ABORIGINAL HERITAGE BILL REVIEW: SUBMISSION

by PETER INGALL

The aphorism "the road to hell is paved with good intentions" is epitomised by the *Aboriginal Cultural Heritage Bill* 2020 ("Bill").

The stated objects of the Bill in s.8, relating to the recognition, protection and preservation of Aboriginal heritage may be regarded by all as eminently desirable. Unfortunately, in attempting to achieve that result, the Bill breaches human rights, imposes a burdensome bureaucracy requiring unnecessarily onerous compliance, and unnecessarily exposes itself to legal challenge, potentially rendering significant aspects invalid or unenforceable. This is a very disappointing effort, particularly in the context of the very recent *Parliamentary Inquiry into Private Property Rights*, the creation of which was motivated by recognition of widespread unresolved injustices suffered by WA landowners.

This submission does not in any way question the stated objectives with regard to aboriginal concerns. What it does question is the associated human rights, bureaucratic, and legal validity hell which it threatens to impose in Western Australia. The goal should be to achieve the stated objectives with a wide detour around these - on the road to salvation, one might say - which shall be explained as follows.

Breaching Human Rights

It is clear that in the pursuit of the s.8 objects, there is significant potential for the existing property rights of common law title holders to be adversely affected, with no compensation. The imposition of: protected area orders, and regulations; ACH management plans; stop activity orders; prohibition orders; remediation orders; and significant criminal liability, among other things which you could no doubt identify, pose a significant potential interference with a landholder's ability to use land as thencetofore entitled. ("Landholder" is used here to refer to any common law title holder, by freehold or leasehold, which would ordinarily include an owner as defined in the *Heritage Act* 2106 s.6(f), but also an occupier of such land.)

Victorian legislation, which bears many similarities to the Bill, is rather more advanced in execution, as it has been enacted and regulations promulgated. "Kenneth", in the newspaper comment attached below, provides an example of what a common law title holder might feel when affected by comparable aboriginal heritage law (Victoria in his case).

One term used to describe the impairment of a landowner's right to use land as previously entitled, is "injurious affection". Without attempting to compile an exhaustive list of possibilities here, it is clear that there is significant scope for injurious affection to be sustained on properties as a consequence of the operation of the Bill's terms. For example, compliance with the process of producing management plans might "sterilise" the use of the land for an extended period of time. The loss of value caused to the land as a consequence could be compounded by the making of a protected area order...and so it goes on.

It may be that such legislative interference with private property ownership is necessary to achieve the objects of the Bill, but the failure to provide for compensation to affected landholders is completely unnecessary. More than that, it would amount to a breach of Article 17 of the *Universal Declaration of Human Rights ("UDHR")*, which provides that no person shall be arbitrarily deprived of his property. The reader might be reminded that the *UDHR* has had uninterrupted bipartisan political support by the Commonwealth in foreign affairs in the eight decades since it was adopted by the UN General Assembly under the presidency of "Doc" Evatt. According to Australia, everybody else in the world should abide by and benefit from the *UDHR,* so why not also landholders in WA?

The Bill is structured so that the (aboriginal heritage related) public benefit is substantially paid for by randomly unlucky private landowners who happen to (possibly) have aboriginal heritage characteristics on their land, whereas it is a matter of common sense and justice - and human rights - that a public benefit be paid for by the public.

This Bill, in attempting to restore or maintain the human rights of the aboriginal population of WA is, quite unnecessarily, structured to breach the human rights of common law title holders (some of whom, ironically, might be aboriginal).

This would be remedied by ensuring that one of the objects of the Bill is - expressed here in general terms - that any common law title holders adversely affected by the operation of the Bill should be compensated for their loss (of, say, peaceful enjoyment and land value) and compliance costs incurred, in a timely and equitable manner. Ideally, it would provide for substantial compliance with Art.17 *UDHR*.

The absence of such a provision is a major human rights defect in the Bill.

Remedying this breach of human rights would, of course, potentially be at significant cost to the public purse. This would of itself encourage the government to achieve the desired objectives with a more streamlined system. (In this regard, comparison might

be made with the *Treasure Act* (UK) 1996 which has resulted in a great increase in the reporting of finds. There are obviously major cultural differences between finds in the UK and aboriginal sites, but the comparison might nonetheless be informative.)

Legislative Invalidity

Mr Ian Callinan AC, formerly a Justice of the High Court, has made extra-judicial commentary that, *inter alia*:

> "..restrictive covenants can be worth a great deal of money. There is a clear analogy between a legislatively imposed involuntary restriction on a land owner and one given for value and noted on the title. Each is equally a matter of public record and has all other relevant qualities in common. Yet under Australian law rarely does the former give rise to a right to compensation."

Callinan actually speculates that the major new legal issue of the coming years relates to this:

> "Restrictions on reasonable usage, obligations of preservation, insistence on expenditure for no or little return, and on planting or replanting, are all potentially expensive. I see the crafting of a means of ensuring a fair and equitable sharing of this expense as the real challenge to the legislatures and the courts, including the High Court as the constitutional court...". (Callinan, Ian QC AC, "For the sake of our heritage, the buck must stop somewhere", *The Australian*, 3 Jan 2008 at Summer Living p.10.)

In this context, a breach of "mere" human rights by the Bill will not make it unenforceable subsequently, as an Act, but a breach of the seemingly forgotten law of tenure might. Here's the argument in brief.

Tenure in WA (like the other states) is by Crown grant of freehold or leasehold title. For brevity, the focus here shall be on freehold title.

In 1998, the High Court cited with approval Isaac J's 1923 observation with respect to an estate in fee simple, or freehold, as conferring "the lawful right to exercise over, upon, and in respect to, the land, *every act of ownership which can enter into the imagination*." [Emphasis added. *Fejo v Northern Territory* [1998] HCA 58.]

To quote the majority joint judgment ((at. §43) which identical point was made by Kirby J. (at §93), to make the point unanimous):

> "..An estate in fee simple is, 'for almost all practical purposes, the equivalent of full ownership of the land' [20] and confers 'the lawful right to exercise over,

upon, and in respect to, the land, every act of ownership which can enter into the imagination.' [21] It simply does not permit of the enjoyment by anyone else of any right or interest in respect of the land unless conferred by statute, by the owner of the fee simple or by a predecessor in title.

20 *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635 at 656, per Deane, Dawson and Gaudron JJ. See also *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 80, per Deane and Gaudron JJ.

21 *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 42, per Isaacs J, quoting *Challis's Real Property*, 3rd ed (1911), p 218. See also *Minister for the Army v Dalziel* (1944) 68 CLR 261 at 298, per Williams J and *Wik Peoples v Queensland* (1996) 187 CLR 1 at 176, per Gummow J."

More recently, in *Northern Territory v Griffiths* ([2019] HCA 7 at pp 26-27 para 67 per Kiefel CJ Bell J Keane J Nettle J Gordon J), the High Court once again acknowledged the great breadth of rights associated with freehold title, AND explicitly recognised that a lesser power exercisable over land by an owner will ordinarily cause the land to have a lesser economic value:

"At common law, freehold ownership or, more precisely, an estate in fee simple is the most ample estate which can exist in land[101]. As such, it confers the greatest rights in relation to land and the greatest degree of power that can be exercised over the land [102]; and, for that reason, it ordinarily has the greatest economic value of any estate in land. Lesser estates in land confer lesser rights in relation to land and, therefore, a lesser degree of power exercisable over the land; and, for that reason, they ordinarily have a lesser economic value than a fee simple interest in land.

. 101 See Amodu Tijani [1921] 2 AC 399 at 403; *Royal Sydney Golf Club v Federal Commissioner of Taxation* (1955) 91 CLR 610 at 623; [1955] HCA 13; Megarry and Wade, *The Law of Real Property*, 8th ed (2012) at 52; Honoré, "Ownership" in Guest (ed), *Oxford Essays in Jurisprudence* (1961) 107. See also *Fejo v Northern Territory* (1998) 195 CLR 96 at 151-152 [107]; [1998] HCA 58.

. 102 See *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 42, 45; [1923] HCA 34; *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 285; [1944] HCA 4. See also *Yanner v Eaton* (1999) 201 CLR 351 at 365-366 [17]; [1999] HCA 53."

One limitation to note with respect to Crown grants of freehold, is that when made they may, and often do, contain reservations (for example with respect to mineral rights).

In *Commonwealth v Western Australia* [1999] HCA 5 at §103, Gummow J. observed that the effect of the reservations:

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

In *Dixon v Throssell* [1899] 1 WALR 193, a Crown grant dating from the early 19th century reserved to the town the right to resume one-twentieth of the land for the making of roads, bridges, canals, toe-paths or other works of public utility and convenience. Circa 1899, the Crown resumed a portion of the land for the purposes of a botanical garden. The landowner objected.

The Supreme Court of Western Australia unanimously found that the Crown had no right to resume for the purposes of a botanical garden under the reservation contained in the grant. The point is, where a limitation of use is imposed by the Crown (for our purposes, that can be the colony or state of Western Australia, or by the Governor on the advice of Parliament (or in the early days by Executive *fiat*)) which is not within the terms of a reservation, the Crown must pay compensation to avoid derogation from the Crown grant.

This brings us to a fundamental common law characteristic of grants in general, and *a fortiori*, Crown grants. The classically pithy characterisation of same was made long ago by Bowen L.J. as cited by Lord Templeman in *British Leyland Motor Corporation v Armstrong Patents Ltd* [1986] AC 477:

> "As between landlord and tenant and as between the vendor and purchaser of land, the law has long recognised that "a grantor having given a thing with one hand is not to take away the means of enjoying it with the other" per Bowen L.J. in *Birmingham, Dudley and District Banking Co. v. Ross* (1888) 38 Ch. D. 295 at 313.
>
> In *Browne v. Flower* [1911] 1 Ch. 219, 225 Parker J. said that:
> '... The implications usually explained by the maxim that no one can derogate from his own grant do not stop short with easements. Under certain circumstances there will be implied on the part of the grantor or lessor obligations which restrict the user of the land retained by him further than can be explained by the implication of any easement known to the law. Thus, if the grant or demise be made for a particular purpose, the grantor or lessor comes under an obligation not to use the land retained by him in such a way as to render the land granted or demised unfit or materially less fit for the particular purpose for which the grant or demise was made.'

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

Any presumption that the Crown may validly legislate to cause injurious affection without compensation, in derogation of a Crown grant, is made in ignorance of the law of tenure. Ignorance of the law does not make the ignorant belief, the law.

Indeed, the permanence of a Crown grant of freehold was affirmed by the Privy Council in the never-overruled case *Cooper v Stuart* [1889] 14 App Cas 286 at 288 where Lord Watson ruled that "the common law rule against perpetuities was inapplicable to Crown grants of land in New South Wales". The common law with respect to Crown grants is identical in NSW and WA.

As sovereign, the Crown retains the power to compulsorily resume any permitted use, or resume entirely, any Crown grant, provided that it does not derogate from the grant in doing so, i.e., by providing compensation to the landowner for the injurious affection.

It might be thought by some that a Crown grant can simply be truncated by legislation without any need for compensation, but that would be to fail to understand that by any such grant, the Crown has *alienated* the title, and in so doing has denied itself that power. If it were otherwise, then the whole system of security of tenure since the time of Governor Phillip and Lieutenant-Governor Stirling would be exposed as a massive sham. There is no common law authority for such a view.

Given the great potential for injustice posed by the Bill's terms, there is a substantial risk that after enactment, an aggrieved landholder could make the challenge anticipated by Callinan, to establish the unenforceability of various provisions. For such a challenge to succeed, a court could simply follow the existing authorities.

If on the other hand, injuriously affected landholders were properly compensated, the Crown could legitimately have the aboriginal heritage reservation noted on each title, and the Act could be legitimately enforced against any subsequent breach by the landowner. Compliance with the Art. 17 *UDHR* human right would also be achieved.

The road to hell would have been avoided and the path to salvation rejoined.

That's all I have time for, for now.

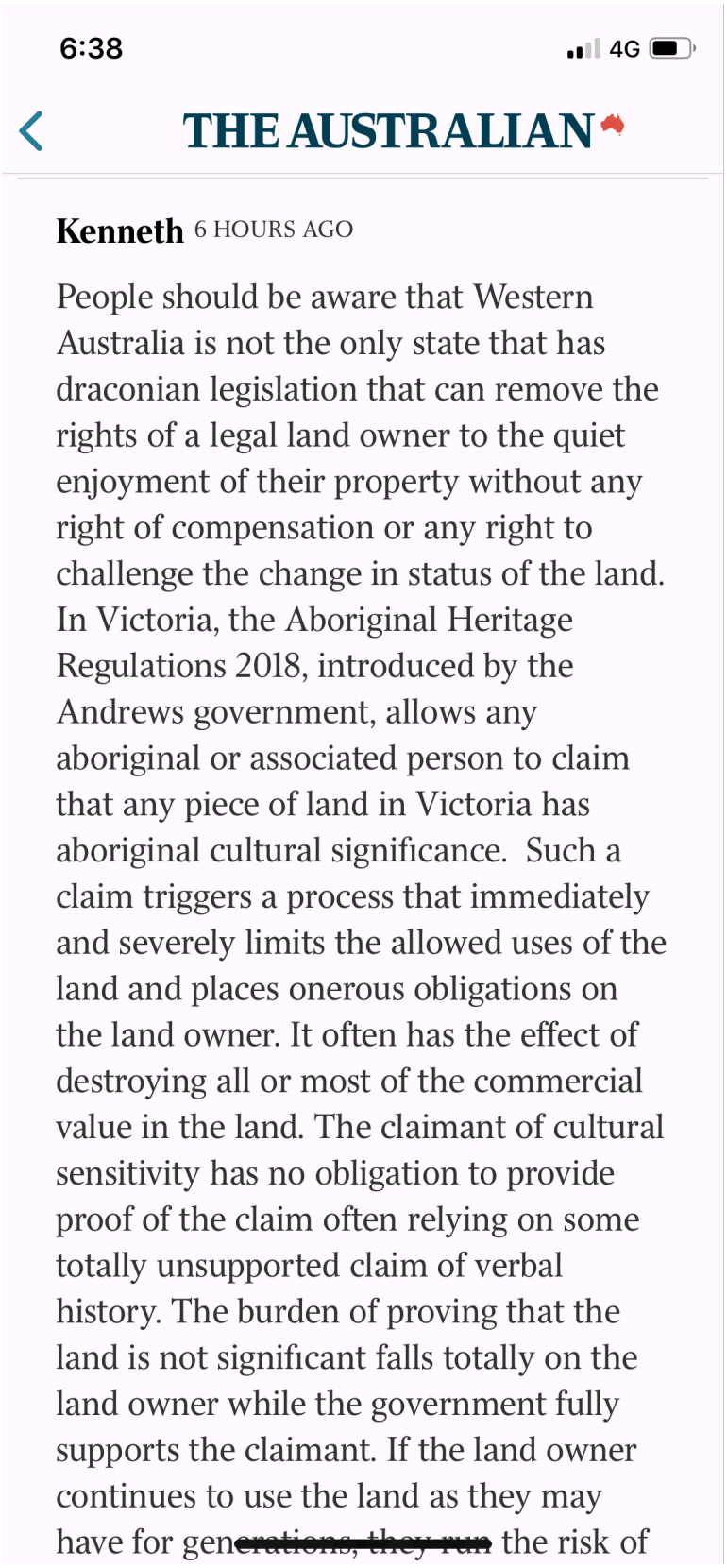
A supplementary point might be made about the common law coronial jurisdiction of treasure trove, which may well apply to aboriginal objects in WA, but that's for another time.

Thank you for reviewing this submission.

Peter Ingall

9 October 2020 Enc:

"Kenneth" Comment on : "Palmer skirts WA to launch $30b claim", *The Australian*, 14 Aug 2020.



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THE AUSTRALIAN

Kenneth 6 HOURS AGO

People should be aware that Western Australia is not the only state that has draconian legislation that can remove the rights of a legal land owner to the quiet enjoyment of their property without any right of compensation or any right to challenge the change in status of the land. In Victoria, the Aboriginal Heritage Regulations 2018, introduced by the Andrews government, allows any aboriginal or associated person to claim that any piece of land in Victoria has aboriginal cultural significance. Such a claim triggers a process that immediately and severely limits the allowed uses of the land and places onerous obligations on the land owner. It often has the effect of destroying all or most of the commercial value in the land. The claimant of cultural sensitivity has no obligation to provide proof of the claim often relying on some totally unsupported claim of verbal history. The burden of proving that the land is not significant falls totally on the land owner while the government fully supports the claimant. If the land owner continues to use the land as they may have for gen[redacted] the risk of

supports the claimant. If the land owner continues to use the land as they may have for generations, they run the risk of unknowingly committing a very serious crime. with the possibility of going to jail and paying an enormous fine. The only solution often for the land owner is either to pay the person's organisation that made the original claim a very high fee to perform a cultural heritage assessment or commence a very expensive and difficult legal battle against the full weight of the Victorian government as the act behind these regulations specially states that the person making the claim is to be believed and that they have no obligation to prove their claims. Most amazingly, the land owner commits a serious crime if they even tells anyone, including the press, as to why the lands was considered of cultural sensitivity. The legislation also specifically denies the land owner any right of compensation. I will let you form your own view of the result of such disgusting law.

Report Liked 19 Reply

Peter 6 HOURS AGO

An irony is that the WA Parliament is conducting an Inquiry into Private