Major Infrastructure Projects:
Commonwealth Powers & Private Land Rights in the States

- A Pamphlet -

How & Why The Commonwealth Should Prevent Zoning Injustices

Why *The Tax That Dares Not Say Its Name* Is Bad Policy

Betterment Tax
Value Capture
Land Value Contribution
Windfall Gain Tax
Vendor Tax
Zoning Tax
Home Zone Tax

For the Attention of :
the House of Representatives Standing Committee on Infrastructure, Transport and Cities, and Others

October 2021

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[1.0] Introduction

This pamphlet is addressed to the Commonwealth Standing Committee on Infrastructure, Transport and Cities, but is also relevant to landowners, and to any State Government, particularly with respect to the tax which a dares not say its name: betterment tax.

Not imagined by the founding fathers of the Australian Constitution, the persistent vertical fiscal imbalance between the Commonwealth and States (which has existed since the irreversible referral of income tax powers by the States to the Commonwealth during World War II, fifty years after the constitutional conferences) has led to the phenomenon of substantially Commonwealth-funded major infrastructure projects being carried out on land other than Crown land, in the States.

Many current and future Commonwealth-funded infrastructure projects are substantially planned to happen on land within one or more States which at the project outset is privately owned.

In such circumstances, the interaction of Commonwealth powers and State real property laws on a substantial scale has the potential to cause some unexpected and undesirable outcomes. These include for example, as shall be explained:

- gross injustices being inflicted on landowners; and,
- more generally, the adoption of counterproductive *ad hoc* "major project" tax policy which fails to properly meld with the wider established policies in relation to tax, economic development, social justice and even major political party philosophies.

If not addressed, it is likely that such undesirable outcomes might be experienced in the course of one major project after another. Accordingly, it would seem prudent to learn from experience and develop Commonwealth major infrastructure project policies designed to avoid, or at least minimize, such undesirable outcomes. The identification and development of such policies for now and the future would seem to be perfectly within the ambit of the Standing Committee on Infrastructure, Transport and Cities ("SCITC").

The purpose of this pamphlet is to draw the SCITC's attention to these issues, for the benefit of the people of Australia, and in particular for their "social and economic prosperity" which such projects are intended to generate.

Particular aspects dealt with in this pamphlet include:

A. The relatively weak bargaining position of the Commonwealth in relation to privately owned land in the States, as compared to State powers of resumption;

B. The phenomenon of private landowners in the States being arbitrarily deprived of their property rights, that being a breach of human rights, as an unanticipated consequence of the Commonwealth's major infrastructure projects;

C. How the Commonwealth might improve its position, within the Constitution, so as to avoid unnecessary cost and risk in dealing with private landowners and the States, while simultaneously ensuring that the human rights of all landowners affected by a project are preserved; and

D. Demonstrating that the proposed betterment tax (i.e. "value capture") is bad policy, utterly failing the basic policy realities that any proposed Commonwealth or State revenue raising initiative must consider, including that it be consistent with, for example:

- Wider tax policy, including those of Hawke/Keating & Howard/Costello;
- Coalition and Labor party philosophies (!); and
- Informed Treasury analysis.

[2.0] Commonwealth Powers of Land Acquisition in the States

As is well known, the Commonwealth is required by s. 51(xxxi) of the Australian Constitution to acquire property only on "just terms".

At the same time, the Crown in right of the Commonwealth has never had the constitutional power to issue Crown grants in any State, and so has no right or power of resumption in any State. *The Land Acquisition Act* 1989 (Com.) enables the Commonwealth to compulsorily acquire land, but only within the Commonwealth's constitutional capacity. These limits were exemplified by a Federal Court quashing of a "Pre-Acquisition Declaration" purporting to compulsorily acquire a Crown pastoral lease (occupying 576 square kilometres) in South Australia for the purpose of "the conferral of interests in land on Aboriginal people (being people of a particular race)", this purpose being beyond the Commonwealth's power (*French v Gray, Special Minister of State* [2013] FCA 263.)

In contrast, South Australia could have resumed said Crown grant of pastoral lease at any time, without having to find any particular head of power to do so, for whatever reason it wished, provided only that a valid resumption must avoid derogation from the Crown grant.

As in South Australia, Crown grants in NSW (for example) have all been made by the Crown in right of the State (formerly Colony), so the right of resumption of granted title rests exclusively with the State.

This throws up a potential difficulty for the Commonwealth when acquiring private land for a public purpose such as a major infrastructure project: namely, that its compulsory acquisition powers are relatively narrow compared to those of the State. S. 6 of the *Lands Acquisition Act* describes the principle correctly, if briefly:

> "'Public purpose'… means a purpose in respect of which the [Commonwealth] Parliament has power to make laws".

As members of the SCITC might be aware, the Senate Finance and Public Administration References Committee is conducting an *Inquiry into the planning, construction and management of the Western Sydney Airport project* (the "Senate Inquiry"). It appears that a key impetus for the Inquiry was media and other reports with respect to payments being made by the Commonwealth to acquire land well above "market value".

Whatever the particular facts investigated by the Senate Inquiry might turn out to be, it is clear that in acquiring land necessary for the conduct of the project, the Commonwealth's compulsory acquisition powers are limited compared to the plenary powers of NSW.

Paradoxically, the Commonwealth's powers with respect to the relationship between State Governments and private landowners are potentially quite dominant, as shall be explained.

[3.0] State Landowner Injustices & Commonwealth Infrastructure Projects

The Western Sydney Airport Corporate Plan 2019-2020 was headlined:

> "**Purpose Statement**: To generate social and economic prosperity by working together to safely deliver a thriving airport precinct in Western Sydney".

This is a laudable purpose, consistent with Commonwealth policy, and the generation of social and economic prosperity might be considered a goal typical of other major infrastructure projects undertaken by the Commonwealth, such as the inland rail project.

Yet if reference is made to the Western Sydney Airport project, it is easy to find many affected landowners who have been, and are being, treated very unjustly. The injustices take two main forms:

1. Inadequate compensation for resumption of properties; and

2. Refusal to either resume, or provide compensation for, injuriously affected properties.

[3.1] Inadequate compensation for resumption of properties

With regard to the first category, the nature and scope of the inadequate compensation is explained by Mr McKinnon, a local Penrith solicitor (McKinnon, Daniel, "Special Report: It's not just a house, it's a home – or is it?", *The Western Weekender*, 3 Aug. 2021):

> "AUSSIES EXPECT THAT LEGISLATION IN THIS COUNTRY IS UNDERPINNED BY A FAIR GO. THE HEARTBREAK OF AFFECTED LANDOWNERS IN ORCHARD HILLS IS PALPABLE.
>
> They are being forced from their homes for the sake of necessary progress – but at enormous personal and financial cost.

> If you wandered into the local pub and asked the average Aussie what they'd say about legislation that could force them off their land with no regard to ensuring they could set up somewhere close by in the neighbourhood they love you'd get one answer.
>
> Tell em' they're dreamin'." (Emphasis in original.)

McKinnon explains the legal position in some detail, and concludes:

> "The Commonwealth version of the [NSW] Act, the Land Acquisition Act, provides an apt summary of how reinstatement compensation should work as "the amount necessary to reimburse the person for the costs of acquiring a reasonably equivalent interest in land that entitles the person to occupation of a reasonably equivalent dwelling". This appears to be a far more palatable position than the current rigid operation of Section 56 (3) [of the *Land Acquisition (Just Terms Compensation) Act* (NSW) 1991]."

The reader will note that the unjust conduct is being carried out according to NSW law, yet the necessity for these people having to lose their properties with inadequate compensation for fair reinstatement arises from the Commonwealth project, which is supposed to be delivering "social and economic prosperity", rather than social and economic misery.

In such circumstances, the Commonwealth has a responsibility to remedy, and indeed prevent, such injustices from occurring in a State. As we shall see, it possesses the power to do so, on the recommendation of the SCITC.

[3.2] Refusal to Resume, or Compensate for, Injurious Affection

Please note these observations…..

> **Ms STANLEY** (Werriwa—Opposition Whip): "…small landowners in the Aerotropolis are left in limbo. This is causing unnecessary stress, anguish and mental illness. Landowners' demands are not unreasonable. They want certainty, transparency and confidence in the process and for their future". (*Hansard* House of Representatives, 20 October 2020 at 7531.)

A more detailed question on the subject was posed in the NSW Legislative Council in November 2020:

> **"COMPULSORY LAND ACQUISITIONS**
> **The Hon. MARK BANASIAK (12:37**:36**):** My question without notice is directed to the Minister for Mental Health, Regional Youth and Women, representing the Minister for Planning and Public Spaces. Is the Minister aware that under proposed precinct plans for the aerotropolis, residents who live along Thompsons Creek have been given certainty that their land will be acquired, but residents who live along Wianamatta-South Creek on the same street have been given no such certainty despite the land already zoned RE1 Public Recreation and rendered unusable and unsaleable? Is the Minister also aware that that contradicts both a promise made by former planning

> Minister Anthony Roberts and Transport for NSW policies for handling compulsory acquisitions? Why is the Minister's department not treating all members of the area with fairness and respect, and why is her department acting in a contradictory matter?
>
> **"The Hon. BRONNIE TAYLOR (Minister for Mental Health, Regional Youth and Women) (12:38**:30**):** I thank the honourable member for his question, which is directed to the Hon. Rob Stokes, Minister for Planning and Public Spaces. As the question contained a large amount of detail I will take it on notice and provide an answer to him as soon as possible." (*Hansard* New South Wales Legislative Council, 24 November 2020.)

Reportedly, in extra-Parliamentary commentary, Mr Mark Latham MLC and Ms Jodi McKay MLA have each separately referred to the situation as "legalised theft", as has Mr Greg Warren MLA in Parliament, as well as others. As of the time of writing this letter, the question raised to the relevant State minister by Mr Banasiak has not been addressed.

So what's going on?

As the comments suggest, these controversies relate to land affected by the Commonwealth-led major infrastructure project of Western Sydney Airport.

Just in the Wiannamatta-South Creek area of the Western Sydney Aerotropolis and the Western Parkland City, approximately 100 landowners (almost all with 5 acre lots) have had some or all of their land rezoned by the New South Wales Government ("NSW") from "RU4 Rural Small Holdings", intended for land which is to be used for small scale rural and primary industry production, to a newly invented "Environment and Recreation" zone. The prior value of a typical 5 acre block approximated $5m, but since rezoning, no "sterilised" land has been sold because no buyer wants the uncertainty associated with the newly imposed restricted use. All land is held by freehold title, which is a form of common law title. The zoning and governing legislation does not purport to be a defeasement within the terms of any existing reservation to the title as granted by the Crown (i.e., by NSW).

There is no time limit to the rezonings, which could in principle last for a lifetime, at the exclusive discretion of NSW. The NSW Minister has advised landowners that there is "no budget" for compensation or resumption.

NSW cannot be unaware of their objections. Landowners have made very large numbers of submissions (600 in one round alone) strongly objecting to the NSW Government actions, and have achieved significant news media interest, but to date, not one scintilla of action has been taken to actually remedy their very substantial concerns.

Here are some stories….

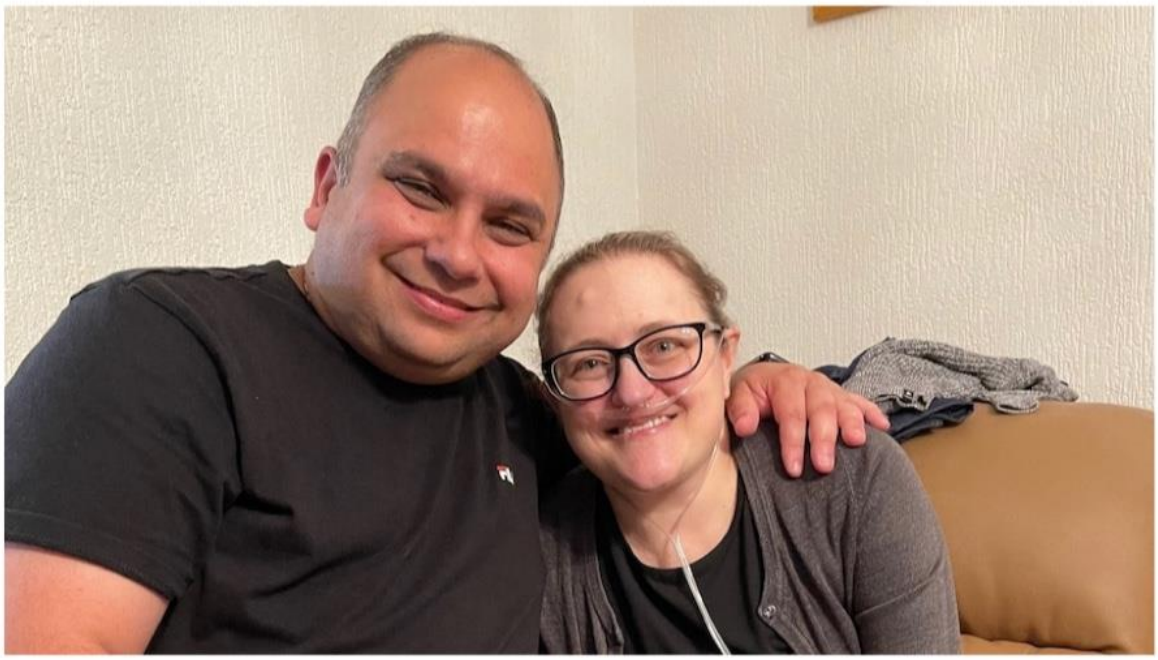
As put by one landowner:

> "…people and their families [are being treated] with contempt. It has caused unnecessary shock, anxiety, stress, worry, financial disadvantage, lack of sleep, physical exhaustion and generalised damage to health. This is an intolerable and unacceptable toll on people's mental health and quality of life.

Australia is a democracy. We are egalitarian. What we are currently experiencing feels like the exact opposite. It appears some are more equal than others."

ABC Western Sydney / By data journalist Catherine Hanrahan

Posted Sat 3 Apr 2021 at 6:10am



Angela Spagnol fought against the rezoning of her family home at Bringelly until the day she died. *(ABC News: Supplied)*

An extract from the story: ""My heart is so weak I can't get on the phone and make a call to media outlets and councils. I've been told to reserve my oxygen and not speak. Please fight harder friends, and fight for me too." Please read the full story on the ABC website.

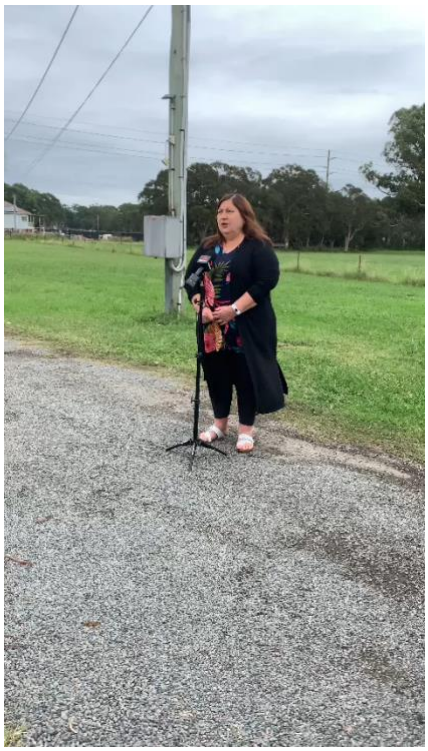
See also this video story:

Nat Wallace reporting,
"Properties 'virtually worthless' after government rezones them",
A Current Affair - Channel 9 Sydney,
27 April 2021
https://www.youtube.com/watch?v=ddHUDcY2QEU

The above quoted **"Purpose Statement**: To generate social and economic prosperity by working together to safely deliver a thriving airport precinct in Western Sydney" - is providing no comfort for these landowners. These injustices are being imposed by the NSW Government, not the Commonwealth, but they are occurring directly as a result of the Commonwealth's major project initiative, situated on what has been private property.

Given the undeniable fact that these landowners' difficulties have been caused by decisions relating to this huge Commonwealth-led project, the Commonwealth should take steps to remedy these injustices. Further, and this is a key point of this pamphlet, the Commonwealth can and should take steps to prevent such dysfunctional Commonwealth/State outcomes from occurring with respect to other major infrastructure projects in the future. As shall be explained, achieving this need not cost the Commonwealth any money.

The affected landowners are not asking for a favourable rezoning – like many others in the vicinity have been granted – but simply compensation for what has been taken from them. The speech of landowner Maria Zucco, reproduced below, is very pertinent.



Landowner Maria Zucco Speech - March 2021 YouTube link 5:57

The landowners' property has been, to use the legal term, "injuriously affected" by the adverse rezoning, and uncompensated.

"Injurious affection" is an expression which is associated with the law of resumption: it is primarily concerned with depreciation to the value of retained land. It can be caused by a public authority in a variety of situations, one of which is, as in the subject instance, by the exercise of a law, rule or regulation, e.g. rezoning. Thus, a landowner's property can be said to be injuriously affected. Injurious affection is a form of deprivation of property, and a government may make provision for compensation for same.

The Commonwealth says that it is contributing $5.3b to the construction of the airport and, *inter alia*, $60m for the "Western Sydney Parkland City Liveability Program" and $15m for "Western Sydney Parkland City Housing". The landowners' treatment by NSW has been in direct and blatant contradiction to such substantial Commonwealth contributions.

The treatment of the landowners by the NSW Government is unjust, and in fact a breach of their human rights, by arbitrarily depriving them of our property rights: Art. 17(2) *Universal Declaration of Human Rights* ("UDHR").

These UDHR rights have had the bipartisan support of external affairs ministers from "Doc" Evatt in 1948 to today, and have been extended by Commonwealth law to native title holders in Australia.

Yet it seems that common law title holders in the Australian States aren't good enough to deserve the same benefit of Australian policy as everyone else in the world.

That these newly imposed substantial restrictions of real property use are deprivations of property rights is not a novel view. Take for instance this observation from the High Court:

> "A necessary first step …..is for Australian courts firmly to grasp the principle that the various separate rights of user of property are in themselves property …What needs to be recognized is that property is a bundle of rights, and each right in that bundle is itself property….." per Callinan J., *Chang v Laidley Shire Council* [2007] HCA 3.

Of course, NSW is a member of the Australian federation and accordingly, the Commonwealth possesses certain powers which NSW cannot deny.

[3.3] State Responses to "Property Theft": A Case Study

No doubt in response to the significant and embarrassing media interest in the land woes of the Aerotropolis landowners, and having to face embarrassing and unanswerable questions in Parliament (those of Mr Banasiak MLC and Ms Stanley MP cited above being prime examples), the Minister appointed in 2021 a Western Sydney Aerotropolis Independent Community Commissioner ("WSAICC") to investigate the circumstances and propose solutions.

The WSAICC Report was published quite promptly in August 2021and contained numerous recommendations, 40 in total. Many recommendations were with respect to achieving improved communications between State authorities and landowners, and improved co-ordination between authorities. That's well and good, but the key issue requiring resolution is the making of proper compensation for impairment (injurious affection) of proprietary land rights, or adequate compensation on resumption of title, or indeed the abandonment of zoned impairments. In this regard, the most relevant recommendations and initial Government responses are as follows. (For full details, visit: https://www.planning.nsw.gov.au/Independent-Community-Commissioner?fbclid=IwAR0wum3OdnK-hxeY-ocuby1JF93LtC2IOBcd_6Y-LCuR5oyT6MLL1UEsk5c)

> "*Recommendation 7: Establish funding for support and advisory for landowners including personal, financial, planning and property advisory*
>
> There is a significant level of distress among the most impacted landowners.

Funding support for individual impacted small landowners is to be made available immediately so they can engage their own advisers.

Advice would include land use planning, land valuations, financial advice and personal counselling.

Recommendation 15: Include additional land uses to the allowable existing uses in the zonings to enable landowners to continue residential and other low impacts uses for land (for examples an additional dwelling storey, a shed etc.) even if these uses may be prohibited under the new zonings. These transitional uses must consider and not impact future airport operations.

Landowners can continue their residential uses and other business or existing uses where those uses have been lawfully established as per their previous zoning. An owner does not need approval to continue doing what they were doing before the rezoning.

When seeking to change, extend or increase the intensity of those uses under their new zonings, they should be permitted to do this under *additional land uses*, even if they are uses which are not permitted under the new zoning. This will allow people to continue as they would have intended to use their land prior to the rezoning and to undertake development into the future…..

Recommendation 17: Clearly set out the acquisition process including likely timing depending on the acquisition requirements

Uncertainty for many landowners is focused on a lack of information about the intentions and process of acquisition. It is imperative that this is addressed as a priority including through the following elements:

> ….. For land that is required for infrastructure, provide a timeline of when the land will likely be needed.
>
> When needed by a landowner, expedite the acquisition of land including those lots that are required or responding to the compassionate circumstances of landowners (see recommendation 18 below)…..
>
> Clearly set out the principle that the price paid for the land will be its market value as if the public affectation (*sic*) introduced by the precinct planning process did not apply to the land…

Recommendation 18: Once the Precinct Plans are finalised, enable acquisition on a voluntary basis due to compassionate grounds for landowners on a case-by-case basis

Prima facie triggers for a compassionate acquisition claim are be established. One or more the of the following triggers are to be included:

> Consent to reasonable (re)use has been refused…..
>
> Land cannot be sold in the current market for a reasonable price

Permanent amenity impacts on households are significant because of the land use changes that are occurring around them due to the changed zoning (i.e., access, noise, dust, privacy, safety, etc.)

Pressing personal, social or domestic circumstances (case-by-case).

In some cases, only part of a property may be required for a public purpose but the impact of that affectation (sic) on land, when considered with other issues such as flooding, may mean that the land can no longer be productively used. In other cases, a property may not be required for a public purpose for many years.

In such cases, voluntary acquisition on compassionate grounds should be possible, using the approach by the NSW Government in other public infrastructure programs such as long-term transport corridors.

The Government needs to clearly set out its willingness to consider compassionate acquisitions on a case-by-case basis observing the following:

Provide accessible, easily understood material explaining the acquisition process (material produced by the Centre for Property Acquisition is a good example)

Manage requests in a clear and respectful manner (the Transport for NSW Corridor Acquisition approach is a good guide)

Identify specific areas where combined affectations (*sic*) (E&R, flooding, ANEC, SP1 and SP2 changes to existing Development Control Plans which provide for more uses than would be available under existing use rights) are so severe that proactive Government acquisition is warranted now…….

Ensure there is an appeal process if requests for acquisition are rejected. One option could be to use the existing Hardship Review Panel – (with modified Terms of Reference as appropriate), which is administered by DPIE under the *Just Terms Act*.

Recommendation 19: If acquisition of part of a property is required for any public purpose, for example if it is more than 30% of a 10-hectare lot or less, the whole lot is acquired, if that is desired by the landowner…..

Recommendation 20: To address concerns regarding potential zoning impacts, DPIE should investigate options that increase the potential economic return for land zoned E&R….

Recommendation 21: Use existing legislation to assist owners facing significant rate increases and provide further information regarding opportunities to defer rate payments….

Recommendation 25: In consultation with impacted landowners zoned E&R in the Wianamatta-South Creek precinct to the east of Wianamatta-South Creek adjoining the Kemps Creek and Rossmore Precincts, the Department is to investigate if they can be reverted to the zoning that existed on their land before the commencement of the Aerotropolis SEPP."

The initial Government responses to these recommendations , respectively, are:

Recommendation 7: "Supported in principle. Subject to the resolution of funding."

Recommendation 15: "Supported in principle. Subject to further investigation."

Recommendation 17: "Supported in principle. Subject to the resolution of funding."

Recommendation 18: "Supported in principle. Subject to the resolution of funding."

Recommendation 19: "Supported in principle. Subject to further investigation."

Recommendation 20: "Supported in principle. Subject to further investigation."

Recommendation 21: "This is a matter for local government to consider."

Recommendation 25: "Supported.."

Particularly if the "resolution of funding" is converted from aspiration to reality, the recommendations can be seen as a major step forward in remedying injustices being imposed onto landowners.

Yet, the WSAICC Report itself demonstrates the inadequacy of the State's approach, in no small part due to the limited terms of reference imposed on the WSAICC. Thus:

A. The Report considers only landowners in the Western Sydney Aerotropolis precinct, to the exclusion of landowners situated anywhere else in the State. Thus for example, any landowner in say northern NSW who has land impacted by the High Speed Rail project and has the remaining land adversely rezoned from farming to environmental uses, would receive none of the consideration contained in the recommendations. This *ad hoc* and arbitrary distinction would seem to be explainable by the difference in political noise made by the different communities. (The Aerotropolis group is unusual in having a very large number of injuriously affected landowners in the same vicinity at the same time, in an era of highly accessible social media.)

B. Although the Commissioner is titularly "Independent", she reports to the Minister. This may be contrasted with the much more substantial independence of the judiciary: judges do not report to any Minister. It is in this context that the Report can be seen to operate entirely within what might be described as the State land use planning ecosystem, governed principally by the *Environmental Planning and Assessment Act* NSW (1979) ("the Act"). Within this legislative ecosystem, the larger legal context is ignored. Thus for example, words and concepts such as "human rights"; "law of tenure"; "justice"; "common law title", "Crown grant" and "derogation" are entirely absent from the Report.

C. Although a focus of the Report is to remedy hardship, this is done in the context of an unspoken presumption that the State has the right and power to impose injurious affection onto land, and the landowners, without compensation. Taking steps to relieve hardship caused solely by the State in this context effectively constitutes an act

of sympathy (and political judgment), which is akin to the mercy of the tyrant being bestowed on some of the grateful populace. Landowners, whose life plans are on hold, are now cast in the role of mendicants, waiting to learn if there is a "resolution of funding" and if they are deemed to qualify as a "hardship" case. The Report's subtitle does refer to "A FAIR AND EQUITABLE WAY FORWARD FOR SMALL LANDOWNERS", but without any reference to the principles of the wider system of law and equity, which omission renders it a mere aspirational slogan. Real equity for a landowner is the power to obtain an equitable order against the State in the Supreme Court, for example declaring the invalidity of zoning rules which derogate from the Crown grant of freehold title. Real fairness is receiving compensation as a right when owners are arbitrarily deprived of their granted property rights by the Crown.

D. …and who decides what is hardship? Why do people have to suffer "hardship" before they can be considered eligible for compensation for deprivation of their property rights? Article 17(2) of the *Universal Declaration of Human Rights* ("UDHR") provides that a person shall not be arbitrarily deprived of his property. It does not go on to make exceptions for people who do not suffer "hardship", or who are medium or large landowners rather than small landowners, or for those affected who reside outside the Western Sydney Aerotropolis. In the same way as Art. 17, the existence or non-existence of "hardship" is irrelevant to the reality of an imposition of injustice by the State by derogation from a Crown grant.

E. The WSAICC Report (at 4) acknowledges "a common theme across all of my engagement has been a high level of distress". As publicly reported, the value and marketability of land that "they own is likely to be their single largest – if not only – asset" plummeted, with lives often being effectively put on hold. This economic and personal damage was caused by the State's rezoning which effected uncompensated injurious affection on their land. This arbitrary deprivation of their pre-existing property rights is essentially tortious (i.e., a civil wrong - cf., nuisance, negligence, trespass, passing off, interference with economic relations etc.) and justly entitles them to an award of damages in compensation for same, quite apart from any payment for land acquisition. However, the WSAICC Report fails to propose any such compensation for economic or personal damages.

F. A fundamental shortcoming of the Act which permeates through the whole land use regulation ecosystem is the absence in its Objects (s.1.3) of any provision with respect to the protection of the property rights of the group of people most directly and substantially affected by its operation: landowners. Thus, there is no Object to respect the real property of landowners, or to avoid arbitrarily depriving them of their property rights, no requirement to avoid derogation from Crown grants of title, no right of natural justice – no nothing really. Given that the single group of people most likely to be significantly affected by the operation of the Act is that of private landowners, the omission of such an Object is remarkable, and fundamental. The absence of such an Object in the Act is a key reason for the existence of the "anything goes" culture of impunity inside the State land use planning ecosystem.

   The High Court states that self-imposed inability of the Crown to derogate from its own grant provides for security of ownership:

> "Security in the right to own property carries immunity from arbitrary deprivation of the property....." (per 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* ([2019] HCA 7 at §71)).

The word "arbitrarily" has been interpreted by the High Court to mean not only "illegally" but also "unjustly":

> "....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.)" (In *Western Australia v Commonwealth (Native Title Act Case)* [1995] HCA 47; 1995 185 CLR 373, the High Court affirmed its observation to that effect in the *Mabo (No. 1)* case.)

G. Although Recommendation 17 provides that the market price for injuriously affected resumed land should be assessed at the value prior to the injuriously affecting rezoning, it does not recommend amending legislation to provide for reinstatement, as proposed by solicitor McKinnon at **[2.1]** above.

The WSAICC Report does not demonstrate or advocate a comprehensive adoption of human rights or equitable justice for landowners in the State. It is a proposed "subject to the resolution of funding" solution for landowners in a small particular area of the State, based on the oppressor's definition of "hardship". While the Report's recommendations - if implemented - are definitely a step forward for some landowners in NSW, it is far from a comprehensive solution. In this way, it confirms that the Commonwealth cannot rely on a State to avoid treating landowners unjustly and in breach of their human rights.

[4.0] The Potential Commonwealth Role to Cure Landowner Injustices

So, the above analysis illustrates two types of injustice being inflicted on landowners right now by a State in the context of a major infrastructure project substantially funded by the Commonwealth:

1. Inadequate compensation for resumption of properties; and

2. Refusal to either resume, or provide compensation for, injuriously affected properties.

There are two ways in which the Commonwealth could solve these problems:

1. Ensure that s. 96 grants to the States contain conditions which protect the property rights of landholders; and/or

2. Ratify Art. 17 UDHR, and by use of its external affairs power (and reliance on s. 109 of the Constitution), legislate to protect State landholders from arbitrary deprivations

of property rights (as it has done long ago with respect to native title by 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.). Art. 5 was a copy of Art. 17 UDHR.).

In this context, we draw attention to s. 96 of the Australian Constitution which allows the Commonwealth to make tied grants to the States, imposing whatever conditions it sees fit. Thus, to take the example of the general region of the Aerotropolis project and its land use planning, it might include, consistent with Art. 17(2) UDHR, these conditions in such grants, namely that NSW does:

1. not arbitrarily deprive landowners of any of their pre-existing property rights (i.e., any rights in the "bundles" associated with common law title) without compensation;

2. provide a mechanism for prompt compensation to any affected landowners;

3. in cases of compulsory resumption, actually provide compensation sufficient to be reinstatement (comparable to the Commonwealth Act); and

4. provide to the Commonwealth on demand evidence of compliance with such conditions.

One wording option would be for the Commonwealth to require in each and every s. 96 grant made to NSW relating to general region of the Aerotropolis project (or similarly to any major infrastructure project in any State) that: NSW *compensate* the freehold (or leasehold) title holders *for any loss, diminution, impairment or other effect* of State legislation on their common law real property rights and interests.

This wording, "…compensate ….. *for any loss, diminution, impairment or other effect"* is copied from s. 51(1) of the *Native Title Act* 1993 (Com.) which protects native title rights. Why shouldn't Aerotropolis landholders have the same human rights to compensation as native title holders? Why should the Commonwealth effectively discriminate against common law (freehold or leasehold) title holders?

This sort of intervention is something that would require no cost outlay for the Commonwealth.

A naïve bystander might think that it would be an implied condition of any s.96 grant intended for economic development by the Commonwealth, that the grantee, NSW, would not then proceed as part of the greater development scheme to arbitrarily deprive property owners of their human rights, but there is no such implied condition. It has to be made explicit.

If NSW complied with the conditions by respecting the property rights of owners (and possibly, removing some restrictive zonings which would cost NSW nothing), no further action by the Commonwealth would be necessary as far as the Western Sydney Airport region is concerned.

As noted above, the Senate Finance and Public Administration References Committee currently has the addition of conditions to s.96 grants to NSW before it as a subject for its *Inquiry into the planning, construction and management of the Western Sydney Airport*. However, that Inquiry is not scheduled to report until 30 June 2022 (absent extensions), and the relevant Minister(s) is/are perfectly free to act on this point in the meantime. "Justice delayed is justice denied" and to unnecessarily wait another year for remedial action to be recommended is not a burden landowners would look forward to, or deserve.

Adoption of Art. 17 UDHR into domestic law by the Commonwealth would be a more permanent solution than the essentially administrative policy of requiring compliance with it as a condition of s. 96 grants. It would also be more comprehensive in the sense it would apply regardless of whether or not a relevant s. 96 grant existed. Steps which would seem to be required to implement its adoption are outlined at *Arguments for Property Rights in Australia* at [9.0] https://adverse-rezoning.info/

Another point relevant to the Commonwealth arises from the fact that that some of the hundreds of adversely affected landowners in the greater Western Sydney Airport region might be foreigners or have dual citizenship with respect to one of the many countries which has a free trade agreement ("FTA") with Australia. About 30% of Australian residents were born overseas, and that area would have its fair share of people with dual, or still foreign, citizenship.

Any such landowners might well be entitled to make a sovereign risk claim for compensation with the support of their foreign native country against the Commonwealth for any loss or damage caused by NSW's injurious affection. Investor-State Dispute Settlement (ISDS) is a mechanism in an FTA or investment treaty that provides foreign investors (and reciprocally, Australian investors overseas) with the right to access an international tribunal to resolve investment disputes**.** A foreign investor in Australia can use ISDS to seek compensation for certain breaches of Australia's investment obligations, regardless of whether that breach has been made by the Commonwealth itself or, as in this case, by a State. Thus for example note: "obligations setting parameters on expropriation of a foreign investor's property" (Australian Government – Department of Foreign Affairs and Trade "Investor-state dispute settlement (ISDS)" – Circular 2019.)

In such a situation, the Commonwealth has no legal recourse available to it to secure reimbursement from NSW (or other State) for monies paid out by order of the international tribunal. Thus, NSW's unjust and human-rights-breaching behaviour poses a potential risk to Commonwealth coffers. It costs USD100,000 to launch an ISDS claim, so if say 30 foreign landowners were identified, each having incurred a loss of say $5m, the total claim against the Commonwealth would be in the order of $150m. The sum of USD100,000 starts to look not so expensive. The Commonwealth cannot counterclaim anything.

Adding conditions to s. 96 grants as proposed above (or adopting Art. 17 UDHR into domestic law) would protect the Commonwealth from any such ISDS claims, and accordingly would be a prudent measure for the Commonwealth.

This ISDS avenue is not open to most landholders, who who have the apparent misfortune in this context to be Australians, so again, in this way, they are being discriminated against (inadvertently perhaps) by the Commonwealth. Adding conditions to s. 96 grants as proposed

would eliminate this discrimination also, as would adopting Art. 17 UDHR into domestic law.

Landowners in four Australian electorates are directly affected by Western Sydney Airport major infrastructure project: Hume, Macarthur, Werriwa and Lindsay. Other Commonwealth initiatives such as the inland rail project will affect landowners in other electorates. The landowner injustices outlined above provide a cautionary tale which should serve as a warning to the Commonwealth about unexpected consequences of its well-intended initiatives, and the need to take curative and preventive steps to avoid them.

Indeed, such a danger with respect to the east coast high speed rail project was heralded back in 2013 ("On Track: Implementing High Speed Rail in Australia", A Report by the High Speed Rail Advisory Group, August 2013 at 22):

> "Cost to governments for the preservation of the corridor should be minimised by exploring options and mechanisms which protect the corridor without actually having to purchase it, such as holding or sheltering land from development by rezoning and restricting planning approvals to limit or change the development controls applicable to a site."

There is no allusion in this passage to the just necessity to compensate injuriously affected landowners for losses caused by such rezoning and restricting planning approvals.

What landowners would ask for, is to:

1. Restore their human rights in compliance with the UDHR;
2. Be just;
3. With respect to resumptions, provide reinstatement compensation;
4. Cause NSW to either compensate for losses, or revoke, adverse zonings;
5. Be consistent with the Commonwealth's stated regional economic objectives;
6. Eliminate the existing Commonwealth discrimination against us as common law title holders, in comparison with native title holders (whose rights we do not begrudge);
7. Eliminate the existing Commonwealth discrimination against those of them as being Australians, in comparison with FTA foreigner landowners (whose rights we do not begrudge); and
8. Prudently eliminate the risk that FTA foreigner landowners might initiate ISDS action against the Commonwealth.

It is not often that MPs, purely by achieving appropriate administrative action, can: restore human rights, render justice; promote Government economic objectives; eliminate multiple discriminations; remove "an intolerable and unacceptable toll on people's mental health and quality of life"; and lower Commonwealth litigation risk, all at once, and with no cost outlay!

The SCITC has the power to recommend this.

As it happens, it would seem that all of these potential difficulties for the Commonwealth could be avoided permanently, and the achievement of "social and economic prosperity" more comprehensively achieved, at no cost of any significance to the Commonwealth.

The solution would be to require the State(s) not to arbitrarily deprive any landowner of property rights. A suggestion would be to adopt the wording from s. 51(1) of the *Native Title Act* 1993 (Com.), requiring any State to: "…compensate ….. *for any loss, diminution, impairment or other effect"* to the real property rights of any common law title holder.

Why might that work? Consider each major example considered above..

A. **Ensuring restitution.** In cases such as Orchard Hills, where properties are being compulsorily resumed by the State with inadequate compensation for fair reinstatement, if the Commonwealth required State compliance with UDHR, the State would be forced to comply and to pay proper reinstatement value. (If the s.96 grant condition technique were used, the State would risk losing the grant. If UDHR legislation were adopted, it would by s.109 invalidate non-complying State legislation, allowing property owners to enforce a reinstatement valuation against the State.)

B. **Eliminating uncompensated injurious affection**. In cases such as Wiannamatta-South Creek, where properties have been adversely rezoned by the State without compensation, if the Commonwealth required State compliance with UDHR, the State would be forced to comply and to pay proper reinstatement value, or abolish the rezoning. (If the s.96 grant condition technique were used, the State would risk losing the grant. If UDHR legislation were adopted, it would by s.109 invalidate non-complying State legislation, allowing property owners to obtain a declaration of invalidity or other remedies against the State.) It is important to note that in curing this injustice, requiring the payment of acquisition on "just terms" would be inappropriate and ineffective, because the State is not purporting to "acquire" anything: it is simply depriving property rights. Accordingly, protection against arbitrary deprivation as per Art. 17 UDHR (or prohibition of uncompensated "loss, diminution, impairment or other effect") is the necessary protection.

C. **Elimination of Risk of ISDS Claims.** By eliminating arbitrary deprivations of property rights against landowners, as in the above examples, the potential risk of ISDS claims by FTA foreign landholders against the Commonwealth is eliminated. (The Commonwealth has no legal recourse to recover that loss from the State concerned.) Prudential Commonwealth governance requires that this risk be addressed and if possible, eliminated.

Speaking generally, it might be said that the two alternative strategies could be adopted as complementary strategies. That is to say, the s. 96 grant strategy would be capable of adoption in a timely manner and would provide the required efficacy in the shorter run. This could take place pending the adoption of Art. 17 UDHR into domestic law, which would be a more comprehensive and permanent solution.

Undoubtedly, any State which found itself constrained by such Commonwealth policies from arbitrarily and unjustly impairing the property rights, and so the human rights, of common law title holders might object. Yet, any State not involved in perpetrating such injustices would be in practice unaffected.

[5.0] SCITC "Value Capture": The Tax That Dares Not Say Its Name

Another area where Commonwealth-funded major infrastructure projects might collide in unexpected ways with State landowners is where *ad hoc* project-related taxation arrangements were to be adopted.

In this regard, notice may be taken of the SCITC Inquiry into options for financing faster rail Dec. 2020 ("SCITC Financing Inquiry"). Recommendation 1 is:

> "2.136 The committee recommends that the Australian Government, in consultation with state, territory and local governments, develop mechanisms at the national level for value capture of uplifts in property values relating to rail infrastructure projects, wholly, or partially, funded by the Australian Government."

Although the SCITC Financing Inquiry is expressed to be with respect to rail infrastructure projects, the Chair has expressed the view that its recommended policy should apply to "transformational infrastructure projects" in general. Thus, relevant extracts from "Federal rezoning tax floated", *Queensland Country Life*, by Marian Macdonald 14 Jul 2021 report:

> "First, [Mr Alexander] said, the tax should only come into effect for "transformational infrastructure projects" like highspeed rail.
>
> Second, the proposal would allow farmers to continue farming after rezoning, without any penalty, Mr Alexander said.
>
> 'The landowner will know well in advance and be fully informed that their lucky day, their winning of the lottery has happened, that their land is going to be rezoned, and it's going to benefit from new infrastructure,' he said.
>
> 'They can continue farming as long as they want. It's just on the sale of that farm that the uplift is shared.'
>
> Mr Alexander used the example of a farmer with land rezoned as a result of a new rail line, who would pay a 75 per cent tax on the value increase.
>
> "If that farmer had 100 acres worth $100,000 or $200,000 originally and it was then sold at $100 million, they'd be walking away with $25 million," he said.
>
> "Now, that is a fantastic outcome for that farmer and the taxpayer, for their investment, would be getting $75million.
>
> "To my mind, that's fair."
>
> ……. The main roadblock to the introduction of the new tax appears to be politics and the cooperation of the state and federal governments.
>
> 'We'd have to work hand-in-glove with the states of course, because the Commonwealth's capacity just to work solo on that would be very difficult,' Mr Joyce said.

……. ‘Effectively, taxpayers fund speculators and lucky, influential landowners into multi-billionaire status,’ [Mr Alexander] said.

‘What really gets my goat is that Josh Frydenberg then says, in recovering from our COVID recession, we're going to spend phenomenal amounts of money on infrastructure, we're going to pay for it out of debt, and future generations of taxpayers are going to pay this back.’

‘Well, to me, that is terribly unfair because, in doing so, these taxpayers will be impoverished for generations to come and the money is going straight into the pockets of the speculators and landowners.’”

The above denigration of “farmers” above as “speculators and landowners” is, with respect, inappropriate. Landowning in Australia is ordinarily considered to be a respectable activity: even banks rely on it for much of their business. As to speculators, they are important for the efficient functioning of markets, including housing markets: for example, Robert J Schiller received a Nobel Prize for Economics for explaining that very point. (The interested reader might read: Schiller, Robert J, “Speculative Asset Prices”, *Prize Lecture*, Dec. 8 2013 which is a version of the lecture he gave for the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel, on December 8, 2013.)

As to “lucky, influential landowners” being transformed into “multi-billionaire status”, this assertion is at odds with the 100 or so landowners interviewed by the WSAICC, as the Commissioner reports:

“The landowners living in the Western Sydney Aerotropolis are distinct from other communities in Greater Sydney. Like the family highlighted in the story above, many have owned their land for decades, and for others ownership has been in their family for generations.

The community is culturally diverse where English is not the first language spoken in a good proportion of homes. Some have come to Australia to escape turmoil and war in their country of origin, which makes this cohort particularly sensitive to the actions of government and to significant change.

Many in the community have not engaged in the workforce in a “traditional” sense and therefore have not built superannuation nor diversified their assets. The land that they own is likely to be their single largest – if not only – asset. This makes the development of the Western Sydney Aerotropolis particularly devastating if they are not able to sell or to move on their own terms……”

Well, these 100 landowners would be a more typical characterisation of landowners than “multi-billionaires”.

Further, with respect, the observation that “phenomenal amounts of money [being spent] on infrastructure” will cause “future generations of taxpayers…[to] be impoverished for generations to come...” is an extraordinary assertion. If the project will lead to such dire outcomes, why on earth support it all? If on the other hand, the project, supported by the government of the day, is expected to generate “social and economic prosperity”, then what

cogent information has the Chair to the contrary? Perhaps the Chair is confused about the difference between investment and expenses?

Turning specifically to the SCITC Financing Inquiry Recommendation 1, its "value capture of uplifts in property values" is a euphemism for betterment tax. Other names used for the impost include: "vendor tax"; "windfall gain tax"; "land value contribution"; "zoning tax" and "home zone tax". The reason that betterment tax is a "tax that dares not speak its name" is that, as noted in the *Henry Tax Review*, it is inefficient both economically and administratively, and prone to disputation. It has a demonstrated history of failure in NSW in particular. South Australia has rejected adoption of the tax for these very reasons.

Further, the proposed betterment tax recommendation:

- is being in made in a tax policy vacuum with no Treasury analysis, and directly contradicts the thrust of the Hawke and Keating and Howard and Costello tax reforms in the period 1983 to 2007;
- fails to consider the incidence of the tax;
- effectively imposes land tax and capital gains tax on principal places of residence for the first time, and at a fixed rate rather than the marginal tax rate;
- duplicates capital gains and land taxes for investment properties;
- contradicts Coalition and Labor Party policies;
- fails to explain the Constitutional power on which the Commonwealth can rely;
- fails to understand the law of tenure in NSW and the other States;
- is contrary to the red tape reduction policies of both the Coalition and Labor Parties;
- potentially encourages the States to conduct manipulative and unjust zoning strategies; and
- fails to contemplate steps to prevent unjust injurious affection of landowner's rights caused by States in the context of major infrastructure projects.

Given that virtually all of the land subjected to betterment tax pursuant to Recommendation 1 would be situated in the States, it is State law which governs private real property rights, to the general exclusion of the Commonwealth. That is to say, the Commonwealth has no constitutional power to resume or to rezone land in a State, being confined solely to compulsory acquisition of proprietary interests within its Constitutional heads of power, and limited by s. 51(xxxi), as explained at [1.0]. Hence Mr Joyce's reported comment that "We'd have to work hand-in-glove with the states" might be taken as a recognition of that constitutional reality, which was not addressed at all in the SCITC Financing Inquiry report.

The SCITC Financing Inquiry report also fails to consider the fundamental differences in real property law between the UK (with which Professor McNaughton would be familiar), the six Australian States (in each of which tenure is held by Crown grant of freehold and leasehold estates), and the ACT (governed by Commonwealth leases). Different real property laws can provide different landowner rights in different jurisdictions, but the SCITC report did not consider this.

The SCITC Financing Inquiry report fails to properly consider the effect of a betterment tax in the overall tax system: one aspect of this is the complete failure to reference the *Henry Tax Review*, which should be regarded as an essential resource when considering changes to tax policy.

Equally startling is the report's visions of beneficial financial outcomes based on static anecdotal models of "value capture", without any reference of the advocated policy to Treasury for any analytical financial evaluation, which analysis should be done during the planning of the project.

Such analysis would not be a static "land value uplift/tax revenue assessed" type, but rather require dynamic modelling in the context of the existing tax system, and calculation of multiplier effects (positive or negative) on project-related economic activity and net revenue.

Further, as shall be explained, given the numerous difficulties associated with accurately calculating zoning betterment values, and a certain mystery about what the betterment tax rate might be, and whether or not it would be assessed to be payable at the taxpayer's marginal tax rate, or whether it would apply retrospectively or only prospectively, etc., Treasury would have to include a sensitivity analysis to estimate the possible effects of so many different possible assumptions.

Betterment, like happiness, is something that is readily understood by all, but is notoriously very difficult to measure.

As we shall see, with respect, there are a great number of important factors which the SCITC Financing Inquiry report has failed to address.

[5.1] The Lessons of History

According to the New South Wales Parliamentary Record:

> "…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."

If the references to betterment tax, and compensation of those whose lands have been injuriously affected by planning decisions, sound rather unfamiliar, it is because this Parliamentary extract dates from 1945. Yes, that's now over 75 years ago. The then Minister for Local Government, the Hon. J.J. Cahill M.L.A., made these comments in a speech introducing the *Local Government (Town and Country Planning) Amendment Bill*. (New South Wales Parliamentary Debates, vol. 176 at 1720-1721.)

Part XIIA of the bill included Div. 9, which provided for payment of compensation in certain cases, and Div. 10 which enabled betterment charges to be collected from the owners of land benefited by prescribed schemes.

So, what happened to this scheme? Was betterment tax collected? Were injuriously affected owners compensated? What lessons were learned?

According to the *Dictionary of Sydney*:

> "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." (Ashton P. & Freestone R., *Planning, Dictionary of Sydney*, 2008, http://dictionaryofsydney.org/entry/planning)

A textbook writer (Wilcox) noted:

> "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." (Wilcox, M.R., *The Law of Land Development in New South Wales*, Law Book Co., (1967) at 278.)

Three points stand out from this historical experience:

> 1. There was no attempt to use sly euphemisms such as "value capture" or "profit capture" or "land value contribution" to conceal what was properly called a tax, i.e. a betterment tax;
>
> 2. There was a genuine concern to compensate landowners injuriously affected by planning decisions, which was seen as a matter of "common sense and justice" (Wilcox *ibid*., at 277-278) in contrast with the current NSW government, which has demonstrated an utter disregard for same; and
>
> 3. The scheme was in place for decades, but failed to actually raise tax or compensate injuriously affected landowners.

What lessons has Government learned from this history? Possibly nothing, except perhaps to avoid calling a betterment tax a betterment tax.

[5.2] Betterment Tax

The *Australia's Future Tax System: Report to the Treasurer- Part Two: Detailed Analysis 2009 "Henry Tax Review"* at Box E4-2 noted that:

> "in practice, betterment taxes can increase the uncertainty associated with land Development….[and]… can involve lengthy disputes".

Here is an extract of the *Henry Tax Review* ("Part Two Detailed Analysis" at 423-424) dealing with betterment tax, in the broader context of infrastructure charges. (The focus of interest is the section about betterment tax, but the preceding section about infrastructure charges is included to provide some context.)

> **"E4–5 Infrastructure charges**
> Infrastructure charges (sometimes called 'developer charges' or 'developer contributions') are fees levied on developers to compensate governments for providing facilities necessary for land development. The charges are often associated with basic infrastructure (such as local roads and water mains), but more recently this has sometimes been extended to include major headworks (arterial roads and pumping stations) and social infrastructure (parks and libraries).
>
> Infrastructure charges are widely used by local government as well as some State governments, and are increasingly prevalent in other developed countries. There is limited information and few aggregate statistics relating to infrastructure charges in Australia. Chan et al. (2009) reported that in 2005–06, New South Wales councils collected $232 million and Victorian councils collected $454 million in charges.
>
> **What is the potential role for infrastructure charges?**
>
> In Australia, the practice of governments charging for infrastructure has been becoming more prevalent since the 1980s. This reflects increasing demand for infrastructure and fiscal constraints on local governments, but also a policy shift towards using economic instruments to allocate infrastructure and influence development decisions (Chan et al. 2009).
>
> In principle, efficient provision of infrastructure would be encouraged where its users pay for the construction of infrastructure that would be avoidable (that is, not needed) if the development did not proceed. By levying infrastructure charges that reflect these costs, State and local governments provide signals to develop housing in ways and places of greatest value. The cost of infrastructure increases directly with distance from essential headworks and inversely with the density of development (Slack 2002). To the extent that a developer can respond to these costs, for example, by choosing to build closer to an existing development or by increasing the density of housing, charging the developer can improve housing supply.
>
> Indeed, in the absence of pricing, developers build without regard to such costs, and governments are more likely to rely on other policy instruments, such as planning regulations, to limit the budget costs of infrastructure associated with housing

developments. The absence of effective infrastructure pricing increases the need for development regulations.

There are problems with infrastructure charges in practice

In practice, infrastructure charges have a number of problems.
First, infrastructure charges can sometimes be used to raise tax revenue, rather than focusing on providing efficient user charging. Where the charge exceeds the cost of providing infrastructure, it acts like a tax and can discourage development. This is more likely to occur where the size of the charge is not set relative to the cost of infrastructure but the developer's capacity to pay. In these cases, the charges may attempt to capture part of the increase in value resulting from the provision of infrastructure or from changes in zoning, that is, to impose a betterment tax (see Box E4–2). However, the benefit to the developer is difficult to determine, and attempting to set charges on this basis can lead to negotiations that are protracted and non-transparent. This can slow down development processes and result in payments that are not effective as prices for infrastructure. In general, infrastructure charges will operate more effectively if they are set to reflect the cost of infrastructure, not to tax the profit of development.

Box E4–2: Betterment taxes

A particular form of tax used when land is re-zoned for alternative use is a 'betterment tax' which attempts to capture some of the increase in land value. Betterment taxes are not infrastructure charges since the objective is to tax economic rent, although sometimes the revenues are hypothecated (that is, earmarked) to infrastructure provision.

In concept, betterment taxes are attractive since they aim to tax the economic rent from land rezoning that would otherwise accrue to the landowner. However, in practice, betterment taxes can increase the uncertainty associated with land development. To operate effectively, betterment taxes need to isolate the increase in value attributable to the zoning decision or the building of infrastructure from general land price increases at the local level. This is often difficult since the value of land will move in anticipation of a change in re-zoning. Sometimes this can occur many years before the re-zoning. Betterment taxes may be applied on an ad hoc basis and the rate of the betterment tax is sometimes left to discussions between developers and government as part of the planning approval processes, rather than being set in a transparent manner. Betterment taxation can involve lengthy disputes as, by setting the tax conditions, the dispute is really about how to share the economic rent.

Additionally, having a betterment tax in place may encourage governments to create economic rent through additional zoning restrictions or delays in land release, in order to raise more revenue. Where zoning is used in such a manner, it is likely to stop land being devoted to its most productive use — at least in the short run. A land tax applied to all types of land (see Section C2 Land tax and conveyance stamp duty), is likely to encourage governments to allow land to be used for its most productive use as this will increase the value of the land (and hence increase the revenue raised from land tax).

Second…."

Some key points made in Box E4-2 may be explored as follows.

[5.3] Capital Gains Tax v Betterment Tax

Capital gains tax ("CGT") 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.)
- not assessable on the principal place of residence (or any substantially unaltered property purchased before 1985).

In 1999 a capital gains discount was introduced to promote more efficient asset management and improve capital mobility, by reducing the tax bias towards asset retention, and to make Australia's CGT internationally competitive. Under the discount, individuals and the beneficiaries of trusts pay CGT at normal rates on only half of any capital gain realised on an asset held for at least twelve months. Superannuation funds receive a one-third discount.

An advantage of CGT not shared by betterment tax is that the CGT calculation is easily made - simply deduct the purchase price from the sale price, adjust for inflation, and apply the tax rate - the identification of reasons for the size of the capital gain is completely irrelevant and unnecessary to ascertain.

However, correct identification of betterment requires all other factors influencing the market value over the betterment period to be identified and separated out which, done correctly, is a statistically complex and uncertain task. Further, the period during which betterment occurs does not necessarily coincide with the rezoning date and the sale date: betterment might actually commence long before (or even after) the rezoning date, and play out long before, or long after the sale date. The premise of a betterment tax is that the value of betterment caused by rezoning may be easily identified, but it is not.

In this circumstance, the relevant government might simply elect to nominate a valuation at rezoning date and the actual property sale value as the relevant values to calculate the betterment tax. This flight to relative simplicity however would mean that it is no longer a betterment tax or "value capture", but simply another CGT, with a starting date value prone to dispute (not being a transactional value, but a mere estimate).

[5.4] Tax Interaction

The SCITC report acknowledged these submissions, but implicitly rejected them in its Recommendations, notwithstanding that both are consistent with the *Henry Tax Review*:

> "2.23 The Property Council outlined its position on each funding option in its submission, and argued that while there are a variety of tax options available, 'some will be very harmful and should be avoided'. The Property Council asserted that efficient broad based taxes, productive state debt, asset recycling or user charges are the most efficient ways to fund infrastructure…….
>
> 2.77 In terms of the property industry, the Property Council highlighted that the different levels of governments already receive taxes that capture some degree of economic uplift at the:
> - Australian Government level—including company tax, capital gains tax and the goods and service tax (GST)
> - state or territory level—including stamp duty, payroll tax and land tax
> - local government level—including rates, fees and charges.
>
> 2.78 Infrastructure Partnerships Australia supported a broad based land tax for capturing value and encouraging 'highest and best use on developments'. (Citations omitted.)

These submissions raise the question as to the potential interaction between the proposed "transformational infrastructure project" betterment tax (let's call it the "betterment/CGT tax" for now) and the existing tax structure, which are likely to lead to unintended consequences. Thus, for example, it would seem that:

1. The betterment/CGT tax would apply to the principal residence, unlike the existing CGT.

2. The betterment/CGT tax would apply to the principal residence not at the marginal tax rate, but at a much higher and seemingly arbitrary tax rate. (In the above article, Mr Alexander proposes a 75% tax rate, and the *Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill* 2021 ("the NSW LVC Bill") proposes that the rate be arbitrarily be set by local councils, unless the minister decides otherwise.)

3. The betterment/CGT tax would effectively duplicate the CGT, so that landowners other than principal places of residence would face paying tax on capital gains twice over.

4. The betterment/CGT tax would apply to such investment property not at the marginal tax rate, but at a much higher and seemingly arbitrary tax rate, and thus also to principal places of residence

5. Unlike the CGT, which does not tax inflation, the SCITC proposed betterment/CGT tax would, there being no provision recommended to adjust for inflation. Taxing inflated value is not taxing betterment, and so acts as a land tax. This would constitute

a second land tax for investment properties and the effective introduction of land taxes for places of principal residence, both at a punitive non-marginal tax rate as per above. (This is discussed further at [5.7.5].)

6. Unlike the CGT, the SCITC report fails to provide that transmission on the death of the owner would not be a taxable event, so that bereaved families could well be forced to sell their family property to fund the betterment tax payable. Further, in this context, the tax would effectively be characterised as a death duty, which is a State tax, which they have otherwise abolished.

7. The Grants Commission process may deduct any betterment/CGT tax revenue from future distributions to the State concerned, in favour of other States, making any net revenue gain to a State illusory, except in the highly unlikely case where all six States collected the same amount of betterment/CGT tax revenue every year.

8. Although betterment/CGT tax might be described at law as a vendor tax because the vendor is liable to make the tax payment, from an economic viewpoint, the tax incidence is an entirely different matter – i.e., it can be passed on to end users, whether they be first home buyers, or industry, driving up costs. (This is explained at [5.7.3].)

9. The SCITC proposed betterment/CGT tax, unlike the CGT, is not proposed to be levied prospectively. That is to say, it would, from its inception, apply to existing landowners, rather than only to land purchased after the inception date. The latter course would vastly lower the revenue achievable for many years, but also have proper regard to the legitimate interests of landowners who have made investment decisions without notice of such a tax.

10. The Commonwealth, having no control over zoning decisions, or the adoption or non-adoption of a State betterment/CGT tax, or the rate of tax applied within each State, would appear to be in a very poor position constitutionally or practically, to secure consistent tax policy nationally. The SCITC report does not explain upon what constitutional basis the Commonwealth would possess the power to impose betterment tax in each State.

11. Commonwealth income tax is assessed according to a progressively rising income tax scale, but the betterment tax is a flat rate (hypothetically 75%, according to the above newspaper report). Relatively speaking, the betterment tax is regressive. Your report does not explain why the progressive tax rate policy should be abandoned for a flat rate betterment tax. Under the SCITC proposed policy, the same tax on a five (5) acre block would be paid, whether it were owned by a pensioner, or by the hypothetical ”billionaire”.

[5.5] Pre-Betterment Valuation

For the purpose of setting a betterment value, the commencement of the betterment period would be, presumably, the date of rezoning. The presumption might be that the value of the property on the day before the rezoning announcement would be the “pre-betterment” value, from which any consequent betterment value would be calculated.

However, is that zoning date the correct date? As noted above by the *Henry Tax Review*: "since the value of land will move in anticipation of a change in re-zoning. Sometimes this can occur many years before the re-zoning." This can occur in a variety of ways, for example:

- many landowners might make a long term investment on the basis that eventually population pressure will lead their land to be rezoned, so that the possibility is "priced in" accordingly;

- the development of land use plans by NSW may become public knowledge over time, particularly given the common requirement for community consultation, so that such information becomes priced into the market;

- the process might be compared with financial market speculation, where announcements of Reserve Bank interest rate changes are almost completely "priced in" at the time of the announcement.

An example of this, which happens to relate to another "transformational infrastructure project" is supplied by an experienced solicitor, practising in the vicinity of the new Western Sydney Airport:

> "Penrith is in a unique situation at the moment with multiple examples of compulsory acquisition across the Local Government Area (LGA) including the widening of Mulgoa Road, the new Northern Road and the construction of the train line from St Marys to the airport including a metro station in Orchard Hills (the Railway Project)…….
>
> ….Since the announcement of the Railway Project and speculation that the land immediately surrounding it would be rezoned, properties that were valued at $3,000,000 – $3,500,000 in 2020 are now selling for $5,000,000 and beyond – an increase of more than 40%.
>
> The reason for the increase is the expectation that as a result of the Railway Project land in Orchard Hills will be rezoned, opening the doors to significant residential and commercial development.
>
> Dave Reardon of LJ Hooker Commercial Penrith recently oversaw a number of properties coming on to the market in the Railway Project precinct and offered this comment when asked about increasing property prices in the area: "The confirmation of the railway station at Orchard Hills pushed a number of properties in the near vicinity onto the market. We were fortunate enough to be able to achieve a great result for our owner. However, due to media exposure and some indecision from government in terms of timing, the momentum in the marketplace dropped significantly and now we seem to be seeing a "wait and see" attitude from most owners. Once there is clarity from the government on timing and zoning we would expect to see interest in the area on the rise again."

> The increase in prices has not been restricted solely to the epicentre of the Railway Project precinct. Core Logic data reveals the sale of a 5-acre property on Wentworth Road, not far from the metro station site, with a purchase price of $4,750,000 in March 2021.
>
> It would appear that interest in Orchard Hills was piqued following not only the announcement of the Railway Project, but publication of a document titled "Penrith Local Housing Strategy" in 2019 and the exhibition of th environmental impact statement (EIS) for the Project in December 2020. Both are arguably precursors to rezoning.
>
> The 2019 report, commissioned by Penrith City Council, speaks specifically to the fact that rezoning is or will be inextricably linked to the completion of the Railway Project: "In the longer term, the majority of new housing is likely to occur primarily within Glenmore Park South (Stage 3) and Orchard Hills. In locations where future train station precincts are delivered, future capacity may be increased however the rezoning, delivery and provision of new housing around these locations be entirely dependent on the progress and staging of the new North-South Rail link."
>
> The report references Orchard Hills as a rezoning site slated for residential housing development contingent on the completion of Railway Project multiple times throughout. This, coupled with the EIS in late 2020, saw interest in the suburb from developers soar, and with it, property prices.
>
> ….New legislation could impose a levy on land which experiences a significant increase in value that flows from an infrastructure project (including rezoning) payable on disposal of the land. The justification for same would be that the landowner has experienced a windfall as a result of a government funded public purpose project at no expense to said landowner.
>
> Such a proposal arguably punishes savvy investors, however, who make deliberate decisions to land bank in areas that will be subject to rezoning long into the future. While the airport is a fairly unique example, long term rezoning is quite often predictable in places like Sydney where there is limited land supply and an increasing population. For example, land to the north and south of Sydney (e.g. The Ponds, Box Hill, Oran Park) was always going to be rezoned for residential purposes eventually to facilitate an ever-growing population…." (McKinnon, Daniel, "Special Report: It's not just a house, it's a home – or is it?", *The Western Weekender*, 3 Aug. 2021).

It is very clear from this outline that property markets are very dynamic, and that they can apply - and remove - "zoning premiums" well before any zoning decision is actually made. Although in this example, much of the change occurred one or two years beforehand, some zoning premium might exist say three decades earlier. It follows that if the implementation of a zoning change is the commencement date of the betterment tax calculation, then much of the betterment has already occurred!

Such market pricing sensitivity is in fact indicative of an efficient market, but the implication for calculating the pre-betterment value of a parcel of land is that a significant portion of the betterment might already have occurred at the rezoning date.

So, what is the correct pre-betterment date? How is it valued? Who pays for the valuation? Is the owner entitled to appeal the valuation? If not, might it not be challenged in court? What happens to planned transactions while this process is played out? If this process is duplicated on not one, but hundreds or thousands of properties, what effect will that have on the market liquidity for land, and the rate of development? Given the significant reported shortcomings with the current acquisition valuation process in relation to the Aerotropolis, the question must be asked: could the bureaucracy cope efficiently with this process?

The Chair's foreword to the report states in part: "…the Australian Government - working with state, territory and local governments - should: secure land valuations before announcements…."

With respect, this is completely unrealistic. Should the valuations be done before community consultation commences? How will it be known precisely what properties should be valued if project plans have not yet been developed? If valuations commence in an area, wouldn't landowners figure out what is going on? It would be impossible to conduct large numbers of valuations simultaneously. The cat would be out of the bag. Prices would immediately start to adjust to the new market information. Who is paying for these valuations: the Commonwealth? The State? Where is the budgeted provision for this? Landowners should be entitled to get their own valuation: are they to be denied that opportunity, or the opportunity to do so in a timely way? If the rezoning does not proceed, will the government refund the landowners' valuation fees? The worst aspect of all this, apart from its utter impracticality, is that it would be encouraging a culture of secrecy by government, although we might be comforted by the prospect that any such process would be doomed to fail.

That's not all. The States are not petty despotisms, where Premiers rule by decree (notwithstanding some behaviour in recent times which might suggest otherwise). Imposition of the proposed tax and implementing the valuation process requires legislative authority. In this case, each State would have to pass relevant legislation, which might initially be styled as, say, the *Betterment Tax Transformational Infrastructure Project Bill* ("BTTIP"). Of course, it would take time to draft the Bill, table it in Parliament, and go through other processes such as review by a Parliamentary Committee. This process could easily take a year or so. The legislation would have to set out, *inter alia*: what is and what is not a "transformational infrastructure project"; how the legislation would complement relevant Commonwealth legislation; rules authorising valuations; their legal effect; rights of appeal; fair notice to landowners; whether councils perform the valuations; provision of funding to councils for the carrying out and administration of valuations; the not inconsequential decision as to what the tax rate should be, whether fixed or scaled; whether or not revenue should be exempted from the Grants Commission calculation of GST distribution, etc., etc.

Putting aside the need for any facilitating Commonwealth legislation, this legislative process would have to be done six times, once for each State. It might well be that for sound policy reasons, some States will decline to adopt a transformational infrastructure project betterment tax. In that case, this proposed "Federal tax" would in fact be a non-Federal patchwork tax.

Having been passed, as a State *Betterment Tax Transformational Infrastructure Project Act,* the good ship BTTIP would be ready to sail into its sea of troubles.

It is quite apparent that with all the fanfare associated with the operation of the Act, by the time valuers attended their task, the good horse "Pre-Betterment Value" would have substantially bolted.

[5.6] Post-Betterment Valuation

For the purpose of setting a betterment value, the conclusion the of the betterment period would be, it appears, at the time of sale of the land. Because payment is required at the time of sale, it has also been described as a "vendor tax". (Gadiel, Aaron, "New vendor tax on future development sites", *Mills Oakley*, June 2021.)

The evident intention is that the council would value the land at the time of sale, subtract the pre-betterment valuation to obtain the betterment value sum and then apply the applicable rate of tax to determine the value of the betterment tax.

If the "vendor" assessed for tax ends up not selling the property until many years later, is the amount payable at that later time unchanged, or adjusted for inflation, or revalued? The SCITC report does not explain this.

While the sale contract would provide a fixed price on which to base calculations, the "value uplift" (or "land value contribution" etc.) does not purport to be a capital gains tax, but rather a tax on betterment caused by rezoning. So, what is the "post-betterment" value? Similar questions arise as did so with the pre-betterment valuation.

How is post-betterment valued? Who pays for the valuation? Is the owner entitled to appeal the valuation? If not, might it not be challenged in court? What happens while this process is played out? If this process is duplicated on not one, but hundreds or thousands of properties, what effect will that have on the market liquidity for land, and the rate of development?

The valuation post-betterment is actually vastly more complicated compared to pre-betterment valuation because of the large range of other factors which could influence the land value during the betterment period, whatever its length. Some examples include:

- reaction of the market to depress the net price of betterment-tax-affected-land below what it would have been without the tax imposition;

- variation of zoning of other land in the district;

- announcements of other land use developments in the area, which are not rezoning-related, but which affect the local market;

- interaction with other zoning changes to the land, such as the imposition or removal of environmental zoning;

- quarantining the betterment calculation from properties receiving betterment, but not from a "transformational infrastructure project";

- improvements which might be made to the land during the period;

• decay of condition of the land or fixtures during the period;

• in relation to farmland, the rise or fall of commodity prices, according to the commodity being grown on different farms (wheat, sheep, barley etc.)

• in relation to farmland, the variability of the weather (particularly rainfall) influences the appearance and productivity of the land, and land prices; and

• rising or falling interest rates;

• changes in Australian Prudential Regulation Authority prudential requirements for banks which restrict or encourage property landing;

• rises or falls in foreign exchange rates which affect economic activity;

• inflation, and changing rates of inflation;

• net migration rate ebbs and flows;

• organic economic development which occurs after the "value uplift" or betterment caused by the zoning changes exhausts;

No doubt the reader might suggest other variables which could influence land values during the betterment period.

So how are the effects of variables such as these separated out from the changing market value of the land, so that the value of the betterment effect itself could be correctly calculated satisfactorily for both the landowner and the government?

In principle, this could only be done by the application of advanced statistical techniques. Imagine a dynamic three-dimensional spatial model of value effects (think Star Wars style visual 3D with declining land values indicated by dales and increases by hills), accurate to within say +/- one metre (to be sensitive to individual property boundaries), with detailed assumptions verified by a multiple-cross-valuation process acceptable to landowners and government. The Australian Bureau of Statistics would have to open a new department to cope with the workload and the statisticians would have a great time. Who would pay for this time-consuming and colossally expensive space-age-style misallocation of resources?

At this point, the Government might say oh well, we're not going to worry about that: we'll just deem the conventional land valuation at rezoning date and the sale price as the betterment values. By using these values as proxies for betterment values, this approach effectively turns the betterment tax/land value contribution into a CGT. The only difference with the existing CGT which it would substantially duplicate, is that the starting date is the rezoning date rather than the purchase date, and that it would apply additionally, as a NEW HOME ZONE TAX to principal places of residence.

The "land value contribution" betterment tax would thus in truth be an arbitrary CGT. Significant uncertainties remain in the form of the valuation process, appeals processes and consequent land market disruption. As noted by the *Henry Tax Review* (above):

> "Betterment taxation can involve lengthy disputes….".

The County of Cumberland Scheme failure is evidence of that.

[5.7] Further Complications

[5.7.1] Restorative Zoning

What about **restorative zoning**? Much land in recent years has been adversely rezoned from rural to environmental, destroying "value". See for example, above at **[2.2]**. Some of said properties have since been recognised to have been inappropriately rezoned, and after a period of years are being restored to their original rural zoning, with a consequent restoration of "value". There is no indication in the SCITC Financing Inquiry report that these situations, where a landowner's pre-existing rights of use are simply being restored, would not be caught by the betterment tax.

[5.7.2] Fluctuating Betterment

What about if the betterment value – however calculated - **peaks then falls** (due perhaps to a faltering economy, or a bust following an "irrationally exuberant" boom)? Is there provision for a refund for the lower betterment value?

Under proposed NSW legislation, local government councils would, at the time of sale of the land, issue a "land value contribution certificate" which would specify the "contribution", i.e., the betterment tax. A question which councils have asked is: what happens if a sale doesn't occur until years, or many years later? Is the land value certificate revised – up, or down, as appropriate? Is account taken of inflation?

Another possibility is where there is a late re-alignment of a major project rail line, perhaps many years after the initial plans were drawn up. Is there provision for a tax refund - due to the passing of years, perhaps to the descendants, but often to the by now former owners? In this example, the current landowners might suffer worsenment from the line change, so would they be compensated also? Who pays for the administration of all this?

[5.7.3] Variability of Tax Incidence

Because, using the proposed NSW law as an example, payment is required at the time of sale, it has also been described as a "vendor tax". (Gadiel, Aaron, "New vendor tax on future development sites", *Mills Oakley*, June 2021.) This is correct as a matter of law, because the vendor is being fixed with the legal responsibility to pay the tax. However, the "vendor tax" description is misleading from an economic viewpoint, because the incidence of the tax burden could be passed on from the vendor, which raises the question: what would be the tax incidence of the land value contribution/betterment tax?

Tax incidence is the manner in which a tax burden is divided between buyers and sellers. Although, the proposed tax would be levied on the first post-rezoning sale, and so is effectively a vendor tax, who ultimately pays the tax depends on supply and demand.

The tax incidence depends on the relative price elasticity of supply and demand. When supply is more elastic than demand, existing landowners bear most of the tax burden. When demand is more elastic than supply, buyers bear most of the cost of the tax. Past experience in the UK (with their betterment tax failures) suggests that in practice, supply is relatively inelastic because most landowners are not, for the time being at least, active sellers, so they will only consider selling if the purchaser pays the betterment tax in addition to the net price required by the vendor. The purchaser, being in this context likely to be a developer, will only pay that tax premium if confident that it can in turn be passed on to its customers after development. If those customers are for example, first home buyers, it is they who end up funding the tax. If therefore home buyers are priced out of the market as a consequence, then that would contribute to the "housing shortage" and "high cost of housing".

There does not appear to be any indication that the SCITC Financing Inquiry report has considered the pattern of consequential tax incidence and the resulting policy implications.

[5.7.4] Superior Alternative Tax Policies

On the very same budget day in 2021 that a Bill was tabled in NSW Parliament to introduce a betterment tax, the South Australian budget was also presented. Here's a comment:

> "The Treasurer highlighted in his briefing that whilst other states had increased their land tax rates and introduced new property taxes for rezoning, he had ruled that out. To his credit, it was the right thing to do, particularly for rezoning, because that type of tax would only inhibit new development and supply in a very tight market." ("Budget overlooks chance for property tax changes", *Business Insight*, 27 June 2021.)

As noted in the *Henry Tax Review* above: "..in practice, betterment taxes can increase the uncertainty associated with land development". It should be clear from the above analysis that the Bill increases uncertainty in many ways, and its practical complications with regard to valuations in particular will clearly cause delays and hesitancy, with owners reluctant to go to market, inhibiting new development and supply.

Your humble correspondent submits that attention should be paid to this further point made in the *Henry Tax Review* (above):

> "A land tax applied to all types of land (see Section C2 Land tax and conveyance stamp duty), is likely to encourage governments to allow land to be used for its most productive use as this will increase the value of the land (and hence increase the revenue raised from land tax)."

Again, this is consistent with the submissions noted above, of the Property Council and Infrastructure Partnerships Australia. In this context we also note these observations, in reference to Victoria's proposed "windfall profits" tax, which envisages confiscating up to 50 percent of any uplift in value in a property over $100,000 gained by a rezoning:

"….The proposal also increases development risk. Not every rezoning application is completely successful, or successful at all. The profit from the successful applications has to underwrite the losses from the unsuccessful ones. To economically justify paying tax on successful rezonings, the developer will be forced to increase their win/loss ratio, leaving deserving, but more marginal, proposals, untouched….

It is frequently foreseeable that some areas will eventually be rezoned as urban densities increase. Land and houses near transport and retail hubs are likely to be rezoned for higher-density dwellings, as is rural land on the edge of towns. This potential uplift will figure in all purchasing decisions in these areas and be part of the contract value.

Because the tax raises costs and stifles development, it will suppress supply, forcing prices up. It will also force a developer to charge a higher price for the end product. Development feasibilities do not count company tax or personal tax as a cost, but they do count taxes levied on the way through, such as land tax, stamp-duty and GST.

A developer who rezones a property and increases its value effectively buys more cheaply, making it easier for them to bring affordable product on stream. In fact, they will probably end up sharing some of their good fortune with the purchasers. Increasing tax on the way through means they are going to load all of that onto the end product, or they won't do the project at all…."

Ironically, to combat housing affordability, the Victorian government has a number of schemes to lower costs for developers and subsidise build-to-rent schemes. So on the one hand they charge a tax that decreases housing affordability, and on the other they will probably end up using most of the windfall, and more, subsidising housing affordability elsewhere as well as paying for the deadweight of increasing layers of bureaucracy.

The whole fandangle is a version of Marx's labour theory of value that imputes no value to the work of the entrepreneur, and delegitimises entrepreneurial effort on the basis it is achieved by exploiting someone else and is "unearned". To ethically justify the tax you have to see the uplift in value due to a change in zone as a gift of the state. In fact, it is a gift of the entrepreneur, who has found a way to grow wealth by correcting an inefficiency in the town plan.

Other states may be encouraged to follow suit. They should think twice. A tax that kicks entrepreneurs and home buyers, costs more than it raises, and only temporarily shuffles tax revenues between the state and Commonwealth, is not a recipe for "building back better" after COVID-19 ." (Young, Graham, "Victorian 'windfall tax' kicks entrepreneurs and home buyers", *Australian Financial Review*, 2021.)

Although the proposed major project infrastructure betterment tax would affect industrial and commercial property as well as housing, the principles are the same. Young's statement that the proposed tax might cost "more than it raises" might seem unlikely to legislators mesmerised by "windfalls", but the SCITC Financing Inquiry report has conducted **no financial modelling** to explore what the range of financial outcomes might be.

This failure might be considered understandable, given the SCITC Financing Inquiry's failure to explore:

- the potentially dysfunctional interaction with existing taxes, such as CGT, GST and land tax;
- the uncertainty of State participation, given the associated legislative and administrative demands and policy differences between States;
- the difficulty of actually measuring betterment accurately; and,
- not least, the adverse economic dynamics including negative multiplier effects in a market dissuaded from risking at least some development that would otherwise have proceeded.

[5.7.5] Taxing Inflation: A Covert New Land Tax

The nominal value of land is influenced by the rate of inflation. Indeed, one reason for investment in land rather than cash is as a hedge against inflation. At the moment, the rate of inflation is historically low.

For the purposes of a betterment tax, the relevant valuation dates might be taken to be the deemed rezoning event dates, namely: the date before information about the possibility of rezoning becomes public knowledge - if it can be identified; and the effective end of the betterment period, being the point in time at which the betterment effect is exhausted - if such a date can be identified.

Given the relative difficulty of identifying these betterment valuation dates, it can be expected that as proxies, the date of rezoning and the date of the first sale thereafter would be deemed to be the relevant dates for determining the "betterment period".

Assuming, for example, a rate of inflation of 1.5% per annum over a betterment period of say fifteen (15) years, *ceteris paribus* the cumulative nominal increase in property value by the end of the period would be a calculated 25%. Thus, at a 1.5% p.a. inflation rate, the nominal end value of a property valued initially at say $1m would be $1.25m. However, this $250,000 rise in value, being due to inflation, is merely nominal: the real va lue is unchanged at $1m in rezoning date dollars.

It follows from this that any increase in nominal land value due to inflation is not betterment at all. Taxing this nominal increase in value would effectively be a land tax, not a betterment tax or "value capture", as there is no real "value" or betterment to be captured. Accordingly, to avoid the betterment tax effectively being a tax on "non-betterment", provision ought be made for use of a deflator price index (such as the State Consumer Price Index) to adjust for real prices over the betterment period. This has not been recommended in the SCITC Financing Inquiry report.

It is well known that the Reserve Bank has a policy of achieving an annual rate of inflation of 2% to 3% and that in the past interest rates have been much higher – say 17% p.a. in. the late 1980's, and bank bills reaching over 20% during the Whitlam Commonwealth Government period.

So, to take a couple more examples, assume inflation rates of merely 3% and 5% over a betterment period of say ten (10) years, again *ceteris paribus*. The cumulative nominal increases in property value by the end of the betterment period would be calculated at 34.39% and 62.89% respectively, with the nominal values being $1.3439m and $1.6289m. It is clear that these values would continue to rise exponentially, the longer the duration of the betterment period with respect to each affected piece of land.

In the third example, the nominal value of the land is already 62.89% higher than the real value at the rezoning date, and none of this change is attributable to rezoning – if betterment did exist, the nominal and real values would both be higher again at the end of the betterment period. To take a purely illustrative hypothetical betterment tax rate of 20% of "betterment", without allowing for inflation, the tax taken would be 20% x $628,900 = $125,780. This sum is thus not a tax on betterment, but a land tax. In this way, a "betterment tax" without an inflation adjustment mechanism would covertly introduce land tax onto the place of principal residence which has been rezoned (i.e. create a NEW HOME ZONE TAX), and duplicate existing land tax burdens for other rezoned properties.

The question must be asked in this respect: would a Government know what it's doing, in failing to make provision for use of a deflator price index to adjust for real prices over the betterment period?

[5.7.6] The Antithesis of Hawke & Keating Tax Policy

Betterment tax is the antithesis of Hawke & Keating Tax Policy.

Together with other Budget Bills, the abovementioned NSW LVC Bill was introduced on motion by Mr Dominic Perrottet (Epping—Treasurer. The Bill, which included introduction of a betterment tax (termed a "land value contribution"), was the subject of his speech, entitled:

> "YOUR FAMILY, YOUR FUTURE"

One relevant extract from the Treasurer's speech as recorded by Legislative Assembly Hansard 22 June 2021, reads:

> "What sets the NSW Government apart from every other State—and the Commonwealth—is that we are not just focused on today, we are focused on the future.
>
> **Productivity is everything**
>
> And the key to that is productivity.
>
> Lifting productivity means the people of our State get more value for their efforts and more reward for their work.
>
> Higher productivity means higher wages, better jobs, better services and more freedom.
>
> But since the Hawke, Keating and Howard governments, productivity reform has virtually stopped.
>
> It takes imagination to build a better future.
>
> And long before any pandemic, this Government saw the future coming.

> In 2018 we appointed the NSW Productivity Commissioner, and we've acted on advice to get the ball rolling.
>
> We're advancing reforms to deliver a more streamlined planning system, to get more houses built faster and more affordably…."

What is frankly bizarre is that the effect of NSW LVC Bill being introduced by this speech would, if enacted, directly contradict these sentiments. Note in complete contrast, the Ministerial Statement by Mr Keating (Treasurer) on reform of the Australian taxation system (Hansard 19 September 1985 at 1345ff), where Mr Keating states:

> "We will establish a capital gains tax so that in the future taxpayers who take their income in the normal manner will not be disadvantaged as against taxpayers who choose to take their income as capital…..
>
> CAPITAL GAINS TAX
>
> …The Government has decided to introduce a capital gains tax but, in the light of the public debate, to incorporate several major modifications to the proposal outlined in the White Paper in June.
>
> These changes address the concerns which have been expressed and will substantially reduce the impact of the tax and allow the community a lengthy period in which to adjust to its application. In particular, it has been decided that the tax will be in every sense be prospective. That means it will apply only to gains on assets purchased or acquired after today. All assets already owned by taxpayers will be exempt from the tax when sold by them, both in respect of gains accrued until now and all future gains. The Government has decided that the deemed realisation at death proposal, outlined in the draft White Paper, will not apply. Liability for tax in the case of death will be rolled over to successors, and will only be assessed on any subsequent disposal. Therefore the capital gains tax will not apply in the case of death.
>
> Other main features of the tax include:
>
> …It will apply only to real capital gains calculated by fully indexing the cost of the asset for inflation;
>
> …a complete exemption will apply to gains on the taxpayer's principle *(sic)* residence…..
>
> …there will be provision for nominal losses to be offset against gains;
>
> …the tax will be levied, on real gains, at ordinary rates of personal and company income tax..

> As an illustration of the fact that this tax will affect only a tiny proportion of the population, its expected revenue yield, in the fifth year of operation is expected to be only $25m….
>
> …I repeat….that every asset already owned by taxpayers will be exempt from the tax."

The contrast between Keating's capital gains tax (CGT) and the NSW LVC Bill's so-called land value contribution (LVC) could not be more stark. Most obvious is the complete prospectivity built into the CGT, whereas the LVC applies to lands already owned. The CGT excludes the principal place of residence, but the LVC does not. The CGT excludes inflation from asset valuations, but the LVC does not. The CGT is applied at marginal tax rates, but the LVC rate applies regardless of the marginal tax rate: this makes the LCV a highly regressive tax. The CGT demonstrated an acknowledgement that property owners make long term investment decisions, and that it would be both unjust, and damage investor confidence, if rule changes were not made prospectively: the LVC does not. The CGT did not apply in the case of death: the LVC makes no such commitment. The CGT tax rate is predictable and consistent nationwide, whereas the LVC in NSW will compete with other states (such as South Australia) where the LVC is always zero, and worse, potentially be assessed by individual councils adding further uncertainty to investment decisions by homeowners and business investors alike. Unlike the CGT which duplicated no other tax, the LVC will effectively duplicate the CGT for property investors.

Far from being a "Your family" budget, the LVC provisions constitute a big kick in the guts for family landowners. Far from being a productivity enhancing measure, it is a productivity and incentive destroying measure which is in complete and utter contrast to the Keating productivity enhancing policies admired by the NSW Treasurer, which begs the question as to why such a terrible tax would be introduced by his Government.

The NSW LVC Bill was referred to the NSW Legislative Council Portfolio Committee No. 7- Planning and Environment Committee, which conducted an Inquiry ("the NSW LC LVC Inquiry"). Given the SCITC's support for "value capture" initiatives, it would presumably be fully aware of the issues raised before the Inquiry. Indeed, it is surprising that, given Recommendation 1, that the SCITC did not take steps to ensure that a Commonwealth submission was made to the Inquiry. Nonetheless, here are just a few key observations about it.

During the nine-business-days submission period, the NSW LVC Inquiry received 144 submissions. The largest number of submissions was from landowners, who unanimously objected to the proposed LVC. The second largest number of submissions was from NSW councils, the clear majority of which objected to the Bill's proposed LVC, substantially because it was too vague, was not the product of any consultation, and left the Minister with too much discretionary power. The Inquiry members unanimously rejected the LVC Bill. (See https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2821 - tab-members)

The Housing Industry Association submission (Submission 104) is of particular interest, explaining as it does the likely adverse impacts on housing market participants - builders and buyers.

As explained above, betterment taxes have a history of failure, being costly and complex to administer, prone to litigation, impairing the market efficiency of property trading and increasing costs which are often passed on to the final end users, which can include first home buyers. It is clear that betterment can not in practice be accurately measured, so that CGT type valuations will be used as proxy values, making the LVC in fact a type of CGT, and if no account is taken of inflation, a land tax as well. The proposed LVC is the complete antithesis of Hawke and Keating style productivity initiatives.

As noted above, if NSW requires more revenue, the *Henry Tax Review* has noted that a land tax applied to all types of land is more efficient – and of course improved economic efficiency is key to productivity, which the NSW Treasurer so fervently espouses.

Keating's CGT strategy as outlined in his above quoted speech is a masterclass in pitching a new tax to avoid injustice, inefficiency, and discordance with other taxes. Perottet has rightly lauded the economic development credentials of Hawke and Keating, but the betterment tax as proposed in the SCITC Financing Inquiry report is, like Perottet's "land value contribution", its antithesis.

Indeed, the proposed betterment tax is the antithesis of good policy in other ways….

[5.7.7] The Antithesis of Red Tape Reduction

Betterment Tax is the antithesis of red tape reduction.

Both the Morrison Government and the Labor Party have supported the reduction of Government red tape for business. Indeed, reducing red tape was part of the Hawke-Keating agenda back in 1985. The latest manifestation seems to be the "**Deregulation Taskforce**" which will identify: the main regulatory barriers to investment and to new business models from the perspective of business; the degree of complexity and length of time regulatory approvals and appeals processes take; and duplication, interaction and cumulative burden of regulation imposed within and across Commonwealth, state, territory and local jurisdictions.

It must be very clear from the above analysis that your report's proposed tax means more red tape for business – that is, more regulatory barriers to investment, more complexity and uncertainty, more duplication and a new regulatory burden spread across Commonwealth, state, territory and local jurisdictions.

To constructively monitor, liaise and influence the States to adopt Recommendation 1, the Commonwealth would really need to set up a permanent secretariat, which would:

- not forget to participate in relevant State Inquiries; prepare submissions; and
- attempt to have the States voluntarily co-ordinate their policies. In short, such an office would be yet another red tape production facility.

[5.7.8] Betterment Tax – The Antithesis of Party Policies

Betterment tax is antithetical to all major Party policies.

Liberal Party policy reads in part:

> "**We Believe:**
> In the inalienable rights and freedoms of all peoples; and we work towards a lean government that minimises interference in our daily lives; and maximises individual and private sector initiative
> In government that nurtures and encourages its citizens through incentive, rather than putting limits on people through the punishing disincentives of burdensome taxes …."

Really? Could the Liberal members of the SCITC please note that your report directly contradicts this. Past Labor Party economic policy, for which Hawke and Keating are extolled (even by a Liberal NSW Treasurer (and now Premier) as noted above) is, Labor members might note, in direct contradiction to the SCITC Financing Inquiry's proposed betterment tax.

In the old days, the joke was that the Country Party policy philosophy was to capitalise profits and socialise losses. Part of the National Party policy now reads:

> "The Nationals provide a considered and commonsense perspective on all elements of Government policy and a balance between Australia's political extremes."

Surely, a considered and common sense perspective, in the context of the above considerations, must demand that the proposed betterment tax be dropped.

[5.7.9] The Antithesis of Howard & Costello's "New Tax System"

Betterment Tax is the antithesis of Howard & Costello's "New Tax System" with respect to which adverse comparison has to be made..

> "The release of the 1998-99 cabinet papers by the National Archives of Australia [in 2020] provides new insights into the difficulty of designing, advocating and implementing lasting economic reform. There are lessons, as ever, for today's policymakers should they wish to heed them…..
>
> Howard and his treasurer Peter Costello announced their intention to overhaul the tax system in August 1997…..
>
> It was high stakes. The burden of taxation would shift from income to consumption, with a 10 per cent GST that would replace wholesale sales tax and some state taxes [nine (9) in all]. The states would receive all the revenue. The base and the rate could not change without the states agreeing….
>
> This is where the cabinet also played an important role. Submissions and minutes constitute thousands of pages. Costello briefed ministers with a PowerPoint slide show. There were nine meetings in four weeks, often taking all day, as the package was

> finalised. Compensation elements — including reductions in income tax rates and special support for families, pensioners, self-funded retirees, welfare recipients and small business — were enhanced.
>
> Ministers also wanted the benefits for 'employment and wealth creation, efficiency, and business costs' emphasised by the treasurer. It was also important to argue to voters that 'Treasury's distributional analysis shows that no household type or income range loses as a result of the package', a cabinet minute said." (Bramston, Troy, "Howard and Costello GST experience shows the way for tax reform", *The Australian*, Jan. 3 2020.)

The proposed betterment tax is a step in reversing the shift of taxation from income to consumption. It is introducing an *ad hoc* state tax contrary to the intention of the GST, which was to eliminate such taxes. There is no Treasury analysis of the dynamic effects of the proposed tax, or on the actual burden of its incidence. There are no demonstrated benefits for employment and wealth creation, efficiency and business costs.

The New Tax System was implemented by a Coalition government, so how can it be that Coalition members of the committee, in particular, can endorse a new tax which promises to directly contradict long established Coalition tax policy?

As to the shortcomings of the proposed tax, apart from its productivity-sapping, red-tape-expanding, taxation-complicating, legislatively-challenging and administratively-costly, and policy-contradictory shortcomings, wait, there's even more!

[5.7.10] Government Moral Hazard

The *Henry Tax Review* (above) made many pertinent observations about betterment tax in a short passage. Here's another:

> "…having a betterment tax in place may encourage governments to create economic rent through additional zoning restrictions or delays in land release, in order to raise more revenue".

This raises the issue of the effect of Government zoning strategy as a market manipulation technique: "moral hazard" might simply express the potential problem here. The introduction of a betterment tax might provide additional incentive for such manipulation. Remember, zoning is a State power, over which the Commonwealth has no legal control.

One glaring example of this moral hazard at the outset is the NSW Government's complete disregard for the "common sense and justice" displayed in the 1945 NSW legislation referred to above, which provided for money to be used to compensate those whose lands have been injuriously affected. Even though that scheme ultimately failed, the intent to provide appropriate compensation to landowners adversely affected by rezoning was clear, in contrast to the NSW LVC Bill, where it is arbitrarily and unjustly absent.

State Governments can manipulate zoning restrictions using one of four identifiable strategies of injustice. The fourth strategy, which is in fact a calculated version of restorative zoning

mentioned above, incorporates a betterment tax. The SCITC Finance Inquiry report does not identify how this manipulative behaviour would be addressed. The four strategies of injustice are -

A. the **Private Land Sterilisation Strategy:** maintain the adverse zoning (environmental and recreation zoning, say) indefinitely, claiming that it has achieved environmental benefits for the public (of course, at the cost of the landowner, which is not acknowledged);

B. the **Landowner Loss Realisation Strategy**: at some later time of its choosing, compulsorily acquire the land for exclusive public use, at the lower, zoning affected market value, thus making the landowner's loss permanent with a bargain price achieved for the government;

C. the **Mandated Developer Compliance Strategy:** at some later time of its choosing, require developers to contribute green space to projects at their own cost, by purchasing the sterilised land at the post-zoning depreciated value, prospectively from owners distressed by the zoning and consequently under pressure to sell at any price; and

D. the **De-sterilisation Uplift Strategy:** at some later time of its own choosing, after the injuriously affected owners have sold out, and after some "change in circumstances", rezone the affected land more favourably to a successor landowner (which could be a developer, or the government itself), capturing the uplift in value, if not itself as the owner, then by using the favourable rezoning to negotiate better terms with developer/owner or receive the proposed betterment tax (or "land value contribution" or whatever other euphemistic terminology is considered expedient).

Each of the four strategies relies in one way or another on the existence of uncompensated injurious affection being imposed on a landowner, so that sort of "value capture" is nothing like a betterment tax. However, in the case of the *De-sterilisation Uplift Strategy*, the government could compound the injustice by the imposition of a betterment tax on the manufactured uplift.

For further analysis, see: "PART II - The Rights & Wrongs of 'Value Capture'" in "Real Property Rights - and Wrongs", Submission to the *INQUIRY into the acquisition of land in relation to major transport projects: Portfolio Committee No. 6 – Transport & Customer Service*, June 2021 ("Submission 30").
https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2698 - tab-submissions

The point of including these observations here is that in addition to all its other shortcomings, the proposed SCITC betterment tax is not balanced by any concern for landholders injuriously affected by adverse rezoning.

Anyone who thinks such strategies are far-fetched has not spoken to affected landowners. Here's another documented case study…

[5.8] A Contemporary Case Study: High Speed Rail

Preparations are currently being made for the High Speed Rail ("HSR") project in NSW pursuant to the *High Speed Rail Study Phase 2 Report*. See also: https://www.nsw.gov.au/a-fast-rail-future-for-nsw . This decades-long project involves the planning of train corridors and stations. One such planned is the Port Macquarie Station.

On current plans, the Port Macquarie Station and adjacent rail corridor will be situated on private property owned by 3 Sons Trust, some of which land will have to be acquired in due course. The 3 Sons Trust property is 401 acres in size, the largest parcel of land in the area. The HSR would require resumption of 50 acres of same along the eastern side of the property. The 3 Sons Trust has no in-principle objection to this. The 3 Sons Trust property is forested, and used for farming (firewood, mulching and viticulture) and has a forestry agreement with NSW. It has an approved rural subdivision approval for the construction of four houses and a rural zoning.

Immediately to the west of the 3 Sons Trust property lies the Sancrox property where the proprietors are making a planning application and is prospectively being approved for 683 residential lots plus 1 ha. of commercially zoned land. This is on an area of land less than half the size of the 3 Sons Trust land. The 3 Sons Trust has never objected to the proposed favourable rezoning of the Sancrox or other neighbouring properties. It has been roughly estimated that such a rezoning would add $60m to the value of the Sancrox land – before any actual development begins.

Immediately to the south of the 3 Sons Trust property is State forest, which is actively logged.

Approval of the Sancrox planning proposal could not be done without amending the local Structure Plan. The Draft Structure Plan prepared by the Port Macquarie Hastings Council ("PMHC") has been published for public "feedback" in 2021. The Draft Plan allowed, *inter alia*, for the proposed development. However, to the surprise and shock of 3 Sons Trust, their whole property was shaded in light green and designated as "Proposed Environmental Conservation" area. This was done without any prior notice or consultation with the 3 sons Trust, and without any offer of compensation whatsoever.

The proposed "Environmental Conservation", if not withdrawn (and the PMHC has failed to address the strong objections of 3 Sons Trust so far), would have a devastating effect on the financial and life plans of the owners. For example:

- the value of the property would plummet to almost zero (as has been the case with Aerotropolis landowners cited above);
- the plummeting value risks the bank calling in the mortgage for breach of equity covenants;
- no income producing activity would be allowed on the property;
- the planned construction of four houses would be prohibited; and

- they would be literally deprived of their right to earn food and shelter on their own land.

This is clearly a breach of human rights, unconscionable and unjust, but acceptable to the PMHC.

The proposed "Environmental Conservation" is also puzzling because it is a contradiction of other land uses, including:

- No validated ecological evidence was relied upon by the PMHC.
- The primary use of the land to date was disregarded
- An SEPP 44 Koala Habitat Assessment by Naturecall Environmental in February 2018 concluded that the Property is not core koala habitat. No threatened species or ecological communities have been identified on the Property.
- The neighbouring Cowarra State Forest was not designated "Environmental Conservation", notwithstanding its geographic and ecological similarity.
- The prospect of clear felling 50 acres of the land for the proposed HRS Port Macquarie Station is somehow not inconsistent with "Environmental Conservation".
- All other adjacent privately owned properties, which were not designated "Environmental Conservation", are designated as being suitable for residential and/or commercial activities.
- Given that the 3 Sons Trust land remaining after compulsory acquisition of the 50 acre portion would be immediately adjacent to the HSR Port Macquarie Station (which includes provision for parking 2.500 motor vehicles), then in the absence of any truly compelling ecological imperative, the expected long term use of the land would ordinarily be some combination of residential and commercial uses.

In short, the proposed "Environmental Conservation" designation for the 3 Sons Trust land is not only unjust, but strangely illogical.

This is where the twist in the tale kicks in, and lessons for the operation of "value capture" start to become evident.

Examination of publicly available PMHC minutes and other related documents reveals that the PMHC and adjacent landowners realised that regulatory environmental limitations would limit their planning proposal to about 300 residences. This could be doubled by buying environmental offsets, but the owners were unwilling to pay for same. Then, a PMHC officer proposed (this is in the minutes!!) that a sufficient environmental offsite offset would be achievable by rezoning the adjacent "corridor" – being of course the 3 Sons Trust land – to "Environmental Conservation".

That's right: the 3 Sons Trust land is, under the Draft Plan, being used as an "offsite offset".

The 3 Sons Trust's consent to this was never sought. No mention of, let alone provision for, compensation by anybody has been made at any time.

This must be the ultimate in "beggar-thy-neighbour" policy. The Gospel of Matthew records Jesus Christ to say: "…. Thou shalt love thy neighbour as thyself" (**22:37-39**). Well, there's no sign of any such Christian sentiment here!

3 Sons Trust continues to fight to have the proposed "Environmental Conservation" designation rescinded from the PMHC Plan. A dossier of publicly available documents evidencing these circumstances is being collated for review by anyone interested.

As to betterment tax implications from this case study, here are a few:

1. When does the betterment period start? When NSW published its video? When the Phase 1 study commenced? When the Phase 2 study was published? Or maybe it's when an announcement is made as to the actual construction timetable is announced?

2. Should the betterment tax be applied to the Sancrox landowners if their planning proposal for 683 residences is approved? A 75% tax rate of $60m is $45m – but this increase would occur as the consequence of rezoning in the context of current growth rates in Port Macquarie, regardless of the proposed, but not yet certain, HSR project. Maybe the prospect of HSR might account for 10% of that increase (i.e., $4.5m)? So how would that percentage be calculated exactly? Who would value it? Who would check the valuers?

3. Standing in the shoes of the developer, it is easy to see that a $45m tax levy would be a significant impediment to the viability of the project. Suppose the tax was "only" half that: a $22.5m tax levy would be a significant financial hurdle. Worse still, would be if the tax rate (as proposed under the NSW Bill) is capable of being set and varied by the minister or local government authority, from one case to another. Such uncertainty is a real cost in itself, and would be an investment inhibitor. In practice, no developer would proceed with such a project unless confident that the tax incidence could be passed on – to home buyers and businesses. In these ways, the betterment tax would have a material adverse effect on housing availability and affordability.

4. If the 3 Sons Trust land is rezoned "Environment Conservation" pursuant to the published Draft Plan, the reduced value may cause the bank to foreclose to the ruination of the owner. The purchaser could simply be patient, and in later years – or maybe not so later years – as circumstances evolve, have the land rezoned in the increasingly busy precinct adjacent to the HSR station, which after all has no verified ecological value, and achieve a substantial rise in value. The extent of the windfall would be artificially large due to the previously depressing impact of the environmental conservation zoning and to that extent be at the cost of the 3 Sons Trust. Is that transfer by manipulative rezoning ethical? No it is not.

Some of the 3 Sons Trust neighbours, led on by the PMHC, have made a decision which is regrettable. Yet nonetheless, they and all the other affected landowners are typical Australians of unremarkable means, with the initiative to save and invest for the future, who

collectively give the lie to the fanciful premise of "lucky, influential landowners" being transformed into "multi-billionaire status". Stereotyping is not a sound basis for policy.

[6.0] Legal Misconceptions

Yet the view that uncompensated injurious affection can be imposed onto landowners willy-nilly by a State is based on a misunderstanding of the law. It has been reported that the Chair has said:

> "….the proposal would allow farmers to continue farming after rezoning, without any penalty, Mr Alexander said.
>
> 'The landowner will know well in advance and be fully informed that their lucky day, their winning of the lottery has happened, that their land is going to be rezoned, and it's going to benefit from new infrastructure,' he said.
>
> 'They can continue farming as long as they want. It's just on the sale of that farm that the uplift is shared.'" (*Queensland Country Life* quoted above.)

Well, fancy that, the farmer can still farm on his own land, without being penalised. Apart from conceding a right to farmers that they already possessed thanks very much, these comments demonstrate a fundamental misunderstanding of real property law in the States by purporting to grant a right to farmers by rezoning, when in fact the rezoned rights, and much more, have already been granted to them.

How might this be explained?

Dr Fry observed:

> "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 – 167 at 159.)

Kemp added:

> 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, Richard E. *Principles of the Law of Real Property in New South Wales,* 1903 at 67.)

Thus also, the High Court in *Fejo v Northern Territory* [1998] HCA 58 cited with approval Isaac J's 1923 observation:

> "..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." (See *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.)

Now, "every act of ownership which can enter into the imagination" includes any number of rights, such as for example the right to: grow crops, chop down trees, construct buildings, demolish buildings, run livestock, subdivide, protect the land from erosion by the sea, lease to tenants, exclude trespassers, grant easements, enter into restrictive covenants, etc. etc. The ability to exclude trespassers, for example, is an aspect of the right of free enjoyment which is inherent in the grant of freehold. This is the law which authorises you to exclude anyone else from being on your land.

At this point, the question might be asked: If the Crown has, by granting the proprietary right of freehold, also provided the landowner with an unfettered right of alienation of rights from the Crown, how does that actually work? The answer is supplied by the High Court, per Brennan J. in the *Mabo (No. 2) Case*:

> "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." (*Mabo and others v. Queensland* (No. 2) [1992] HCA 23; (1992) 175 CLR 1 F.C. 92/014 (3 June 1992) at para. 74.)

Brennan J. is here simply applying the fundamental common law rule with respect to grants of any kind, namely that a grantor may not derogate from his own grant to a grantee. That is to say, the grantor cannot repudiate the grant. As expressed elsewhere:

> "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.)

Brennan's observation essentially repeats what the Supreme Court of NSW had ruled a century and a half earlier:

> "…the Crown cannot derogate from its own grant" (per Stephen CJ, *Cooper v Corporation of Sydney* (1853) 1 Legge 765 at 771-772.)

By using the mechanism of the grant as the basis for the law of tenure in NSW and the other States, the Crown (in right of each State) has effectively denied itself the power to act

arbitrarily to repudiate the terms of the grant. This is the essence of the "alienation" of title which is fundamental to the Crown grant and the security of tenure of the landowner.

Let us for the moment revert to Mr Alexander's "lucky" landowner, whose land is favourably rezoned. We can see from the above legal analysis that where a landowner possesses freehold title, he may choose to use that land for farming. It may be that for perfectly legitimate planning purposes, the State may "zone" the land for rural use. It might well be that this is consistent with the landowner's intended and actual use, in which case there is no conflict of purpose. However, the landowner, by virtue of the Crown grant of freehold already possesses the legal right to use that land in any way he sees fit. Three points follow from this:

1. if the existing zoning purports to prevent the owner from carrying out alternative uses, such as subdivision etc., then it is in derogation of the grant;

2. if the zoning is rezoned to allow uses relevant to the major transport project, it is simply consistent with, and should be in acknowledgment of, the landowner's existing rights of user under the grant; and

3. to the extent that the existing zoning might have artificially depressed the value of the land, any quick rise in property value attributable to the rezoning would simply reflect a re-adjustment to full value, which would otherwise have occurred more gradually over a period of time.

Any view that a favourable rezoning of a farmer's land in the context of a major infrastructure project, or indeed in any context, is some sort of gift to a "lucky" owner misunderstands the law of tenure, and is wrong in law. If the opportunity for more productive uses on private land arises as a consequence of a proximate major infrastructure project, or for any other reason, then that opportunity is lawfully the property of the landowner.

Some further legal points might be briefly made here with respect to the permanence of freehold title, security of tenure, observance of human rights, and the characterisation of freehold tenure as a bundle of rights, each of which is itself property.

The unfettered right of alienation, which permits every act of ownership which can enter the imagination, does not simply fade away with time. In *Cooper v Stuart* [1889] 14 App Cas 286 at 29, the Privy Council found that 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. That is, the legal force of a Crown grant does not come to an end at a particular point: it continues in perpetuity while the Crown exists, unless the Crown chooses to entirely resume the grant and subsequently cancel it.

Further, the High Court states that the self-imposed inability of the Crown to derogate from its own grant provides for security of ownership:

> "Security in the right to own property carries immunity from arbitrary deprivation of the property....." (Per 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* ([2019] HCA 7 at §71).)

The word "arbitrarily" has been interpreted by the High Court to mean not only "illegally" but also "unjustly":

> "....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.)" (In *Western Australia v Commonwealth (Native Title Act Case)* [1995] HCA 47; 1995 185 CLR 373, the High Court affirmed its observation to that effect in the *Mabo (No. 1)* case.)

The above comments by Isaacs J. and Brennan J. refer to the possibility of statutes (i.e. legislation) relating to Crown grants. Legislation relating to Crown grants, to be valid, cannot derogate from the grants. Examples of legislation which so regulate, without derogation include:

- Torrens title legislation, which facilitates the cheap and reliable conveyance of ownership;
- Strata title and community title legislation, which enables novel forms of subdivision (which Isaacs J. might have described as being imaginative);
- Compulsory acquisition legislation, which provides for compensation on resumption; and
- Planning laws which do not materially restrict freehold rights of use under the Crown grant.

The previously mentioned concept as expressed by High Court Justice, Ian Callinan AM, namely that property is constituted by a bundle of rights of user, and that each such right is property, is entirely consistent with the characterisation of freehold ownership as including "every act of ownership which can enter into the imagination".

Thus, the idea that the State may freely restrict freehold rights of user (such as the right to exclude trespassers, or to grow wheat etc.) – or in other words, to injuriously affect a property without making compensation - in derogation of a Crown grant, because the property is merely the bare title to the land itself, rather than any of the uses to which the owner might choose to put it, is wrong in law.

[6.1] Rebuttal Fallacies

If it were correct in law that the Crown could derogate from its own grant, there would be judicial authority for same, but it such authority doesn't exist. For example, as we have seen, Brennan J's leading and uncontradicted judgment in the *Mabo (No. 2) Case* reaffirmed the Crown's inability to so derogate.

Judicial authorities are fallaciously cited from time to time in support of the proposition that a State has the power to injuriously affect real property without compensation. As examples of this, three such cases are briefly examined here. They are:

- *Commonwealth v New South Wales* (the *"Wheat Case")* (1915) 20 CLR 54
- *British American Tobacco Australasia Limited and Ors v. The Commonwealth of Australia* [2012] HCA 43 ("*Tobacco Plain Packaging Case*")
- *Slattery v Naylor* (1888) LR 13 App Cas 446

Each of these cases, two heard by the High Court, and the earliest by the Privy Council, is good authority for a variety of propositions, but not with respect to the law of tenure, which was not in issue and so did not require the judges' attention.

[6.1.1] *Commonwealth v New South Wales* (the *"Wheat Case")*

The NSW Government, quite apart from frequently maintaining an utter disregard for justice in this field is under a perhaps innocent misapprehension as to the legal rights of landowners injuriously affected by adverse rezoning.

This misapprehension can immediately be traced to the *Review of the Land Acquisition (Just Terms Compensation) Act 1991* by Mr David J. Russell SC (February 2014) (the Russell Review). The first term of reference of the Russell Review (at 6) was to "define and clarify what real property rights or interests in real property are".

The Russell Review cited a textbook reference which relied upon *Commonwealth v New South Wales* (the *"Wheat Case")* (1915) 20 CLR 54 as authority for the proposition that State Parliaments may enact legislation to compulsorily acquire land without the payment of compensation, or with much reduced compensation. This interpretation is fallacious.

A startlingly obvious problem with citing the *Wheat Case* as authority for such a proposition is that in the *Wheat Case,* as the nickname suggests, the property in issue was wheat. Wheat is a chattel, not real property. The High Court did not consider the law of real property in the *Wheat Case*. The law of real property was irrelevant to the facts in issue.

The only trace of relevance that can be found therein is the observation of Barton J. (*ibid*., at 98), that the State could "assume or resume". "resume" is a clear allusion to the taking back of a grant, and as we have seen above, the authority of superior courts, including the High Court, is very clear that the Crown cannot derogate from its own grant. Indeed, Barton J. did not say that the Crown could "assume or derogate".

None of the judges in the *Wheat Case* held that the Crown, in resuming property, could validly repudiate or derogate from its grant, and neither has any subsequent High Court case, including *Durham Holdings v New South Wales* (2000) 205 CLR 399, which reaffirmed the general reasoning in the *Wheat Case*, and the consistent findings of other High Court judgments in the intervening period.

These points are explained in greater detail in your humble correspondent's Submission 30: https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2698 - tab-submissions

[6.1.2] *Tobacco Plain Packaging Case*

To take another example, the *Tobacco Plain Packaging Case* has been wrongly recited as authority for the proposition that a Government can derogate from a Crown grant, by resuming or impairing property rights without compensation. In fact, that case, which related to intellectual property law, which is personal property governed by Commonwealth law, is poles apart from real property law of the States. To explain this as briefly as possible, please refer to the one page summary overleaf:

***British American Tobacco Australasia Limited and Ors v. The Commonwealth of Australia* [2012] HCA 43 ("*Tobacco Plain Packaging Case*") & Real Property Law**

Crown Grant of Freehold Title	v.	***Tobacco Plain Packaging Case***
State law		Commonwealth law
Applies only within the same State		Applies nationwide
Real property		Personal property
Right in a physical thing		Not a right in a physical thing
Positive rights		Negative rights
Proprietary rights granted		No proprietary rights granted
Alienation of proprietary rights by Crown		No proprietary alienation by Crown
Valid in perpetuity (unless resumed)		Statutory trademark property impermanent
Derogation v defeasement/resumption		"Acquisition" v deprivation/taking
S.51(xxxi) not applicable to States		Commonwealth bound by s.51(xxxi)
Power held since Colony formation (e.g., in NSW, since 1788)		Commonwealth power held since Federation (1901) (s.51(xviii))
States' power unaffected by Federation (Ss. 106, 107 & 51)		States' power inchoately granted to Commonwealth at Federation (pending ratification of Convention on Tobacco Control) (ss. 51(xxix) & s.109)
Power to resume (or, "compulsorily acquire"), but not to assume, estates		No power to resume or to assume estates in a State

Citations of authorities for any of the above points may be provided on request.

Crown grants of freehold title in particular, and intellectual property rights, are both types of property, but they are identical only in terms of the lowest common denominator, i.e. they are both "property" in Australia, as interpreted by the Australian judiciary. Beyond that, they are generally polar opposites as types of property at law.

The States' real property law of tenure and estates was in no way at issue in the *Tobacco Plain Packaging Case*. To simply attribute Commonwealth laws as applied to intellectual property law in the *Tobacco Plain Packaging Case* to the States' law of tenure and estates would be to extinguish by mere inference the whole body of judicial authority and law relating to proprietary interests in land in the States. As well as that, it would constitute a wholesale breach of the common law principle of legality as explained by French CJ.

[6.1.3] ***Slattery v Naylor***

Another authority used fallaciously to the effect that a State Government may deprive an owner of "the reality of proprietorship" including "everything that [makes] the property worth having" without compensation, is Professor Gray's reliance on the Privy Council case of *Slattery v Naylor* LR 13 App Cas 446. (Gray, Kevin, "Can environmental regulation constitute a taking of property at common law?" (2007) 24(3) *EPLJ* 161.)

Gray recounts the facts, that Slattery had purchased a burial plot in a Catholic cemetery and:

> "…some five years later the municipal council of the borough of Petersham, motivated by environmental health considerations, passed a bylaw which prohibited any further interments closer than 100 yards from any public building, place of worship, schoolroom, dwelling-house or public street within the borough. This amounted, in effect, to a total ban on any further burials in the cemetery at Petersham. When Slattery's wife *died* six months later, Slattery nevertheless buried her in his plot [and] was prosecuted by the borough inspector of nuisances…Slattery was convicted…
>
> the Privy Council upheld a criminal conviction for unlawful interment of the remains of a departed spouse in an already purchased burial plot." (*Ibid.*, at 161, 181.)

In relying on the *Slattery Case* for his proposition, Prof. Gray, with respect, demonstrates a complete and utter ignorance of the nature of the law of tenure in NSW, namely tenure by Crown grant of freehold and leasehold. In his entire polemic, there is no mention of the role of Crown grants. In fact, had he chosen to read another Privy Council case, namely *Cooper v Stuart* (cited above), he would have found an excellent description of the key characteristics of this real property law as it applies in NSW.

So, what were the real property rights which existed in the circumstances of *Slattery's Case*? We know that "Slattery purchased a burial pit in the cemetery", so there was a contract. It was a "Roman Catholic Cemetery", so presumably the "burial pit" had been purchased from a Roman Catholic entity, which was the vendor party to the contract. No other details are supplied.

The longstanding practice in NSW with respect to cemeteries, is that the cemetery operator (in the subject case, the Catholic Church), is granted a licence by the Crown to perform cemetery services, and by such licence has the power as the cemetery operator to itself enter into contracts granting burial allotment rights to "licence holders", who might or might not bear the name of "Slattery"(!)

In such circumstances, it is clear that Slattery would not have possessed a Crown grant of freehold title to his burial allotment, and nor would he have had a Crown grant of leasehold title, in the form of a 99 year lease, or a perpetual lease, or for any other term. It would also seem highly likely that the Catholic Church itself did not possess freehold or leasehold title to the cemetery land, but merely a Crown grant of licence. No doubt a record of same would still exist in the State archives.

The main conclusion here is that Slattery's proprietary right under such a contract - effectively being the licensee of a licensee - was very much more limited than if he had been the registered proprietor of the freehold or leasehold title to the land. Indeed, Slattery did not

argue that he possessed freehold or leasehold title to the plot: this would have been an extraordinary omission in argument before the Privy Council if he had either form of title.

It would seem that the effect of the revised bylaw would have been to frustrate the allotment contract. In this circumstance, Slattery would ordinarily have been entitled to a refund from the Catholic Church. Gray has failed to inquire as to whether or not Slattery was entitled to a refund and/or a substitute allotment, simply concluding that this was a case of "uncompensated prohibition", notwithstanding also that Slattery did not claim any unsatisfied compensation right under contract or otherwise. Given that Gray features the *Slattery Case* as a leading example of the power of government to take or regulate property rights without compensation, such an omission must be considered fundamental and telling.

In short, *Slattery's Case* is no authority at all for the proposition that a State may derogate from its own grant. As mentioned above, this contrasts with another Privy Council case, ignored by Gray, *Cooper v Stuart*, which specifically addressed the issue and held that NSW could not derogate from its grant. Whatever the validity of Prof. Gray's arguments might have in other common law countries, with respect to the real property law of NSW they are complete rubbish.

A footnote to this line of argument, is the generalisation that laws of England and the Australian States, stemming from the same tree of legal development, are much the same. This may be true in many ways, but not with respect to the law of real property. Some such differences were explored by the Supreme Court of NSW in *Burns v Allen* [1889] NSWR 218, which followed the *Cooper v Stuart* Privy Council judgment. Such fundamental differences escaped the attention of the mostly England-based Professor Gray.

[6.1.4] Conclusions as to Legal Misconceptions

Given that there is absolutely no judicial authority for the proposition that the Crown in right of a State may derogate from its own grant (and certainly that was not the position taken by Brennan J. in the relatively recent High Court *Mabo (No.2) Case*), it can be seen that a State's understanding of its own real property law can, these days, be decidedly inadequate.

This is not helped by legal practitioners who, like planners (but with less excuse, as planners are not lawyers), read legislation as if they were diners reading a menu in a restaurant. Practitioners should be more like the food inspector, who goes into the kitchen and checks that the turkey is not chicken and that the kitchen is clean. Instead of taking the validity of a legislative or regulatory document at face value, practitioners should be testing its veracity in the context of the wider law, particularly the common law.

This confused uncertainty is not limited to NSW, but exists to a greater or lesser extent in the other States. It is an additional reason for the Commonwealth, in entering into any legally sound arrangements with a State relating to the acquisition or injurious affection of privately owned land, ought to take steps to ensure that the legal and human rights of such landowners are protected. While the immediate concern of the SCITC may be with regard to landowners impacted by major infrastructure projects, there is no reason in principle why such

protections should not be extended to all landowners within that State, as is already the case with native title holders.

A point being made here is that the State Government's working assumption that it can willy-nilly impose zoning restrictions on landholders without compensation is very open to challenge. Further, the Commonwealth can readily use or acquire the power to stop it.

Another point is that the Chair's view about a farmer's "lucky day, their winning of the lottery" is totally misplaced as a matter of law: the farmer who possesses freehold title to land in a State already has real property rights "limited only by the imagination". Indeed, the Chair's view as quoted is an example of an unfortunate contemporary tendency by some to regard freedoms not as rights, but as gifts to be bestowed by ministers.

[7.0] Conclusion – Proposed Commonwealth Initiatives

As noted at the outset, the interaction of Commonwealth powers and State real property laws on a substantial scale has the potential to cause some unexpected and undesirable outcomes.

The identification and development of such policies for now and the future would seem to be perfectly within the ambit of the Standing Committee on Infrastructure, Transport and Cities. The SCITC has the opportunity and power to develop some new policies for current and future major projects, for the benefit of the people of Australia, and in particular for their "social and economic prosperity" which such projects are intended to generate.

Particular aspects to be addressed include:

1. The constitutionally limited power of the Commonwealth in relation to compulsorily acquiring privately owned land in the States, compared to the States themselves;

2. The phenomenon of private landowners being arbitrarily deprived of their property rights, that being a breach of human rights, as an unanticipated consequence of the Commonwealth's major infrastructure projects; and

3. The efficiency of tax arrangements to capture economic uplift generated by the Commonwealth's major project investment.

The SCITC "value capture" recommendation is however formulated in complete isolation from the Australian taxation system, and many other policy areas as explained herein. As any physician would confirm, a primary ethical principle of the Hippocratic Oath is "First do no harm.". Similarly, the first priority for the SCITC should be to stop encouraging States to adopt betterment taxes (regardless of the euphemism adopted).

In the development of a major Commonwealth infrastructure project, an early step is obviously to estimate its financial viability. As part of that process, where the project is expected to be situated on, or in close proximity to, privately owned land, attention should be

paid to the tax structure relating to private land use: i.e., how effectively the existing tax system would operate to raise (Commonwealth and State) revenue from private land use consequent to the economic activity generated by the project.

At this early stage, the future interaction between the Commonwealth and private landowners can be assessed with a comprehensive focus on:

1. Consistency with Macro Policies:
    - Party Policies
    - Project Policies, including enhancement of social and economic prosperity
    - Economic Policies
    - General Tax System Policies
    - Human Rights Policies

2. Enhanced Cost Control:
    - Prudential protection against the risk of ISDS claims
    - Enhanced control over private land acquisition and injurious affection costs
    - Clarification of legal rights of landowners in each State
    - Reduced likelihood of litigation being brought by affected landholders
    - Reduced red tape

3. Rezoning Policy Consistency with Wider Policy:
    - UDHR compliance, consistent with Commonwealth external affairs policy
    - UDHR compliance, consistent with Commonwealth FTA agreements
    - UDHR compliance, consistent with Commonwealth native title policy
    - Prevent opportunity for "moral hazard" zoning manipulation by States.

The phenomenon of private (i.e., common law) landowners being arbitrarily deprived of their property rights, that being a breach of human rights, as an unanticipated consequence of the Commonwealth's major infrastructure projects, can and should be avoided. Given that such protections are already provided by Australia to native title holders, and to foreigners investing in common law title, their absence with respect to Australians who invest in common law title must be considered an anomaly, which common sense and justice demand must be rectified.

As to the Commonwealth, it can avoid unnecessary cost and risk arising from State dealing with private landowners and simultaneously ensure that the human rights of all landowners affected by a project are preserved. The addition of suitable conditions to s.96 grants, and the adoption of Art. 17 UDHR into domestic law are two strategies readily available to the Commonwealth.

Policies such as a betterment tax, as proposed by the SCITC, if considered worthy of consideration (notwithstanding their history of failure, *Henry Tax Review* scepticism etc.), should be examined by Treasury at the outset. Such analysis would not be a static "land value uplift/tax revenue assessed" type, but rather require dynamic modelling in the context of the existing tax system, and calculation of multiplier effects (positive or negative) on project-related economic activity and net revenue. The SCITC would then be in a more informed position to consider what tax tweaks, if any, might be beneficial and appropriate.

Given the numerous difficulties associated with accurately calculating zoning betterment values, and a certain mystery about what the betterment tax rate might be, and whether or not it would be assessed to be payable at the taxpayer's marginal tax rate, or whether it would apply retrospectively or only prospectively, etc., Treasury would have to include a sensitivity analysis to estimate the possible effects of so many different possible assumptions.

Commonwealth major infrastructure projects are intended to create "social & economic prosperity". Where they are undertaken on or near privately owned land in a State, the Commonwealth should plan, from the outset how:

- to ensure that the human rights of property owners are observed in all circumstances, not simply by the Commonwealth, but also by the relevant State; and

- the financial effect of any proposed new tax in relation to the project would manifest itself dynamically, according to Treasury analysis.

The Commonwealth is in a strong position to "generate social and economic prosperity" from supporting major infrastructure projects by:

- preventing the States from unjustly depriving landowners of their property rights (and *ipso facto*, their human rights); and

- avoiding *ad hoc* unproductive tax policies in favour of reviewing the dynamically modelled performance of the Australian taxation system with respect to such projects, to explore revenue possibilities that would not be isolated from, or counterproductive to, said system.

The Standing Committee can do!?

Peter Ingall
Barrister

 See also: https://adverse-rezoning.info