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# Upholding the Australian Constitution: The Samuel Griffith Society Proceedings

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### Chapter Three

#### The Attack on Property Rights

Lorraine Finlay

#### Federal Court Judge: *And what Law are you basing this argument on?*

Darryl Kerrigan: *The Law of bloody common sense! . . . . A man's home is his castle . . . You can't just walk in and steal our home . . . .*

- *The Castle*, 1997

Darryl Kerrigan's "law of common sense" is becoming an increasingly rare commodity in Australia when it comes to dealing with property rights. In recent years there has been "a gradual, but significant, erosion of traditional protections for private property rights".<sup>1</sup> The disregard for and lack of interest that is shown in property rights is somewhat unusual given the highly fashionable status within some Australian circles of the idea of a National Bill of Rights and enhanced protections for individual human rights more generally. As Chris Berg from the Institute of Public Affairs has observed:

. . . in the late 20<sup>th</sup> century, the right to property became the mistreated stepchild of human rights law. Related, but unloved.

This paper will argue that property rights in Australia are currently being attacked simultaneously on a number of fronts, and that the existing protections are insufficient and largely symbolic. Part One will consider whether private property rights remain important in the modern context and will outline the existing mechanisms for the protection of property rights.

Part Two will consider a number of recent examples illustrative of the continued attack on property

rights, notably the *Wild Rivers* legislation in Queensland; the impact of native vegetation legislation (as highlighted in the case of Peter Spencer); the allocation of water entitlements (as seen in the High Court decisions in *ICM Agriculture Pty Ltd v Commonwealth*<sup>2</sup> and *Arnold v Minister Administering the [Water Management Act 2000](#)*<sup>3</sup>); the compulsory acquisition of land for the purposes of urban redevelopment (through the case study of *R & R Fazzolari Pty Ltd v Parramatta City Council*; *Mac's Pty Ltd v Parramatta City Council*<sup>4</sup>); and the significant costs imposed on private property owners through heritage listings. Finally, Part Three will consider a number of proposals designed to strengthen the protection of property rights in Australia and will evaluate their potential effectiveness in terms of reasserting the central importance of meaningful private property rights in Australia.

## **Part I: A Reflection of the Values of a Bygone Era?**

### ***Defining Property Rights***

When we are discussing property rights it is important to remember that we are not just speaking about a limited, classical understanding of property in terms of real or personal property. Rather, as was confirmed by the High Court of Australia in *Minister of State for the Army v Dalziel*:

Property, it has been said, is *nomen generalissimum* and extends to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profits or use in land of another, and choses in action.<sup>5</sup>

This broad definition was confirmed in *Dorman v Rodgers*, with Murphy J concluding that:

In modern legal systems, 'property' embraces every possible interest recognized by law which a person can have in anything and includes practically all valuable rights.<sup>6</sup>

Similarly, our understanding of private property rights in the modern context has developed beyond the question of mere possession or title to encompass a wider "bundle of rights". In addition to recognized title and possession, "the protection of property rights has evolved to mean owners have the right to obtain benefits from their property, including the right to put it to productive use and to dispose of it through sale".<sup>7</sup> Property rights, therefore, encompass "the right to own property, the right to dispose of property and the right to exclude others".<sup>8</sup>

### ***The Continued Importance of Property Rights***

Recognition of the importance of private property rights can be traced back to the *Magna Carta*. Property rights were expressly mentioned in Article 39 of the *Magna Carta 1215*, which provided that:

No freeman shall be arrested, or detained in prison, or deprived of his freehold, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land.<sup>9</sup>

Since that time leading philosophers and political thinkers have emphasized the link between private property rights and the protection of individual liberty. This was noted by Henry Maine, who claimed that the history of individual property rights and history of civilization "cannot be disentangled".<sup>10</sup> Similarly, John Adams observed that:

Property is surely a right of mankind as real as liberty . . . The moment that the idea is admitted into society that property is not as sacred as the laws of god, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. Property must be secured or

liberty cannot exist.<sup>11</sup>

The connection between private property and the rule of law has also been strongly emphasized, with Jeremy Bentham stating:

Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.<sup>12</sup>

To this end, the protection of property rights has long been seen as part of the legitimate role of government. John Locke saw the preservation of property as the "great and chief end ... of men uniting into Commonwealths and putting themselves under government," with the purpose of government being to join with others to "unite for the mutual benefit of their lives, liberties and estate, which I call by the general name, property".<sup>13</sup> James Madison also saw government as having a central role in protecting private property, stating:

Government is instituted to protect property of every sort; as well as that which lies in the various rights of individuals ... this being the end of government, that alone is a just government, which impartially secures, to every man, whatever is his own.<sup>14</sup>

The reverse has also been recognized. William Pitt acknowledged that private property may itself have an important role to play in protecting individuals from despotic governments, declaring:

The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter, the rain may enter – but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement.<sup>15</sup>

Do property rights continue to have relevance and importance in the modern day? Justice Murphy certainly claimed, in *Attorney-General (Cth); Ex rel Mckinlay v Commonwealth*, that "[t]he exaltation of property rights over civic and political rights is a reflection of the values of a bygone era".<sup>16</sup> Similarly, the protection of property rights has been called by some to be "an archaic notion, a relic of a time long gone when the status of an individual would be determined by the property he owned".<sup>17</sup>

This paper argues that private property rights are just as important today as in the past. The link between property rights and individual liberty remains relevant in the modern context, and the foundations for both individual freedoms and economic security may be found in private property rights. In relation to this point, it has been emphasized that:

Without private property rights there is no way to check the power of the state over the individual. When the state gains control over private property rights the ability to create wealth stagnates or even declines, thereby creating poverty and misery rather than freedom and wealth.<sup>18</sup>

The link between private property rights and the rule of law also continues to be relevant in the modern context, with Hayek observing that:

The principle of "no expropriation without just compensation" has always been recognized wherever the rule of law has prevailed. It is, however, not always recognized that this is an integral and indispensable element of the principle of the supremacy of the law. Justice requires it; but what is more important is that it is our chief assurance that those necessary infringements of the private sphere will be allowed only in instances where the public gain is clearly greater than the harm done by the disappointment of normal individual expectations.<sup>19</sup>

At a more practical level, a secure system of property rights is an essential ingredient for economic growth and prosperity as it provides people with both the incentive and security that are necessary to allow them to confidently save and invest. There is a well established causal link between property rights and higher standards of living,<sup>20</sup> with the ownership of private property motivating individuals "to improve the productivity and value of assets in the realization that family and designated heirs may benefit from such endeavour".<sup>21</sup> In short, "[t]he evidence is irrefutable that the protection of property rights is the key to wealth accumulation and secure and stable societies".<sup>22</sup>

The importance of property rights, and of fair compensation being paid when private property is compulsorily acquired by government, was emphasized by Justice Heydon in *ICM Agriculture Pty Ltd v The Commonwealth*:

Unless they have a duty to pay compensation, legislatures will tend to experience undue temptation to acquire the property of citizens, and will tend to give into it, because this will usually be cheaper than employing some alternative technique. The threat that legislatures will acquire property without just compensation will result in people electing not to generate property by saving, or developing their property to less than optimal levels, or seeking a greater rate of return to meet the risk of acquisition, or pursuing investment opportunities in jurisdictions which do provide compensation for compulsory acquisition. The threat of acquisition without compensation thus damages incentives to invest. It damages the prospect of a dynamically efficient economy in which incentives to invest improve long-term social welfare by creating an optimal level and allocation of investment resources ... And there is a peculiar injustice in removing what may be the whole of one citizen's assets without compensation instead of funding compensation for that citizen by taking a very small part of the assets of all taxpayers . . .<sup>23</sup>

The continued importance of private property rights in the modern context can be clearly illustrated by considering the disastrous consequences of "Fast Track Land Reform" program in Zimbabwe. Under this program, which commenced in the late 1990s, the Zimbabwean Government has "acquired" thousands of farms without paying compensation. This has been ostensibly done to address historical and racial injustices. The government-appointed Utete Commission has estimated that "during the first three years of land reform some 250,000 people and their 1.3 million dependents were forcibly displaced from commercial farms alone".<sup>24</sup> The farm invasions have continued even after the signing of the power-sharing arrangement between ZANU-PF and the Movement for Democratic Change in September 2008, "with 480 new incidents of violence against farmers recorded"<sup>25</sup>.

The results of this program have been catastrophic for Zimbabwe, resulting in "a pullout of foreign investment, defaults on farm bank loans, and a massive decline in agricultural production".<sup>26</sup> The Justice for Agriculture organization has estimated "that more than half of all the farms taken over by the State are now derelict and abandoned".<sup>27</sup> The Commercial Farmers' Union has estimated that the total output of the Zimbabwean agricultural industry has declined from 4.3 million tons of agricultural products worth approximately US\$3.347 billion in 2000, to just over 1.348 million tons worth approximately US\$1 billion in 2009.<sup>28</sup> There is clearly a link here between the government seizures and land reform measures and the worsening and uncertain economic environment in Zimbabwe.

### ***The Protection of Property Rights***

The right to private property, and the importance of guaranteeing just compensation if private property is expropriated by government, has been recognized in a range of international instruments, declaratory rights documents, and domestic constitutions. One of the earliest

examples, the *Declaration of the Rights of Man and the Citizen*, was adopted by the National Constituent Assembly in France in 1789. Article 17 provides:

Property being an inviolable and sacred right, no one may be deprived of it except as required by evident and legally ascertained public necessity, and on condition of previous just compensation.

More recently, the right to own property has been enshrined in Article 17 of the *Universal Declaration of Human Rights*, which also provides that "no one shall be arbitrarily deprived of his property". The right to property is also contained, in various forms, within regional instruments such as the *American Convention on Human Rights* and the *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*. Similar protections are also offered by certain domestic constitutions. The [Constitution](#) of the United States, for example, provides a level of constitutional protection for property rights through the due process clauses of the Fifth and Fourteenth Amendments and the takings clause of the Fifth Amendment. Private property rights have even been recently recognized in China. In 2003 the Central Committee of the Chinese Communist Party agreed to amend the Chinese [Constitution](#) to include such rights.<sup>29</sup> The key issue here is whether such constitutional guarantees end up offering substantive protections or whether, in practice, they have limited symbolic value.

Within Australia the importance of private property rights was recognized by the framers with the inclusion of [s. 51\(xxxi\)](#) of the [Constitution](#). [Section 51\(xxxi\)](#) provides that:

The Parliament shall, subject to this [Constitution](#), have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

[Section 51\(xxxi\)](#) is distinct in that it is one of the few guarantees of individual rights within the Australian [Constitution](#). Although it has been described as a "provision of a fundamental character"<sup>30</sup> and a "very great constitutional safeguard,"<sup>31</sup> the "just terms" guarantee in fact offers only limited protection to property rights in Australia, with there being two main limitations to its efficacy – one structural, and the other interpretive.

The most obvious limitation is the fact that the guarantee does not extend to State governments, who are able to acquire property compulsorily without being required to provide just terms compensation or, indeed, any compensation at all.<sup>32</sup> A proposal to extend the guarantee under [s. 51\(xxxi\)](#) to State governments was rejected by the Australian people at the 1988 referendum with a national "no" vote of 69 per cent. It should be noted here that the question about "fair terms" compensation was just one part of a larger question that also included the extension of the right to trial by jury and the extension of freedom of religion and that the referendum itself included four separate questions.

The second limitation is the narrow approach to the interpretation of [s. 51\(xxxi\)](#) that has been regularly applied by the High Court of Australia. This has resulted in [s. 51\(xxxi\)](#) proving "under modern conditions, to be an insurance policy with some disconcerting exclusion clauses".<sup>33</sup> One example is the technical definition of "acquisition" that has been strictly applied in cases such as *Mutual Pools & Staff Pty Ltd v The Commonwealth*<sup>34</sup> and *ICM Agriculture Pty Ltd v Commonwealth*,<sup>35</sup> with the result that the just terms guarantee can effectively be side-stepped by the Commonwealth Government if it limits or restricts property rights in a manner that does not amount to an actual acquisition. The end result is that the protection offered by the constitutional guarantee under [s. 51\(xxxi\)](#) is limited and has not been capable of preventing the attacks on property rights that will be discussed below.

## **An Absolute Right?**

It is important to acknowledge at the outset that property rights are not absolute, and that it is recognized that there will necessarily be limitations to what an owner is allowed to do with their property. The first broadly accepted limitation is that some level of state regulation will be required to ensure that an individual's use of their property does not unreasonably affect the right of others to enjoy their own property.

The second, and more controversial, area of state regulation has been the traditional right of "eminent domain". Once known as the "despotic power," this is the right of the state to compel the transfer of private property to the state for some public purpose. It is accepted that it may sometimes be necessary, and entirely reasonable, for the state to exercise its power of eminent domain to deliver required public policy outcomes. However, as will be illustrated by the examples discussed below, this is a power that is increasingly being exercised for questionable ends and without proper regard being given to the real costs that are being imposed on the affected individuals.

Whilst acknowledging that it is necessary and entirely proper to have some restrictions attaching to private property rights this paper argues that there are numerous examples in Australia today of government actions simply going too far in restricting or removing property rights. The fundamental rule that should be applied is that governments "should err on the side of restraint, rather than interference in property rights".<sup>36</sup> At the very least, if it is considered necessary for governments to impose measures that interfere with an individual's property rights, then the payment of just compensation should be an automatic precondition of government action. Unfortunately, the examples discussed in Part Two below suggest that this is not the current approach in Australia, but rather that we are living in an environment where property rights are too often afforded little respect by government.

## **Part II: Recent Examples**

The cases discussed below are all examples of government regulations and actions that have removed or damaged the property rights of individuals in Australia. These should not be seen as isolated examples, or as the only relevant examples. There are numerous further case studies that could have been discussed in this paper, ranging from large national policy initiatives such as the proposals for the mining profits tax, emissions trading scheme, or national broadband network, through to individual decisions directly affecting particular people and properties, such as the refusal by the Victorian Civil and Administrative Tribunal in cases such as *Gippsland Coastal Board v South Gippsland Shire Council*<sup>37</sup> and *Myers v South Gippsland Shire Council*<sup>38</sup> to grant development consents on coastal land in part because of climate change considerations. Rather, the following examples are symptomatic of a larger problem and highlight the need for a broader campaign to restore respect and protection of property rights.

### **Wild Rivers Legislation in Queensland**

Probably the most controversial example of an attack on property rights by a State government in recent times has been the introduction by the Queensland Government of the *Wild Rivers Act* 2005 (Qld). The *Wild Rivers* legislation was designed "to preserve the natural values of rivers that have all, or almost all, of their natural values intact"<sup>39</sup> by creating a regulatory framework around declared areas to protect them from new development activities that have the potential to degrade their "natural values". Put simply, the legislation is designed to prevent and restrict development in protected areas in the name of environmental sustainability. By June 2010 there had been ten formal *Wild River* declarations. Declared *Wild River* areas include the Archer, Lockhart and Stewart rivers in the Cape York Peninsula; Settlement Creek, Morning Inlet, the Gregory River and Staaten River in the Gulf of Carpentaria; Hinchinbrook and Fraser Islands; and the Wenlock

## River Basin.<sup>40</sup>

The Wilderness Society has been one prominent proponent of the *Wild Rivers* legislation, claiming that the policy:

. . . affords these rivers protection under a regime that prevents large-scale development threats, such as in-stream mining, damming and intensive irrigation, while supporting the continuation or establishment of smaller scale commercial uses, eco-tourism and other sustainable industries.<sup>41</sup>

The legislation has, however, generated significant controversy. In particular, it has highlighted divisions between environmental groups and indigenous groups, who have opposed the legislation on the basis that it adversely affects economic opportunities and restricts the native title property rights of indigenous peoples in declared areas. The potential impact of the *Wild Rivers* legislation on indigenous communities (both immediately and in the longer term) is enormous, as noted by the Director of the Cape York Institute for Policy and Leadership, Noel Pearson:

The impact on the Cape York Reform Agenda . . . is significant. Our reform agenda which focuses on rebuilding individual responsibilities, reciprocity and incentives, is designed to break widespread passive welfare dependence and build economic independence . . .

Yet the highly restrictive nature of the *Wild Rivers Act*, which imposes layers of red tape on communities and individuals seeking to self-start small-scale enterprises, mocks that progress and significant investment. They hurtle our reform initiatives backwards.

The most perverse effect of Queensland's *Wild Rivers* scheme is that it will make small scale environmentally sustainable developments more difficult, whilst at the same time not prevent large-scale industrial developments such as mining.<sup>42</sup>

It is not only directly affected indigenous communities who have opposed the legislation. For example, Dr Peter Call from the Anglican Diocese of Brisbane has publicly expressed his opposition to the policy, saying that the legislation erodes indigenous property rights and job opportunities.<sup>43</sup> Similarly, Professor Ross Fitzgerald has argued:

Surely indigenous and non-indigenous people have a reasonable expectation that control over their land means they will determine future land use and management subject to a fair and reasonable regulatory framework. For many indigenous people it seems ironic that, while they have recently seen the return of their traditional lands, control over these lands is being removed by government at the behest of white-dominated conservation and heritage groups.<sup>44</sup>

The central problem with the *Wild Rivers* legislation is that it stops those with a legal interest in the declared areas from being able to make their own decisions about how best to exercise their interest. For example, in relation to the declared areas on the Cape York Peninsula, this "has effectively taken away from the Indigenous people of Cape York the ability to use . . . their land in the way that they would like".<sup>45</sup> A *Wild Rivers* declaration effectively locks up the land, requires a complex development application process to be negotiated if any development is to occur and makes it increasingly difficult to attract third party investment to the area. This has significant and long-term economic consequences and makes economic development in these areas entirely prohibitive. The legislation also fails to provide for any compensation to be paid to those whose property rights are affected.

An example of the economic consequences of this policy was provided by the Queensland Resources Council. It has suggested that if this legislation had been in place a decade ago both the Century mine in Far North Queensland (one of the world's largest zinc mines) and the bauxite

mines at Weipa would not exist.<sup>46</sup> A more concrete example of the economic effects can be seen in the announcement by Cape Alumina Ltd that it would be reviewing its \$1.2 billion Pisolite Hills bauxite mine and port project in West Cape York Peninsula after the announcement of the Wenlock Basin *Wild River* Declaration in June 2010. Shortly afterwards, this was also followed by Matilda Zircon announcing that it would be giving up the exploration tenements that it held in the Cape York Peninsula.<sup>47</sup>

A Private Member's Bill in response to the Queensland legislation was introduced in the House of Representatives on 8 February 2010 and in the Senate on 25 February 2010. The [\*Wild Rivers \(Environmental Management\) Bill 2010\*](#) was expressly intended "to protect the interests of Aboriginal traditional owners in the management, development and use of native title land situated in wild river areas"<sup>48</sup> and sought to do this by requiring that "the development or use of native title land in a wild river area cannot be regulated under the relevant Queensland legislation unless the Aboriginal traditional owners of the land agree".<sup>49</sup> This bill has been passed by the Senate, but has yet to be passed by the House of Representatives, although it is worth noting that the newly-elected Member for Leichhardt declared immediately following his election that the bill would be a priority if the Coalition ended up forming government.<sup>50</sup>

Legal action has also commenced, with a writ challenging three *Wild River* declarations being lodged with the High Court of Australia. The central claim is that the declarations made under the legislation breach both the *Native Title Act* and the *Racial Discrimination Act*.

There is no doubt that there is a public benefit in protecting areas of environmental significance. The *Wild Rivers* legislation appears, however, to take the view that environmental protection is necessarily mutually exclusive from sustainable development, and fails to acknowledge the serious economic consequences that flow from its implementation. In addition to this, the *Wild Rivers* legislation places the costs burden almost exclusively on the Aboriginal traditional owners by removing their right to manage, develop and use their land. The legislation claims to be targeted at achieving a broad public benefit through the protection and preservation of environmentally significant areas. If this is the case, then surely it would be more equitable to share the costs amongst the broader public?

### ***Native Vegetation Legislation***

In his address to the 2009 Property Rights Australia Conference Noel Pearson drew the link between the battle against the Queensland *Wild Rivers* legislation and the battle against the ban on regrowth clearing under the [\*Vegetation Management Act 1999\*](#) (Qld).<sup>51</sup> Both pieces of legislation represent an attack on property rights and both pieces of legislation fail to provide any compensation to landholders whose property rights are lost or diminished. For these reasons, both pieces of legislation (in their current forms) should be opposed.

The attack by governments on property rights has been particularly pronounced in rural and regional Australia, with farmers forced to comply with an increasingly complicated, stringent and punitive legal regime of restrictive conservation and environmental regulations. One example of this is the introduction of native vegetation and biodiversity regulations – such as the [\*Native Vegetation Act 2003\*](#) (NSW) and the [\*Vegetation Management Act 1999\*](#) (Qld) – which limit and regulate the clearance of native vegetation on private land in rural areas. In the 2004 *Inquiry Report into the Impacts of Native Vegetation and Biodiversity Regulations* the Productivity Commission concluded that:

. . . the current heavy reliance on regulating the clearance of native vegetation on private rural land, typically without compensating landholders, has imposed substantial costs on many landholders who have retained native vegetation on their properties. Nor does regulation appear

to have been particularly effective in achieving environmental goals – in some situations, it seems to have been counter-productive.<sup>52</sup>

Perversely, the costs involved with these policies have been predominantly borne by those farmers who have previously been the most environmentally responsible, being the farmers who have previously “voluntarily chosen to fence off wetlands, plant native species, retain old trees for habitat and keep stock out of waterways”.<sup>53</sup> Farmers whose properties are then reclassified for conservation effectively lose the productive capacity and, therefore, the value of their land. As the land itself has not technically been acquired, there is no requirement for compensation to be paid, notwithstanding that the farmer has effectively lost control of his own property and that his property rights have clearly been significantly curtailed. As Louise Staley has observed:

By contrast, the environmentally irresponsible farmer is much less likely to face restrictions because there is nothing left to protect.<sup>54</sup>

This point was reinforced by the evidence given at a public parliamentary committee hearing by a farmer in Dandaragan, Western Australia:

[W]ith hindsight, we should have borrowed money, cleared the lot and then none of us would be here today wasting our time and our son would be still [living with] us instead of having to go off the farm to look for work. It does not feel good to have your neighbours look over your fence and say “you should have cleared sooner and then you would not have this worry”.<sup>55</sup>

The dilemma faced by farmers in this highly regulated and bureaucratic environment was clearly outlined in the following example provided by Jim Hoggett from the Institute of Public Affairs:

Farmer Jim is thinking of felling one of the 20,000 trees on his property for fenceposts. He has used up his 30 tree (0.15 per cent) exemption. He looks alone of the 19,970 trees. He has to consider: what slope it is on; whether it has a rare species; whether it has any hollows or is on the way to having hollows; what native animals or birds are feeding off it or are likely to do so; what effect it has on the forest canopy; whether it is near a stream; whether it is of aboriginal significance; etc., etc. Then he will be in a position to make a lengthy submission to government seeking permission to fell. Welcome to the world of tree-by-tree approvals.<sup>56</sup>

The case that most starkly illustrates the simple injustice of the existing state of affairs is that of Peter Spencer. Peter Spencer owns Saarahnee, a property at Shannons Flat in New South Wales. The property is subject to native vegetation legislation,<sup>57</sup> which requires that development consent under the [Environmental Planning and Assessment Act 1979](#) (NSW) be obtained before any native vegetation is cleared. Spencer applied for consent to clear 1402 hectares at Saarahnee. Consent was refused. It was claimed that the combined effect of the native vegetation legislation and the refusal of development consent amounted to an acquisition of property in that it left the property entirely unsuitable for commercial farming.

The restrictions imposed on Spencer were in this case imposed under State legislation, meaning that there is no direct requirement for just terms compensation to be made available. However, Spencer argued that the acquisition was effected and authorized by Commonwealth legislation – specifically the [Natural Resources Management \(Financial Assistance\) Act 1992](#) (Cth) and the [Natural Heritage Trust of Australia Act 1997](#) (Cth) – and that the legislative framework in NSW was linked to a number of Inter-Governmental Agreements signed between that State and the Commonwealth. Spencer claimed that the land clearing restrictions in NSW that were preventing him from farming his land had been imposed at the Commonwealth’s request as greenhouse gas abatement measures to allow Australia to meet its international targets under the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*. As a result, he argued that the

guarantee of just terms compensation under [s. 51\(xxxi\)](#) of the [Constitution](#) was enlivened. As the Commonwealth had made no offer of compensation to Spencer the acquisition of his property was therefore unconstitutional.

Spencer commenced legal action in relation to this issue with the filing of an original Notice of Motion in the Federal Court of Australia on 12 March 2007. Since then, he has appeared in court more than 200 times in relation to this matter.<sup>58</sup> The central questions being raised before the courts are whether the [Natural Resources Management \(Financial Assistance\) Act 1992](#) (Cth) and the [Natural Heritage Trust of Australia Act 1997](#) (Cth) can be characterized as laws with respect to the acquisition of property within the meaning of [s. 51\(xxxi\)](#) of the [Constitution](#), and whether the Commonwealth can authorize an agreement that would require a State to use its power to acquire property on unjust terms. This argument has been rejected by Justice Emmett and, on appeal, by the Full Federal Court. A Notice of Constitutional Matter has been filed with the High Court of Australia, with *Spencer v Commonwealth of Australia* being heard on 16 June 2010 and a decision on the application for special leave being reserved.

Although Spencer has not been successful in his legal arguments to date, the courts have been well aware of the broader context in which this legal action has been brought and the serious injustice that underpins it. For example, on 26 August 2008 Emmett J dismissed Spencer's application for interlocutory relief in the Federal Court but, in doing so, observed:

One cannot but feel the utmost sympathy for Mr Spencer if it be the case that Saarahnee has been effectively sterilized by the State Statutes, with the effect that he can no longer carry on at Saarahnee the activities which he was able to carry on prior to the enactment of the State Statutes.

Similarly, in the NSW Supreme Court, Rothman J commented that although the requested remedies for judicial review, misleading and deceptive conduct, or unconscionable conduct, had not been made out:

. . . it is an extremely disheartening and sad occasion that a person, whose life and resources have been placed into a rural property for the purposes of conducting a grazing and farming business, has been required to resort to this action.

Governments, not courts, make judgments about political policy relating to what, within reason, is for the benefit of the community. Mr Spencer does not dispute that the objects of the conservation policies adopted in the agreement between the Commonwealth and New South Wales are, at one level, for the benefit of the community.

The Federal and State Governments have entered into a scheme to improve the environment and, in so doing, improve the lot of other rural and other proprietors. Nevertheless, they have done so at the expense of Mr Spencer.

While all members of society must accept that there will be restrictions on their activities "for the greater good of society," when those restrictions prevent or prohibit a business activity that was hitherto legitimate, because of the area in which it is operating, and assistance is offered which does not fully compensate for the restrictions imposed, society is asking Mr Spencer, and people in his position, to pay for its benefit.

During this time Peter Spencer also engaged in a 52-day hunger strike from the top of a wind mast platform on his property to correspond with the United Nations Framework Convention on Climate Change in Copenhagen. The hunger strike was intended to call attention to his demand that the Commonwealth Government should pay fair compensation to him, and other affected property owners whose land rights had been diminished by land clearing restrictions. After ending

his hunger strike (following medical advice), Spencer maintained that he would continue his fight "on the ground".<sup>59</sup>

Ultimately, the root of the problem in the case of Peter Spencer "lies in the native vegetation laws that have prevented him from clearing – and farming – much of his land".<sup>60</sup>

In the 2004 *Inquiry Report into the Impacts of Native Vegetation and Biodiversity Regulations* the Productivity Commission concluded that, while the retention, management and rehabilitation of native vegetation and biodiversity were important objectives, "existing regulatory approaches are not as effective as they could be in promoting these objectives and impose significant costs".<sup>61</sup> In particular, it was concluded that the effectiveness of the clearing restrictions had been compromised, that "perverse environmental outcomes" often resulted and that landholders "... are being prevented from developing their properties, switching to more profitable land use, and from introducing cost-saving innovations. Arbitrary reclassification of regrowth vegetation as remnant and restrictions on clearing woodland thickening in some jurisdictions are reducing yields and areas that can be used for agricultural production".<sup>62</sup>

Again, the case of Peter Spencer is not an isolated incident. This is a problem that is all too common in rural areas and that urgently needs to be addressed. While it is certainly necessary and desirable to ensure that the environment is protected, and there is clearly a public benefit to be gained from effective environmental legislation, the existing regulatory framework is becoming overly complicated and restrictive and the compliance costs fall almost exclusively on one small section of our community. The case of Peter Spencer highlights the need to ensure that property owners whose rights are necessarily restricted in the pursuit of a broader public interest are automatically given fair compensation. It also highlights the inadequacy of the existing mechanisms for the protection of property rights in Australia.

### ***Allocation of Water Entitlements***

The management of scarce water resources is a critical issue in Australia, particularly in rural and regional areas. As a result, the Working Party on the Erosion of Property Rights has argued that:

The existence of fresh water in rural areas is one of the largest determinants of value for land that there is, so to remove the water right is tantamount to a partial and significant resumption of rights that attach to the land, if not the land itself. If the State sees fit to resume the water from a property, then it follows that fair compensation should be paid.<sup>63</sup>

Similarly, Louise Staley has observed that:

When determining water policy within a property rights framework, the key principle must be the protection of existing rights to water. It is unacceptable for current users of water to have the rules changed and massive additional charges imposed or complete withdrawal of water when they have made investment decisions based on current rights.<sup>64</sup>

Recent cases concerning the allocation of water entitlements have highlighted the inadequacy of the protection offered by the constitutional "just terms" guarantee under s. 51(xxxi). The first of these is *ICM Agriculture Pty Ltd v The Commonwealth*<sup>65</sup>. In this case the High Court of Australia (by a 6:1 majority) held that the reduction of a licensee's groundwater entitlement by the replacement of groundwater bore licenses<sup>66</sup> with aquifer access licenses<sup>67</sup> did not constitute an acquisition of property. Under the new aquifer access licenses the first and second plaintiffs found that their water entitlements were decreased by approximately 70 per cent, while the third plaintiff suffered a decrease of approximately 66 per cent. The effect of this was "potentially

calamitous".<sup>68</sup> For example:

. . . while the first two plaintiffs in the year 1 July 2006 to 30 June 2007 had entitlements to take 18,6398 megalitres, and their permitted allocation was 10,351 megalitres, under the aquifer access licences they were only entitled to 5,198 megalitres.<sup>69</sup>

The majority held, however, that as water was a natural resource and the State had always had the power to limit the volume of water taken, its capacity to control the water resource was not enlarged by the reduction in the plaintiffs' water entitlements. A narrow and technical definition of acquisition was applied by the majority, endorsing the approach previously adopted by Deane and Gaudron JJ in *Mutual Pools & Staff Pty Ltd v The Commonwealth*:

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. 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.<sup>70</sup>

As the replacement of the licenses was not held by the majority to constitute an acquisition of property, the requirement for just terms compensation under s. 51(xxxi) was not enlivened in this case.

In his dissenting judgment, Justice Heydon took a broader approach to this question, holding that each of the integers of s. 51(xxxi) should be liberally construed, and citing with approval the conclusion by Dixon J that the constitutional guarantee under s. 51(xxxi) "should be given as full and flexible an operation as will cover the objects it was designed to effect".<sup>71</sup> In determining the meaning of property, for example, Justice Heydon cited with approval the statement by Gummow J in *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* that "one should lean towards a wider rather than narrower concept of property, and look beyond legal forms to the substance of the matter".<sup>72</sup> Justice Heydon concluded that:

The idea that persons possessing entitlements to take water pursuant to licenses granted under statutory power should not lose those entitlements by governmental compulsion unless they are given just terms is not an inconsistent or incongruous notion.<sup>73</sup>

*ICM Agriculture Pty Ltd v The Commonwealth* was followed almost immediately by the case of *Arnold v Minister Administering the [Water Management Act 2000](#)*<sup>74</sup>, which was an appeal brought in essentially the same factual circumstances. The legal question before the High Court in *Arnold* was whether the [National Water Commission Act 2004](#) (Cth) and the related Funding Agreement entered into between NSW and the Commonwealth violated [s. 100](#) of the [Constitution](#), which provides that:

The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

By a 6:1 majority the Court dismissed the appeal, holding that no contravention of [s. 100](#) had occurred. Justice Heydon, in dissent, referred to his reasons in *ICM Agriculture Pty Ltd v The Commonwealth* and reaffirmed his reasoning in that case that the substitution of bore licenses for aquifer access licenses was invalid.<sup>75</sup> He then held that there was no need to consider the merits of the appellant's arguments in *Arnold* in relation to [s. 100](#) as doing so would "not result in substantive orders more favourable than [restoring the original bore licences]".<sup>76</sup>

According to Professor George Williams, the decision in *Arnold* "reveals major problems with Australia's structure of government when it comes to the Murray-Darling Basin". Both *Arnold* and *ICM Agriculture Pty Ltd* highlight the constitutional anomaly that sees the [Constitution](#) guarantee "just terms" in relation to any property acquired by the Commonwealth, while the same guarantee is not extended to property acquired by the States. As Professor Williams observed:

It may be constitutionally valid law for New South Wales to acquire property without compensation, but it should not be. It is offensive in a modern democracy like Australia that the States can acquire property without redress. This should be fixed.<sup>77</sup>

### ***Compulsory Acquisition for Urban Redevelopment***

The government's power of eminent domain has always been controversial, particularly in the modern context of urban redevelopment plans where it has been used to transfer land from a private owner to a private developer for the purposes of economic development. While it may be accepted that there might be times when it is appropriate for the State to exercise the power of eminent domain, it is also important to recognize that:

The power to compulsorily acquire privately owned land is one of the most significant powers that the modern Western State possesses, and as such must be carefully exercised.<sup>78</sup>

The US case of *Kelo v City of New London*<sup>79</sup> provides an early example of the use of the power of eminent domain to further urban redevelopment plans, and offers an interesting contrast to analogous cases in Australia. In *Kelo*, the City of New London compulsorily acquired the property owned by Susette Kelo, but then proceeded to sell it to a private developer as part of a revitalization plan for the city. The question for the US Supreme Court "was over whether compulsory acquisition for private purposes that would result in higher economic activity and taxes paid was legitimate".<sup>80</sup> By a margin of 5:4 the Supreme Court upheld the acquisition of the property, with Ms Kelo being forced to move from her cottage. The controversial nature of the decision, and the public outcry that resulted, directly led to the introduction of reforms in more than 40 States designed to prevent governments from exercising their power of eminent domain in pursuit of this type of public purpose.

When this very same question arose recently in Australia the roles played by the courts and the Parliament were entirely reversed, with the High Court of Australia cast in the role as the defender of property rights and the NSW Parliament subsequently acting to defeat these interests. The case in question was *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council*.<sup>81</sup> The controversy arose over a decision by the Parramatta City Council to enter into a Public Private Partnership with private developers (specifically, two companies in the Grocon Group) for the redevelopment of the Parramatta City Centre. As part of the \$1.6 billion Civic Place development the Council sent Proposed Acquisition Notices to the owners of the land within the redevelopment block. Under the Development Agreement between the Council and the private developers, parts of the acquired land would then be transferred to the developers in return for money and other benefits. Two of the owners – Ray Fazzolari and Michael Winston-Smith – challenged the proposed acquisition of their property.

Under the [Local Government Act 1993](#) (NSW) and the [Land Acquisition \(Just Terms Compensation\) Act 1991](#) (NSW) local councils in NSW have broad powers of compulsory acquisition. A local council is given the power under [s. 186\(1\)](#) of the [Local Government Act](#) to acquire land "for the purpose of exercising any of its functions" although, critically in this case, an important limitation is introduced by [s. 188](#). It states that land may not be compulsorily acquired without the owner's approval "if it is being acquired for the purpose of re-sale". The central question in this case, therefore, was whether the land that was being acquired was, in fact, being

acquired for the purpose of re-sale. The case ended up before the High Court of Australia, where the five member Court unanimously upheld the rights of the property owners and held that the compulsory acquisition of the land was unlawful. The High Court interpreted the compulsory acquisition powers narrowly<sup>82</sup> and found that the purpose for which the Parramatta City Council was attempting to acquire the land was to re-sell it to Grocon, which, under the legislation, they could not do without the approval of the owner. In holding the acquisition to be unlawful the High Court restored the injunctive relief that had originally been granted in the Land and Environment Court. If that had been the end of the matter it would have been seen as an unequivocal reinforcement and protection of private property rights by the courts.

Unfortunately, that was not the end of the matter. The [Land Acquisition \(Just Terms Compensation\) Amendment Bill 2009](#) (NSW) was subsequently introduced into the NSW Parliament. It was passed on 17 June 2009. Without discussing the specific details of the legislation, it is sufficient for our purposes to note that when the bill was introduced into Parliament it was expressly acknowledged by the Government that "the focus of the bill is to overcome an aspect of the High Court's decision that the Government considers may produce anomalous and unintended consequences for landowners, native titleholders and public authorities alike".<sup>83</sup> The legislation effectively allows the Parramatta City Council – and any other local council in the future – to invoke a legal fiction to avoid the limitation on the Council's power of re-sale that was reinforced by the High Court in *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council*.

This is a fundamental change in the law and broadens the power of eminent domain, effectively allowing local councils to acquire property compulsorily for the purpose of then transferring it to a private developer. The fact that the NSW Parliament so readily approved such a significant qualification to individual property rights – and that this was passed with bi-partisan support – should be enormously concerning to all property owners in this country.

### ***Heritage Listings***

The increasing use of heritage listing regulations in Australia provides a more gradual example of the long-term erosion of private property rights. Heritage registers are extensively used throughout Australia, with different registers operating at different levels of government. For example, on 23 June 2010 the Heritage Council of Western Australia celebrated the 1,300<sup>th</sup> listing on the State Register of Heritage Places with the listing of the Aquinas College Administration Building and Chapel.<sup>84</sup> In Western Australia there are currently 36 historic precincts listed in the State Register<sup>85</sup> and 74 Heritage Agreements in place<sup>86</sup>.

There is no doubt that heritage preservation provides a public benefit to the entire community. However, at the same time, it is necessary to recognize that:

. . . the legal and economic costs of heritage preservation are disproportionately borne by private property owners to the extent that their property rights are eroded. This cost burden on private owners is economically unreasonable and a rebalancing of the costs of heritage conservation is desirable. Specifically, the community's contribution ought to be greater because of the benefits it gains from heritage preservation.<sup>87</sup>

Similarly, the Productivity Commission has also concluded that, for privately-owned places, "the existing arrangements are often ineffective, inefficient and unfair".<sup>88</sup> In relation to privately owned property the Productivity Commission observed that:

Statutory listing involves applying added regulatory controls over private owners' use and enjoyment of their property. While there is scope in the legislation for governments to consider the

cost consequences of this at the time of the listing (and a few do), owners have no right to insist that this is done. Appeals are limited to issues of heritage significance and due process – namely that specified procedures for notification and gazettal have been followed. As a result, many of the appeals on these grounds are a proxy for owner concerns with the cost consequences of statutory listing.<sup>89</sup>

Once a property is placed on the heritage register the owner is restricted in the use that he is able to make of his own property. He is not able to demolish or renovate the heritage listed building as he may wish (unless he is able to perform renovations in compliance with strict heritage regulations), is not able to develop the property on which the building is situated, and is liable to pay for heritage maintenance. An owner can find his property listed even if he does not support its listing;<sup>90</sup> there is no avenue of appeal, and there is no compensation for any reduction in the property's value.

Further, Louise Staley has noted that heritage legislation actually operates as a strong disincentive to property owners maintaining their property, and may well have unintended effects:

Some property owners particularly those with buildings of marginal heritage value allow them to deteriorate to the point where all heritage value is lost and the buildings are condemned. Others risk fines and conviction to bring the bulldozers in at midnight, making a calculation that the risks are outweighed by the potential for making a reasonable return from redevelopment.<sup>91</sup>

There is a recognized "disconnect" which arises from the fact that there is no cost associated with heritage listing a property for the bureaucrats who make that decision, but it is a decision with enormous financial consequences for the person whose property is listed. This was acknowledged as a problem by the Productivity Commission, which noted that it "leads to a strong incentive to 'overlist' properties, as there is no penalty to the government for doing so".<sup>92</sup> The Productivity Commission has suggested that heritage listing should only be possible where both the owner and listing authority agree to the property being listed, and that the listing should only stay in effect as long as there is continued consent by the property owner.<sup>93</sup> It was noted that negotiated agreements for heritage listing are already used successfully in a number of overseas jurisdictions.<sup>94</sup> Other suggestions by the Productivity Commission included the introduction of "unreasonable costs" as a basis for appeals by private owners against new listings and requiring governments to pay compensation to individuals whose properties are heritage listed.<sup>95</sup>

### **Part III: Strengthening and Protecting Property Rights**

The above examples provide some insight into the extent of the challenge that we are currently facing. Throughout Australia governments at the local, State and Commonwealth levels are increasingly restricting and undermining property rights in a wide range of areas. Our ultimate aims should be threefold: firstly, to ensure that any necessary acquisitions are carried out in as fair a manner as possible; secondly, to reverse the current trend whereby property rights are regularly and easily attacked and undermined; and, finally, to work towards establishing a renewed respect for the importance of private property rights.

It is an unfortunate reality that private property rights are frequently undermined by the actions of governments at all levels in Australia today. At a minimum, therefore, we need to ensure that the worst aspects of current practices are addressed and that private property owners are dealt with as fairly as possible when their property is acquired. This includes ensuring that property owners are consulted about government decisions or actions that will affect their property rights, and providing avenues of appeal so that unfair restrictions can be challenged.

Most importantly, it requires ensuring that fair compensation is paid as a matter of course. There

are two aspects to this. Firstly, it is necessary to extend existing compensation guarantees so that *all* levels of government are required to pay compensation when private property is acquired. Secondly, compensation should be mandatory not only when property is directly acquired by government but also when restrictions are introduced which directly or indirectly reduce the value of the property.

The failure to pay compensation for the removal or reduction of private property rights is not only unfair to the person whose rights have been affected, but is also damaging to good governance. This point was made by Professor Suri Ratnapala in a paper presented earlier to the Samuel Griffith Society:

Apart from constitutional principle and the demands of justice, the denial of compensation is damaging to good governance. The denial of compensation eliminates the discipline that the price mechanism brings to decision making. A government that need not compensate owners has less reason to "get it right" than a government that must. The uncoupling of power and financial responsibility allows governments to seek short term political dividends. It promotes politics and ideology over facts and science.<sup>96</sup>

There are numerous groups and individuals who have recognized the need to strengthen the existing compensation requirements. For example, the NSW Farmers Association has called for "amendments to the [Constitution](#) by referendum that enshrine the property rights of all people by requiring State Governments to pay compensation on just terms upon the acquisition of property".<sup>97</sup> The Institute of Public Affairs has similarly argued that State constitutions should be amended to guarantee a right to compensation whenever property rights are appropriated.<sup>98</sup> Going one step further, the Liberal National Party in Queensland has committed to the introduction of a Charter of Property Rights to "legally guarantee the rights of private property owners" and "legally enshrine compensation for landholders whose pre-existing rights are diminished as a result of government policy".<sup>99</sup> Indeed, one of the recommendations made by the National Human Rights Consultation Committee was that an Australian *Human Rights Act* should include a provision protecting property rights and that "the provision should provide for just compensation and due process for the compulsory acquisition by the Commonwealth of property required for public purposes".<sup>100</sup>

This final suggestion does raise an important note of caution. It is important that in trying to correct one problem we do not risk inadvertently creating another. For the same reason that a Charter of Rights should be resisted and is unlikely actually to be effective in protecting rights, a Charter of Property Rights should be resisted and is unlikely actually to be effective in protecting property rights. A Charter of Property Rights raises all of the same concerns and potential difficulties as a broader Charter of Rights. Legislating to provide for an automatic compensation mechanism that is activated when property rights are restricted would be a positive step. This is, however, to be distinguished from legislating to protect the rights themselves, which risks opening the door to all of the disadvantages associated with using a Charter of Rights.

Further, the limitations that are apparent in relation to the existing constitutional guarantee under s. 51(xxxi) provides an important reminder that a constitutional guarantee is not sufficient in itself to ensure that the relevant rights are protected on the ground. The current problem is as much a political problem as it is a legal one. If we are not able to build an environment in which the general public, politicians and government bureaucrats are all encouraged to respect and value private property rights, then we will continue to see the gradual erosion of property rights regardless of any changes that may be made to the surrounding legal framework.

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