70% = (calculator handy?) 34.3%. So, even though a clear, healthy majority might support all three topics, this is by the force of simple arithmetic instantly converted into a low minority. To the extent that the above-mentioned voter confusion is also considered, the “yes” vote would inevitably be further depressed. 20% support here we come! Despondency for the referendum proponents!

Varying the assumed level of support provides these results:
(a) two thirds majority support for each item in each state converts to 29.54% less the confusion factor;
(b) 88% majority support for each item in each state converts to 68.1%, enough for the referendum to pass, subject to the unquantifiable confusion factor.

In other words, by combining three topics into one question, the referendum could only reach a two-thirds majority “yes” vote, if support for each of the individual items had been, at a bare minimum, 88%, but probably more to allow for the confusion factor.

Accordingly, Question 4 of the 1988 Referendum was a question designed, and doomed, to be rejected. Whether it was so because of the political exuberance of the bicentennial year, or because it was designed by a committee (recall Sir Alec Issigonis’ comment that “a camel is a horse designed by a committee”) or just sheer incompetence, might best be a question for historians.

The conclusion to be drawn from all this is that Question 4 of the referendum cannot be taken to demonstrate that voters were in favour of having governments take their property without compensation, but simply that the Question was incompetently designed.

4.4 Reconciling Crown Grants and Other State Powers

Consistent with the above analysis of settled law that a state may acquire property without the payment of compensation, Griffith CJ in *New South Wales v Commonwealth* (1915) 20 CLR 54 (the *Wheat case*) at 66-67 observed:

> "the power to expropriate private property, ...is generally, and I think rightly, regarded....as a power inherent in sovereignty. In my judgment the only condition of its exercise is that the property, whether real or personal, shall at the moment of the exercise of the power of expropriation be within the territorial limits of the State...The general power of expropriation is a power which is by the [Australian] Constitution neither withdrawn from the States nor exclusively vested in the Commonwealth."

While Griffith CJ found one condition only - of territoriality - Barton J found another at 78:

> "...in respect of property real or personal, the power of the Parliament to assume or resume property is as absolute *quoad* New South Wales as the power of the Parliament of the United Kingdom in its sphere, with this qualification only, that the power of any State of the Commonwealth must be exercised subject to the Federal Constitution."

Barton J's qualification might be taken as an allusion to, for example, s.109 of the Australian Constitution - which, as we explored above at **4.1** - when used in conjunction with the Federal Government's external affairs power - as it now already has done, and could more extensively do in the future - can limit or terminate a state's ability to destroy or acquire property without compensation.

These two limitations to state power to expropriate property without compensation might be joined by a third - the state's own power to prohibit that power. There are two techniques which might be used to achieve this. Neither was considered by any of the High Court decisions relating to a state's power to expropriate property, because they have not been argued, or considered relevant to the issues at hand.

The first limitation is that of "double entrenchment" where a state legislates so that a particular statute can only be amended by a specified step outside the State's power to control (typically by the decision of a popular referendum), and the law specifying such can itself only be changed by another such specified step (again, conventionally, a popular referendum). So far, no state has double entrenched an obligation on Itself to pay compensation for expropriated property and in all truth, such a future prospect would seem to be most unlikely. Still, it is a technique for a state to limit its own sovereignty which has been used for other purposes.

The second technique for a state (or previously, as a colony) to limit its own power is to issue Crown grants of land. It is clear at common law, as noted above at **2.1** that resumption of a grant without compensation for any associated loss would be a repudiation of that grant (except of course in the case of defeasements validly exercised pursuant to reservations).

To this, it might be argued that a state (i.e., the Crown) may legislate to expressly terminate any right to compensation which a Crown grant might carry with it and in so doing: seek to abolish the common law rule with respect to repugnancy in the context of Crown grants; and/or seek to retrospectively apply the rule against perpetuity to Crown grants of freehold title.

Putting aside the possibility that the state's power to make grants of land might be a constitutionally entrenched power by virtue, for example, of its inclusion in Letters Patent (as in the case of Queensland as outlined above), there would be a most formidable difficulty facing such legislation.

Essentially, this difficulty is a dilemma. The dilemma created would be: can the Crown (i.e. the state) defeat an instrument - namely a grant - which the Crown itself has previously created, where that instrument, not being subject to the rule against perpetuities, is perpetual, and where an essential part of that instrument is the right to compensation on resumption of any part of the landholder's right to enjoyment of the title?

Here we face a paradox of omnipotence as exemplified by the question: "Can God make a stone so heavy that He can't lift it?"

The answer, whether yes or no, implies a limitation to God's power, but God is, by definition, omnipotent. We'll leave that solution to the theologians - or check out Peter Suber's "Nomic: A Game of Self-Amendment in Hofstadter's 'Metamagical Themas'", *Scientific American* (June 1982).

The paradox here is that if the Crown can create a legal instrument which provides a grantee with an interest in land, which interest can exist in perpetuity, absent resumption, so that in the case of resumption, compensation must be paid, that instrument must by necessity eliminate the Crown's power to retrospectively legislate to be able to resume without compensation. If, on the other hand, the Crown does have that power, to effectively legislate *ex post facto* to be able to resume without legislation, thereby repudiating the grant, then the Crown does not, after all, have the power to create a legal instrument which provides a grantee with an interest in land, which interest can exist in perpetuity, absent resumption, so that in the case of resumption, compensation must be paid.

Consequently, if the latter case were to hold, namely where the Crown does have that power, to retrospectively legislate to be able to resume a Crown grant without compensation, then the security inherent in Crown grants and recognised by the courts since the early 19th century would really just be a sham, as would be the role of defeasements. (This is consistent with our concluding observation at **2.1.4** above.)

Indeed, such a conclusion would validate the legally baseless idea that all freehold and leasehold land is subject to an undocumented, inchoate reservation of indeterminate scope. Such a fundamental sovereign risk must be untenable.

Ultimately, the resolution of this dilemma is potentially by a decision of the High Court. In the end, it would have to choose between destroying the integrity of the system of Crown grants as a basis for land title in Australia, and not. Further, if resumption of any aspect of a Crown grant, absent a reservation, did not carry with it an entitlement to compensation, then the purpose of Crown grant reservations would become meaningless in practice.

In short, the Crown's power to limit its own power - as exercised in the nature of Crown grants - is an aspect of its sovereignty. A decision by a court to deny that, would be to impose a new limitation on Crown (state) sovereignty.

4.5 Other Implications for Landholders

As noted above at **3.5**: A Crown grant is a legal instrument not limited by the common law rule against perpetuity - in other words it is a perpetual title which can only be absolutely terminated by a complete resumption by the Crown. It is an aspect of its perpetual nature that compensation must be paid on any termination by resumption.

Further, as noted above at **2.1.4**: the existence of a right to compensation by the landowner for a mere impairment (as opposed to a complete resumption) by the Crown of its enjoyment of *unreserved* title is demonstrated by cases where the Crown has (successfully) relied on defeasement pursuant to a reservation to establish an absence of right of compensation.

So far, our focus has been on situations where a landholder's use of land has been (or at least, purportedly been) directly adversely affected by State legislation or other regulatory instruments. However, attention might be paid two two other types of situation, namely where:

1. the State's activities on other land (i.e., on Crown land or other private land) practically impairs the landowner's enjoyment of title; and

2. the State acts to prevent a landowner from physically protecting his/her entitled land from destruction by natural forces.

These are both cases where a State causes or exacerbates a physical detriment to the landowner's property. The nature of the title provided by a Crown grant should, in such circumstances, provide the landholder with protection from the State in the form of injunctive relief (where timely and practical) or an entitlement to damages.

4.5.1 Injurious Affection Caused by a State's Activities on Crown Land or Other Private Land

Consider an example. A State road authority builds a new bridge over a creek. Upstream from the bridge, above the creek, is a house, situated on a Crown grant of land, which has previously had no recorded cases of being flooded. You guessed it - after the construction of the new bridge, in times of very heavy rain, the creek waters back up from the bridge and flood the house. This happens on several occasions. The owner seeks compensation for his losses, but the State has passed legislation granting itself legal immunity in such cases.

In this case, the landowner has suffered damage because of activities undertaken by the State on other land, which might not even have any contiguity at all with the owner's property.

Two possible arguments relating to the grant might be considered:

A. Work by the Crown has caused the amenity of the homeowner's property to be significantly and adversely affected, so that the quality of the land is materially different from the land when originally granted. Now, it might be said that the amenity of land might be affected for all sorts of reasons over an extended period of time (eg., transition from a rural setting to a busy suburban neighbourhood, or to an industrial neighbourhood, climate change, or an untidy neighbour), but such changes might be caused for all sorts of reasons which have nothing to do with activities of the Crown, and the Crown would have no prospective liability for any damage caused by any such things. The distinguishing point in this example is that the Crown has directly caused the damage to land which it has granted in freehold or leasehold, so in principle, it must bear liability for that damage, or remove the cause of that damage.

B. Legislation granting the State immunity from liability in this situation is itself repugnant to the grant. It is in the nature of a defeasance, and a defeasance not made for the purpose defined by a reservation contained in the grant must carry with it an obligation to compensate the affected owner. Accordingly, to the extent that the legislation is repugnant to the grant, it must be unenforceable, or be found to carry an obligation by the Crown to pay compensation.

This example demonstrates how the existence of a Crown grant might be used to:

(a) found a right of action for injurious affection;

(b) invalidate State legislation purporting to avoid the Crown's liability for damage caused; and

(c) serve as an alternative legal argument to the common law right of nuisance, which would not offer the advantage of (b).

It might be noted in passing that a right of action for injurious affection, where it is alleged to be a civil wrong, might properly be characterised as a tort: the “tort of injurious affection”, or perhaps alternatively, the “tort of derogation”. There is no apparent judicial precedent for this suggestion, but the logic seems clear.

In this context, “injurious affection” is a civil wrong where it constitutes, or results from, a “derogation” from a grant. Each of the two terms has a distinct meaning, but in the context of Crown grants relating to interests in land, there is a substantial degree of overlap between them. Perhaps it might be better described as the “tort of injurious affection arising from derogation”.

Be that as it may, acts very similar to the above example were considered by the High Court in *Marshall v Director-General, Department of Transport* [2001] HCA 37 , where the landowner had claimed:

> “As a direct consequence of the construction of the road on the land resumed by the respondent Authority, the claimant has suffered loss, damage and a diminution in the value of the balance lands in that as at the date of resumption such lands could reasonably have been foreseen to be rendered more susceptible to flooding. The claimant's claim for compensation is calculated by reference to the cost of flood mitigation works already carried out and remaining to be carried out on the balance lands sufficient to return the said lands to the same degree of susceptibility to/immunity from flooding as was the case at the date of resumption for rainfall events in the Eudlo Creek catchment. $651,325.00"

The High Court gave no consideration to the possible implication or relevance of any Crown grant of title - it was not raised or argued - but examined the language of a section of Queensland legislation which provided for compensation to be paid in cases of injurious affection, in order to determine its precise scope. See per *Gleeson CJ Gummow J Kirby J Callinan J* (*ibid.,* at 12 & 13):

> “In our opinion, however, the language of s 20(1)(b) of the Act could hardly be plainer. In assessing compensation, regard is to be had not only to the value of the land taken but also to the damage caused by the exercise of *any statutory powers* by the constructing authority otherwise injuriously affecting *such other* [the remaining, severed] *land*. The section does not say "the exercise of any statutory powers by the constructing authority on and only on the land taken ...". The section clearly distinguishes between the land taken and the severed land. It does not seek to distinguish between the various activities carried out by a constructing authority in the exercise of its statutory powers: for example, the conduct of a survey, the construction of a road, the building of a bridge, the installation of drainage or footpaths beside the road, and the subsequent use of everything that has been done or brought into existence as, and for the purposes of, a road. In

truth, all of these can relevantly and properly be characterised as part and parcel of the construction, and subsequently the use of the road. Once the constructing authority acquires land for a statutory purpose and carries out the statutory purpose, it must, pursuant to s 20(1)(b) of the Act, compensate the dispossessed owner for the injurious effect upon the residual land resulting from the undertaking and the implementation of that purpose, actual and prospective....

A constructing authority does not have an unfettered right to resume land. Unless the authority has a *bona fide* purpose of exercising a statutory power in respect of the land, a purported resumption of it would be unlawful. (Cf *The Queen v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 187 per Gibbs CJ.) There is no suggestion of unlawfulness here."

The Court subsequently considers some other comparable cases (*Ibid.*, at 17-18):

"In *Treston v Brisbane City Council* (1985) 10 QLCR 247, before the implementation of the statutory road scheme, the claimants' suburban allotment on which their residence stood was adjoined by a like allotment similarly used. After it, there ran beside their reduced allotment a footpath and a busy roadway constructed on the neighbouring allotment. The footpath was constructed on the sliver of land acquired by resumption from the claimants. The respondent there argued that the claimants were not, or were hardly, injuriously affected by the relatively innocuous use to which the actual land taken from them was put, as a footpath, and that they were not entitled to be compensated for injurious affection caused by the noise and fumes resulting from the use of the new road. The Land

Court (1985) 10 QLCR 247 at 256-259 (Mr White) found itself able to reject that argument by adopting the same sort of approach as the Land Appeal Court had adopted in *Beaver Dredging* (1985) 10 QLCR 166. See also *Vanhoff Pty Ltd v The*

Commissioner of Main Roads (1992) 14 QLCR 331 . It is no answer to say, as was suggested by the respondent in argument here, that there may be others who have lost no land but who may be either equally, or almost equally, injuriously affected in the enjoyment of their land by the implementation of a constructing authority's purpose, yet have no entitlement to any compensation. That is irrelevant. The fact that the enjoyment or utilisation by them of their property may have been adversely affected, and indeed, perhaps unfairly so by reason of the unavailability to them of compensation, provides no reason to distort the language of the Act, and to deprive others, who have lost land, of compensation for injurious affection....."

Further, (*Ibid.*, at 17-18):

> "The appellant is entitled to have compensation assessed for injurious affection to his remaining land resulting from the exercise of the respondent's power in duplicating the highway. Just as each pylon in *Beaver Dredging (1985) 10 QLCR 166. See also Vanhoff Pty Ltd v The Commissioner of Main Roads (1992) 14 QLCR 331* was an integral part of a power line constructed by the authority there, and, as Barwick CJ in *Morison (1972) 127 CLR 32 at 39* said, regard should be had to "the use of the constructions on the acquired land in combination with other land and the constructions thereon". The use of the appellant's land acquired here should be taken in combination with the use of other land for the duplication of the highway, for the purposes of assessing the damage to the appellant's remaining land by reason of injurious affection to it.
>
> The acquisition of the land, the work done on it, and the use, passive or active, to which it is put in pursuance of a statutory purpose such as that involved here, will form part of the exercise of the relevant statutory power so as to give rise to a right to compensation for such injurious affection as is caused to remaining land by reason of the exercise of the power. If it were otherwise, the authority would have neither the need nor the legal right to acquire the land in question."

The allusion in the above quoted judgment "that there may be others who have lost no land but who may be either equally, or almost equally, injuriously affected in the enjoyment of their land by the implementation of a constructing authority's purpose, yet have no entitlement to any compensation" hints of an awareness of the possibility that other landowners might suffer injurious affection as the result of the exercise of statutory power without any statutory or other entitlement to compensation. Thus, even where legislation provides for compensation for injurious affection, there can be a so-called "acquisition law gap": that is, impaired enjoyment of usage rights (theretofore existing pursuant to a Crown grant) is not compensated.

Having said that, it would seem that in the above *Marshall* case, the High Court has interpreted the relevant operating legislation in a manner that would be substantially consistent with the measure of compensation for this particular landowner which would have been determined if the circumstances had been considered as a defeasement of title, with no operative reservation.

4.5.2 Destruction of Private Land Enforced by Council (with no Compensation)

Consider an example. Beachfront homeowners find that over time, foreshore sea currents commence to progressively wash away their land. Landowners naturally wish to protect their land with boulders or a form of seawall. The local government

council (acting under the authority of the Crown) makes orders to prevent any such protective work from being done.

Now, it may be said that a usual Crown grant does not carry any warranty as to the quality of the land - as to whether for example, it has good soil or not, or is subject to flooding or not, or whether it is suitable for cattle grazing, or not. A grant simply identifies the precise location of a plot of land, not its quality. It is up to the grantee or prospective purchaser to make a judgment about the utility of the land.

It would follow from this that the Crown grant of title does not burden the Crown with any duty to maintain or warrant the quality of the land. The role of the Crown in granting title is simply to: define the land by survey, so that the landholder can identify its boundaries and occupy that area within, to the lawful exclusion of others; and to provide a judicial system to allow the landowner to lawfully enforce his rights of possession. (It may be that the Crown might by its later dealings assume an obligation to preserve private land from destruction, but we focus here on obligations associated with the grant itself.)

Having said that, it is clear that the physical land itself is an integral and essential element of a Crown grant. It follows that if such land is threatened with destruction by natural forces, the title holder is entitled (subject only in practice to considerations of nuisance and the like with respect to neighbours) to protect that land with practical measures. In the case of encroachment by the sea, such measures might include foreshore reinforcement.

If the State were to act to forbid the title holder from taking such protective measures, it should be properly regarded as being repugnant to, and a derogation from, the Crown grant. It is fundamental to any freehold or leasehold title that the land to which it relates must actually exist, so it follows that if the Crown seeks to prevent a landholder from protecting the granted land against permanent destruction, the affected landholder should be able to secure: with a timely application, an injunction or other equitable relief from such a Council prohibition; or otherwise compensation for the damages caused by loss of land to the sea which loss could otherwise have been prevented.

Any State law preventing the landowner from protecting land in such circumstances might be characterised as being in the nature of a defeasement.

This example demonstrates how the existence of a Crown grant might be used to:

(a) invalidate council orders made to prevent landholders from protecting their land; and

(b) serve as an alternative legal argument to other common law rights of nuisance.

Facts very similar to this example were considered by the New South Wales Supreme Court in the previously mentioned case *Ralph Lauren 57 v Byron Shire Council* [2016] NSWSC 169, where fourteen plaintiffs, who were owners of property on Belongil Beach in the Byron Bay area, as part of legal actions which spanned six years, sought relief from the council's physical and legal interventions in their use of the land.

Hidden J notes (*ibid.*, at §15), the claim that the council acted by use of a Coastal Zone Management Plan ("CZMP"):

> "to prevent residents, including the plaintiffs, from carrying out any protective works, such as a terminal wall, to protect their properties; and the Council was to develop "an enforcement policy for retreat of development in accordance with consent conditions, and develop an infrastructure and utility services retreat policy." Finally, the Council would itself "fail and refuse to take any other steps, by way of beach nourishment, terminal wall or end control structure ... so as to provide protection to the properties of residents."

In other words, there was a policy of planned retreat, where the council expected landowners to watch their properties being washed away with no prospect of compensation or acquisition (resumption) by the Crown.

The Supreme Court gave no consideration to the possible implication or relevance of the Crown grant of title - it was not raised or argued - but examined closely arguments as to the validity of government decisions under the legislation, and the plaintiffs' reliance on a claim in negligence, and alternative claims in nuisance and under s 177 of the *Conveyancing Act* (NSW) 1919.

As His Honour notes (*ibid.*, at paras 4 and 5), the background to these claims may be sketched briefly:

> "Between the 1960's and the 1970's, the Council constructed an artificial headland protected by a rock seawall adjacent to Jonson Street, Byron Bay, referred to in the pleadings as the "Jonson Street Structure." The plaintiffs allege that the structure has caused erosion of the beach to the northwest, in particular, at Belongil beach. Consequently, their properties have been exposed to seawater and wave action. It is also alleged that the Council failed to take reasonable steps to protect the plaintiffs' properties by, among other things, failing to modify or remove the Jonson Street Structure, and provide further seawalls to protect the beach. It is also alleged that the Council failed to allow the plaintiffs to take such protective measures.

> The plaintiffs claim damages, in some cases for the cost of protective works to their properties, and in all cases for diminution of the value of their properties said to be due to their exposure to the effects of erosion."

The plaintiffs were forced, by dint of the law known to them, to place heavy reliance on the evidence presented that the erosion of their properties was in fact caused by the erection of the structure by the Crown. From the point of view taken in this paper with respect to the true legal effect of Crown grants of title, three observations might be made (on the working assumption that the land title concerned was pursuant to Crown grants of freehold title):

(a) just as, in the previously outlined example of water backing up from roadworks performed by the Crown, so might the damage to the beachside properties by works of the Crown in Byron Bay be characterised as an injurious affection to the granted title, and subject to rectification or compensation; but also

(b) the enforced policy of "planned retreat" itself should be regarded as being repugnant to the Crown grants of title and so, of itself, entitle the landowners to remedies of rectification or compensation, without any need to demonstrate causation of damage by Crown works in Byron Bay; and

(c) any statutory exemption from liability which the Crown might claim would be itself repugnant to the Crown grants of title and so rendered void.

The reader might conjecture that the Byron Shire Council is an extreme case, and that councils would not ordinarily attempt to prevent a landowner from protecting his land. Not so! In this respect, we note the claim that there are "examples from Byron Bay to the *(sic)* Eurobodalla where defensive engineering solutions have been rejected or delayed": NSW Coastal Alliance *Media Release* 15 April 2018.

Another litigated case, relating to the northern beaches area of Sydney exemplifies the point, but the court refused to issue a mandatory injunction requiring the demolition of a seawall erected by a property owner: *Warringah Council v Franks & Ors* (*supra* at 3.3.1.3).

4.6 S. 51 (xxxi) of the Constitution - A Red Herring

The Constitution reads, in part:

> **"51. Legislative powers of the Parliament**
>
> The Parliament shall, subject to this Constitution, have power[12] to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> ..... . (xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;....."

It's an odd thing, that there is no reciprocal, express, provision in the Constitution, namely that a State cannot acquire (or re-acquire) property of and from the Commonwealth on unjust terms - i.e., put positively, that a State must acquire (or re-acquire) property of and from the Commonwealth only on just terms.

In *Grace Bros Pty Ltd v The Commonwealth* [1946] HCA 11; 72 CLR 269; (1946) ALR 209, Justice Dixon of the High Court of Australia stated that the inclusion of the condition [s. 51(xxxi)] was to "prevent arbitrary exercises of the power at the expense of a State or a subject".

Given that prior to Federation, the Commonwealth had no assets of any kind, it is logical that the Colonies were focused on ensuring that the assignment of property to the Commonwealth would be done on "just terms", or to avoid the risk of any Commonwealth coercion, and it was perhaps an oversight that the issue of transferring Commonwealth property to the States was not specifically addressed.

Putting aside that constitutional quirk, the operation of s.51(xxxi) as it stands is very clear, and settled. In *P J Magennis Pty Ltd v Commonwealth* [1949] HCA 66; (1949) 80 CLR 382, Williams J states:

> "9. Section 51 (xxxi.) of the Constitution applies only to legislation of the Commonwealth Parliament and does not invalidate State legislation which does not provide just terms."

In *Pye v Renshaw* [1951] HCA 8; (1951) 84 CLR 58 at §8, the High Court states:

> "8. As has already been pointed out, the legislative power of the State is not affected by s. 51 (xxxi.) of the Constitution. If a State Act provides for the resumption of land on terms which are thought not to be just, that is of no consequence legally: it cannot affect in any way the validity of the Act or of what is done under the Act."

In *Pye,* the High Court also quotes *Magennis*, to support its view:

> " Para 6:.....because State powers are in no way affected by s. 51 (xxxi.). As Latham C.J. (1949) 80 CLR, at p 405 said: "There is in my opinion no doubt as to the power of the State Parliament to provide for compensation for land resumed upon any basis which it thinks proper".

Latham C.J. seems to slightly contradict his own words quoted above in the first lines of his judgment in Magennis:

> "....State Parliaments are not bound by any similar constitutional limitation [to s. 51(xxxi)]. They, if they judge it proper to do so for some reason, may acquire property on any terms which they may choose to provide in a statute, even though the terms are unjust."

Here, he says the State may be unjust, but above, he refers to a state's power to provide for compensation "upon any basis that it thinks proper". Perhaps he is implying that a state can behave properly and unjustly, which is a way of emphasising the absence of relevance of s.51 (xxxi) to a State.

However, rather than concluding from these decisions that the states' freedom to act unjustly is a point of general principle, it should, we say, be confined to the particular issues relating to s. 51 (xxxi) which the High Court were considering in those cases. Their focus of concern in these cases was the application and non-application of s. 51(xxxi). Having decided that the section had no application to the states, it was not considered whether the States might have some analogous sort of duty arising from somewhere other than a constitution, and no such submission seems to have been put to the Court. (It is true that a general argument challenging this view was put in the *Durham* case, but the argument put there fundamentally challenged the state's power to acquire property without compensation as a general proposition. The point being made here is very different: namely, that while the state's general power as stated by the High Court is accepted, there may be other sources of limitations to that power, see: **1.2 Clarifying the Confusion: Limitations of the Power of the States.**)

In the context of the above line of cases, it was only necessary for the High Court to find that s. 51(xxxi) had application only to the Commonwealth, and so to point out by way of obvious contrast, there was no such provision in state constitutions. Given that it was not submitted, and so not asked of the High Court to consider, whether there might be another source of such a duty with respect to particular types of property on the part of the states, then nor were authorities such as those at **2.1 The Nature of a Grant** above given consideration.

Nor indeed for that matter - speaking more generally - in the 1940's or 1950's, was any argument put to the High Court on the subject of native title or many of the Justices' more recent observations with respect to property as noted above at **4.1 & 4.2 High Court of Australia - Some Property Principles.** Some things change.

It is in this reasoning context, that we are suggesting that by taking the Court's perfectly correct reference, in the context of the Australian Constitution s. 51(xxxi), to the lack of any such equivalent provision in a state's constitution, a generalised view that therefore a s state cannot otherwise ever have any obligation to compensate for resumptions is not just lazy, but a serious over-generalisation. Instead, the High Court's observations should generally be confined to the context of those decisions, which was deciding the extent of operation of s. 51(xxxi).

As we have seen, s. 51 (xxxi) of the Constitution clearly has no application to any state, but in the perceived absence of any obligation by a state to provide compensation in these matters, a number of cases have been brought to the High Court seeking a sufficient nexus between laws of a state and the Commonwealth, in an attempt to obtain the benefit of the operation of s. 51 (xxxi). In the course of these cases, there has been some clarification of what "acquisition" means Constitutionally.

The existence of a distinction between a restriction on the use of property and "acquisition" and how they might overlap, or not, was considered by the High Court in *Commonwealth v Tasmania* (*Tasmanian Dam* case") (1983)158 CLR 1 and examined by McLeod (supra).

In a more recent case, I*CM Agriculture Pty Ltd v The Commonwealth* [2009] HCA 51, the High Court indicated the limitations of the application of "acquisition on just terms":

> "81 This is because, whatever the proprietary character of the bore licences, s 51(xxxi) speaks, not of the 'taking' [87], deprivation or destruction of 'property', but of its acquisition. The definition of the power and its attendant guarantee by reference to the acquisition of property is reflected in a point made by Dixon J in *British Medical Association v The Commonwealth*[88]. This is that the wide protection given by s 51(xxxi) to the owner of property nevertheless is not given to 'the general commercial and economic position occupied by traders'.
>
> 82 The scope of the term 'acquisition' was explained as follows by Deane and Gaudron JJ in *Mutual Pools & Staff Pty Ltd v The Commonwealth*[89]:
>
> 'Nonetheless, the fact remains that s 51(xxxi) is directed to 'acquisition' as distinct from deprivation. The extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property[90]. For there to be an 'acquisition of property', there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property. On the other hand, it is possible to envisage circumstances in which an extinguishment, modification or deprivation of the proprietary rights of one person would involve an acquisition of property by another by reason of some

identifiable and measurable countervailing benefit or advantage accruing to that other person as a result[91].' "

See also Gaudron and Gummow JJ in *Smith v ANL Limited* [2000] HCA 58 at §23:

"....the degree of impairment of the bundle of rights constituting the property in question may be insufficient to attract the operation of s 51(xxxi). For example, the prohibition imposed under the legislation upheld in *Waterhouse v Minister for the Arts and Territories* (1993) 43 FCR 175 upon the export of the applicant's painting left him free to retain, enjoy, display or otherwise make use of the painting. He was free to sell, mortgage or otherwise turn the painting to his advantage, subject to the requirement of an export permit if the owner or any other person desired to take it out of Australia. The legislation considered in *British Medical Association v The Commonwealth* (1949) 79 CLR 201, and held invalid on other grounds, today perhaps would be thought to be nearer the line of invalidity. In *British Medical Association*, Dixon J was of the opinion that there was no involuntary taking of property from chemists without just compensation. The chemists were legally free to supply pharmaceuticals or not, as they pleased, in a situation where, if a sale were made at other than a price fixed by the Commonwealth, there would be little or no other trade for them in that commodity."

We have previously observed how s. 51(xxxi) has potential practical effect with regard to land titles in the ACT, but with regard to the states, it is more a distraction - a red herring.

Fundamental differences between a resumption by a state and an "acquisition", we would say, are that:

1. An "acquisition" might, but might not be, a resumption of a grant by the Crown. It could be an aspect of any number of other types of transaction, such as a simple commercial transfer of a freehold title.

2. A resumption is a very particular type of acquisition, namely a reversion to the Crown. It might also be described specifically as a "re-acquisition".

3. An acquisition by the Commonwealth of land situated within any State would not ordinarily be a resumption.

4. While an "acquisition" in the s. 51(xxxi) sense is distinguished from mere "deprivation", deprivation would be sufficient to evidence a resumption, without having to show "acquisition" in the s. 51 (xxxi) sense by the Crown (although in the theory of Crown grants, the existence of one should necessitate the other).

It is in the context of the observations being made here that it might be concluded that the High Court's repeated and clear decisions that s. 51(xxxi) has no effect, or equivalent constitutional provision, in the states has in fact been so interpreted by practitioners as to have been a giant distraction - a huge smelly red herring - for a full century, from the possibility that state obligations with respect to property justice might arise from a source other than s.51(xxxi) or a similar State constitutional provision.

4.7 Identifying Property Rights and S. 51(xxxi)

Having made the point above that a focus s. 51(xxxi) could serve as a distraction from finding any other basis of obligation on the part of the States to provide compensation for the extinguishment, deprivation or indeed acquisition of property rights, some observations by the High Court in relation to what principles might actually identify "property rights" could be applied to the States and the identification of "property rights" in the context of partial resumptions.

It is argued in this paper that, unlike "acquisition" in s. 51(xxxi), mere extinguishment or deprivation of property rights existing within the scope of a Crown grant would constitute a "resumption", attracting an obligation for compensation (in the absence of a suitable freehold reservation of leasehold condition) by the Crown. In this context, "resumption" has a wider scope than "acquisition". Subject to that observation, the following passages from Callinan J.'s judgment in *Commonwealth v Western Australia* [1999] HCA 5 would seem potentially useful in characterising property rights in the context of Crown grants:

> "283. In *The Tasmanian Dam Case*[261], Deane J said that "laws which merely prohibit or control a particular use of, or particular acts upon, property plainly do not constitute an 'acquisition'". With respect I doubt whether such a statement can categorically be made. However, in deciding that the legislation in *The Tasmanian Dam Case* went beyond, as his Honour had defined it, mere extinguishment or deprivation, he used language which might, with some adaptations be employed to describe the ambit of the Declaration made under the Regulations in this case[262]:
>
> 'In the present case, the Commonwealth has, under Commonwealth Act and Regulations, obtained the benefit of a prohibition, which the Commonwealth alone can lift, of the doing of the specified acts upon the ... land. The range of the prohibited acts is such that the practical effect of the benefit obtained by the

Commonwealth is that the Commonwealth can ensure, by proceedings for penalties and injunctive relief if necessary, that the land remains in the condition which the Commonwealth, for its own purposes, desires to have conserved. In these circumstances, the obtaining by the Commonwealth of the benefit acquired under the Regulations is properly to be seen as a purported acquisition of property for a purpose in respect of which the Parliament has power to make laws. 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[263]. The compensation which would represent 'just terms' for that acquisition of property would be the difference between the value of the HEC land without and with the restrictions.'

[261] (1983) 158 CLR 1 at 283.

[262] (1983) 158 CLR 1 at 287. See also Gummow J in *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 595, 602, 634-635.

[263] See *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372 per Dixon CJ.

284. The caution expressed by Hamilton[264] in my opinion has much to commend it:
'A necessary first step in formulating a test for s 51(xxxi) … is for Australian courts firmly to grasp the principle that the various separate rights of user of property are in themselves property. The Court in *Dalziel's* case[265] recognized that by taking away some rights of user, in particular the right to possession, the Commonwealth could make property practically worthless. … What needs to be recognized is that property is a bundle of rights, and each right in that bundle is itself property the subject of acquisition. Whenever the Commonwealth seeks to control the exercise of one of the rights in the bundle a question of acquisition is on the threshold.'

[264] Hamilton, "Some Aspects of the Acquisition Power of the Commonwealth", (1973) 5 *Federal Law Review* 265 at 291.

[265] (1944) 68 CLR 261."

Although the above observations are with respect to the Commonwealth and s. 51(xxxi), the principles with regard to the characterisation of property rights in other

circumstances, namely in the context of Crown grants of title, would seem to be analogous and useful.

4.8 A Potential Role for "Just Terms": Loss, Diminution, Impairment or Other Effect

Having examined the limitations associated with a provision for acquisition on just terms, it might be noted that "just terms" may still be useful, provided the term "acquisition" is avoided.

An example of this is provided, with respect to native title, in the *Native Title Act*, as noted in *Northern Territory v Griffiths* (*supra* at 18):

> "....s 51(1) applies in relation to determining the compensation claims in these appeals.
>
> Section 51(1) is the core provision. It provides that:
>
> 'Subject to subsection (3), the entitlement to compensation under Division 2, 2A, 2B, 3 or 4 is an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect *of the act* on their native title rights and interests.' (emphasis added)
>
> Specific aspects of s 51(1) must be recognised at the outset. It is the native title holders – relevantly, the person or persons who *hold* the native title – who are entitled to compensation on just terms. And those native title holders are entitled to compensation for any loss, diminution, impairment or other effect *of the act* on their native title rights and interests. Relevantly, an act is an "[a]ct affecting native title" if it extinguishes the native title rights and interests." (Citations omitted.)

So in this formulation, the title holder is entitled to compensation "on just terms" if there is "any loss, diminution, impairment or other effect", regardless of the existence of any "acquisition" or not, on the owners' rights and interests.

Adoption of a similar formulation with respect to common law title would eliminate the "reverse discrimination" which now exists as between them native title holders.

Given that the s. 51(1) formulation has been composed as a method of implementing the relevant part of Article 5 of the Discrimination Convention as adopted by the *Racial Discrimination Act*, it might also bear comparison with Article 17 UDHR.

One critical aspect with regard to compensation on "just terms", or indeed for the deprivation of property, is that there be procedural fairness. In this regard, attention

may be paid briefly to the High Court: Winnett, Celia "'Just Terms' or Just Money? Section 51(xxxi), Native Title and Non-Monetary Terms of Acquisition", 33 *UNSWLJ* 776 at 782 summarises these High Court views -

- *Compensation cannot be determined pursuant to an administrative entity's uncontrolled discretion, without independent investigation, consultation with the property owner or recourse to a court*. In the *Bank Nationalisation Case*, the Court unanimously held that provisions authorising the management takeover of private banks contravened section 51(xxxi). Four judges found the terms of acquisition unjust for allowing government-appointed directors to sell the property at a price fixed by them and the Commonwealth Bank, and pay compensation from these proceeds, without independent scrutiny or the owners' involvement. ((1948) 76 CLR 1, 216–18, 319, 350–1, 395. See also Tonking (1942) 66 CLR 77, 107; Nelungaloo (1948) 75 CLR 495, 547, 567.)

- *A rightholder must be heard during the acquisition process*. In *Nelungaloo*, Starke J held the pooling arrangement invalid partly because the property owners 'had no voice in the matter'. ((1948) 75 CLR 495, 547.)....

- *Lengthy delays in providing 'just terms' should not go uncompensated*. In the *Tasmanian Dam Case*, Deane J held certain acquisition legislation invalid for 'forc[ing the property owner] to wait years' before allowing access to a body to determine the compensation payable under section 51(xxxi), and failing to provide interest.(*Tasmanian Dam Case* (1983) 158 CLR 1, 291."

How do the legislative and regulatory instruments adversely affecting owners' property rights in your State currently measure up against these elements of procedural fairness? The reader may consider the answer.

We also note for reference Wickham's (*supra* at 107ff) "APPENDIX - PRESENCE OR ABSENCE OF THE ESSENTIALS OF THE RULE OF LAW IN SELECTED STATUTORY TRIBUNALS IN WESTERN AUSTRALIA" wherein a table indicates the extent of compliance or otherwise with respect to procedural fairness of the legislated procedures of assorted tribunals.

Such a checklist approach would seem to be very powerful in identifying legislated deficiencies in procedural fairness. Consideration should be given to having all proposed legislation checklisted using Wickham's list, or an updated version of it. See also: Creyke R. and Keyzer P., *The Brennan Legacy: Blowing the Winds of Legal Orthodoxy* (2002) which details the achievements of Sir Gerard Brennan AC KBE in the field of administrative justice. Although it is mostly in the Commonwealth context, many principles can equally apply to the states.

5.0 Natural Justice & Procedural Fairness

Wickham's concerns lead us to the current state of the common law relating to natural justice and procedural fairness, which has developed significantly from the late 20th century. While natural justice might be regarded as a legal philosophy, procedural fairness might be regarded as its operational concomitant. A detailed analysis of the contemporary Australian position is provided by Justice Alan Robertson, *Natural Justice or Procedural Fairness*, Federal Court of Australia ,4 Sept. 2015.

The all-too-frequent absence of a process of procedural fairness with regard to the deprivation of land property rights by a state is itself a breach of human rights, and the rule of "no-law".

It is clear that there is often no provision at all for the affected landowner to be heard, fairly, before an adverse decision is made. While, as a general observation, a parliament clearly does have the power to exclude the processes of natural justice, two questions may arise with respect to any particular legislation:

A. does it in fact expressly or clearly deprive landowners of a right to procedural fairness, or is it in fact merely implied or assumed? and

B. given that a common law right to natural justice should undoubtedly attach to any Crown grant of title, shouldn't any purported denial of such a right by legislation be regarded as being repugnant to the grant (or put another way, a derogation from the grant) and so unenforceable to the extent of the repugnance/derogation?

In a recent Victorian case, *Caligiuri & Anor v Attorney General (on behalf of the State of Victoria) & Ors (No 2)*, Garde J reviews the relevant authorities on the subject of land ownership and procedural fairness (at §72ff) as reproduced here (citations omitted):

> "Relevant authority
> 72 The foundational authority for any consideration of procedural fairness is *Kioa v West*, where Mason J said:
>
> The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary intention ... But the duty does not attach to every decision of an administrative character. Many such decisions do not affect the rights, interests and expectations of the individual citizen in a direct and immediate way. Thus a decision to impose a rate or a decision to impose a general charge for services rendered to ratepayers, each of

which indirectly affects the rights, interests or expectations of citizens generally does not attract this duty to act fairly.[20]

73 This passage establishes the salient principle that administrative decisions which affect rights, interests and expectations in a direct and immediate way are subject to procedural fairness, subject to the clear manifestation of a contrary statutory intent. They are distinguished from decisions which indirectly affect the rights, interests or expectations of citizens generally.

74 In the same decision, Brennan J said:
There is no free-standing common law right to be accorded natural justice by the repository of a statutory power. There is no right to be accorded natural justice which exists independently of statute and which, in the event of a contravention, can be invoked to invalidate executive action taken in due exercise of a statutory power.
...
There is no jurisdiction to declare a purported exercise of statutory power invalid for failure to comply with procedural requirements other than those expressly or impliedly prescribed by statute.
...
To ascertain what must be done to comply with the principles of natural justice in a particular case, the starting point is the statute creating the power. By construing the statute, one ascertains not only whether the power is conditioned on observance of the principles of natural justice but also whether there are any special procedural steps which, being prescribed by statute, extend or restrict what the principles of natural justice would otherwise require.[21]

75 As this passage illustrates, by construing the statute creating the power, it can be ascertained whether any special procedural steps prescribed by statute extend or restrict what procedural fairness may otherwise require. This principle is significant as the LAC Act contains a number of procedural provisions directing what is to be done when land is acquired by authorities.

76 In *Annetts v McCann*, Mason CJ, Deane and McHugh JJ said:

It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.
...

In determining whether this Act has excluded the rules of natural justice, [it] need[s] to be kept in mind ... that many interests are now protected by the rules of natural justice which less than 30 years ago would not have fallen within the scope of that doctrine's protection.[22]

77 This passage is apposite also. Whereas thirty years ago the need for procedural fairness before compulsory acquisition decisions were made by acquiring authorities might not have been thought of, the High Court has clearly articulated that procedural fairness must be afforded in the exercise of statutory power where a person's rights, interests or expectations are directly affected unless expressly or impliedly excluded by the provisions of the statute. There is no doubt whatever that the compulsory acquisition of land directly affects rights and interests.

78 In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs,* the High Court said:

It has long been established that the statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires. It is also clear that the particular content to be given to the requirement to accord procedural fairness will depend upon the facts and circumstances of the particular case.[23]

79 More recently, the plurality in *Plaintiff M61/2010E v Commonwealth* held that: It was said, in *Annetts v McCann*, that it can now be taken as settled that when a statute confers power to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, principles of natural justice generally regulate the exercise of that power ... It is unnecessary to consider whether identifying the root of the obligation remains an open question or whether the competing views would lead to any different result. It is well established, as held in Annetts, that the principles of procedural fairness may be excluded only by 'plain words of necessary intendment'.[24]

80 This is the position here. It is the statutory framework of the LAC Act that is of paramount importance when considering whether procedural fairness requires a right to a hearing before the challenged decisions can be made. If a right to a hearing is implied, the content of the right must be determined according to the statutory intent and in the facts and circumstances of the particular case. [25]

81 Moreover, in *FAI Insurances Ltd v Winneke*, the High Court held that the requirements of natural justice do apply to discretionary decisions made by the Governor in Council affecting rights.[26] The fact that the Governor in Council

was the repository of the discretion did not warrant the implication that the discretion was free of natural justice obligations and therefore entirely at large.[27] However, the hearing need not be afforded personally by the Governor in Council, or by the Minister. It could be afforded by the relevant department head or other appropriate officer who in fact made the decision.[28]

82 In their submissions, all parties relied extensively on *South Australia v Slipper ('Slipper')*, where the Full Federal Court gave consideration to the requirements of procedural fairness in the context of the Lands Acquisition Act 1989 (Cth) ('Lands Acquisition Act').[29] The federal land acquisition statute has some similarities to, but also differences from the LAC Act. The summary of the law relating to procedural fairness articulated by Finn J and agreed by the other members of the Court is a useful synopsis of the principles to be applied:

Stated in short form those principles are:
(i) when a statute confers a power on a public official the exercise of which affects a person's rights, interests or expectations, the rules of procedural fairness regulate the exercise of that power unless those rules are excluded by express terms or by necessary implication;
(ii) a legislative intention to exclude the rules will not be assumed or spelled out from indirect references, uncertain inferences or equivocal considerations;
(iii) an intention to exclude should not be inferred merely from the presence in the statute of rights which are commensurate with some of the rules of procedural fairness; and
(iv) while the rules may be excluded because the power in question is of its nature one to be exercised in circumstances of urgency or emergency; 'urgency cannot generally be allowed to exclude the right to natural justice'; although it may in the circumstances reduce its content.[30]

83 In the present case, there is no real dispute between the parties as to the applicable principles....."

It is clear that administrative decisions which affect rights, interests and expectations in a direct and immediate way and so at common law would be subject to procedural fairness must properly include decisions to impair the granted property rights of landowners.

Where such decisions are expressly legislated not to be subject to procedural fairness, such legislation must be:

A. in breach of human rights as per Art. 17 UDHR etc.; and additionally

B. repugnant to the Crown grant and to that extent be unenforceable.

6.0 The Role of Equity

The maxim that "equity follows the law" begs the question: where has equity been? The remedies associated with equity such as injunctions, declarations and mandamus seem to have been rendered largely impotent in the context of the clear and a significant power imbalance between regulatory bodies and property owners. One aspect of regulatory power is the complexity of the regulatory processes, and even if a property owner affected by a decision on one point - which might be, say: a decision made beyond an authority's power; or made incompetently; or endlessly delayed - succeeds in obtaining an injunction or other equitable order, he/she faces the prospect of further regulatory/bureaucratic hurdles, and can't practically go to the Supreme Court endlessly seeking orders.

Original jurisdiction with regard to applications for relief in equity rests with the State Supreme Courts, so they can be costly. However, in the right situations, they can be absolutely brilliant for plaintiffs, because such actions are given high priority by the courts and decisions can be made quite promptly, unlike say commercial actions for damages etc., which might drag on for years. Such orders can put a plaintiff in a very strong (but not inequitable!) negotiating position.

It does seem very clear that in the legal twilight zone where Wickham's "rule of 'no-law'" holds sway, the potential for equitable relief is impaired also. A corollary of that is if the law is clarified, then the potential for obtaining equitable relief in appropriate circumstances should be correspondingly enhanced.

The potential role of equity should not be overlooked. Equity was developed in England over many centuries by judges of the Courts of Chancery in particular as a complement to the law and exists in Australian superior courts to this day. But what is equity exactly in this context? And why does "equity follow the law"? The best and most succinct explanation as to why a system of justice requires the existence of equity as well as law would seem to have been made by Aristotle some 2,500 or so years ago. Here's what he writes (happily, translated from the ancient Greek!) in Book V of *Ethics* (at *EN* 1137a17 to 1137b24):

> *"...A digression on equity, which corrects the deficiencies of legal justice*
>
> x. Our next task is to say something about equity and the equitable: what is the relation of equity to justice, and of what is equitable to what is just? When we look into the matter we find that justice and equity are neither absolutely identical

nor generically different. (They are species of the same genus.) Sometimes we commend what is equitable and the equitable man, to the extent of transferring the word to other contexts as a term of approbation rather than 'good', thus showing that what is more equitable is better. At other times, however, when we follow out the line of argument it seems odd that what is equitable should be commendable if it does not coincide with what is just; because if it is something different, then either what is just or what is equitable is not good; or alternatively if both are good, they are identical.

These, broadly speaking, are the arguments that raise the difficulty about what is equitable: yet there is a sense in which they are all correct, and there is no inconsistency between them. For equity, though superior to one kind of justice (namely legal justice - see below) is still just, it is not superior to justice as being a different genus. Thus justice and equity coincide, and although both are good, equity is superior. What causes the difficulty is that that equity is just, but not what is legally just: it is a rectification of legal justice. The explanation of all this is that all law is universal (i.e., lays down general principles), and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made. And the law is none the less right; because the error lies not in the law nor in the legislator, but in the nature of the case; for the raw material of human behaviour is essentially of this kind. (The circumstances of our actions are often too particular and complicated to be covered satisfactorily by any generalization.) So when the law states a general rule, and a case arises under this that is exceptional, then it is right, where the legislator owing to the generality of the language has erred in not covering that case, to correct the omission by a ruling such as the legislator himself would have given if he had been present there, and as he would have enacted if he had been aware of the circumstances.

This is why equity, although just, and better than a kind of justice, is not better than absolute justice - only than the error due to generalization. *This is the essential nature of equity; it is a rectification of law in so far as law is defective on account of its generality.* [Emphasis added - Ed.] This in fact is also the reason why everything is not regulated by law: it is because that there are some cases that no law can be framed to cover, so that they require a special ordinance [which "ordinance", we think, in contemporary terms might be described as an equitable rule - Ed.]. An irregular object has a rule of irregular shape, like the leaden rule of Lesbian architecture (Lesbian moulding (from the Aegean island of Lesbos) was ogival, i.e. took the form of a double curve; its regularity was checked by a leaden

rule bent to the required shape.): just as this rule is not rigid but is adapted to the shape of the stone, so the ordinance is framed to fit the circumstances.

It is now clear what equity is, and that it is just, and superior to one kind of justice. This also makes plain what the equitable man is. He is one who chooses and does equitable acts, and is not unduly insistent upon his rights, but accepts less than his share, although he has the law on his side. Such a disposition is equity: it is a kind of justice, and not a distinct state of character."

Moving forward to the current century, Justice Brereton of the Equity Division of the Supreme Court of NSW has observed (*inter alia*):

"Equity supplements the common law, providing a separate and distinct body of principle that mitigates its rigours. The common law creates rights; equity relieves against strict insistence upon them, when such insistence is against conscience.....

So long as there is scope for the strict application of rules of law to work injustice, there will be a need for a system of rules to moderate their rigours. While civil law systems include notions of good faith that take account of parties' underlying motives, the common law has no such equivalent. Instead, equity relieves against unconscionable insistence on strict legal right, recognising that obligations may arise in the absence of, or even despite, formal agreement, and holding parties to those obligations where conscionable behaviour so requires.

The recognition of equity as a separate body of principle, and its administration by a specialist court, is a reflection of equity's role in preventing unconscionable insistence on strict legal rights, thus giving effect to certain values that are antithetic to the common law. Those values – adherence to standards of conscionable behaviour notwithstanding strict legal rights – form part of our legal and social identity. By denying their separateness, we lose part of our legal culture and history, and more: to lose sight of the distinction of the doctrines of equity is to diminish their significance...." ("Equitable Estoppel In Australia: The Court Of Conscience In The Antipodes" - *Speech to the Australian Law Journal Conference: Celebrating 80 Years* (2007) Hon. PLG Brereton RFD J., pp. 1 & 12 -13.)

The consistency in the descriptions of the nature of equity made by Aristotle and Brereton J. is striking. It reinforces the enduring and fundamental nature and role of equity and, implicitly, the potential for great injustice when it is unavailable, which it effectively has been for property owners who have seen their property rights impaired without compensation.

Strategically, an equitable remedy might be obtained by use of proprietary estoppel which, like promissory estoppel, is a type of equitable estoppel.

6.1 Proprietary Estoppel

With regard to any claim made by a property owner at law, with respect to Crown grant repugnancy, an alternative legal argument open to the original title holder under a Crown grant could take the form of breach of contract.

However, given that in the ordinary course of events, title would ordinarily pass from one owner in title to another, then in the vast majority of cases, the land would be held by a successor in title, who would have no contract with the Crown, ownership having been acquired from a predecessor in title. Consequently, in these cases, there would be no contractual relationship with the property owner for the Crown to breach with respect to the land.

It is in this contractual gap, where equitable estoppel, in the form of proprietary estoppel, might be considered of strategic use by a plaintiff, in order to obtain a remedy in equity.

The principles governing the nature and existence of equitable estoppel were enunciated by Brennan J, in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 428 as follows:

> "In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the

correctness of the assumption or expectation on which the plaintiff is conducting his affairs."

Now it might immediately be said that such equitable principles have in practice never been applied to facts, proprietary in nature, between parties, where the defendant party is the Crown and the plaintiff is relying on tenure provided for in a Crown grant. To that extent, such a set of facts would be novel, but it must be said that no court has ever declined to hear a case simply because the facts as presented by the parties were novel. Rather, the better view would be that if the principles of proprietary estoppel can prevent an unconscionable insistence on strict legal rights, whatever the particular facts, then of course, they should apply.

Accordingly, we may briefly review the application of the governing principles enunciated by Brennan J. in the case of a successor in title to a Crown grant who has had some aspect of its right to make use of the land impaired without compensation, other than by defeasement within the scope of a reservation to the grant.

1. Although there is usually no relevant contractual dealing of any kind between the property owner and the Crown, yet the plaintiff would be perfectly entitled to expect that the Crown would not be entitled to withdraw from its legal obligations of tenure pursuant to the Crown grant by derogating from, or acting repugnantly with respect to, the grant.

2. The defendant Crown, even if it has not actively induced the particular plaintiff to adopt such an assumption or expectation, will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a diminution of the Crown's rights or an increase in the Crown's obligations and the Crown, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs. An example of this situation could be where a plaintiff who acquires a property which was not heritage listed, but is heritage listed at a later time.

In this context, "a diminution of the Crown's rights or an increase in its obligations" could apply with respect to the "new" legislation (i.e., legislation which has been passed *ex post facto* the issue of the Crown grant) which purports to provide the Crown with the power to diminish the plaintiff's permitted uses of his land, where at the time that the plaintiff adopted the contrary assumption or expectation (i.e., usually, when purchasing the land), the Crown failed to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff was conducting his affairs.

Put more simply, the Crown could be found to have induced the plaintiff to adopt such an assumption or expectation by failing to provide any notice at the material time - which time would typically be when the property is acquired.

As a matter of fact, it is readily evident from numerous published stories already referred to in this paper that it is typical for property owners to be surprised and astonished when the Crown imposes restrictions on the permitted uses of their land, without compensation - which restrictions are very clearly contrary to their assumptions or expectations: indeed, where land has been purchased, the purchaser would typically have taken advice from a solicitor, which advice was not ordinarily contrary to such assumptions or expectations.

3. The plaintiff purchases land in reliance on the assumption or expectation, or invests in its improvement on the basis of such reliance.

4. The Crown would have at least constructive knowledge of any land transfer by virtue of the registration of title or payment of stamp duties etc. Be that as it may, regardless of the date of any transfer or the identity of the title holder at any particular time, the Crown, by adopting the system of tenure by Crown grant of freehold or leasehold, must have expected any title holder to act in reliance thereupon.

5. The plaintiff's action of purchasing the property would cause detriment if his expectation is not fulfilled, simply because new restrictions on land use will lower the value of the property, and/or reduce the ability to earn income from it, by either reducing revenue, increasing operating costs, or both.

6. The Crown has failed to avoid that detriment by, in the first place, imposing the restrictions, and further by failing to provide compensation for consequent losses.

So, it would seem clear enough in principle that a typical landowner who has his rights of usage of land restricted by legislation which derogates from the Crown grant would be in a position to establish an equitable (proprietary) estoppel and obtain an appropriate remedy.

Further, to note Brereton J.'s observation (*supra* at 10):

> "If a person has acquired an equitable interest by way of proprietary estoppel, that interest is itself capable of assignment to a third party, and may be enforced by such a third party against the original legal owner. (*Hamilton v Geraghty* (1901) 1 SR (NSW) Eq 81; Meagher, Heydon & Leeming 4th ed, [17-120])"

Similarly, it would seem, any landowner who succeeds in re-establishing his right to use his land unhindered by non-compensatory land usage legislation, by way of proprietary estoppel, would be able to assign that interest to a successor in title, who could also enforce it against the Crown.

7.0 General Conclusions as to States' Powers

1. Any Australian state (or previously colony), has always had the sovereign power to alienate parcels of land from the Crown by making grants of freehold or leasehold interests in such land.

2. It is very clear from the operation of Crown grants during the 19th and into the 20th century (and in England in previous centuries), that a grant was a grant. Even if a grant was a leasehold rather than a freehold, the conditions and limitations which characterised the grant were clear to all from the outset. The innovative and flexible use of grants achieved social and land management goals without injurious affection to property holders. The relevant law in New South Wales, as observed by the Privy Council in *Cooper v Stuart (supra*), was distinguishable from English law, and Crown grants in New South Wales were not subject to the rule against perpetuities.

3. It is a clear principle at common law that "A grantor having given a thing with one hand is not to take away the means of enjoying it with the other".

4. The progressive introduction of town planning laws and the use of zoning as a planning technique took place from the mid-20th century. Other land use limitations laws relating to heritage listing, vegetation management, coastal management and the like have expanded and developed since the late 20th century.

5. The then very new discipline of town planning and town planning laws was introduced without any express legal reconciliation with the pre-existing tenure relating to Crown grants as they had developed in the Australian States, or to the very nature of a Grant of land itself. The result has been a jurisprudential void.

6. Initially, town planning laws seem to have provided for compensation to property owners for injurious affection caused by planning instruments. Due to 5., no explicit legal reasoning for providing compensation was provided, possibly because the need for a principle of compensation in instances of injurious affection was so fundamentally obvious(?)

7. To the extent that such provision for compensation was made, it was often not actually carried out, leaving large numbers of affected property owners over many decades uncompensated for their losses.

8. With limited exceptions, any entitlement to compensation by affected property owners affected by planning instruments was lost in a kafkaesque administrative miasma of "non-law", or expressed otherwise, such losses were outside acquisition law.

9. Injurious affection caused by a planning instrument - by whatever name it might be called - is by its very nature, where title exists pursuant to a Crown grant, inherently a

partial resumption of the grant, and in the absence of compensation is a derogation from (or is repugnant to) the Crown grant. Accordingly, the grantor should at common law be liable to remedy any loss suffered by the property owner as a consequence, regardless of the possible existence of resumption laws which might purport to diminish or avoid such liability.

10. The failure of an affected property owner to qualify for compensation under available state compensation schemes, where such compensation schemes do not provide for the particular type of loss suffered by the property owner, cannot disqualify compensation for 9. That is, a State, by providing for compensation which is more limited than its obligation under 9, cannot thereby avoid or diminish its obligation. (If 10 is repeating 9, it bears repeating!)

11. The courts will infer - given the argument and opportunity - that the Crown, by virtue of its use of grants as the system of common law tenure, intends that the rights of property of the inhabitants are to be fully respected, and while the Crown, as Sovereign, can make laws enabling it compulsorily to resume land for public purposes, it ought to see that proper compensation is awarded to every one.

12. With respect to resumptions or partial resumptions, where the States at no time expressly made the unequivocal intention to take away the property of a person without giving to him/her a legal right to compensation for the loss, so a court should not see any such intention. If a State did purport to express such an unequivocal intention, we would say that to the extent that it repudiated, or derogated from, any such Crown grant, it would be held invalid.

13 In relation to legal actions taken by any person against a State in relation to such matters, no statute of limitations can apply, as the purported imposition of same would be a repudiation of the grant.

14. In principle, the loss caused with respect to a Crown grant would be suffered by the owner at the time the affecting planning instrument was published or took effect. A subsequent *bona fide* purchaser may ordinarily be taken to have notice of the instrument and so not suffer any loss as a consequence of it.

15. In cases where the imposition of heritage status on a property causes a loss to the owner, then in principle, the same sort of considerations would apply.

16. The views above taken as to a right of compensation, it might be said, adopt rules that accord with contemporary notions of justice and human rights and their adoption would fit naturally within Brennan J.'s skeleton of principle which gives the body of our law its shape and internal consistency, and indeed offer the opportunity to reach a result consistent with "common sense and justice" or even "The Vibe".

17. Equitable relief by establishing proprietary estoppel may provide an alternative litigative strategy for successors in title to a Crown grant.

18. Separately from the above considerations, the Federal Government may, by ratifying Article 17 of the *Universal Declaration of Human Rights*, use its external affairs power to adopt Article 17 as domestic law by legislating in the field and so override, by the effect of s.109 of the Constitution, conflicting state legislation. Alternatively, any state may adopt Article 17 itself.

7.1 Filling the Jurisprudential Void: Unsustainable Corollaries of the *Status Quo*

As noted at **3.5**, a jurisprudential void has existed between: planning and associated legislation relating to the uses of private land on the one hand; and the law relating to the system of tenure by Crown grant of freehold and leasehold on the other.

In this void, enforcement of planning and like laws relies on an unwitting fiction that diminishing a title holder's right of free enjoyment, and fettering his right of alienation, are not in the nature of a resumption and are not, in the absence of compensation, a derogation from, or repugnant to, the grant of the Crown.

When this jurisprudential void is filled, by analysis of the interaction between such legislation and Crown grants, the prevailing contemporary view must be restated, for instance, as follows:

- that a state by legislation may validly derogate from and impair or injuriously affect, the property rights of any owner of a Crown grant of freehold or leasehold without compensation, notwithstanding that such legislation is not in the nature of a defeasement pursuant to a reservation in the original grant.

Such a view of the law can be seen to carry with it the following corollaries.

1. The practice of incorporating reservations in Crown grants in all Australian colonies/states, since the time of Governor Phillip, has been superfluous and unnecessary.

2. Crown grants of tenure are deficient compared to all other grants at common law, because they lack the most fundamental characteristic of a grant: that is, that a grantor cannot derogate from, or repudiate, a grant.

3. Crown grants of freehold and leasehold in fact constitute an inferior security of tenure, more akin to form of permissive occupancy terminable at the will of the

Crown, rendering security of tenure by Crown grant of freehold and leasehold since settlement in 1788 an elaborate sham.

4. Diminishing a title holder's right of free enjoyment, or fettering his right of alienation, without compensation, does not derogate from the Crown grant.

5. The common law presumption in favour of private property does not apply, notwithstanding that no such legislation in fact has contained a clear and express intention to derogate or repudiate an owner's granted property rights.

6. Procedural fairness is not required in the process of purporting to derogate from a Crown grant.

7. The Crown (state) does not have the power to deny or limit its own power in the issuing of grants.

8. The common law relating to (a) the power to issue and (b) the nature of, Crown grants, dating from the foundational Letter of Instruction or Letters Patent in each colony/state do not form part of the constitution of the state.

Perhaps the reader can postulate more such corollaries. In any case, for the prevailing contemporary view as restated above to be upheld, the proponent would have to prove these corollaries. However, this would be a difficult challenge, because none of the above corollaries is supported by a body of the common law in Australia.

7.1.1 A Philosophical Explanation for the Jurisprudential Void: Incommensurability

The doctrines of tenure and of estates which govern the system of tenure by Crown grants of freehold and leasehold have not disappeared: aspects of same are recognised by the superior courts when relevant to matters being heard by them.

At the same time, planning and other land use legislation relating to private land is real and substantial, and the source of a great deal of litigation for a great variety of reasons.

For brevity, in this section we may refer to these two fields as: the law of tenure (the original paradigm); and land use legislation (the new paradigm). Generally speaking, the shift from one paradigm to another is "revolutionary".

The general manner in which land use legislation developed without being actively reconciled with the pre-existing law of tenure has been described above at **[3.0]**. The consequent jurisprudential void has prevented any argument being put to the courts which would allow them to address the void and pronounce a clear reconciliation.....but nonetheless, how can such a great void exist and persist?

It is arguably a case of incommensurability.

> "Incommensurability was originally a concept introduced by ancient Greek mathematicians to signify geometric findings like those described by Kuhn (1983: 679): "The hypotenuse of an isosceles right triangle is incommensurable with its side, or the circumference of a circle with its radius, in the sense that there is no unit of length contained without residue an integral number of times in each member of the pair. There is thus no common measure." (Heidlebough, Nola J., "Incommensurability" (2012) https://doi.org/10.1002/978of1444338386.wbeah21183.)

What does mathematical incommensurability have to do with competing legal theories? Not much really, but its adoption into the philosophy of science, thereby allowing an understanding of the dynamics of competing scientific theories and paradigms, potentially does. The role of this metaphorical incommensurability is explained in this extract:

> "The metaphorical application of this mathematical notion specifically to the relation between successive scientific theories .....was popularised by two influential philosophers of science: Thomas Kuhn and Paul Feyerabend.....
>
> In the influential *The Structure of Scientific Revolutions* (1962), Kuhn made the dramatic claim that history of science reveals proponents of competing paradigms failing to make complete contact with each other's views, so that they are always talking at least slightly at cross-purposes. Kuhn characterized the collective reasons for these limits to communication as the incommensurability of pre- and post-revolutionary scientific traditions, claiming that the Newtonian paradigm is incommensurable with its Cartesian and Aristotelian predecessors in the history of physics, just as Lavoisier's paradigm is incommensurable with that of Priestley's in chemistry.....
>
> These competing paradigms lack a common measure because they use different concepts and methods to address different problems, limiting communication across the revolutionary divide.....Like in evolution, the process does not change toward some fixed goal according to some fixed rules, methods or standards, but rather it changes away from the pressures exerted by anomalies on the reigning theory (Kuhn 1962, 170–173)....
>
> In *The Structure of Scientific Revolutions* (1962), Thomas Kuhn used the term 'incommensurable' to characterize the holistic nature of the changes that take place in a scientific revolution. His investigations into the history of science revealed a phenomena [sic] often now called 'Kuhn loss': Problems whose solution was vitally important to the older tradition may temporarily disappear,

become obsolete or even unscientific. On the other hand, problems that had not even existed, or whose solution had been considered trivial, may gain extraordinary significance in the new tradition. Kuhn concluded that proponents of incommensurable theories have different conceptions of their discipline and different views about what counts as good science; and that these differences arise because of changes in the list of problems that a theory must resolve and a corresponding change in the standards for the admissibility of proposed solutions ..... So for example, Newton's theory was initially widely rejected because it did not explain the attractive forces between matter, something required of any mechanics from the perspective of the proponents of Aristotle and Descartes' theories (Kuhn 1962, 148).

....to a significant extent, the science that emerges from a scientific revolution is not only incompatible, but often actually incommensurable, with that which has gone before...

Scientific progress, Kuhn argued, is not simply the continual discovery of new facts duly explained. Instead, revolutions change what counts as the facts in the first place. When reigning theories are replaced by incommensurable challengers, the purported facts are re-described according to new and incompatible theoretical principles. The main goal of Kuhn's Structure was to challenge the idea of scientific progress as cumulative, according to which what is corrected or discarded in the course of scientific advance is that which was never really scientific in the first place, and Kuhn used incommensurability as the basis of his challenge. Instead of understanding scientific progress as a process of change toward some fixed truth, Kuhn compared his suggestion to that of Darwin's: scientific progress is like evolution in that its development should be understood without reference to a fixed, permanent goal (1962, 173)."

(Oberheim, Eric and Paul Hoyningen-Huene, "The Incommensurability of Scientific Theories", *The Stanford Encyclopedia of Philosophy* (Fall 2018 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2018/entries/incommensurability/>.)

The practice of law has characteristics which are essentially scientific, but also characteristics which are the antithesis of science.

An example of the former is the detailed examination and testing of evidence in criminal and civil matters, which is akin to the fundamental scientific practice of making and testing refutable (i.e., testable) hypotheses, which distinguishes science from alchemy, astrology and the like. Indeed, examination-in-chief and cross-examination might be seen as a highly structured (and at times aggressive)

form of dialogue, a technique used by the ancient Greek philosophers to explore, contest and explain.

An example of the latter is that in science, argument by authority is a fallacy, whereas in the law, argument by authority is fundamental. This difference is easily explained, firstly by reference to the social role of the judicial system, which is to "find facts" and make decisions - yes or no - issues have to be resolved. Science on the other hand just deals with hypotheses and is not in a position to declare "facts", or as Kuhn wrote, "a fixed truth". Its task is to be able to make reliable predictions: fixed truths are in the realm of God (and the courts). Judicial acceptance of the burdens of proof - "beyond a reasonable doubt", or "on the balance of probabilities", and acceptance of the need for an appellate system, are inherently acknowledgements of the uncertainties of reality, but still, at the end, a judgment of facts must be made, and the superior court must be followed.

In this context, the poetry of Xenophanes of Colophon (570-478 BC) as translated by Sir Karl Popper is an expression of the inherent limitations of science, which is to say that perfect truth is unknowable:

> "But as for certain truth, no man has known it,
> Nor will he know it; neither of the gods
> Nor yet of all the things of which I speak.
> And even if by chance he were to utter
> The perfect truth, he would himself not know it;
> For all is but a woven web of guesses."

Allowing for such differences between the practice of science and of the law, it would still seem valid and useful to use the concept and implications of incommensurability in science to inform the nature and dynamic of competing legal paradigms, including the focus herein on the law of tenure v land use legislation (i.e., the original and new paradigms).

The gradual development of land use legislation from the mid-twentieth century might be regarded as a paradigm shift from the earlier paradigm's exclusive reliance on the use of leases with conditions, freeholds with reservations, and resumptions of land made in toto. The rapidly growing population and rapid evolution in desired land use policies required a more flexible, adaptable, and co-ordinated approach to land management, which zoning and other land use legislation appeared to offer.

To allude to the above extracts on incommensurability, here we might see competing paradigms which, with regard to private property rights in particular, failed to make complete contact with each other, so that proponents of each would have to talk at least slightly at cross-purposes. These competing paradigms lack a common

measure because they use different concepts and methods to address different problems, limiting communication across the revolutionary divide.

Thus, to revert to the simple analogy of the layer cake (as at **[3.4]**), we have the revolutionary paradigm shift of it being sliced - not vertically, but horizontally, with the top layers being removed, one by one.

The top layer is still cake (i.e., legal rights or interests in the land), but compulsory acquisition legislation does not apply because the cake owner still possesses the bottom of the cake.

Under the original paradigm, horizontal slicing was not imagined - if it had been, compulsory acquisition legislation would have been drafted more widely, to provide for compensation for impairment or injurious affection. In contrast, under the new paradigm, impairment of property rights for some landowners caused by "horizontal slicing" was of incidental concern (- a "Kuhn loss", one might say).

As cited at **[3.2]**, *An Act to authorize the resumption or occupation and use of any Lands required for purposes of Military Defence and to make Compensation to the Owners thereof*. 1854 Vic No. 10 NSW provided in the Preamble: "...whereas it is proper that compensation should be awarded and paid to the owners of such lands for such resumption occupation taking or use thereof and for any damage thereto...". Thus, in addition to "resumption", however that might be defined, the legislators contemplated occupation, taking, use, and damage as deserving of compensation, but it is also clear that the wholesale zoning or other restriction of use with respect to large tracts of land, affecting many different proprietors was not imagined. As the twentieth century progressed, it might be said that the original paradigm's inability to support this evolving need constituted an "anomaly" in the then "reigning theory".

Thus also, under the original paradigm, the proprietor's clear and obvious right to use the land in a manner (for the most part, subject to common law rules such as nuisance etc.) to be limited only by the imagination, has been replaced in the new paradigm by a practical assumption that impairments or injurious affection are not manifestly deprivations of property rights. The modern legislative language is less often of "resumption", the meaning of which in that context seems into be fading into obscurity, but of "taking" or "regulating", or protecting a public interest in whatever form the current fashion might take.

While the new paradigm might be said to have addressed an "anomaly" of the old, it has many anomalies of its own, which are the subject of this paper.

Under the original paradigm, resumption legislation which provided for compensation made perfect sense, for it avoided derogation from the Crown grant, and broad scale legislated land use limitations were not imagined. Under the new paradigm, such compensatory resumption legislation continues to exist, because it was "always

there", and no doubt its abolition would be highly visible and generate an adverse electoral impact. Nonetheless, from this new perspective, there is no legal imperative for it to exist.

In this context, Kuhn's above-quoted characterisation of the "collective reasons for the.. limits to communication as the incommensurability of pre- and post-revolutionary scientific traditions" seems to fit. The original and new paradigms approach land ownership and land use from different directions. The original paradigm has been left mute, and the new one constitutes an incommensurable outlook which generates its own priorities and disregard of the original.

In this context, it can be understood how the new paradigm has generated its own dynamic and momentum.

However, whereas a new paradigm in science may supersede the old one because it offers superior predictions (and, for the time being at least, fewer anomalies), in law, the law of an old paradigm does not necessarily cease to be simply because it is forgotten, but only because it is progressively overruled. In Australia, none of the law relating to Crown grants of tenure has been overruled, and nor has it been legislatively extinguished. It still exists. For example, as noted previously, the rule against perpetuity does not apply to Crown grants of freehold title, and in the *Mabo (No. 2)* case the High Court affirmed that the Crown is not competent to derogate from a grant once made. The virtual invisibility of the old paradigm explains why modern land use legislation does not even attempt to expressly extinguish property rights existing under tenure by Crown grant.

What doesn't exist, as yet, has been any attempt by the lawyers blinded by the incommensurability of the new paradigm with the original, to acknowledge the fundamental validity and relevance of the original paradigm and seek to have a court explore the jurisprudential void and reconcile the two.

As already noted at **[3.3.2.1]**, a former High Court judge, Ian Callinan AC, has identified that there is a problem - for example, noting:

> "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."

It is clear from the authorities quoted in this paper that the courts are perfectly well positioned to continue to validate the law of land tenure, and to reconcile it with land

use legislation. However, the courts are not in a position to positively dictate what matters shall be brought before them. At the time of writing, well over ten years after Callinan's 2008 virtual plea to have the issue presented to superior courts, precisely nothing has happened, even though many tens of thousands of landowners around the country would clearly have an interest in such a development.

For example, in the *Greentree* case (explored infra at **[8.1]**), there is no sign that counsel for the defendant landowner being prosecuted raised as an issue the enforceability of the governing environmental legislation, due to either its derogation from the Crown grant and/or additionally, such derogation being ultra vires the Commonwealth's legislative reliance on s. xxix of the Constitution and relevant international instruments, none of which provided for, or even contemplated, arbitrarily depriving people of their property. Not having been raised, the judges did not consider these issues. Everyone involved took the complete validity of the environmental legislation at face value. It wasn't a case of the old paradigm being assumed to be irrelevant - "assuming" is itself a positive mental act - but rather that it was simply invisible.

That most other lawyers, unlike Callinan, seem not to even identify such inconsistencies of justice, much less the possibility of, or need for, a resolution, can be explained by the incommensurability of the new paradigm with the old, and their consequent failure to comprehend both the existence of the void, and the need and opportunity to reconcile the paradigms.

7.2 Guideline for Action re Crown Grants of Title

If the above legal reasoning and authorities in relation to Crown grants of title in the Australian states are accepted, a cause of action seeking relief from a state may be drafted. Here is a suggested guideline as to content. (A comparable action against the Commonwealth may also require evidence in relation to the so-called chain of validity.)

> 1. The Plaintiff [who is the Registered Proprietor, or has some other legal or equitable interest sufficient to provide standing] owns Land [as described].
>
> 2. The Defendant/s is/are the Crown in right of [State] and/or [Authority] acting under the authority of the Crown.
>
> 3. The Plaintiff acquired its legal [or equitable?] interest in the Land on the Acquisition Date (___/____/___).

4A. The Land Title is by a Crown grant of freehold made in [State] on [date].

or

4B. The Land Title is by a Crown grant of leasehold made in [State] on [date].

5. The Grant of freehold title is not governed by the rule against perpetuity.

6. On the Instrument Date (___/____/___), [which is after the Acquisition Date] the Defendant caused Legislation [or some other Instrument] to take effect with respect to the Land.

7. The Instrument takes effect so as to:

- limit the Plaintiff's prior existing ability to use the land; and/or

- require the Plaintiff to perform certain works on the land; and/or

- practically reduce the value of the Plaintiff's Land; and/or

- cause the Plaintiff to incur costs in relation to complying with, or negotiating against, the implementation of the Instrument with respect to the Land; and

- fails to provide for compensation to the Plaintiff for the above.

8A. The Instrument is not a Defeasement made pursuant to a Reservation in the Grant of freehold title.

or

8B. The Instrument is not a Defeasement made pursuant to a Reservation in the Grant of leasehold title, nor is it made pursuant to a Condition relating to the Grant.

9. The Instrument is in the nature, but not the form, of a Defeasement.

10. Not being made pursuant to a Reservation [or maybe also/instead a Condition - in relation to leasehold], and lacking provision for compensation, the Instrument is repugnant to the Grant of title.

11A. There is no express intention contained in the Instrument Legislation purporting override the repugnancy, or indeed to expressly provide that the Instrument is to be taken to derogate from the Plaintiff's rights under the Grant of title.

or

11B. If there is taken to be an express provision in the Instrument Legislation purporting to override the repugnancy, such intention fails because the Crown grant, being created as a perpetual instrument of title, terminable in part or completely only by resumption by the Defendant State, is not capable of being repudiated by the Defendant, thereby to become a progressively “vanishing title”.

12A. Due to said repugnancy, the Instrument is unenforceable with respect to the Land. [This would serve as a defence by the landowner to any action by the Crown.]

or

12B. Due to said repugnancy, the Instrument is unenforceable with respect to the Land to the extent of the repugnancy and the Plaintiff is entitled to compensation for all loss of amenity and/or negative financial impact (as per 7. above) caused by the application of the Instrument to the Land.

or [if the action is commenced reasonably promptly after the Instrument Date, or even in anticipation of the Instrument Date]:

12C Due to said repugnancy, the Plaintiff seeks equitable relief in the form of, for example:

(a) a Declaration that the Instrument is repugnant to the Grant of title and so unenforceable against the Plaintiff

or

(b) an Injunction to prevent the Defendant/s from implementing, or acting, pursuant to the Instrument

or

(c) a Writ of Mandamus requiring the Defendant/s to take steps to remedy damage caused or being caused consequent to the Instrument.

8.0 Validity of Commonwealth Legislation Re Landowners in the States

McLeod (*supra* at 129-130) explains the problem for landowners:

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

To take the EPBC Act as a significant example of Commonwealth legislation operating to affect the property rights of landowners in the Australian states, the scope of its validity and enforceability may be seen to rely on four links in a chain, as it were. The four links in the chain of legislative validity are:

1. adoption of international agreements (including conventions) by the Commonwealth;

2. Commonwealth legislation relying on the Constitutional external affairs power (s.51(xxix)), which conforms with the relevant international agreements;

3. by the operation of s.109 of the Constitution, the legislation may (in the absence of any provision to the contrary) override inconsistent state laws, if any; and

4. the Commonwealth legislation applies to private property in so far as it is not repugnant to the property owner's Crown grant of freehold or leasehold title.

Let us consider the strength of each of these links in turn, commencing with adoption of international conventions.

8.1 Link #1 - Adoption of International Conventions by the Commonwealth

It seems that the EPBC Act's reliance on the Constitution's external affairs power is in fact derived from seven separate international agreements:

> "Most of the provisions in Division 1 of Part 3 of the EPBC Act (relating to matters of national environmental significance) rely constitutionally upon the external affairs power. The external affairs power under section 51(xxix) of the Constitution, allows for the Commonwealth to legislate so as to implement the terms of international treaties that have been signed by Australia. Key provisions of the EPBC Act are largely based on the following treaties:
>
> - The Convention for the Protection of the World Cultural and Natural Heritage 1975 (World Heritage Convention);
>
> - The Convention on Wetlands of International Importance especially as Waterfowl Habitat 1975 (the Ramsar Convention);
>
> - The Convention on Biological Diversity 1992;
>
> - Japan-Australia Migratory Bird Agreement (JAMBA);
>
> - China-Australia Migratory Bird Agreement (CAMBA);
>
> - Convention on the Conservation of Migratory Species of Wild Animals - (Bonn Convention); and

- The Convention on International Trade in Endangered Species of Wild Fauna and Flora 1976 (CITES)." (*Fact Sheet: The Environment Protection & Biodiversity Conservation Act and the Australian Constitution,* National Farmers' Federation, 9 February 2007.)

For the purpose of illustration, two of these instruments with wide scope shall be considered here: the Convention on Biological Diversity 1992 ("Biological Convention"); and the Ramsar Convention 1975. Subsequently, a third example, namely the Convention for the Protection of the World Cultural and Natural Heritage ("Heritage Convention") shall be considered.

The most relevant part of the Biological Convention is Article 8, which reads as follows:

"**Article 8. In-situ Conservation**

Each Contracting Party shall, as far as possible and as appropriate:

(a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;

(b) Develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity;

(c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use;

(d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;

(e) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas;

(f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies;

(g) Establish or maintain means to regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity, taking also into account the risks to human health;

(h) Prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species;

(i) Endeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components;

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;

(k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations;

(l) Where a significant adverse effect on biological diversity has been determined pursuant to Article 7, regulate or manage the relevant processes and categories of activities; and

(m) Cooperate in providing financial and other support for in-situ conservation outlined in subparagraphs (a) to (l) above, particularly to developing countries."

Nowhere in Article 8 is there express provision for its objectives to be achieved by a deprivation of property rights. The words "must", "ought", "shall", and "property" are nowhere to be seen.

Further, Article 8's preamble "shall, as far as possible and as appropriate", is not imperative in tone at all, or a mandate, but implies a principle that other considerations might have to be taken in to account when implementing Article 8. Thus, for example, it could not be interpreted as purporting to override the *Universal Declaration of Human Rights*, including the provision that persons shall not be arbitrarily deprived of their property: Article17(2).

In Australian law, there is a common law presumption in favour of property rights, as noted elsewhere in this paper (eg., at **2.1.3** and **9.4.3.2**), and in interpreting the meaning of the Biological Convention, the absence of any such express provision to the contrary must fail to rebut that presumption. Indeed, although s. 17 of the *UDHR* has not as such been adopted into domestic law by the Commonwealth, and so remains "merely" a human right, the failure of the Biological Convention to expressly repudiate or override it, must carry with it the interpretation that the Convention must be read in the context of the *UDHR*'s existence.

In the *Tasmanian Dam case* (*supra*), the High Court examined whether or not the Commonwealth legislation in question operated to breach s.51(xxxi) of the Constitution, to "acquire" property other than on "just terms", but that is a very different question from asking whether there has been an arbitrary deprivation of private property rights.

It is clear that Article 8 of the Biological Convention does not provide for, or authorise, the achievement of its objectives by the impairment, or arbitrary deprivation, of private property rights.

Relevant parts of the Ramsar Convention were considered in detail by the Federal Court of Appeal in *Greentree v Minister for the Environment and Heritage* [2005] FCAFC 128; 144 FCR 388; 223 ALR 679; 143 LGERA 1, as they had been, previously, in the Federal Court before Sackville J.: *Minister for the Environment & Heritage v Greentree (No 2)* [2004] FCA 741. Here is an extract from the Federal Court judgment of Sackville J. (at 12-14):

> "The recital and the key provisions of the Ramsar Convention are as follows:
>
> *'THE CONTRACTING PARTIES,*
>
> *RECOGNIZING the interdependence of man and his environment;*
>
> *CONSIDERING the fundamental ecological functions of wetlands as regulators of water regimes and as habitats supporting a characteristic flora and fauna, especially waterfowl;*
>
> *BEING CONVINCED that wetlands constitute a resource of great economic, cultural, scientific and recreational value, the loss of which would be irreparable;*
>
> *DESIRING to stem the progressive encroachment on and loss of wetlands now and in the future;*
>
> *RECOGNIZING that waterfowl in their seasonal migrations may transcend frontiers and so should be regarded as an international resource;*
>
> *BEING CONFIDENT that the conservation of wetlands and their flora and fauna can be ensured by combining far-sighted national policies with co-ordinated international action;*
>
> *HAVE AGREED as follows:*
>
> *ARTICLE 1*

1. For the purpose of this Convention wetlands are areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres.

2. For the purpose of this Convention waterfowl are birds ecologically dependent on wetlands.

ARTICLE 2

1. Each Contracting Party shall designate suitable wetlands within its territory for inclusion in a List of Wetlands of International Importance, hereinafter referred to as "the List" which is maintained by the bureau established under Article 8. The boundaries of each wetland shall be precisely described and also delimited on a map and they may incorporate riparian and coastal zones adjacent to the wetlands, and islands or bodies of marine water deeper than six metres at low tide lying within the wetlands, especially where these have importance as waterfowl habitat.

2. Wetlands should be selected for the List on account of their international significance in terms of ecology, botany, zoology, limnology or hydrology. In the first instance wetlands of international importance to waterfowl at any season should be included.

3. The inclusion of a wetland in the List does not prejudice the exclusive sovereign rights of the Contracting Party in whose territory the wetland is situated.

4. Each Contracting Party shall designate at least one wetland to be included in the List when signing this Convention or when depositing its instrument of ratification or accession, as provided in Article 9.

5. Any Contracting Party shall have the right to add to the List further wetlands situated within its territory, to extend the boundaries of those wetlands already included by it in the List, or, because of its urgent national interests, to delete or restrict the boundaries of wetlands already included by it in the List and shall, at the earliest possible time, inform the organization or government responsible for the continuing bureau duties specified in Article 8 of the any such changes.

6. Each Contracting Party shall consider its international responsibilities for the conservation, management and wise use of migratory stocks of waterfowl,

both when designating entries for the List and when exercising its right to change entries in the List relating to wetlands within its territory.

ARTICLE 3

1. The Contracting Parties shall formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory.

2. Each Contracting Party shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List has changed, is changing or is likely to change as the result of technological developments, pollution or other human interference. Information on such changes shall be passed without delay to the organization or government responsible for the continuing bureau duties specified in Article 8.' (Emphasis added.)

Article 6 of the *Ramsar Convention* provides for a Conference of the Contracting Parties to review and promote implementation of the *Convention*. The bureau provided for in Art 8 is to convene ordinary meetings of the Conference, which must now take place at intervals of not more than three years (Art 6(1)).

Article 8 of the *Ramsar Convention* provides for the performance of 'continuing bureau duties'. The duties of the bureau include the following (Art 8(2)):

'(b) to maintain the List of Wetlands of International Importance and to be informed by the Contracting Parties of any additions, extensions, deletions or restrictions concerning wetlands included in the List provided in accordance with paragraph 5 of Article 2;

(c) to be informed by the Contracting Parties of any changes in the ecological character of wetlands included in the List provided in accordance with paragraph 2 of Article 3;

(d) to forward notification of any alterations to the List, or changes in character of wetlands included therein, to all Contracting Parties and to arrange for these matters to be discussed at the next Conference.'"

In none of these "key provisions" is the word "property" mentioned: much less is there any express provision for its objectives to be achieved by a deprivation of property rights.

It is clear that the Ramsar Convention does not provide for, or authorise, the achievement of its objectives by the impairment, or arbitrary deprivation, of private property rights.

The Heritage Convention was examined in the *Tasmanian Dam case* (supra). One may turn immediately to the analysis of Gibbs CJ. who drew these conclusions:

> "29.....Article 6 acknowledges the sovereignty of the States in whose territory the heritage is situated and *is expressed "without prejudice" to "property rights provided by national legislation*". (at p489).....
>
> 32.....The expression "without prejudice to property rights provided by national legislation" *is a reference to domestic laws - in the case of Australia, both Commonwealth and State*."
>
> "87. .....it was not intended by those articles to bind the States Parties to any course of action upon which they themselves were not prepared to embark. Similarly the changes made to Art. 6 show that *the performance of the duty of international cooperation was not intended to override national sovereignty or individual proprietary rights*. (at p473)" (Emphases added.)

So, there we have the (uncontradicted) finding of the Chief Justice that the Heritage Convention does not require or authorise the achievement of its objectives by the impairment, or arbitrary deprivation, of private property rights, whether those rights are derived from the Commonwealth or from a state.

The facts of the *Tasmanian Dam case* related to unalienated Crown land in Tasmania, not to private land. No tenure of an interest in land by Crown grant of freehold or leasehold was the subject of any dispute with the Commonwealth. Accordingly, the High Court was not required to turn its attention to such circumstances and made no specific decision thereupon.

Like the Ramsar and Biological Conventions considered above, the Heritage Convention must be subject to the common law presumption in favour of property rights, and in the absence of any such express provision to the contrary must fail to rebut that presumption.

8.2 Link #2 - Passing the Commonwealth Legislation

The second link of the chain - i.e., by the operation of the Commonwealth's Constitutional external affairs power(s.51(xxix), passing the legislation (for example the EPBC Act) - relies for its integrity on the presumption that the Act operates within the scope of the relevant Convention(s). High Court authority for this is explored by

GE Fisher, “External Affairs and Federalism in the Tasmanian Dam Case”, (1985) 1 *Queensland Institute of Technology Law Journal*, 157 at 171-172:

> “The need for conformity to the international agreement is an inherent limitation of some consequence ..... This conformity limitation receives in the *Tasmanian Dam case* various related statements, which when taken together evince a real effect. The law implementing the international agreement must be such as to 'conform to the treaty and carry its provisions into effect', [111] it must be found 'conducive' to the end of the Convention, [112] the legislative power is confined to 'what may reasonably be regarded as appropriate' [113] for the implementation of the agreement, what is 'capable of being reasonably considered to be appropriate and adapted to achieving' [114] the purpose of the agreement. Furthermore it has been suggested that there has to be a 'reasonable proportionality' between the purpose or object of the agreement and the legislative measures for achieving or procuring it.[115] That the conformity limitation is to be taken seriously is demonstrated by the difference of opinion among the majority in the *Tasmanian Dam case* as to how it should operate there. While Mason and Murphy JJ. thought that the prohibitions in s. 9 of the World Heritage Properties Conservation Act 1983 (Cth) were reasonably appropriate for giving effect to the UNESCO Convention for the Protection of the World Cultural and Natural Heritage, Brennan and Deane JJ. decided that the prohibitions in that section, with the exception of s. 9(1)(h) (the doing of any prescribed act of dam construction), were too wide.[116]
>
> Though the limitation does not restrict the range of subject matters within the power of j treaty implementation in s. 51(29), it clearly affects in a substantial way the extent to which these subject matters may be dealt with. The extent of the power is dependent upon a complex of factors going to the character of the international agreement concerned. Such factors include:[117]
>
> (a) the nature of the ends or purposes envisaged in the agreement;
>
> (b) the style of the agreement and its mode of expression;
>
> (c) whether the agreement imposes obligations or provides benefits;
>
> (d) the nature of those obligations or benefits;
>
> (e) whether the obligations or benefits are specific or general;
>
> (f) the depth of involvement of the agreement in a subject matter: whether minimal guidelines or detailed regulations are required, whether tangible

or
intangible benefits are provided;

(g) the breadth of the subject matter of the agreement: whether the agreement covers a
large field of activity or a restricted one;

(h) whether large elements of discretion or value judgment are allowed the parties to the
agreement;

(i) whether the agreement is bilateral or multilateral;

(j) whether or not the provisions of the agreement are declaratory of international law.

All these factors show that s. 51(29) does not admit of the general regulation of the subject matter to which the international agreement relates.

[111] Tasmanian Dam case, supra n. 1 at 697 per Mason J.

[112] Ibid, at 782 per Brennan J.

[113] Ibid, at 730 per Murphy J.

[114] Ibid, at 805-6 per Deane J.

[115] Ibid, at 806 per Deane J.:
Thus, to take an extravagant example, a law requiring that all sheep in Australia be slaughtered would not be sustainable as a law with respect to external affairs merely because Australia was a party to some international convention which required the taking of steps to safeguard the spread of some obscure sheep disease which had been detected in sheep in a foreign country and which had not reached these shores.

[116] Ibid, at 705-9 (Mason J.), 735-6 (Murphy J.), 785-8 (Brennan J.), 811-3 (Deane J.).
[117] A number of these factors are identified by Mason J., ibid, at 696."

So, turning to the EPBC Act, does it, to use a phrase used by the High Court as cited above, comply with the "need for conformity to the international agreement [,which] is an inherent limitation"?

Attention may be paid to provisions of the EPBC Act relating to the use of land by Sackville J. (*Greentree (No 2) case* at 8-9):

"The *EPBC Act* came into force on 16 July 2000, some thirteen months after the purported designation of the Ramsar Gwydir Wetlands. The objects of the Act include the following (s 3(1)):

'(a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and

(b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and

(c) to promote the conservation of biodiversity; and

(d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and

(e) to assist in the co-operative implementation of Australia's international environmental responsibilities…'

Section 3(2) provides that in order to achieve its objectives, the *EPBC Act*:

'(a) recognises an appropriate role for the Commonwealth in relation to the environment by focussing Commonwealth involvement on matters of national environmental significance and on Commonwealth actions and Commonwealth areas; and

(b) strengthens intergovernmental co-operation, and minimises duplication, through bilateral agreements; and

…

(e) enhances Australia's capacity to ensure the conservation of its biodiversity by including provisions to:

(i) protect native species…;

…;

(iv) identify processes that threaten all levels of biodiversity and implement plans to address these processes; and

(f) includes provisions to enhance the protection, conservation and presentation of world heritage properties and the conservation and wise use of Ramsar wetlands of international importance…'

Division 1 of Part 3 of the *EPBC Act* is headed 'Requirements relating to matters of national environmental significance'. Subdivision B (ss 16-17B) deals with 'Wetlands of international importance'. Section 16 provides as follows:

'(1) A person must not take an action that:

(a) has or will have a significant impact on the ecological character of a declared Ramsar wetland; or

(b) is likely to have a significant impact on the ecological character of a declared Ramsar wetland.

Civil penalty:

(a) for an individual – 5,000 penalty units;

(b) for a body corporate – 50,000 penalty units.

(2) Subsection (1) does not apply to an action if:

(a) …

(b) Part 4 lets the person take the action without an approval under Part 9 for the purposes of this section; or

…

(3) In this Act:

***ecological character** has the same meaning as in the Ramsar Convention.'*

A penalty unit is defined by s 4AA(1) of the *Crimes Act 1914* (Cth) to mean $110. It follows that the maximum civil penalty for breach of s 16(1) of the *EPBC Act* is $550,000 in the case of an individual and $5,590,000 in the case of a body corporate.

Section 17B of the *EPBC Act* makes it an offence to take action which results or will result in a significant impact on the ecological character of a declared Ramsar wetland. It appears that no criminal proceedings have been instituted against the respondents."

Division 1 of Part 3, Division B of the EPBC Act clearly purports to prevent any person from performing certain acts (let us refer to them as the "prohibition

provisions") with regard to declared Ramsar wetlands, and provides for civil and criminal penalties for their breaching.

Speaking generally, the prohibition provisions would clearly appear to conform with the Ramsar Convention, as they are intended to protect the "environment", and in particular, Ramsar declared wetlands.

This would certainly be the case with respect to Commonwealth lands: there, the Commonwealth is free to regulate uses thereon in any way it chooses, within its constitutional powers.

It would also appear that the prohibition provisions conform with the Ramsar Convention with respect to trespassers on private land. In such a trespassing circumstance, the landowner would also have a legal right to claim against the trespasser for any loss or damage caused to him during the course of the trespass.

Similarly, if the "landowner" was merely an occupier pursuant to a licence at will, for example, the licence as it extended to the Ramsar declared wetlands could easily be terminated or amended by the licensor so as to ensure that the prohibition provisions would lawfully take effect in a manner conforming with the Ramsar Convention.

However, when it comes to the application of the prohibition provisions to the landowner, who possesses tenure by freehold or leasehold, the position is fundamentally different. This is because, to the extent that such prohibition provisions purport to limit his right to use the land, they are effectively making him a trespasser on his own property. Further, there is no arrangement for compensation to the landowner for the curtailment of his right to use his land. These are issues which are governed, in NSW, by the law of tenure by Crown grant of freehold and leasehold.

The property on which the *Greentree judgments* declared wetlands were situated, named *Windella*, was about 2,000 hectares in size, situated 80 kilometres west of Moree in northwestern NSW. At no stage in the *Greentree judgments* did the Federal Court specify the nature of the property's tenure, i.e., whether it was either: freehold title - and if so, whether it was subject to any reservations in the Crown grant; or, alternatively, leasehold title - and if so, whether it was subject to any conditions in the Crown grant.

It follows that there was never any inquiry as to whether the application of the EPBC Act to the land fell within the scope of any such reservation or condition. Of course, it is highly unlikely that it did, given that the Crown grant/s in all likelihood would have been issued many decades previously, perhaps during the nineteenth century.

In the *Greentree judgments,* the Federal Court, twice - first by a single judge, and secondly by an appeal bench of three judges - failed to consider the possible relevance of the landowner's tenure in any way. Indeed, it did not make an actual

assumption that it wasn't relevant: it failed even to consider whether such an assumption should be made. Clearly, it wasn't raised by any of the counsel of the landowner, and so the Court was not prompted to consider such an issue.

It is very clear that a law with respect to "the ecological character of a declared Ramsar wetland" is a law with respect to land, and the usage of land. It is not a civil or criminal law of general application: i.e., a law which applies everywhere in a jurisdiction, such as say, committing a fraud. (It would be no defence for a landowner to plead that because he committed a fraud while using a computer situated on his own land that his rights of land use protected him from liability: his ownership of the land is simply irrelevant.)

That the prohibition provisions of the EPBC Act should be properly characterised to be laws with respect to land, and the usage of land, a few obvious points might be noted:

1. the Act applies to "wetlands", which is a type of land;

2. Ramsar wetlands can be clearly defined on maps (see for example, the *Greentree judgments*);

3. declared Ramsar wetlands are intended to "run with the land", so that if the land is conveyed to a new owner, or indeed, to a long succession of owners, the prohibition provisions purportedly remain in force: and

4. imposition of the prohibition provisions impairs the landowner's previously existing rights to use the land.

Lest the role and relevance of the state law of tenure be considered inconsequential and worthy of total ignorance, here are some snippets to the contrary, from analysis earlier in this paper. (We assume that the landowner has freehold title for the purpose of this discussion, but the conclusions are only moderately relaxed in the case of leasehold title.)

The "most valuable incident" of an estate in fee simple (i.e. freehold) "is one that is now inseparable from it, *the unfettered right of alienation,* and along with this is the *right of free enjoyment*." (Kemp at **3.4**.)

"..An estate in fee simple is, 'for almost all practical purposes, the equivalent of full ownership of the land' and confers 'the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination.' It simply does not permit of the enjoyment by anyone else of any right or interest in respect of the land unless conferred by statute, by the owner of the fee simple or by a predecessor in title." (High Court at **3.4**.)

The phrase “every act of ownership which can enter into the imagination” is very wide. Now, it might be said that one man’s wetland is another man’s swamp. Thus, for example, if the owner wished to bulldoze a wetland/swamp, and build on it a corrugated iron shed, decorated with colourful graffiti, and top it off with a giant pink pompom, he is so entitled. In the case of *Windella*, situated 80 kilometres west of Moree - which most city dwellers would consider to be beyond the black stump - there would be in practice no question of nuisance either. (We might note in comparison the phenomenon of giant “objects” normally constructed adjacent to the main roads of country towns, often on private land, such as the Giant Pineapple, the Giant Prawn, the Giant Ram, the Giant Cow, the Big Banana etc.)

Having said that, there is, apparently, no known instance of a landowner wishing to bulldoze a wetland and to build thereupon a graffiti-covered corrugated iron shed, with or without a giant pink pompom attached. However, on *Windella* the relevant activity which gave rise to the *Greentree* litigation was: clearing, ploughing and the cultivation of wheat.

Given that clearing, ploughing and the cultivation of wheat are practices which have taken place since the uncertain time in pre-history when nomads abandoned the practice of wandering and foraging and settled down to cultivate land, such activities might be fairly regarded as highly unimaginative. Even so, they are activities which can “enter into the imagination” and indeed as noted at **2.0**, the very first Crown grant in NSW was made for the purpose of an experimental farm. They are examples of the right of free enjoyment which are integral to the act of alienation by the Crown in favour of the landowner.

“...the common law’s conception of property as comprised of a ‘bundle of rights’” (High Court at **3.4**.) is consistent with the above idea of multifarious acts of ownership, and implies that a property right associated with land is not limited in identification to an all-or-nothing extinguishment or non-extinguishment of title to a piece of land.

“*When validly made, a grant of an interest in land binds the Crown and the Sovereign's successors*(135) Halsbury, op cit, 4th ed., vol.8, par.1047.....Therefore an interest validly granted by the Crown, or a right or interest dependent on an interest validly granted by the Crown cannot be extinguished by the Crown without statutory authority. *As the Crown is not competent to derogate from a grant once made(137), a statute which confers a power on the Crown will be presumed (so far as consistent with the purpose for which the power is conferred) to stop short of authorizing any impairment of an interest in land granted by the Crown or dependent on a Crown grant*.” (Emphasis added. The High Court at **2.1.1.**)

“....assuming the Crown to be affected by the rule against perpetuities in England, it was nevertheless inapplicable, in the year 1823, to Crown grants of land in the Colony of New South Wales, or to reservations or defeasances in such grants to take

effect on some contingency more or less remote, and only when necessary for the public good." (The Privy Council at **2.1.4.**)

The legal force of Crown grants persists. It has not simply withered away with time, or disappeared in a magical legal puff, even if lawyers seem to have forgotten it: the maxim that "ignorance of the law is no excuse" applies as much to lawyers as to anyone else. A certificate of title not attached to a Crown grant would effectively be a certificate of nothing. Accepting Wickham's "rule of 'no-law'" (see **3.5**) is not an acceptable option.

"...the Crown cannot derogate from its own grant" (Supreme Court of NSW at **2.1.3.**) This is, it might be said, the flipside of alienation by Crown grant. Except by defeasement pursuant to a reservation (or, in the case of leasehold, pursuant to a condition), the Crown may only subject the grant (or any part of it) to involuntary alienation against the landowner - that is, to resume such, and avoid derogation - by compensating the landowner to the extent of the involuntary alienation (resumption).

Note also, the sovereign right to resume a Crown grant is held by the Crown in right of the state which made the grant - which in respect of the *Greentree judgments,* is NSW. The Crown in right of the Commonwealth has no such power with respect to Crown grants in the states.

"Security in the right to own property carries immunity from arbitrary deprivation of the property....." (High Court at **3.4**.)

The word "arbitrarily" has been interpreted to mean not only "illegally" but also "unjustly" (High Court at **3.4**.)

"....In the development of the international law of human rights, rights of that kind have long been recognised. Thus, the Universal Declaration of Human Rights 1948, Art 17 included the following: "1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property." (High Court at **4.1**.)

It is very clear from the above that (except for a defeasement pursuant to a reservation) an involuntary alienation of property rights from a grantee without compensation constitutes a derogation from the Crown grant and as such is an "arbitrary deprivation of property", "illegal" and "unjust" and a breach of human rights.

There is nothing in the Ramsar Convention which could support a conclusion that prohibition provisions in the EPBC Act, when imposed on landholders, conform to the Convention. This is equally true with respect to the Biological Convention. Accordingly, any enforcement against landowners by the Commonwealth not conforming to the international agreement relied upon, must be outside the Commonwealth's power and unconstitutional, and so invalid.

With regard to interpretation of the Ramsar Convention, a straw man argument which might be raised is that Article 17 of the UDHR is a mere human right, and has not been made law in Australia by the Commonwealth (even though it has been advocated internationally by all Commonwealth governments for over eight decades as noted at **3.5** and **9.5**). The immediate riposte to this is that in interpreting the intention any international agreement such as the Ramsar Convention, the existence and relevance of other agreements would not be judged by whether any particular countries had brought it into domestic law or not. (Indeed, it would be usual for such agreements to be brought into domestic law at some time after the making of the agreement: accordingly, at the time that the international agreement is made, it would not instantly become law in any jurisdiction.)

As to interpretation of an international agreement, there is another relevant point: "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." (High Court at **2.1.3**.)

There is no such expressed intention in the Ramsar Convention, or the Biological Convention.

A final nail in the coffin of the view that Commonwealth legislation such as the EPBC Act conforms to the Ramsar Convention or other international agreement when applying prohibition provisions to landowners in Australian states is the *a fortiori* point that, as demonstrated at **2.1**: Crown grants and the associated common law are properly regarded as part of the constitutions of NSW and other states. Thus, in so far as such Commonwealth prohibition provisions purport to operate in repugnance to a state Crown grant, such purported operation is in breach of the constitutional law of the relevant state. It could not possibly be said that that could conform to either the Ramsar Convention or the Biological Convention.

Thus, to the extent that the EPBC Act (or any other Commonwealth legislation) does not conform to the Ramsar Convention, or the Biological Convention, or to any other international agreement similarly relied upon by the Commonwealth as a source of its power, it must be invalid and unenforceable.

This is true of any such legislation, but an example where Commonwealth legislation was found to conform to an international convention is provided by the *World Heritage Properties Conservation Act 1983 (Cth)* which, on the facts of the *Tasmanian Dam case* did not purport to apply to privately owned land or, as Gibbs C.J as noted above phrased it, "individual proprietary rights".

Mason J. explained (*supra* at 71):

> "However, what is important in the present context is that neither the Commonwealth nor anyone else acquires by virtue of the legislation a proprietary interest of any kind in the property. The power of the Minister to refuse consent under the section is merely a power of veto. He cannot positively authorize the doing of acts on the property. As the State remains in all respects the owner the consent of the Minister does not overcome or override an absence of consent by the State in its capacity as owner. The fact that the Minister has a power of veto of any development of or activity on the property does not amount to a vesting of possession in the Commonwealth. Significantly, the Act contains no provision dealing with possession. (at p495)"

Accordingly, the Commonwealth's "veto" power with respect to certain development or activity leaves the state's sovereignty of the specified land otherwise unaffected. Thus, subject to the extent of the Commonwealth's veto, the state retains the power to alienate the land by Crown grant of freehold or leasehold. (Further, if native title to the land were to exist, a grant of freehold extinguishing same would attract (unlike in 1983) a liability to the state to compensate the native title holders for the loss under the *Native Title Act (Com.)* - see **1.1**, **3.4**, **4.2**, **4.8** and **9.4.1**.)

This position conformed with the Heritage Convention and so, may be contrasted with the EPBC Act as applied in the *Greentree case*. The Commonwealth legislation in the *Tasmanian Dam* case did not deprive any landowner of any proprietary right, so no question existed as to whether or not it might have therefore failed to conform with the Heritage Convention.

In short, the second link of the chain must also fail where Commonwealth legislation relying on the Constitutional external affairs power (s.51(xxix)), fails to conform with the relevant international agreement(s).

8.3 Link #3 - The Operation of Section 109

The third link of the legislative validity chain is that by the operation of s.109 of the Constitution, the Commonwealth Act, such as the EPBC Act, may override inconsistent state laws, if any.

S. 109 provides as follows:

> "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

In the particular case of the EPBC Act, the potential for such inconsistency between Commonwealth and state laws is substantially avoided by s.10 of the Act:

"This Act is not intended to exclude or limit the concurrent operation of any law of a State or Territory, except so far as the contrary intention appears."

It might be concluded therefore, that due to the existence of s.10, any attempt by the Commonwealth to, for example, enforce the prohibition provisions of the EPBC Act against a landowner in an Australian state, could not operate in conflict with the law of tenure by Crown grant in that state.

In cases where a Commonwealth law did not have a provision like s.10, then the question would remain whether prohibition provisions such as those in the EPBC Act would override inconsistent state laws by the operation of s.109.

To continue, as an example, the objects of the EPBC Act are listed in s.3:

"(1) The objects of this Act are:

(a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and

(b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and

(c) to promote the conservation of biodiversity; and

(ca) to provide for the protection and conservation of heritage; and

(d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and

(e) to assist in the co-operative implementation of Australia's international environmental responsibilities; and

(f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and

(g) to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge."

These objects would appear to conform to the international agreements, such as the Ramsar Convention, upon which the Commonwealth is substantially relying to use the external affairs s.51(xxix) power, and clearly express the Commonwealth's intentions.

Accordingly, to the extent of any conflict with state laws relating to environment protection and biodiversity conservation (putting aside s.10 of the Act), s.109 of the Constitution could operate to invalidate the state law to the extent of the inconsistency.

However, in characterising the operation of s.109, the question may be raised as to whether, for example, the prohibition provisions of the EPBC Act, when applied to landowners, are fairly characterised as merely covering the field of "environment protection and biodiversity conservation", or if they are in reality also purporting to cover the field of the law of tenure with respect to wetland and other such land.

The objects of the EPBC Act do not include to: be able to arbitrarily deprive landowners of their property rights; or change the law of tenure by Crown grant in a state; or legislate any such thing in relation to land ownership. Nonetheless, the EPBC Act was effectively used by the Commonwealth to that effect in the *Greentree case*.

Let us pose the question put by Isaacs J. in *Clyde Engineering Co. Ltd v. Cowburn* (1926) 37 C.L.R. 466 at 489:

> "Was the second Act on its true construction intended to cover the whole ground and, therefore, to supersede the first? **...** If, **...**, a competent legislature expressly or impliedly evinces an intention to cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field."

It is, in the case of the EPBC Act, abundantly clear that the Commonwealth did not expressly or impliedly evince an intention to "cover the field" or even indeed, to moderately trespass on, the law of tenure by Crown grant in a state. If there were any doubt about this, one could refer again to the international agreements on which the Commonwealth's reliance on the s.51(xxix) power is based, from which no such intention is made evident, and accordingly from which the Commonwealth might be imputed to have derived no such understanding or intention.

Without exploring all the other legal theories with respect to the operation of s.109, (see for example: Allan Murray-Jones, "The Tests for Inconsistency under Section 109 of the Constitution", 10 *FedLawRw* 25) the general observation might be made that where Commonwealth environmental or other legislation, in so far as it might purport to operate in respect of private land in any Australian state, does not clearly express an intention to override state laws of tenure, it cannot override such state laws by the operation of s.109.

Accordingly, this third link of the chain is likely to fail. (As noted above, with regard to the EPBC Act in particular, the question would not actually arise due to the existence of s.10 of the Act.)

8.4 Link #4 - Interaction of Commonwealth Legislation & Tenure by Crown Grant

In the absence of a convention which provides for, or authorises, the achievement of its objectives by the impairment, or arbitrary deprivation, of private property rights, Commonwealth legislation, such as the EPBC Act, can apply to private property only in so far as it is not repugnant to the property owner's Crown grant of freehold or leasehold title.

Given Australia's multigenerational bipartisan support internationally for the *Universal Declaration of Human Rights* (explained at **9.0** to **9.5**), it must be considered most unlikely that any such contradicting convention provisions would have a prospect of being composed and adopted, let alone ratified by the Commonwealth. So, putting aside this most unlikely of possibilities, how might Commonwealth legislation which has the purported effect of adversely affecting private property rights in the states interact with tenure by Crown grant of freehold or leasehold title?

At **3.5** and **7.1**, the jurisprudential void which has existed at state level was identified and explained. This void extends into the space which should constitute the legal relationship between Commonwealth law and the law of tenure in the states.

This Commonwealth/state void is exemplified by the failure in the *Greentree judgments* to consider the possible relevance of the landowner's tenure in any way (as noted at **Link#2**).

According to the Australian Law Reform Commission: "...state legislation is not the concern of this Inquiry" (ALRC, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Report 129)* (2016), Chapter 20 *Property Rights—Real Property, Laws that interfere with real property rights - Environmental laws* at 20.102.) and the associated common law is by inference similarly dismissed.

Such mandated myopia may be explained by the ALRC's terms of reference as a Commonwealth entity, but the real world interactions between state and Commonwealth laws cannot be simply avoided by erecting such an artificial wall. The point is that such institutionalised myopia prevents the ALRC itself, as a major influencer in the field of law, from the possibility of ever discovering and exploring the void.

Having said that, an exploration of the (Commonwealth law/state law of tenure) jurisprudential void, in order to reveal its mysteries, may be realised firstly by an examination of relevant aspects of the *Tasmanian Dam case.*

The *Tasmanian Dam case* (putting aside other questions not relevant here) addressed these issues:

1. the ability of Commonwealth legislation to rely on s. 51(xxix) of the Constitution to override the state prerogative in relation to wastelands of the Crown (i.e., Crown land); and if so valid

2. whether or not that amounted to an "acquisition" of property under s. 51(xxxi) of the Constitution, in which case it would have to be made "on just terms".

8.4.1 Sovereign Ownership v Ownership of Land

To repeat (from **2.0**) Dr Fry's observation: "the Crown became the "ultimate" or "radical" owner of all land in Australia; and in the *Mabo No.2* case, the High Court's observation (per Brennan J. at 45):

> "There is a distinction between the Crown's title to a colony and the Crown's ownership of land in the colony, as Roberts-Wray points out (74) ibid., p 625:
>
> "If a country is part of Her Majesty's dominions, the sovereignty vested in her is of two kinds. The first is the power of government. The second is title to the country ...
> This ownership of the country is radically different from ownership of the land: the former can belong only to a sovereign, the latter to anyone. Title to land is not, per se, relevant to the constitutional status of a country; land may have become vested in the Queen, equally in a Protectorate or in a Colony, by conveyance or under statute ....."

So, ownership of the country, which can belong only to a sovereign, may be distinguished from ownership of the land, which can belong to anyone. Sovereign ownership is relevant to the constitutional status of the country, but title to land, per se, is not. Assertion of ultimate dominion includes the power to convey title by grant (to paraphrase the words of Marshall C.J., in Johnson v. McIntosh (70) (1823) 8 wheat, at p 574 (21 US , at p 253 as quoted per Brennan J. *Mabo No.2* at para.45).

This distinction is exemplified in *The Northern Territory Surrender Act* 1907 (SA), s.7, part of which provides:

> "The Northern Territory is hereby surrendered to the Commonwealth in accordance with the agreement. Such surrender is subject to all freehold, leasehold, or other estates or interests in or agreements, securities, or rights in respect of land within the said Territory in existence at the time of the acceptance of such surrender by the Commonwealth....."

The surrender was made pursuant to s.111 of the Constitution:

> "Section 111 States may surrender territory
>
> The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth."

South Australia surrendered its sovereign powers with respect to the Northern Territory to the Commonwealth, but interests in land are separately identified in the Act, and it is clear that the Commonwealth did not "acquire" the latter, or gain any entitlement to repudiate such interests. There was no question of s.51(xxxi) of the Constitution having any application, i.e., to require the Commonwealth to pay South Australia or any person "just terms", precisely because:

(a) s.51(xxxi) operates with respect to proprietary interests only (*Tasmanian Dam case*);

(b) the Commonwealth's acceptance of the surrender was with respect to sovereignty over the Northern Territory only, and was not an "acquisition" in the proprietary sense; and

(c) without some compelling reason to the contrary (and none is evident), ss.51(xxxi) and 111 must be interpreted in a manner where their operation is complementary, rather than contradictory.

Similarly, in 1909, NSW agreed to surrender land for the "Federal Capital Territory" to the Commonwealth under s. 111, but also to implement s.125:

> "Section 125 Seat of Government
>
> The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney.

> Such territory shall contain an area of not less than one hundred square miles, and *such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor.*
>
> The Parliament shall sit at Melbourne until it meet at the seat of Government." (Emphasis added.)

Again, the state, in this instance NSW, surrendered its sovereign powers to the Commonwealth, this time with respect to an area of approximately 900 square miles, plus Jervis Bay. S.125 makes it very clear that the Commonwealth could not "acquire" title, to any private, alienated land, as it could only be granted "Crown lands" - i.e., unalienated wastelands of the Crown - by the state.

Thus ss.111 and 125 operated with respect to sovereign ownership, quite separately and in contrast to s.51(xxxi), which operates with respect to proprietary interests, which these examples of surrender to the Commonwealth were carefully constructed not to offend.

Although no reference was made by the High Court to ss. 111 and 125 of the Constitution in the *Tasmanian Dam case*, the same essential distinction between sovereign ownership and proprietary ownership of land was made, and this distinction was at the heart of the finding that the relevant Commonwealth legislation did not amount to an acquisition of property under s.51(xxxi).

With respect to sovereignty over land in Australia, that might be said to rest with the Commonwealth alongside each of the separate states. Each of these territories of sovereignty might be compared to a tectonic plate, with the six state plates abutting each other and the Commonwealth plate. Much of the time, these tectonic plates co-exist peacefully, but on occasion, pressure at the boundaries might build up, causing friction and heat. An example of this friction and heat is provided by the Commonwealth's use of the Constitution's s.51(xxix) external power in the *Tasmanian Dam case*, to expand its sovereign power - or exerting tectonic pressure - as against Tasmania.

In the *Tasmanian Dam case*, the High Court affirmed an expansion of Commonwealth sovereign power, but also limited its scope: the Commonwealth tectonic plate moved forward, but shortly, against Tasmania's.

The validity of the Commonwealth's power was explained by, for example, Mason J.:

> "51. *It has been affirmatively established by the course of decisions in this Court that the prerogatives of the Crown in right of the State can be adversely affected by Commonwealth laws enacted under ss.51 and 52 of the Constitution*. In the Commonwealth v. New South Wales (the Royal Metals Case) [1923] HCA 34; (1923) 33 C.L.R. 1, the Court held that a Commonwealth law under s.51(xxxi) could terminate the prerogative rights in respect of royal metals possessed by the

States, provided that the law complied with the requirements of s.51(xxxi). See Federal Commissioner of Taxation v. Official Liquidator of E.O. Farley Ltd. [1940] HCA 13; (1940), 63 C.L.R. 278, at pp. 322-323, where Evatt J. pointed out that the prerogative of preference enjoyed by the Crown in right of the State could be destroyed by the valid Commonwealth legislation on the subject of "bankruptcy and insolvency". Dixon J. expressed a similar view, at pp. 313-314, though distinguishing an exercise of the taxation power, at pp. 316-317. In In re Foreman & Sons Pty. Ltd.; Uther v. Federal Commissioner of Taxation [1947] HCA 45; (1947), 74 C.L.R. 508, at p.529, Dixon J. expressed the same view in his dissenting judgment, a judgment which was later vindicated in The Commonwealth v. Cigamatic Pty. Ltd. (In Liquidation) [1962] HCA 40; (1962), 108 C.L.R. 372; see now Bank of New South Wales v. Federal Commissioner of Taxation [1979] HCA 64; (1979), 145 C.L.R. 438. In the meantime, The State of Victoria v. The Commonwealth [1957] HCA 54; (1957), 99 C.L.R. 575 had decided that s. 221(1)(b)(i) and (ii) of the Income Tax and Social Services Contribution Assessment Act 1936-1956 (Cth) was a valid exercise of the "bankruptcy and insolvency" power. The relevant provision gave priority to the Commonwealth in payment of income tax by a trustee in bankruptcy and the liquidator of a company; see pp. 611-612, 624, 658. (at p493)

52. All this supports the view which I expressed in State of Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation [1982] HCA 31; (1982), 41 A.L.R. 71, at p. 117, when I said:

"Although the grant of legislative powers to the Commonwealth Parliament in s. 51 is prefaced by the words 'subject to this Constitution', there is nothing elsewhere in the Constitution which subordinates the exercise of these powers to the prerogatives of the Crown in right of the States. Elsewhere the emphasis, as in s. 109, is on the supremacy throughout the Commonwealth of all laws validly made under the Constitution. There is no secure foundation for an implication that the exercise of the Parliament's legislative powers cannot affect the prerogative in right of the States and the weight of judicial opinion, based on the thrust of the reasoning in the Engineers' Case, is against it." (at p493)

53. *The State prerogative in relation to wastelands of the Crown is a matter of considerable importance*. Its history in Australia was discussed by Stephen J. in the Seas & Submerged Lands Case, at pp. 438-441. *There is, as the Royal Metals Case shows, no reason for thinking that it stands immune from the operation of Commonwealth laws enacted under s. 51. Nor is there any solid ground for distinguishing s. 51(xxix) from the other legislative powers in their application to State prerogatives*." (Emphases added.)

Thus, in relying on s.51(xxix) of the Constitution, the Commonwealth can, with the assistance of s.109, affect the prerogative in right of the states, including the state prerogative in relation to wastelands of the Crown. However, the Commonwealth's limitation of power is also noted (per Brennan J.):

> "15. What do the Commonwealth measures purport to do? They do not diminish the territory subject to the laws of the State, nor the competence of the Tasmanian Legislature to make laws with respect to the Parks. The Parks do not become a Commonwealth place subject to the exclusive legislative powers of the Commonwealth; Constitution, s. 52(i). If a Tasmanian law authorizes a particular use of the Parks and a valid Commonwealth law prohibits that use, the authority conferred by the Tasmanian law is ineffective: that follows from the grant of legislative power to the Commonwealth and the operation of s. 109 of the Constitution. There is no implication in the Constitution that the residue of effective State legislative power should not be diminished....."

To repeat (from **4.2**), note also per Brennan J. *Mabo No.2* at para.84:

> "The power of alienation and the power of appropriation vested in the Crown in right of a State are also subject to the valid laws of the Commonwealth..... Where a power has purportedly been exercised as a prerogative power, the validity of the exercise depends on the scope of the prerogative and the authority of the purported repository in the particular case."

As already noted above, the Commonwealth's "veto" power with respect to certain development or activity - as Mason J. expresses it - leaves the state's sovereignty of the specified land otherwise unaffected. Accordingly, subject to the extent of the Commonwealth's veto, the state retains the power to alienate the land by Crown grant of freehold or leasehold.

Indeed, it might be noted in passing that the Commonwealth's power as validated by the High Court is, in principle at least, inherently revocable, in contrast to any state's alienation of title by Crown grant of freehold, which grant may be resumed, but not revoked. In the *Tasmanian Dam case* situation, the Commonwealth's power could be terminated by the repeal of either the relevant legislation, or of the relevant parts of the Heritage Convention. While this might be regarded as highly unlikely politically, it is legally feasible: the next, long term movement in the tectonic plate is not entirely predictable, and to mix metaphors, these two links in the chain of legislative validity are solid, but not indestructible.

In contrast, the High Court's position with regard to proprietary freehold title, as noted above at **4.2** is that: "a valid grant of unqualified freehold title extinguished completely and for all time the native title rights and interests of indigenous Australians in respect of that land". (The fact that native title had no legal recognition at the time of the *Tasmanian Dam case* is irrelevant to the point.) This comparison

simply highlights the essential legal ephemerality of the Commonwealth's use of the s.51(xxix) Constitutional power, in contrast to the essential permanency of alienation of freehold title.

Mason J.'s *Tasmanian Dam case* passage (reiterated and expanded upon here) can be seen as defining the relative scope of the sovereign powers of the Commonwealth and Tasmania:

> "70. The effect of s.9, and perhaps to a lesser extent, of ss. 10 and 11, is to prevent any development of the property in question, subject to the Minister's consent, so as to preserve its character as a wilderness area. Section 13(1), which compels the Minister to have regard only to the protection, conservation and presentation of the property, applies only to consents under s.9. In terms of its potential for use, the property is sterilized, in much the same way as a park which is dedicated to public purposes or vested in trustees for public purposes, subject, of course, to such use or development as may attract the consent of the Minister. In this sense, the property is "dedicated" or devoted to uses, that is, protection and conservation which, by virtue of Australia's adoption of the Convention and the legislation, have become purposes of the Commonwealth. However, what is important in the present context is that neither the Commonwealth nor anyone else acquires by virtue of the legislation a proprietary interest of any kind in the property. *The power of the Minister to refuse consent under the section is merely a power of veto. He cannot positively authorize the doing of acts on the property. As the State remains in all respects the owner the consent of the Minister does not overcome or override an absence of consent by the State in its capacity as owner. The fact that the Minister has a power of veto of any development of or activity on the property does not amount to a vesting of possession in the Commonwealth. Significantly, the Act contains no provision dealing with possession***.** (at p495) " (Emphasis added.)

Thus, the circumstances of the Constitutional surrender of the Territories by South Australia and NSW to the Commonwealth, and the Commonwealth's successful use of s.51(xxix) in Tasmania, constitute examples of the re-allocation of sovereignty over land as between the Crown in right of the Commonwealth and the Crown in right of each of those states.

Even though the Commonwealth might be said, in the ordinary vernacular, to have "acquired" greater sovereignty, these were not s.51(xxxi) type "acquisitions", which relate to proprietary, not sovereign, rights.

8.4.2 Ownership of Land - S.51(xxxi) "Acquisition" - Revising Proprietorship

Having made the distinction between sovereign ownership and the ownership of land, note that it has already been argued (at **4.6 S. 51 (xxxi) of the Constitution - A Red Herring**) that with regard to the latter, the absence of an identical provision in the state constitutions has served as a complete distraction from the existence of other sources of rights of compensation which might exist at state level.

Further analysis of the High Court's interpretation of s.51(xxxi) may proceed on the basis of the corollary that where there has only been, as in the *Tasmanian Dam case*, an assertion of sovereignty - and not proprietorship - by the Commonwealth, s. 51(xxxi) can have no application.

In that case, the High Court was not required to decide on the issue as to whether s.51(xxxi), or indeed any other law effecting a right of compensation, applied to private land in Tasmania or elsewhere. No private land was affected by the relevant Commonwealth legislation. The Court did recognise in principle that property rights could be adversely affected without the existence of "acquisition" by the Commonwealth, but in the absence of a private property issue, the manner of characterising same evinced an uncertain variety of terminology. Thus, to take a few examples:

Mason J.: "the property is sterilized"; "adversely affects or terminates a pre-existing right";(cited per Dixon J.) "innominate and anomalous interests"; "a regulatory law that did not effect an acquisition";

Brennan J.: (cited per Gibbs J.) "...compulsory divesting..."; (cited per Mason J.) "a law which is merely regulatory";

Deane J.: "purportedly acquired".

A futile attempt to clarify the point, upon submission by the counsel for Tasmania, is made by reference to United States law. Note Mason J. at 70-71:

> "65. At this point it is convenient to deal with the argument that ss.9, 10, 11 and 17 effect an acquisition of property otherwise than on just terms. Tasmania's submission is that, although the Act does not attempt to divest title from the State to the Commonwealth, it so restricts the rights of the State with respect to its waste lands and confers such rights on the federal Minister with respect to those lands that there has been an acquisition of property. Mr Ellicott, Q.C., points to the distinction between "taking" property and "regulation" of property which has been developed in the United States, a distinction which was discussed by Stephen J. in Trade Practices Commission v. Tooth & Co. Ltd. [1979] HCA 47; (1979), 142 C.L.R. 397, at pp. 413-415. (at p494)
>
> 66. The proposition, supported by the judgments of Holmes J. and Brandeis J., in Pennsylvania Coal Co. v. Mahon [1922] USSC 193; (1922), 260 U.S. 393, at pp.

415, 417 (67 Law Ed. 322, at pp. 326-327), is that a restriction on the use of property deprives the owner of some right previously enjoyed and is therefore an abridgment of rights in property without making compensation. The consequence is that if the regulation of property goes too far it is a "taking". Corpus Juris Secundum (1965), vol. 29A, "Eminent Domain" c 6 states:

"**There is no set formula to determine where regulation ends and taking begins**; so, the question depends on the particular facts and the necessities of each case, and the court must consider the extent of the public interest to be protected and the extent of regulation essential to protect that interest." (at p494)

67. **The decisions of the United States Supreme Court have no direct relevance to s.51(xxxi) of the Constitution**. Many of them turn on the Fifth Amendment which is made applicable to the states by the Fourteenth Amendment; see, for example, Penn Central Transportation Co. v. New York City [1978] USSC 180; (1978), 438 U.S. 104 (57 Law Ed. 2d 631), in which Pennsylvania Coal 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 "taking". The relevant provision in the Fifth Amendment is ". . . nor shall private property be taken for public use, without just compensation". It seems that the Supreme Court has proceeded according to the view that the object of the clause is to prevent government from forcing some people alone to bear public burdens which should be undertaken by the entire public. (Armstrong v. United States [1960] USSC 113; (1960), 364 U.S. 40 (4 Law Ed. 2d 1554); National Board of Young Mens Christian Assns. v. United States [1969] USSC 114; (1969), 395 U.S. 85 (23 Law Ed. 2d 117);Penn Central). (at p494)

68. The emphasis in s. 51(xxxi) is not on a "taking" of private property but on the acquisition of property for purposes of the Commonwealth. To bring the Constitutional provision into play it is not enough that legislation **adversely affects or terminates a pre-existing right** that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be. The effect of s.51(xxxi) was correctly stated by Dixon J. in Bank of N.S.W. v. The Commonwealth (the Banks Case)(1948), 76 C.L.R.1, at p.349:

"I take Minister of State for the Army v. Dalziel ((1944), 68 C.L.R.261) to mean that s.51(xxxi.) is not to be confined pedantically to the taking of title by the Commonwealth to some specific estate or interest in land recognized at law or in equity and to some specific form of property in a chattel or chose in action similarly recognized, but that it extends to **innominate and anomalous interests**

and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property. Section 51(xxxi.) serves a double purpose. It provides the Commonwealth Parliament with a legislative power of acquiring property: at the same time as a condition upon the exercise of the power it provides the individual or the State, affected with a protection against governmental interferences with his proprietary rights without just recompense. In both aspects consistency with the principles upon which constitutional provisions are interpreted and applied demands that the paragraph should be given as full and flexible an operation as will cover the objects it was designed to effect." (at p495)" (Bold emphases added.)

Brennan J. also considered and rejected the relevance of the American law:

90. Section 51(xxxi) of the Constitution has a dual function. It grants power to make laws with respect to the acquisition of property and it limits the exercise of such a power by requiring that a law with respect to the acquisition of property provide just terms. Neither the grant of the power nor the limitation suggests that the concept of "property" be narrowly confined. The concept comprehends **"innominate and anomalous interests"** in addition to those estates in land or those interests in land or in a chattel or in a chose in action which are recognized at law or in equity; per Dixon J. in Bank of N.S.W. v. The Commonwealth, at p. 349. The free enjoyment of proprietary rights so various in nature may be affected by a great variety of laws, but par. (xxxi) extends only to laws for the acquisition of proprietary rights. The terms of par. (xxxi), from which its purpose is to be gathered, are not directed to the possession or enjoyment of proprietary rights by a State or by a person but to the acquisition of those rights from the State or person in whom they are vested. Dixon J. must have spoken elliptically when, in the Bank of N.S.W. v. The Commonwealth, at p. 349, he described one of the purposes of par. (xxxi) to be the protection of the individual or the State "against governmental interferences with his proprietary rights without just recompense" (emphasis added). In Attorney-General (Cth) v. Schmidt (1961), 105 C.L.R. 361, his Honour attributed a different operation to s. 51(xxxi), saying, at p. 372:

"The scope of s.51(xxxi) is limited. Prima facie it is pointed at the acquisition of property by the Commonwealth for use by it in the execution of the functions, administrative and the like, arising under its laws. It is perhaps not easy to express in a paraphrase the extent of the operation of s. 51(xxxi) and thus to define its full scope and application but it is at least clear that before the restriction involved in the words 'on just terms' applies, there must be a law with respect to the acquisition of property (of a State or person) for a purpose in respect of which the Parliament has power to make laws." (at p540)

91. Where neither the Commonwealth nor any other person acquires proprietary rights under a law of the Commonwealth, there is no acquisition upon which par. (xxxi) may fasten. And so, in Trade Practices Commission v. Tooth &Co. Ltd.(1979), 142 C.L.R. 397, at p.408, Gibbs J. observed that "not every **compulsory divesting** of property is an acquisition within s. 51(xxxi)". (at p540)

92. In the United States, where the Fifth Amendment directed that private property should not be "taken" without just compensation, the Supreme Court construed the provision as one "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (Armstrong v. United States 364 U.S.40 (1960), at p. 49 (4 Law. Ed. 2d 1554, at p. 1561)). If this Court were to construe s. 51(xxxi) so that its limitation applies to laws which regulate or restrict the use and enjoyment of proprietary rights but which do not provide for the acquisition of such rights, it would be necessary to identify a touchstone for applying the limitation to some regulatory laws and not to others. The experience of the Supreme Court of the United States was frankly stated in Penn Central Transport Co. v. New York City 438 U.S. 104 (1978), at p. 124 (57 Law.Ed.2d 631, at p. 648):

". . . 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." (at p540)

93. In this Court, the limitation in par. (xxxi) has not been thought hitherto to apply to **a regulatory law that did not effect an acquisition of property.** In Tooth's Case, the distinction between a law that provides for an acquisition of property and a law that does not was clearly drawn. Thus Mason J. said, at p. 428:...."

The difficulty identified by Mason and Brennan JJ., and by the US Supreme Court itself, in these passages is that there is no set formula to determine where regulation ends and taking begins, to determine when compensation should be payable.

This inadequacy of the American “taking” in not providing the desired clarity of application as to where regulations end and takings begin is not shared by the law of tenure in the Australian states, which in complete contrast, is very clear.

As explored at **2.1** and elsewhere above, a **Crown grant of freehold** is a State/Colony **constitutionally-based instrument of alienation of title**, **not subject to the rule against perpetuity**, and any part of which, **subject to any attached reservation which may be defeased** to the Crown at any future time, may be

resumed by the Crown with **compensation payable**, to avoid a **repugnancy** to the grant. A Crown grant of leasehold operates in the same way, but is subject to the performance of any attached conditions, and (other than perpetual leases) for a limited term.

In the case of freehold tenure, unless it is a defeasement within the scope of a reservation to the Crown grant, any impairment of the proprietor's right of use is to that extent a resumption of the grant, requiring the payment of compensation for any loss to avoid repugnance. It matters not at all whether the impairment is caused by "regulations" or by any other form of legal instrument, be it legislation, executive order, or instructions by public servants etc.

This is not to say that laws and regulations cannot effectively be made with respect to alienated land. Indeed, laws and regulations specifically relating to Crown grants of freehold and leasehold have long existed - in particular, Torrens title and compulsory acquisition laws - these do not derogate from the granted titles at all, but operate in a complementary manner.

This law of tenure - in contrast to the American Fifth Amendment - eliminates any legal issue as to whether compensation is payable, once the facts of impairment are established. Any difficulty in estimating the value of such an impairment will not prevent a court with suitable jurisdiction from making a decision: as has been noted earlier in *Northern Territory v Griffiths* (*supra*), even emphatically non-tradeable native title "rights and interests [which] were essentially usufructuary, ceremonial and non-exclusive.." can be valued.

Having dispensed with the irrelevant distraction of the US Fifth Amendment "taking v regulating" issue, and given that s.51(xxxi) applies only to the "acquisition" of an estate or interest in land - no matter how "innominate or anomalous" such an interest might be, it is time to focus directly on the exploration of the jurisprudential void as it relates to Commonwealth law and the state law of tenure.

Given that tenure within each state is by Crown grant of title, and each state is sovereign within its own territory, then the right of resumption and compulsory acquisition rests with each state. In the event that a state surrenders sovereignty to the Commonwealth, as South Australia did with the Northern territory for example, then the rights of resumption and compulsory acquisition would be transferred to the Commonwealth. The landowners' rights of tenure would be undiminished, and would have the additional comfort of the operation of s.51(xxxi).

Of course, the usual situation is that there is no such surrender. In these circumstances, where the rights of resumption and compulsory acquisition (which do not extend to acting repugnantly, or being in derogation from a grant) rests with a state, the Commonwealth cannot also have any such right. Accordingly, any

Commonwealth law which is so repugnant is also unenforceable at least to the extent of the repugnancy.

(In this context, the extreme unlikelihood of s.51(xxix) being used by the Commonwealth to specifically override the law of state land tenure is assumed.)

Another question is whether or not a Commonwealth law which impairs property rights so as to be a “resumption” would amount to a s.51(xxxi) ”acquisition”. This would appear to be a superfluous question if the Commonwealth law has already been rendered unenforceable by the operation of the law of tenure by Crown grant. However, to address this hypothetical point, the following observations might be made.

A Commonwealth law purporting to prevent an owner of private land from ploughing his land in a state, to be valid, would require compensation be paid to the landowner, and the Commonwealth having (unlike the state) no power of compulsory acquisition, would in practice have to come to a free, negotiated agreement with the landowner. In these circumstances, it would be perfectly in order for the Commonwealth to have the new restriction noted on the title. In such circumstances, there would clearly appear to be a s.51(xxxi) “acquisition”, so the section would apply, even if superfluously.

To the extent that the role of s.51(xxxi) might be considered, the High Court’s distinction made between regulatory law that did not effect an acquisition of property, and an ”acquisition”, would, it is respectfully suggested, be rendered irrelevant in the context of the recognition of the law of tenure.

Effectively, a key point here is that a correct application of the law of land tenure would compel the Commonwealth to enter into agreements which were capable of being noted on title, thus eliminating circumstances where property rights are impaired, but nevertheless not “acquired” by the Commonwealth.

There being no need to find any “acquisition” by the Commonwealth, s.51(xxxi) of the Constitution becomes irrelevant to the outcome. Freed from this constitutional bondage, and with (all, but in any case, even only one link of) the oppressive legislative chain broken, the property owner is liberated and might well exclaim, to use a famous phrase: “Free at last! Thank God Almighty! Free at last!”

To preserve such a result into the future, landowners and landowner organisations should routinely lobby to remind legislators that their *Universal Declaration of Human Rights* Article 17 human rights ought not be breached.

8.5 Sample Student Assignment: Commonwealth Power & Private Land Tenure

Understanding the interactions between various laws might be enhanced by engaging in a sample hypothetical assignment, as follows.

Question:

The Commonwealth enacts an amendment to the *World Heritage Properties Conservation Act 1983* (Cth) (Heritage Act) and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) in these terms -

1. "Where any part of this Act operates with respect to land alienated by a Crown grant of title, causing any loss, diminution, impairment or other adverse effect (other than pursuant to an "acquisition of property" pursuant to s.51(xxxi) of the Australian Constitution) to the common law title rights and interests of an "interested party" to such land (being the proprietor or any other person with an interest in that land), such an interested party shall have under no circumstances:

(a) an entitlement to any compensation for any resulting loss, diminution, impairment or other adverse effect; or

(b) a right to a fair hearing, or natural justice in any other form.

2. Any interested party who acts, with or without intent to do so, contrary to any part of this Act, which Act operates to cause any loss, diminution, impairment or other adverse effect, with respect to the party's land, is subject to a penalty to be executed according to the Act.

3. [In relation to the EPBC Act in particular] S. 10 of the EPBC Act shall not take effect with regard to s. 1."

Landowner F possesses freehold title by Crown grant, of a rural property situated in a state. After spraying some hectares of weeds on the property to maintain grazing pastures on the advice of a professional agronomist, F was issued with a 'breach notice' from a Commonwealth department pursuant to the EPBC Act for breaching an 'environmental listing' which seeks to protect some native grasses. F is faced with a civil penalty, and reduced ability to use the land for grazing stock.

Landowner L possesses a perpetual leasehold title by Crown grant, of another rural property. L cleared and ploughed and cultivated a crop on the land, part of which had been declared a Ramsar wetland under the EPBC Act and is now defending an action by the Commonwealth for pecuniary penalties.

It so happens that L's Ramsar declared wetland is forms part of a larger area of land, all of which is subject to native title by the indigenous group N. In this hypothetical example, the Ramsar declaration of the wetland prevents N from conducting periodic customary burning of the land, one of several usufructuary rights associated with the native title. The respective common law and native land title rights of L and N co-exist without any dispute.

Neither F, L nor N has been paid any compensation for the newly legislated limitations to their land use.

Explain the legal validity of the amendment and suggest possible remedies for title holders F, L and N (fewer than 1000 words, citations omitted).

Suggested Answer:

(a) The Commonwealth's amendment relies on the s.51(xxix) power for its validity, and both Acts have been found to be so valid (the Heritage Act by the High Court in the *Tasmanian Dam case* and the EPBC Act by the Federal Court in the *Greentree judgments*).

(b) The amendment does not apply with respect to acquisitions of property, and so does not contravene s.51(xxxi) of the Constitution. The High Court has, on many occasions, noted that the Commonwealth might "deprive" an owner of a property right without "acquiring" anything, and it is clear that the amendment concerns such non-acquisitory deprivations.

(c) The amendment's intention to deny property owners to a right to compensation for any loss, diminution, impairment or other adverse effect to their rights and interests caused by the Acts is in express terms, and not being ambiguous, would serve to rebut any judicial presumption in favour of property rights which might have otherwise operated to read down the effect of the amendment.

(d) The amendment, being manifestly unjust, firstly in denying any right to compensation for loss, and secondly, also any right to a fair hearing, and thirdly by imposing penalties, arbitrarily deprives landowners of their property rights, in breach of Article 17(2) of the *Universal Declaration of Human Rights* (UDHR). However, Art.17 is merely a human right, and not law, so providing no legal protection from the amendment to an "interested party". (Further, the Parliamentary Joint Committee on Human Rights does not have the power to act with respect to Art. 17, as it is excluded by omission from the governing Act, the *Human Rights (Parliamentary Scrutiny) Act* 2011 (Com.).)

(e) By depriving common law title owners of any right to compensation for any loss, diminution, impairment or other adverse effect, the amendment may also effectively deprive native title holders of their right to compensation under s.51(1) of the *Native Title Act* (Com), because the amendment could be used to demonstrate that a failure to provide compensation to the native title holders in such circumstances is not discriminatory: i.e., there is no discrimination in the non-payment of compensation to both common law title and native title holders: *Racial Discrimination Act 1975* (Cth).

(f) With regard to the EPBC Act, by making s.10 inoperative, the amendment re-opens the ability of s.109 of the Australian Constitution to cause the legislation to override conflicting state laws, if any.

(g) On the reasoning so far, application of the hypothetical amendment to the facts of the case in the Federal Court *Greentree judgments* would bring no change to the result of that case for the landowner: i.e., that he lost the case.

On the other hand.....

(h) The Conventions upon which the Commonwealth's power by s.51(xxix) relies, relate in general terms to heritage and the environment. They do not, expressly or impliedly: provide for the arbitrary deprivation of property rights; or purport to determine the law of land tenure *per se*. For example, in the *Tasmanian Dam case*, Gibbs CJ. observed that "the performance of the duty of international cooperation was not intended to override national sovereignty or individual proprietary rights". In interpreting the Conventions, it is also appropriate to presume that they would not purport to override the UDHR, including Article 17, in the absence of any express intention to do so: after all, the UDHR is expressed to be "universal".

(i) To the extent that the amendment is a law with respect to property rights (and their denial) and to the law of land tenure (and its derogation therefrom), it does not conform to the Conventions, and so is *ultra vires* the Commonwealth and invalid.

(j) While the amendment is to form part of the Heritage and EPBC Acts, and to that extent relates to their purposes to manage environmental and heritage management pursuant to the respective Conventions, it may also be characterised as a law with respect to property rights (and their denial) and to the law of land tenure. The amendment, being relevantly invalid as per (i), could not therefore override state law by operation of s.109 of the Constitution.

(k) Given the invalidity of the amendment with respect to its application to property alienated by Crown grant of freehold or leasehold, the Commonwealth might seek to have any state voluntarily co-operate to use its power of resumption with respect to the particular uses of the land as nominated by the Commonwealth. However, absent a suitable reservation (on freehold title) or condition (on leasehold title), the state would be required to pay compensation to avoid derogating from its own grant.

As to title holders F and L .....

(l) the amendment effectively purports to impair common law titleholders of their " lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination" (to use the phrase repeatedly adopted in the High Court), without compensation, and with the introduction of penalties for breach. If the amendment does not conform to the Conventions, as explained above, the relevant Commonwealth laws must be unenforceable as against F and L. Further, any damage caused to F and L by the Commonwealth's invalid purported enforcement of the Act should be a ground for a claim by F and L in damages.

(m) should the state attempt to impose the same impairments, without compensation, its attempt at (what is) partial resumption would be invalid due to derogation from the grant, and in such circumstances, any damage caused to F and L by the state should be a ground for a claim by F and L in damages. F and L might also be able to have recourse to the equitable remedy of proprietary estoppel against the state.

As to title holder N...

(n) the invalidity of the amendment for the abovementioned reasons with respect to the purported denial of compensation for any loss, diminution, impairment or other adverse effect, with respect to common law title holders, would assist N to establish under the *Native Title Act* that a failure by the Commonwealth to provide compensation for impairment of its native title usufructuary rights would be discriminatory as compared to common law title holders, and so unsustainable. In that circumstance, N should be able to win a damages award pursuant to the *Native Title Act.*

8.6 Environmental Protection, The Commonwealth & The Landowner

So, where does all this leave the environment and the landowner? Are the landowner's lawful land rights to be ignored? Is protection of the environment on private land to be abandoned?

The answer to both questions is "no". The solution is simply to go about things the right way. What is "the right way"? To recap, a typical sequence of events would be as follows.

1. The Commonwealth identifies an area of private land, which it wishes to declare as "Ramsar wetland".

2. The Commonwealth enters into *bona fide* discussions with the landowner regarding the prospective declaration, and giving it legal force by acquiring from the owner: title to the declared wetland; or an easement, or other property right capable of supporting adequate protection of the declared land.

3. Note, that the course of such negotiations, which do not involve a simple prohibition without compensation, would attract the operation of s.51(xxxi) of the Constitution, namely that there is proposed a Commonwealth interest which must be acquired on “just terms”.

4. If the Commonwealth and the landowner agree on just terms, then the landowner and his successors in title would be bound by the agreement, and accordingly would be legally obliged to comply with the prohibition provisions of the Act. In other words, the Commonwealth would have permanently acquired the right to enforce the Act against the landowner with respect to the declared wetland.

5. Suppose the Commonwealth and the landowner cannot agree on just terms. Perhaps the landowner is just stubborn and does not want to relinquish any part of his tenure, on any terms (i.e. “The Castle” movie type of landowner as played by Michael Caton). Or, perhaps he is willing, but considers the price offered to be inadequate. In these circumstances, the Commonwealth does not have the constitutional power to compel the landowner’s agreement, by for example, making a compulsory acquisition. At this point, the Commonwealth’s lack of external affairs power to override state laws of property tenure (which in the case of the EPBC Act is buttressed by the effect of s.10) can turn out to be helpful, for the Commonwealth can turn to the state for assistance.

6. The state has the sovereign power to compulsorily acquire the landowner’s property, by resumption of the Crown grant, or any part of it. For example, the declared Ramsar wetland could be resumed under existing resumption legislation. The landowner, having received fair compensation for his foregone property rights, would be legally obliged to comply with the prohibition provisions of any relevant state Act. In other words, the state would have permanently acquired the right to enforce legislation against the landowner (and his successors in title) with respect to the declared wetland.

7. It would be a matter for the state and Commonwealth to agree between themselves as to: who would be funding the compensation to the landowner; under which legislative scheme - state or Commonwealth - that the declared land would be managed; and as to which of them would hold title to the land, or whether or not sovereignty to the land might be surrendered by the state to the Commonwealth.

In this way, both the landowner’s human rights, and the environment, would be protected.

Such a result may be said to:

1. comply with the "rules of common sense and justice" (discussed at **3.2**);

2. not fracture, but in fact preserve, "the skeleton of principle which gives the body of our law its shape and internal consistency". (High Court - *Mabo No 2 case* per Brennan J at **4.2**.); and

3. not require any new common law at all, but simply the removal of any misunderstanding of the common law as it stands, including the elimination of the jurisprudential void (discussed at **3.5** & **7.1**).

A possible alternative model which respects the state-based landowner's property rights, but which can also assist the Commonwealth to achieve its environmental objectives is provided by the Emission Reduction Fund, pursuant to the *Carbon Credits (Carbon Farming Initiative) Act* (Com.) 2011. The system may be briefly explained:

> "...The federal government's $2.5bn Emissions Reduction Fund provides businesses with the opportunity to earn Australian Carbon Credit Units for every tonne of carbon dioxide equivalent a business stores or avoids emitting through adopting new practices and technologies.
>
> Last financial year, land sector ERF projects received 8.5 million carbon credits, with a total value of just over $100m. Landholders can engage in carbon farming in a variety of ways, including planting trees, or "avoided deforestation" where farmers don't cut down trees when they have a permit to do so. Another avenue involves minimising emissions from savannah fires by doing controlled burns early in the season, for which 76 projects have been registered.
>
> Farmers can manage beef emissions by growing cattle faster to get slaughtered earlier, and creating healthier soils and maintaining pasture to fix more carbon. But the most common project is regeneration, in which farmers allow native trees, shrubs and grasses to grow back.
>
> Michael Marshman, who farms cattle on 18,000ha near the northwestern NSW town of Bourke, had been in financial strife due to drought several years ago. A financial planner mentioned carbon farming to him, and he worked through an intermediary, Climate Friendly, to make a successful bid in the first carbon credits auction.
>
> By running fewer cattle, getting rid of feral goats, and letting the native bush grow back, Mr Marshman is fulfilling his 10-year contract with the government to sequester roughly 200,000 accredited tonnes of carbon.

> That's worth about $270,000 a year to him, out of which he pays a commission to Climate Friendly.
>
> "We went from being broke and freaking out, and I was stacking shelves at IGA to just being able to actually make plans for the future," Mr Marshman said." (Ean Higgins, "Carbon farmers find money grows on trees", *The Australian*, March 18, 2020.)

In this scheme, landowners can voluntarily choose to participate. The activities are, indeed, within the High Court's conceptual scope of "every act of ownership which can enter into the imagination". There is no derogation from a Crown grant, no arbitrary deprivation of property, and indeed, no acquisition of property on unjust terms. Further, there is *prima facie* no question of the Commonwealth acting beyond its constitutional powers, with respect to s.51(xxix) or any other power.

9.0 Adopting UDHR Article 17 as Domestic Law - Implementation Considerations

Each state has the power to make a human right, law. This would be a matter of simple legislation, the main issue perhaps being whether or not to double entrench such legislation to make it impossible to revoke other than by holding a referendum.

At the Commonwealth level, due to the constitutional "heads of power" limitations, it's rather more complicated. This complexity is explored below.

At **4.1** above, it was proposed that the NSW Bar Association's references to Article 17 should be considered by the Federal Government in relation to its possible ratification. For that to be done at the Commonwealth level, the context and processes which might apply should be considered. First, what is the *Universal Declaration of Human Rights*?

> "The Universal Declaration of Human Rights (UDHR) is the foundation of international human rights law. Proclaimed by the UN General Assembly in 1948, it was the first universal statement of the fundamental human rights to which all human beings are entitled.
>
> The UDHR is not a legally-binding treaty – States cannot sign on to the UDHR and it cannot be enforced. Rather, it is an aspirational statement which aims to set 'a common standard of achievement for all peoples and all nations.' Despite not being enforceable itself, the UDHR is widely regarded as a benchmark for a nations' human rights compliance.

> Legal enforceability comes via the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These elaborate on the principles outlined in the UDHR and contain implementation guidance. Collectively, the two Covenants and the UDHR are often referred to as the International Bill of Rights." (State Library of NSW- *Legal Answers Chapter 10: Australia's international obligations*.)

As previously mentioned, Australia's foreign minister, as President of the UN General Assembly, was actively involved in the composition and adoption of the UDHR, by the General Assembly (with Australia's support). It has been possible for the Australian Government, with or without the support of the States, to ratify Article 17 at any time since 10 December 1948, but it has not done so.

It might be said that it is not necessary to do so because Australia has ratified the related treaties, the ICCPR on 13 August 1980, and the ICESCR on 10 December 1975. The problem with this view is that neither treaty, and in particular the ICCPR, failed to incorporate UDHR Article 17 and does not protect private property because, (according to Tomuschat, Christian, *International Covenant on Civil and Political Rights (1966)*, Oxford Pubilc International Law at §16):

> "at the time of the adoption of the Covenant socialist States viewed invested productive capital with the utmost degree of suspicion".

That's right - the communists objected to protecting private property, the Cold War was on, and so to negotiate a treaty, UDHR Article 17 was left out, and has not been included since. Thus, ratification of the ICCPR and the ICESCR by Australia has not included UDHR Article 17. Article 17 remains, undiminished, as part of the UDHR, but without being, as such, the subject of an international treaty.

9.1 Australian Government Fallacies

The Australian Government takes its treaty obligations seriously. For example, as required by the ICCPR treaty, it has made periodic reports to the UN Human Rights Committee with respect to implementation of the ICCPR.

In Australia's sixth periodic report to the Human Rights Committee (the Committee) on the implementation of the ICCPR, in accordance with article 40 of the ICCPR, it is pointed out at 1[§4]:

> *"Human Rights (Parliamentary Scrutiny) Act 2011* (Commonwealth): The Act came into force on 4 January 2012. The Act requires that all Bills and disallowable legislative instruments are accompanied by a Statement of

Compatibility with Human Rights. A Parliamentary Joint Committee on Human Rights was established on 13 March 2012 with the sole focus of human rights scrutiny. This Committee examines Bills, Acts and disallowable legislative instruments for compatibility with human rights and can conduct inquiries into any matter relating to human rights referred to the Committee by the Attorney-General. These scrutiny processes are designed to encourage early and ongoing consideration of human rights issues in policy and legislative development. They also aim to improve parliamentary scrutiny of new laws for consistency with rights and freedoms in the seven core human rights treaties to which Australia is a party."

Further, at 1[§6], it is observed:

"Human Rights Commissioner: On 17 February 2014, a new Human Rights Commissioner was appointed to the Australian Human Rights Commission (AHRC) to focus on civil and political rights and common law rights and freedoms."

Notwithstanding such laudable initiatives, the sixth report, in addressing the "Domestic implementation of the ICCPR" observes at 5[paras 28 & 29]:

"28. The Australian Government considers that existing domestic laws and institutions adequately implement the ICCPR at the domestic level. Human rights in Australia are protected by our constitutional system, strong democratic institutions and specific legal protections. State and territory governments incorporate rights under the ICCPR through legislation, policies and programs, including statutory Charters of Rights in the ACT and Victoria. Robust democratic institutions and specific legal protections are an important part of the promotion and protection of civil and political rights in Australia. Among these institutions and laws are the following:

29. *Constitutional Protections*: Australia is a constitutional democracy with a parliamentary system of government based on the rule of law. The Australian Constitution contains a number of express guarantees of rights and immunities. These include:

- any property acquired by the Commonwealth Government must be acquired on just terms (section 51 (xxxi)),....."

This passage contains a number of curious fallacies, namely:

1. a belief that property rights are to be protected under the ICCPR, when in fact there is no such provision therein;

2. the fact that s. 51(xxxi) has no application to the states, which contain the vast majority of Australian land and population, is not deemed worthy of note in a report considered relevant to property rights;

3. the absence of any law equivalent to s. 51(xxxi) in the states is also not deemed worthy of note in a report considered relevant to property rights;

4. in so far as s. 51(xxxi) provides an express guarantee of rights, it is implicitly considered sufficient to satisfy property rights as human rights, when in fact the obligation that any property "acquired" by the Commonwealth Government must be on "just terms" is in fact a much more narrow protection than the UDHR Article 17, namely that people shall not be "arbitrarily deprived" of their property - and that even if, hypothetically, s.51(xxxi) were to be adopted by the states, the protection would similarly be more narrow.

It would have been more correct for the report to have observed that the ICCPR does not protect private property, but note that nonetheless. 51(xxxi) provides a limited degree (i.e., not with respect to states, and not where there has been deprivation without "acquisition") of protection for property owners from the Commonwealth Government.

As discussed previously, the High Court has made its position abundantly clear on two points:

(i) the s. 51(xxxi) "just terms" provision of the Australian Constitution does not apply to the states, and the states have no comparable constitutional provision (see e.g., *Durham Holdings* case (*supra*));

and

(ii) the "extinguishment, modification or deprivation of rights" in relation to property does not of itself constitute an "acquisition" of property (see e.g., I*CM Agriculture Pty Ltd v The Commonwealth* (supra)).

It is very obvious that there is a large gap between: protection against "arbitrary deprivation of property" as envisaged by Article 17 of the UDHR on the one hand; and on the other, mere protection against acquisition on unjust terms by the Commonwealth; and the absence of any such protection in the states at all.

These large gaps in the definitions of protection of property rights between Article 17 UDHR and Australian law, it might be noted, go completely unremarked in the sixth periodic report to the Human Rights Committee. It's their sixth go at a report, and they STILL haven't realised the major shortcomings of Australian law. They also still haven't realised that protection of private property rights is not included in the ICCPR,

so they don't even need to report on it: rather, the legal deficiency invites action outside the ICCPR ambit.

9.2 Treaty Obligations Re Property Rights

As noted at **4.1**, the equivalent of the Article 17 UDHR right not to be arbitrarily deprived of property is possessed by "persons with disabilities", by virtue of Article 12(5) of the *Convention on the Rights of Persons with Disabilities* ("CPRD") which as noted previously was adopted and proclaimed by General Assembly resolution 61/106 of 13 December 2006 ratified by Australia 17 July 2008, which provides:

> "Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that **persons with disabilities are not arbitrarily deprived of their property**. (Emphasis added.)

It would seem that the ratified CPRD has been adopted into domestic law at a Commonwealth level by its inclusion in the *Human Rights (Parliamentary Scrutiny) Act 2011* s. 3(1)(g). The Act established the *Parliamentary Joint Committee on Human Rights* ("PJCHR"). However, reference to the CPRD under the Act is only required with respect to the Australian Parliament: the Act does not purport to impose any obligations more generally onto the States, so it may be concluded that Article 12(5) of the CPRD has been adopted into domestic law with respect to the Commonwealth only, and not to the States.

On this basis, it might be said that the Commonwealth, unlike the States, cannot arbitrarily deprive persons with disabilities of their property, which is an improvement anyway on the s. 51(xxxi) requirement that property be acquired on just terms.

Effectively, this is now a legal discrimination at Commonwealth level against people without disabilities, who can still be arbitrarily be deprived of their property, where such deprivation is not also an "acquisition" of property.

As noted at **4.1**, the equivalent of the Article 17 UDHR right not to be arbitrarily deprived of property, seems, according to the High Court, to have been adopted into Australian law by virtue of the adoption of Art. 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (the "Discrimination Convention") scheduled to the *Racial Discrimination Act* (Com.) as per the relevant observations int he *Native Title Act Case (supra)*.

Also, in passing, the *United Nations Declaration on the Rights of Indigenous Peoples* ("DRIP"), which has not been ratified by Australia, but "supported" on 3 April 2009. It provides, in part with respect to property rights:

> "Article 10
> Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and **after agreement on just and fair compensation** and, where possible, with the option of return.
> Article 11
> 1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
> 2. States shall provide redress through **effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent** or in violation of their laws, traditions and customs."

Thus the property rights of people with disabilities and indigenous people are in principle protected by treaty in Australia, but thanks to the objections of communist countries in the period to 1966, in the middle of the Cold War, the property of other Australians is not!

Although the CPRD, the Discrimination Convention and DRIP provide for property right protections for people with disabilities and indigenous people, the status of Australia's compliance therewith is separate from ICCPR compliance.

9.3 Article 17 UDHR: Ratifying and Adopting as Domestic Law by the Commonwealth

The *Human Rights (Parliamentary Scrutiny) Act 2011* refers at s. 3(1) to "human rights" as "the rights and freedoms recognised or declared by" a number of international agreements, including *inter alia* the ICCPR, ICESCR, CPRD and DRIP, but not the UDHR. It also creates the PJCHR. Given, as noted previously, neither the ICCPR nor any of the other treaties (with the partial exception of Article 12(5) of the CPRD relating to people with disabilities) gives effect to Article 17 of the UDHR, it would seem clear that if the Commonwealth Government were to consider adopting Article 17 into domestic law (in relation to either just people without disabilities, or all

people), the PJCHR would have no authority to enquire, and Members of Parliament would have no duty to comply by providing a "Statement of Compatibility".

Put in an acronym-free way: if the Commonwealth Government wished to ratify and bring into domestic law Article 17 of the *Universal Declaration of Human Rights*, even if only with respect to people without disabilities, the *Human Rights (Parliamentary Scrutiny) Act 2011* could not apply, as the law now stands, with the result that the Parliamentary Joint Committee on Human Rights would have no authority to enquire or otherwise act, and no Member would be required to provide a "Statement of Compatibility" with respect to any legislative instrument.

Article 17 of the UDHR is not currently a "human right" under this Act, so the purported application of the Act by the PJCHR with respect to Article 17 would be ultra vires. To remedy this, the Commonwealth might, if it wished, list it as a source of "human rights" in the Act. It could at the same time ratify Article 17 before adopting it as domestic law within the process of the Act.

There is another potentially relevant Parliamentary process - to facilitate the making and implementation of Australian treaties. However, as noted above, the UDHR is not a treaty. Having said that, the Resolution of Appointment Joint Standing Committee on Treaties ("JSCOT") includes "any question relating to a treaty or other international instrument", which should at face value include the UDHR.

The process is explained by "*About the Australian Treaties Library*" AustLII as follows.

> "On 2 May 1996, the Australian Minister for Foreign Affairs, the Hon. Alexander Downer MP, and the Commonwealth Attorney-General, the Hon. Daryl Williams AM QC MP, announced reforms to facilitate the involvement of Parliament, the States and Territories, industry, non-government organisations, and the wider community in the making and implementation of Australian treaties. The effectiveness of the reforms, in promoting consultation and transparency in treaty-making, is currently under review.
> The Government decided to: allow more opportunity for Parliamentary scrutiny before final action to undertake international legal obligations; provide National Interest Analyses with all treaty actions being tabled for Parliamentary consideration; establish a Joint Standing Committee on Treaties in the Commonwealth Parliament; establish a Commonwealth-State Treaties Council as an adjunct to the Council of Australian Governments; and make treaties more generally accessible, through construction of an Internet database - this Treaties Library.
>
> **I.** *Tabling of Treaties*

All treaties (and related actions, including amendments to and withdrawal from treaties) are tabled in Parliament for at least fifteen sitting days in both Houses before the Government takes binding action (with special procedures for instances of exceptional urgency). In most cases, this means that treaties are tabled for consideration after signature but before the final step (e.g. ratification or confirmatory exchange of notes) to bind Australia under international law.

II. *National Interest Analyses*
Each treaty is tabled with a National Interest Analysis (NIA). The NIA gives reasons why Australia should become a party to the treaty. Where relevant, the NIA contains a discussion of economic, environmental, social, and cultural effects. Important elements are a description of the consultation undertaken during the treaty-making process, and a certification that arrangements for domestic implementation (e.g. legislation, regulations) are or will be in place before entry into force.

III. *Joint Standing Committee on Treaties*
The Joint Standing Committee ['JSCOT']was first formed on 17 June 1996. The Committee considers tabled treaties and NIAs, and other questions relating to international instruments that are referred to it by either House of Parliament or a Minister. The Committee conducts inquiries, including public hearings, and reports to Parliament, normally within the period of fifteen sitting days.

IV. *Treaties Council*
The Treaties Council, agreed upon by the Council of Australian Governments on 14 June 1996, consists of the Prime Minister and all the State Premiers and Chief Ministers of the Territories, and has an advisory function. It is co-ordinated by the officials-level Commonwealth-State Standing Committee on Treaties. The Council's inaugural meeting was held in November 1997."

9.4 Property Rights and the *Human Rights Act* (Qld) 2019

Many Queensland property owners have had their human rights breached by legislation which in various ways impairs their property rights, without compensation, with respect to vegetation clearing, heritage listings etc.

As Ian Callinan AC, former Justice of the High Court of Australia observed: "For the sake of our heritage, the buck must stop somewhere", *The Australian - Summer Living* at 10, 3 January 2008 (as reproduced at www.adverse-rezoning.info).

So, does the *Human Rights Act* (Qld) assist in any way?

9.4.1 Property Rights and Human Rights

S. 24 of the Act Provides:

Property rights
(1) All persons have the right to own property alone or in association with others.
(2) A person must not be arbitrarily deprived of the person's property.

This section is a replica of Article 17 of the *Universal Declaration of Human Rights* ("UDHR"). It is also consistent with s. 10 of the *Racial Discrimination Act* (Com.) which was enacted to implement Art. 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (the "Discrimination Convention"), with the proviso only that, due to the limitation of the Commonwealth constitutional external affairs power's reliance on Art. 5, s.10 is not universal, but operates to protect rights only where there is racial discrimination.

Accordingly, the terms of s. 24 of the Act not being original, there is Australian common law authority with regard to the interpretation of these rights. Thus, as was pointed out above, in *Western Australia v Commonwealth (Native Title Act Case)* [1995] HCA 47; 1995 185 CLR 373, the High Court affirmed its observations in the *Mabo [No. 1]* case:

> "Discrimination in the enjoyment of the human rights to own and to inherit property which attracts the operation of s 10(1) of the Racial Discrimination Act was discussed in *Mabo [No 1]*. In that case, Brennan, Toohey and Gaudron JJ said [78] :
>
> > Section 10 of the *Racial Discrimination Act* is enacted to implement Art 5 of the Convention and the "right" to which s 10 refers is, like the rights mentioned in Art 5, a human right — not necessarily a legal right enforceable under the municipal law. The human rights to which s 10 refer include the right to own and inherit property. In the development of the international law of human rights, rights of that kind have long been recognised. Thus, the Universal Declaration of Human Rights 1948, Art 17 included the following: "1. Everyone has the right to own property alone as well as in association with

> others. 2. No one shall be arbitrarily deprived of his property." (**The word "arbitrarily" has been interpreted to mean not only "illegally" but also "unjustly"**: see Meron (ed), Human Rights in International Law: Legal and Policy Issues (1984), vol 1, p 122, fn 40.)
>
> Although the human right to own and inherit property (including a human right to be immune from arbitrary deprivation of property) is not itself necessarily a legal right, it is a human right the enjoyment of which is peculiarly dependent upon the provisions and administration of municipal law. Inequality in the enjoyment of that human right may occur by discrimination in the provisions of the municipal law or by discrimination in the administration of the municipal law or by both.

And Deane J said [79] :

> the moral entitlement to own property alone as well as in association with others and the moral entitlement to inherit which are referred to in Art 5 of the International Convention are "rights" for the purpose of the guarantee against racial discrimination contained in s 10 of the *Commonwealth Act*. Implicit in those moral entitlements is the "right" to enjoy immunity from being "arbitrarily dispossessed of [one's] property" which is expressly recognised by Art 17(2) of the Universal Declaration of Human Rights 1948. The second point to be made about s 10 is that the section is not to be given a legalistic or narrow interpretation. As its opening words ("If, by reason of ") make clear, it is concerned with the operation and effect of laws. In the context of the nature of the rights which it protects and of the provisions of the International Convention which it exists to implement, the section is to be construed as concerned not merely with matters of form but with matters of substance, that is to say, with the practical operation and effect of an impugned law."
> (Footnoted citations omitted. Emphasis added.)

S. 51(1) of the *Native Title Act* (Com.) provides for an "entitlement [to compensation] on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the [compensable] act on their native title rights and interests." In *Northern Territory v Griffiths* [2019] HCA 7, the High Court found no difficulty with the the use of the words "loss, diminution, impairment or other effect" with respect to property rights, so it is clear that this is another formulation of words which falls within the scope of the phrase "arbitrary deprivation of property".

Northern Territory v Griffiths is also a good example of the High Court recognising even "usufructuary"(essentially ephemeral) uses as being forms of property: "rights and interests were essentially usufructuary, ceremonial and

non-exclusive.....perpetual and objectively valuable in that they entitled the [native inhabitants] to live upon the land and exploit it for non-commercial purposes." (*ibid*., at 27). Note also the observation of: "the common law's conception of property as comprised of a 'bundle of rights'" (*ibid*., at 27).

It might be noted that with regard to "impairment" or "arbitrary deprivation" of property rights, native title holders now have a common interest with common law title (i.e., freehold and leasehold) holders due to the aforementioned racial discrimination proviso necessarily contained in the *Native Title Act* due to the Commonwealth's reliance on a limited constitutional power.

Thus, in *Northern Territory v Griffiths* (*ibid*., at 29-30), the majority of the Court states:

> "..... native title rights and interests cannot be impaired to a point short of extinguishment without payment of just compensation on terms comparable to the compensation payable to the holders of common law land title whose rights and interests may be impaired short of extinguishment."

In other words, if owners of freehold and leasehold land can have their property rights impaired without compensation within a State or Territory, then a failure by the State or Territory to provide for compensation of native title holders for impairment of their rights and interests would not be discriminatory, so the native title holders could receive no compensation either. Hence the common interest here between native title holders and common law title holders.

Thus from this brief review, it can be seen that the High Court in particular has already found that the "loss, diminution, impairment or other effect" of property rights, which might might consist of a "bundle of rights" taking multiple forms, when unjustly imposed, fall within the scope of "arbitrary deprivation of property".

9.4.2 Declaration of Incompatibility: A "Quasi-remedy" &/or Breach of Human Rights

Part 3 Division 3 provides, in part, in s.53:

> ***Declaration of incompatibility***
> *(1) This section applies if—*
>
> *(a) in a proceeding in the Supreme Court a question of law arises that relates to the application of this Act or a question arises in relation to the interpretation of a statutory provision in accordance with this Act....*

*(2) The Supreme Court may, in a proceeding, make a declaration (a **declaration of incompatibility**) to the effect that the court is of the opinion that a statutory provision can not be interpreted in a way compatible with human rights....*
(4) If the Supreme Court is considering making a declaration of incompatibility, the court must give notice of that fact in the approved form to the Attorney-General and the commission.
(5) The Supreme Court must not make a declaration of incompatibility unless the court is satisfied—
(a) a notice has been given to the Attorney-General and the commission under subsection (4); and
(b) a reasonable opportunity has been given to the Attorney-General and the commission to intervene in the proceeding or to make submissions about the proposed declaration.....

Further, in s.54:

Effect of declaration of incompatibility
A declaration of incompatibility does not—
(a) affect in any way the validity of the statutory provision for which the declaration was made; or
(b) create in any person any legal right or give rise to any civil cause of action.

Ss. 55 to 57 then mandate a legislative process which results in, no more than six months later, a committee report and the Minister's response being tabled in Parliament.

From the point of view of a plaintiff who has taken the trouble to conduct a case before the Supreme Court, this might be best described as a "quasi-remedy". Normally, the burden of court action is undertaken to seek a "remedy", such as a finding that a law as being unenforceable, or an award of damages.

It is an ironically unedifying paradox that a Human Rights Act should in its terms deny courts the power to order remedies for human rights violations found to be committed against a plaintiff, and substitute for them a mere quasi-remedy. It is indeed a denial of human rights, a feat, in a Human Rights Act, which would have impressed Sir Humphrey Appleby! A more honest title for the Act would be the Monty-Pythonesque "*Not Quite the Human Rights Act*". Still, "beggars can't be choosers" and a quasi-remedy is better than no remedy at all, so for now it's ostensibly what the people of Queensland, being the "beggars", have to make do with.

There is a maxim that "justice delayed is justice denied". The same reasoning was used in the *Tasmanian Dam Case* (1983) 158 CLR 1 at 291: a lengthy delay in

providing compensation was itself considered unacceptable: Deane J held certain acquisition legislation invalid for "forc[ing the property owner] to wait years" before allowing access to a body to determine the compensation payable under section 51(xxxi), and failing to provide interest. *A fortiori* a quasi-remedy.

Notwithstanding this injustice inherent in the Act, we note again Kirby J.s pithy observation in *Durham Holdings Pty Ltd v The State of New South Wales* [2001] HCA 7:

> "....so far as the powers of a Parliament of a State of Australia to permit the acquisition of property without the payment of compensation are concerned, a long line of opinions in this Court upholds the existence of that power. [*Pye v Renshaw* (1951) 84 CLR 58 at 79-80; *Minister for Lands (NSW) v Pye* (1953) 87 CLR 469 at 486; cf *P J Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 at 405.]"

Accordingly, the limitation of rights associated with a *declaration of incompatibility* as imposed by s. 54 of the Act would be undoubtedly upheld as being valid in law.

Notwithstanding the above reasoning, the Environmental Defender's Office (EDO) did not waste any time commencing an action in 2020, alleging a breach of human rights under the Human Rights Act, challenging Waratah Coal's proposed Galilee Coal Project in Queensland due to climate change concerns, reportedly relying on six human rights grounds, including the right to own property under section 24.

According to Daly & Douvartzidis ("The convergence of human rights law and environmental and climate change litigation in Australia", Johnson Winter & Slattery (June 2020)), it is the first time in Australian history that a coal mine has faced a legal challenge on human rights grounds. Representing "Youth Action" and "The Bimblebox Alliance", the EDO strategy, if it obtained a *declaration of incompatibility*, would be to "seek to have the Queensland Land Court recommend that the Mining Lease and Environmental Approval for the Galilee Coal Project be refused. Even if the Court does that, it will ultimately be up to the Minister to act on the recommendation."

In this way, seeking a *declaration of incompatibility* would potentially be used by well funded litigants to pursue a political agenda. There is no reason why a well funded property owners' group could not use the same strategy in pursuing the protection of property owners' rights in Queensland.

Having said all that, while the Supreme Court could not use a *declaration of incompatibility* to invalidate offending legislation or award damages, there is in principle no reason for it to be unable to make other orders if there is a separate head of legal liability available to it, as we shall now consider.

9.4.3 Impaired Property Rights: A New Right of Action for Damages?

It might be put that s. 54 of the Act serves to prevent the creation in any person of any legal right or civil cause of action of any kind arising out of the Act as a whole.

The instant riposte to such an expansive limitation by s. 54 is provided by the existence of s. 48(4) in the Act itself, which in relation to interpretation provides:

> *(4)This section does not affect the validity of—*
> *(a) an Act or provision of an Act that is not compatible with human rights; or*
> *(b) a statutory instrument or provision of a statutory instrument that is not compatible with human rights and is empowered to be so by the Act under which it is made.*

The better view would be that s.54 is simply limited to preventing the creation in any person of any legal right or civil cause of action of any kind arising out of the declaration of incompatibility process itself.

Clearly, the Act, by virtue of the existence of s.48(4), contemplates the possibility that, putting aside declarations of incompatibility, a court might discover separate grounds within the Act for declaring offending legislation invalid.

To prevent this, the Act thus expressly provides that another Act which is incompatible with human rights cannot be found to be invalid as a consequence. However, the Act does not expressly provide that such another Act cannot form the basis of a claim for damages or other financial compensation, when read in conjunction with provisions of the Act.

So this raises the question as to whether a court could therefore find in the Act, quite separately from any declaration of incompatibility, a basis for awarding damages to a property owner who has been arbitrarily deprived of property rights. It might be noted at once also that the making of an award of damages presupposes the validity of the (other) Act causing the breach of human rights, and in this respect such a damages award would essentially be an affirmation of the validity of that legislation in compliance with s. 48(4).

This brings us to judicial interpretation, of which two major strands are relevant:

1. the objects of, and interpretive principles as set out, in the Act; and

2. the common law presumption in favour of private property.

These are considered in turn below.

9.4.3.1 The Objects and Interpretation of the Act

In reviewing the Act, the following provisions might be noted.

3 Main objects of Act
The main objects of this Act are—
(a) to protect and promote human rights;.....

4 How main objects are primarily achieved
....(f) requiring courts and tribunals to interpret statutory provisions, to the extent possible that is consistent with their purpose, in a way compatible with human rights; .....

11 Who has human rights
(1) All individuals in Queensland have human rights.
(2) Only individuals have human rights.
Note—
A corporation does not have human rights.

12 Human rights are in addition to other rights and freedoms
A right or freedom not included, or only partly included, in this Act that arises or is recognised under another law must not be taken to be abrogated or limited only because the right or freedom is not included in this Act or is only partly included.

13 Human rights may be limited
(1)A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.....

48 Interpretation
(1) All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.
(2) If a statutory provision can not be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.....

Vegetation clearing, heritage and other legislation restricting owners' pre-existing land usage rights without compensation are clearly unjust "arbitrary deprivations of

property", so there would thus seem to be ample scope for a court to find, using the above sections of the Act, plus relevant common law dicta of the High Court as canvassed above, that such property-depriving legislation, mandated as being valid under the Act, nonetheless attracted liability for causing such loss, for constituting breaches of a human right in law, in particular as per s. 24 of the Act.

9.4.3.2 The Common Law Presumption in Favour of Private Property

As previously noted (at **[4.1.3]**), the principle of legality applies as a common law presumption in favour of private property, and to repeat an observation of the High Court in *The Commonwealth v. Hazeldell Ltd.* (*supra*):

> "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."

It would seem clear that such an express intention has been made in the Act with respect to declarations of incompatibility (s.54) and otherwise with respect to the validity of legislation (s. 48(4)), but importantly, not with respect to any right to seek, separately from a declaration of incompatibility, damages for losses caused by legislation which, while being in breach of human rights as per s. 24, is nonetheless valid under the Act.

The presumption in favour of private property is consistent with the human right as expressed in s. 24 of the Act and in that way would buttress the human rights argument put above.

9.4.3.3 Possible Legal Strategy

S.108 provides that the Act applies to pre-existing legislation as well as future legislation, but only with respect to proceedings which are not commenced before Proclamation of the Act:

> ***108 Application of Act—generally***
> *(1) This Act applies to all Acts and statutory instruments, whether passed or made before or after the commencement.*
> *(2) However, this Act—*
> *(a) does not affect proceedings commenced or concluded before the commencement;.....*

In Queensland, it would be possible to propose, after proclamation of the Act, a one or two-pronged legal action in the Supreme Court, namely to seek, with respect to other Queensland legislation:

(a) a *declaration of incompatibility*, being a quasi-remedy which might eventually lead to a remedial change in relevant laws; and concurrently/or

(b) an action for damages for breaches of human rights under the terms of the Act as caused by that other Queensland legislation, the cause of action having been created by the Act itself, as interpreted by the common law.

Such an action might in principle be initiated either by a common law title holder, or a native title holder, although in the latter case, it would also need to address the potential legal interaction of such a claim with the *Native Title Act* (Com).

It would be possible for Queensland to amend the Act to prohibit such actions for damages, but that might encounter political difficulty, particularly if it is attempted before the mandated legislative process associated with a concurrent *declaration of incompatibility* was completed, as that might be seen as corrupting that legislated process.

9.5 Article 17 UDHR: Let's Practise What We Preach

In her foreword to *Australia and Human Rights: An Overview* (4th ed. 2017) (the "*Human Rights Manual*"), the then Minister of Foreign Affairs, Julie Bishop wrote:

> "Australia will step up its efforts to promote and protect human rights around the world by serving as a member of the United Nations Human Rights Council, the world's peak human rights body, for the 2018-2020 term.
>
> It is in Australia's national interest to protect and promote human rights, uphold the international rules based order and shape the work of the United Nations. As a founding member of the United Nations, and one of only eight nations involved in the drafting of the Universal Declaration on Human Rights, Australia was, and is, of the view that human rights deliver peace, security and prosperity to Australia and the world....."

The "*Human Rights Manual*" (at 15) asserts:

> "Australia considers all human rights to be universal. The *UN Charter* expressly recognises that human rights are universal in application and the *UDHR* is premised on this same view (see in particular article 2), as are the later Covenants."

As stated by the NSW Bar Association, "property rights are human rights", and shouldn't human rights, like charity, begin at home?

November 2020

v. 1.7.2

Encl:

NSW GOVERNMENT

Rob Stokes
Minister for Planning

MD16/2828

EUROBODALLA SHIRE COUNCIL
FILE No: E12.6263.
ACTION OFFICER: L. Usher
DATE: 25 OCT 2016
FOLLOW UP CODE: 14
DOC. No: ENT:

Dr Catherine Dale
General Manager
Eurobodalla Shire Council
PO Box 99
MORUYA NSW 2537

Dear Dr Dale

Certification of the Wharf Road North Batemans Bay Coastal Zone Management Plan

Thank you for submitting the Wharf Road North Batemans Bay Coastal Zone Management Plan (CZMP) for certification under the *Coastal Protection Act 1979*.

I referred the CZMP to the NSW Coastal Panel for advice under section 55G (3) of the Act. The panel provided its advice to me and I enclose a copy for your consideration.

I commend Eurobodalla Shire Council for preparing a CZMP which presents a good strategic pathway forward for managing this coastal area. The CZMP also builds on the recent E2 Environmental Conservation and W1 Natural Waterways re-zonings within the subject area. The plan seeks to return this precinct to public ownership and restore unimpeded public beach and foreshore access to these margins, which will be of significant benefit to the local community.

Following the advice of the panel, I will be happy to certify the CZMP once it has been updated to incorporate advice from Department of Industries (DoI) – Lands and resubmitted. The required changes are minor edits to accurately reflect the roles and responsibilities of DoI–Lands in the CZMP and Wharf Road Emergency Action Subplan. The Office of Environment and Heritage (OEH) and DoI–Lands will work closely with council to give effect to these changes.

If council has any questions about this matter, please contact Ms Gabrielle Pietrini, Regional Manager, Illawarra, OEH, on 4224 4159 or at gabrielle.pietrini@environment.nsw.gov.au.

Yours sincerely

Rob Stokes
Minister for Planning

Enclosure

20 OCT 2016

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Advice to the Minister for the Planning on the Draft Wharf Road North Batemans Bay CZMP

Recommendations

The NSW Coastal Panel recommends that the Minister for Planning:

- Commends Eurobodalla Shire Council for preparing a CZMP for this coastal hotspot area which presents a good strategic pathway forward for managing this problematic area that builds on the recent E2 Environmental Conservation and W1 Natural Waterways re-zonings within the subject area;
- Commends Eurobodalla Shire Council for committing to a CZMP that will return this precinct to public ownership and restore unimpeded public beach and foreshore access to these margins which will be of significant benefit to the local community;
- Commends Eurobodalla Shire Council for diligently preparing the CZMP in consultation with the community and in partnership with OEH and other Government agencies with jurisdictional responsibilities for parcels of land that fall within the operation of the Plan;
- Note that in the opinion of the Coastal Panel, the Wharf Road North Batemans Bay CZMP is **suitable for certification** in accordance with provisions of the *Coastal Protection Act 1979*, contingent on the Plan being re-submitted with some minor revisions prior to finalisation and gazettal, concerning the following elements:

  (i) Action 1 of the implementation strategy (Table 5) seeks to "make application for the purchase of tidal and sub-tidal private properties and beaches at Wharf Road". It is the view of the Coastal Panel that the judgement in *ENVIRONMENT PROTECTION AUTHORITY v. ERIC SAUNDERS [1994] NSWLEC 187 (29 November 1994)*, offers the view that submerged lands automatically revert to the Crown and therefore are not required to the acquired. This should be correctly reflected in the CZMP;

  (ii) There are a number of minor edits required to accurately reflect the roles and responsibilities of Department of Industries – Lands (DoI – Lands) in the CZMP and EASP. DoI – Lands are happy to facilitate discussions with Council to attend to necessary amendments prior to re-submission.

- Include advice to Eurobodalla Shire Council outlining suggestions that, in the opinion of the Coastal Panel, might provide relevant guidance to augment various initiatives and actions proposed in the Plan. The following suggestions are not considered a pre-requisite to be addressed in order to certify the Plan, but includes:

  (iii) It is noted that the area the subject of the Plan has a long history involving several court proceedings that are prominent in the NSW coastal case law. There might be benefit in providing a small appendix that lists or captures this relevant information; and

  (iv) It is recommended that the Plan goes a step further in describing actions that could be undertaken once the relevant private landholdings have been acquired including removal of building stock and restoration of the land. Council should also consider removal of the groyne structure that currently prevents unimpeded access along the foreshore. This will have the added benefit of providing rock armour that could be recycled to facilitate necessary protection of the threatened infrastructure at the road corner.

Next Steps

The Coastal Panel recommends the following next steps:

- That the Minister writes to Council congratulating them on what they have achieved in the development of the Wharf Road North Batemans Bay CZMP to date and the specific aspects which have been outlined above.
- Notifies Council, if the Minister agrees, that the Minister is prepared to **certify** the Plan in accordance with provisions of the *Coastal Protection Act 1979*, contingent on the Plan being re-submitted with some minor revisions addressing the issues denoted in points (i) and (ii) outlined above.
- Notifies Council of suggestions from the Coastal Panel, which might improve outcomes for the Wharf Road North Batemans Bay CZMP, but are not a pre-requisite in order to certify the plan and denoted in point (iii) and (iv) above.