INQUIRY INTO PRIVATE PROPERTY RIGHTS (WESTERN AUSTRALIA):

SUBMISSION TO THE PUBLIC ADMINISTRATION COMMITTEE by PETER INGALL

The New South Wales Bar Association has rightly pointed out that "property rights are human rights" [1]. In its submission to a NSW Review in 2013, the Association took a larger view of property rights, including the advocation of a harmonised approach for all the States and the Commonwealth, and with respect to all property, not just real property. The Association also noted that "...while there are many aspects of government conduct that may adversely affect the use and enjoyment of privately owned land, these activities do not form part of '*acquisition law*.'" The mere fact of the creation of your Inquiry into Private Property Rights ("your Inquiry") indicates that this may be also true in Western Australia.

The High Court is also aware of this problem: "…If it were at all possible sensibly and properly to read the legislation as conferring a right to compensation upon the appellants I would be glad to do so. I cannot do that, but I can surely at least commend to the legislature the restoration to the appellants, and others similarly affected, of the right to compensation to which historically and morally they are entitled." [2]

Indeed, Mr Callinan AC 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…”. [3]

The terms of reference of your Inquiry relate to the laws in Western Australia, but the issues they raise are relevant to all six States. For Western Australia, in assessing the potential scope of problems which exist - or which might in future arise - and the range of possible solutions available, it would be wise to have regard to the experiences of the other States as well as the relevant powers of the Commonwealth: the views of the NSW Bar Association and the High Court already given above are examples of this. For numerous published examples of such problems experienced by individuals in various States, please visit: https://adverse-rezoning.info. For a more detailed outline of many issues related to this submission, see also: *Arguments for Property Rights in Australia* (herewith).

Legal Bases for Compensation: Three Possibilities

Particularly in relation to paragraph (d) of the Terms of Reference, namely that “fair and reasonable compensation must be paid to the owner of private property if the value of the property is diminished by a government encumbrance or resumption in order to derive a public benefit”, it is submitted that there are three legal strategies which merit consideration:

1. Legislation to provide for the “acquisition of property on just terms”;
2. Legislation to provide that “nobody shall be arbitrarily deprived of his property”; and

3. Utilisation of the law relating to Crown grants of title as it currently stands.

For the purposes of this submission, the view is taken that native title is not within the scope of the Terms of Reference, as unlike freehold, leasehold and licence interests: it is not in principle tradeable; and, there is already existing a legal process for compensation to native title holders for the impairment or extinguishment of such title by Western Australia, the other States and the Commonwealth and its Territories.

1. Legislation to provide for the "acquisition of property on just terms"

The issue of private property rights and "just terms compensation": invokes the virtue of justice; and alludes to s. 51 (xxxi) of the Australian Constitution which provides as follows - "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

..... . (xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;.....".

The High Court has held consistently that s. 51(xxxi) applies solely with respect to the Commonwealth and not to the States, notwithstanding valiant attempts by numerous plaintiffs to establish the contrary.

In *Durham Holdings Pty Ltd v The State of New South Wales* [2001] HCA 7 at 56, Kirby J. (in his minority judgment) pithily expressed the High Court's view: "....so far as the powers of a Parliament of a State of Australia to permit the acquisition of property without the payment of compensation are concerned, a long line of opinions in this Court upholds the

existence of that power. [*Pye v Renshaw* (1951) 84 CLR 58 at 79-80; *Minister for Lands (NSW) v Pye* (1953) 87 CLR 469 at 486; cf *P J Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 at 405.]"

In *P J Magennis Pty Ltd v Commonwealth* [1949] HCA 66; (1949) 80 CLR 382, Williams J states: "9. Section 51 (xxxi.) of the Constitution applies only to legislation of the Commonwealth Parliament and does not invalidate State legislation which does not provide just terms."

Of course, Western Australia could legislate the same provision, which would be valid within the State. Indeed, the NSW Bar Association submitted that: "..there is a strong case for amending the State's [i.e. NSW] Constitution so as to include an appropriate guarantee that private property rights or interests will only be acquired on just terms."[4]

Unfortunately, this would not protect landowners with respect to "government encumbrances" and the like, for the reason that governments can extinguish property rights without "acquiring" anything. This distinction has been identified by the High Court. In I*CM Agriculture Pty Ltd v The Commonwealth* [2009] HCA 51, the High Court indicated the limitations of the application of "acquisition on just terms":

"81 This is because, whatever the proprietary character of the bore licences, s 51(xxxi) speaks, not of the 'taking' [87], deprivation or destruction of 'property', but of its acquisition. The definition of the power and its attendant guarantee by reference to the acquisition of property is reflected in a point made by Dixon J in *British Medical Association v The Commonwealth*[88]. This is that the wide protection given by s 51(xxxi) to

the owner of property nevertheless is not given to ‘the general commercial and economic position occupied by traders’.

82 The scope of the term ‘acquisition’ was explained as follows by Deane and Gaudron JJ in *Mutual Pools & Staff Pty Ltd v The Commonwealth*[89]:

‘Nonetheless, the fact remains that s 51(xxxi) is directed to 'acquisition' as distinct from deprivation. The extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property[90]. For there to be an 'acquisition of property', there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property. On the other hand, it is possible to envisage circumstances in which an extinguishment, modification or deprivation of the proprietary rights of one person would involve an acquisition of property by another by reason of some identifiable and measurable countervailing benefit or advantage accruing to that other person as a result[91].’ ”

The reported case of Peter Swift - that he purchased a farm in Western Australia unaware that the property was declared an environmentally sensitive area, which precluded him (and previously the vendor) from farming on his land – would appear to be just such a case, where the landowners were deprived of property rights without any “acquisition” by the Crown. In this way, it can also be seen that the problem addressed by your Inquiry goes well beyond an “acquisition law gap” to include situations where there is no ”acquisition”.

Accordingly, it is submitted to your Inquiry that while legislation providing that property must be acquired by the government on just terms might offer some benefits at the margin, it would fail to protect landowners against losses caused by a “government encumbrance” or

the like. The intent of paragraphs (a), (c) and (d) of the Terms of Reference would not be properly accomplished.

2. Legislation that "nobody shall be arbitrarily deprived of his property"

Article 17 of the Universal Declaration of Human Rights ("UDHR") provides:

1. *Everyone has the right to own property alone as well as in association with others.*
2. *No one shall be arbitrarily deprived of his property.*

Notwithstanding that Australia: literally had a hand in the composition of the UDHR – that hand being of our External Affairs Minister, H.V. 'Doc" Evatt ; and has fully and continuously supported the UDHR for eight decades[5], Australia has never ratified Article 17 or imported it into domestic law.

However, there is nothing to stop Western Australia, or any other State, from taking the initiative and legislating to that effect. In this regard, the *Human Rights Act* 2019 Qld might be noted as a limited adoption of Article 17. S. 24 contains a replica of Article 17 UDHR. S.108 provides that the Act applies to pre-existing legislation as well as future legislation. Having said that, there is no provision to invalidate Acts or "statutory instruments" which breach human rights. Instead, s.53 provides: "The Supreme Court may, in a proceeding, make a declaration (a ***declaration of incompatibility***) to the effect that the court is of the opinion that a statutory provision can not be interpreted in a way compatible with human rights". Such a declaration could then be brought to the attention of Parliament, presumably to embarrass members into remedial action. (Such a limited adoption has been criticised as undermining international human rights standards.[6])

It should be very obvious that there is a large gap between: protection against "arbitrary deprivation of property" as envisaged by Article 17 of the UDHR on the one hand; and on the other, mere protection against acquisition on unjust terms by the Commonwealth, and the absence of any such protection in the States at all.

It is submitted that if Western Australia legislated against the arbitrary deprivation of property, property owners would be protected against uncompensated losses such as those suffered by Peter Swift and that, indeed, the intent of paragraphs (a), (c) and (d) of the Terms of Reference would be accomplished. Any such legislation could include legitimate public policy exemptions relating to the demands of war, other genuine emergency, or the criminal law. Consideration might also be given to incorporation of the legislation into the Western Australian Constitution by use of double entrenchment.

Further, such a law would apply not only to interests in land, but to all types of property.[7]

Relevance of Commonwealth Powers

Western Australia should keep in mind that the Commonwealth could at any time use its constitutional external affairs power to ratify Article 17 of the UDHR and bring it into domestic law. It would then be in a position to pass legislation "covering the field" so that, by operation of s. 109 of the Constitution, the laws of any State, including Western Australia, which conflicted with Article 17 would be rendered unenforceable to the extent of any such conflict.[8]

At this time, there is no evidence of such an intention being held by the Commonwealth, or indeed even any awareness of this legislative possibility. The Australian Law Reform Commission, for its part, has not considered it.

Another potentially relevant Commonwealth reality may be illustrated by pointing out that if, hypothetically, Peter Swift was a citizen of a foreign country which had a free trade agreement with Australia, he might well be entitled to make a sovereign risk claim for compensation with the support of his native country against the Commonwealth for any loss or damage caused by Western Australia's declaration of his property as an environmentally sensitive area. Investor-state dispute settlement (ISDS) is a mechanism in a free trade agreement (FTA) or investment treaty that provides foreign investors, including Australian investors overseas, with the right to access an international tribunal to resolve investment disputes**.** A foreign investor in Australia, or an Australian investing overseas, can use ISDS to seek compensation for certain breaches of a country's investment obligations. For example:

- obligations setting parameters on expropriation of a foreign investor's property[9].

A double irony here is that: this avenue of compensation from the Commonwealth would not be available to Peter Swift if he is an Australian citizen; and in such a situation, the Commonwealth has no legal recourse available to it to secure reimbursement from Western Australia for monies paid out in such circumstances. Crazy!

3 Utilisation of the law relating to Crown grants of title as it currently stands

"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....." [10]

"....Batman in 1835 thought that he had acquired title to land in and in the vicinity of what is now Melbourne by means of a 'treaty' with the tribe of aborigines who at that time inhabited those areas, but found that no title to unoccupied lands ('waste' lands, as they were called) within the boundaries of the annexed territories could be acquired in any other way than by an express grant from the Crown."[11]

Tenure by Crown grant of freehold existed from the commencement of each British colony in Australia, including Western Australia. The legal characteristics of Crown grants were interpreted by the courts through the nineteenth century very clearly and consistently, and have never been overruled. By exploring the essential characteristics of Crown grants here, this submission shall reveal their immediate and compelling relevance to paragraphs (a), (c) and (d) of the Terms of Reference of your Inquiry. The main focus shall be on freehold interests, with subsequent observations made with respect to Crown leasehold title and Crown licences.

A Crown grant of title is an exercise of the Sovereign Crown's power of alienation of its legal rights with respect to land. The Crown of course retains its sovereign power, and so if it chooses, can resume alienated property rights at any time.[12] This power is exercised by the Executive Government (typically the case, initially, in the form of the governor – eg., Governor Stirling in the case of Western Australia and Governor Phillip in New South Wales) and once established, the Legislature.

The alienation of freehold title from the Crown is so complete, that it has been found by the High Court to extinguish native title.[13]

In *Cooper v Stuart*[14], the Privy Council made a number of useful observations about Crown grants with respect to land in New South Wales (which are directly relevant to Western Australia), viz.:

(a) a resumption, when effected pursuant to a reservation, operates as a defeasance;

(b) a reservation does not constitute an exception repugnant to the grant; and

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

Lord Watson held that (at 294): "....assuming the Crown to be affected by the rule against perpetuities in England, it was nevertheless inapplicable, in the year 1823, to Crown grants of land in the Colony of New South Wales, or to reservations or defeasances in such grants to take effect on some contingency more or less remote, and only when necessary for the public good."

These key aspects of Crown grants of title, namely: **reservation**; **defeasance**; **inapplicability of the rule against perpetuity**; **resumption**; and **repugnance**, require at least some brief explanation so as to understand the essential character of any Crown grant of freehold title.

Reservations

There is, in principle, no practical limit to the type of reservations that the Crown might wish to attach to a Crown grant of freehold title at the time of making the grant. As noted by Bryson QC:

"Early Crown grants contained reservations and conditions which could adversely affect a later owner. Reservations enabled the Crown to take land for roads or other public purposes; they usually reserved minerals, resources such as timber, and foreshore land. Grants in eastern Sydney sometimes included a condition that no building was to obstruct visibility of the Macquarie Lighthouse. There were conditions that no timber suitable for naval purposes was to be cut down." [15]

Particular cases which might be cited as examples of this flexibility include for example:

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

(b) "…the land was granted by the Crown, subject to a *reservation* out of the same of (among other matters) all stone, gravel, indigenous timber, and other materials required for naval or public purposes....the intended reservation or exception, in the present case (independently of the consideration that it occurs in a grant by the Crown), is of a peculiar character. It is not of all indigenous trees, then or thereafter growing on the land, or of all the gravel, &c., forming part of the soil.

Only so many and such of these are in terms reserved, as may be required-that is, may be requisite from time to time-for public purposes. There was, therefore, nothing specific or definite excluded, or sought so to be.": *Campbell v Dent* (1864) SR (NSW) 58 at 61 and 63, Stephen CJ

(c) a right of road was reserved in the grant: *Allen v Foskett* (1876)14 SCR (NSW) 456.

(d) 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: *Dixon v Throssell* [1899] 1 WALR 193. (Indeed, Dixon owned certain land within the Municipality of Bunbury which had originally been vested in Sir James Stirling by Crown grant.)

(e) grants related to land bounded by a creek (a tributary of Cook's River which flowed into Botany Bay), included a reservation to the Crown of any quantity of water, and of any quantity of land not exceeding ten acres, for public purposes, provided that water mills on the creek should not be interfered with: *Lord v The City Commissioners* (1856) 2 Legge 912.

Other than the potential variety of reservations available to the Crown, it should be noted that any reservation was noted on the grant itself, so any prospective buyer of the land in question was put on notice of such reservation, and there was no potential injustice in the event that the Crown at some later time decided to resume the reservation by defeasement. To repeat the words of Lord Watson who refers to: "…a 'reservation of a right to resume any quantity of land, not exceeding ten acres, in any part of the said grant.' It is obvious that such a provision does not take effect immediately, it looks to the future, and possibly to a remote future. It

might never come into operation, and when put in force it takes effect in defeasance of the estate previously granted, but not as an exception." [16]

Reservation is thus, put briefly, a right of the Crown to, at any future time, resume reserved uses of the land from the titleholder without payment of compensation to the titleholder. From the above examples, two major observations may be drawn from the use of reservations to Crown grants:

(1) the necessary implication of the importance of reservations was that any purported resumption not within the scope of a reservation would be invalid without compensation to the owner; and

(2) the Crown recognised that land carried with it the potential for a great variety of uses, and that exercising a reservation by defeasement amounted to the resumption of just some uses - that is to say, resumption of a title can easily be partial and need not amount to a complete transfer of title back to the Crown.

Defeasances

Whenever the Crown sought to defease title within the scope of a reservation, it was subject to review by the courts. Take for example the case of *Dixon v Throssell* [17] where 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 relevant grant. For instance, see Hensman J. (at 195): "The Crown Grant gives no power to take away part of the land granted for Botanical Gardens; it only contains a proviso that the land may be taken for roads, bridges, etc., and other works of public utility and convenience... a Botanical Garden is neither a road nor such a work as is specified there as "works of public utility and convenience," which I understand to mean works of the same nature as roads, canals, etc., all

works which are necessary for the development of the country, and so that it maybe inhabited by the people." The Crown lost that case.

In *Ex Parte Smart* [1867] 6 SCR 188 (NSW), there was no valid reservation, and so no attempt to legitimately defease as such. The applicant's claim for relief against the Crown was accepted by the Supreme Court. More about this case below!

I*napplicability of the rule against perpetuity*

A Crown grant of freehold title is not a contract (or for that matter a mere chattel or a building etc.), but a legal instrument not limited by the common law rule against perpetuity - in other words it is a perpetual title which can only be absolutely terminated by a complete resumption by the Crown.

It is an aspect of its perpetual nature that, absent a suitable reservation, compensation must be paid on any termination by resumption (except in the rare case of passive resumption in the form of *escheat*, in Western Australia – *escheat* has long ago been replaced by *bona vacantia* in the other Colonies/States – see *Arguments for Property Rights in Australia* for a discussion of this point).

As Lord Watson of the Privy Council noted (*supra*), the law of NSW (and so of Western Australia) with regard to land title is fundamentally different from that in England.

Resumption

The principal land acquisition statutes in Australia are listed by MS Jacobs[18]. At 27, the author writes: "Most of these Acts provide for the right to acquire, the relevant acquisition

procedure and for the payment of compensation". These Acts relate to the compulsory resumption of land in toto, so as a consequence "resumption" these days is ordinarily understood to be an acquisition of the freehold title, whereas, as we have seen above "resumption" is, by the nature of Crown grants, potentially infinitely variable.

A "resumption" in principle should relate to the reversion, or re-acquisition, of any particular entitlement associated with a grant to or by the Crown. It need not be a formal re-acquisition of the complete title, or be limited to the use of the term with regard to the compulsory acquisition of land for construction of public infrastructure. It could include any entitlement that "runs with the land". Grants of freehold and leasehold tenures carry with them a bundle of legal entitlements, and the mere fact that a resumption is made of some of these entitlements, and not all, does not mean that there has been no resumption - only that there has been a partial resumption.

Indeed, it might be said that (putting the use of reservations aside), any legislative or regulatory instrument which has the effect, subsequent to the original grant of title, of limiting the proprietor's use and enjoyment of the subject land, is in the nature of a resumption of title, with its necessary consequences (in the absence of a reservation) of an entitlement of the title holder to compensation or rectification. Logically, this would also include any statute of limitations purporting to apply to claims relating to Crown grants of title. This indeed leads us to the topic of repugnance.

Repugnance

In *Cooper v Stuart*, as already noted above, Lord Watson of the Privy Council alludes to the possible situation where a provision might be repugnant to a Crown grant and therefore void.

This raises a fundamental common law principle: “A grantor having given a thing with one hand is not to take away the means of enjoying it with the other".[19]

In a water rights case heard by the Supreme Court of New South Wales in *Cooper v Corporation of Sydney* (1853) 1 Legge 765 at 771-772 observed: “...the Crown, or the Corporation of the City, representing the Crown in this matter, irrespective of any powers conferred by the Legislature, can have no right, which an individual in such a case would not have...[for] the Crown cannot derogate from its own grant”. [20]

It might be observed in passing that the common law right of compensation for any resumption of uses inherent in Crown grants as noted here would be entirely consistent with Article 17 of the UDHR which was adopted by the General Assembly of the United Nations in 1948, by which time Crown grants had already been in use in New South Wales and Western Australia for well over 100 years.

Common law v legislation

None of the abovementioned cases relating to Crown grants of title has ever been overruled by subsequent decisions. The common law is unchanged today. During the twentieth century, planning laws, initially modelled it seems on English laws, developed without reference to the fundamentally different law of Crown grant titles in the Australian States. There has never been any jurisprudential reconciliation between Crown grants of title and its related common law on one hand, and planning legislation on the other.

Now it might be said at this point, that, as a general proposition, legislation overrides the common law, so if planning legislation conflicts with property rights under common law, the legislation prevails. Such an argument is fallacious in this context for three primary reasons:

1. Crown grants of title are not a creation of the judiciary, but of the executive and/or the legislature. All judges do is to interpret and give effect to these instruments according to the situations put to them by litigants. Accordingly, to nullify the rights provided by Crown grants of title, planning legislation would need to address the grants themselves, not merely the common law.

2. The High Court has clearly and repeatedly stated that it will not find an intention by the legislature to remove any sort of private rights without compensation unless that intention is very clearly expressed: "That canon is this: that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms." [21] Planning and other legislation which diminishes property rights without compensation (eg., by imposing a government encumbrance on title) has not in fact purported to expressly remove property rights without compensation, or in particular purported to expressly repudiate rights associated with Crown grants of title, so failing the High Court's "expressed and unequivocal intention" test.

3. Most fundamental is the fact that the Colony/State, by virtue of using Crown grants to alienate title, has, voluntarily, limited its own power, to in fact avoid sovereign risk. The paradox here is that if the Crown can create a legal instrument which provides a grantee with an interest in land, which interest can exist in perpetuity, absent

resumption, so that in the case of resumption, compensation must be paid, that instrument must by necessity eliminate the Crown's power to retrospectively legislate to be able to resume without compensation. If, on the other hand, the Crown does have that power, i.e., to effectively legislate *ex post facto* to be able to resume without legislation, thereby repudiating the grant, then the Crown does not, after all, have the power to create a legal instrument which provides a grantee with an interest in land, which interest can exist in perpetuity, absent resumption, so that in the case of resumption, compensation must be paid.

Consequently, if the latter case were to hold, namely where the Crown did have that power, to retrospectively legislate to be able to resume a Crown grant without compensation, then the security inherent in Crown grants and recognised by the courts since the early 19th century would really just be a colossal sham, as would be the role of defeasements. Indeed, such a conclusion would validate the legally baseless idea that all freehold and leasehold land is subject to an undocumented, inchoate reservation of indeterminate scope. Such a fundamental sovereign risk must be untenable. Fry's "tenure by a Crown grant of freehold" would in effect be little more than a licence at the will of the Crown.

Ultimately, in principle, the resolution of this dilemma, posed by having two mutually exclusive options, would potentially be achieved by a decision of the High Court. In the end, any court would have to choose between destroying the integrity of the system of Crown grants as a basis for land title in Australian States, and not. Further, if resumption of any aspect of a Crown grant, absent a reservation, did not

carry with it an entitlement to compensation, then the purpose of Crown grant reservations would become meaningless in practice.

In short, the Crown's power to limit its own power - as exercised in the nature of Crown grants - is an aspect of its sovereignty. A decision by a court to deny that, would be to impose a new limitation on Crown (State) sovereignty.

A jurisprudential void

Can it really be that a whole field of law can simply be overlooked by the legal profession? If so, how could that happen? Here's a suggested precis:

1. Planning laws as such were originally introduced from the mid-20th century or so from foreign jurisdictions which had different systems of property title from the Australian States, and there was no expressed jurisprudential reconciliation relating to the possible interaction between these "exciting" [22] new laws and Crown grants of title.
2. Accordingly, planning law has in this respect developed in its own legal "bubble".
3. Planning laws are often to the benefit of landowners, and to that extent as no disadvantage is suffered, any conflict with pre-existing common law rights is of no practical concern.
4. Early concerns by legislators and textbook authors about disadvantaging a minority of affected landowners, (together with the failure of plans to provide compensation to this minority) in the early years were gradually forgotten[23].
5. Over time, planning law textbooks have perpetuated the jurisprudential void by ignoring and/or substantially misunderstanding the nature of Crown title.[24].

6. Perhaps in some States more than others, the planning bureaucracy has, substantially by default it seems, developed an ethos whereby if some landowners are adversely affected by planning decisions, that is just collateral damage which must be subordinated to the greater planning objectives. Particularly in NSW, it would seem that planning ministers are routinely "captured" by their departments in this way, so that there is a ministerial, and thus political, inertia which prevents recognition of the problem from one decade to the next..[25]
7. Affected landowners are often isolated from each other, and the damage to their interests though very significant, can be difficult to demonstrate, being invisible to bystanders ("the land is the same, they still own it, they must be rich – how can there be a problem?"), and their lawyers have no practical solutions - so being divided and without allies, the landowners are conquered, as it were. They eventually give up.
8. Given the jurisprudential void, lawyers do not think to advocate the Crown grant arguments of the type as proposed in this submission, so judges never hear the arguments and do not rule on them. The closest we have to this are comments such as those of Callinan J. as noted earlier in this submission, where, it might be said, he is more or less begging for someone to bring a good case to the High Court.

The end result might aptly be described as what the Western Australian jurist John Wickham termed the "Rule of No-Law".[26] It is in this context that, with no effective legal strategy apparently available to lawyers, their potential clients, namely unsuspecting and innocent landowners, whose land becomes injuriously affected by a planning instrument, discover gradually to their astonishment that the search for compensation will be swallowed up in a never-ending kafkaesque, progressively impoverishing, administrative tangle of "no-law" - a world away from "common sense and justice". From the published information, it seems that

Peter Swift has managed to have your Inquiry formed on the basis of his adverse experience – a rare result indeed – and he and the supporting parliamentarians should be congratulated for that.

"A cloud on the title"

With regard to (b) of the Terms of Reference, this submission does not presume to offer advice as to whether the registration of all the various encumbrances which can exist these days is an administratively practical matter or not, except to observe that if it is too difficult, how are landowners supposed to cope with keeping track of all such encumbrances?

A more fundamental point to be made is that the probity of the Torrens title system, which guarantees disclosure, is a related, but separate issue from ensuring that fair and reasonable compensation is paid to the owner of private property if the value of the property is diminished by a government encumbrance or resumption in order to derive a public benefit. Of course, while a Certificate of Title is ordinarily conclusive evidence of ownership, it is not the source of title: the source of the title always remains the Crown grant.

Thus for example, in the *Theosophy*[27] case, the landowner was the registered proprietor of a perpetual lease from the Crown of some 500 acres of land. The matter was appealed from the Supreme Court of South Australia, on various grounds, to both the High Court and the Privy Council. Lord Wilberforce for the Privy Council observed (at 6) that: "..the doctrine of accretion [which can dictate who owns newly naturally formed land - the landowner or the Crown] was not excluded by the terms of the Perpetual Lease".

This is an example of a court, quite properly, looking to the legal interest of the landowner as provided for by a detailed examination of the Crown grant, and the factual circumstances relevant to the case, rather than merely referring to the Torrens system Certificate of Title: neither of the former was, or ought necessarily to have been, noted on the Title, but each was critical to deciding the case.

It is also the case that a court will order an encumbrance to be struck off the Certificate of Title if it is not supported by a demonstrable legal or equitable interest. In *Ex Parte Smart* [1867] 6 SCR 188 (NSW), there was no reservation. The Registrar General of New South Wales, under the *Real Property Act*, 26 Vic., No. 9, issued a certificate of title with a clause endorsed thereon, reserving or purporting to reserve "any lawful rights incident to the alignment of streets or roads abutting on the land". However, there was no grant or other deed, under which the applicant claimed, in which any such reservation was contained.

The Supreme Court of New South Wales was unanimous in finding that this was a case of jurisdiction being exceeded. At 193, Faucett J. states: "I think the words were inserted without any authority whatever. The certificate when issued is conclusive evidence of the title of the proprietor. Where a grant of certain land has issued, the grantee and those claiming under him are entitled to a certificate following the terms of the grant, and nothing more. The commissioners are not entitled to insert in the certificate any additions or restrictions which are not contained in the grant.....The insertion of the memorandum complained of is a cloud on the title, and a purchaser is unwilling to have anything to do with the land upon which there is any such cloud." The Registrar General was ordered to cancel the certificate, and to issue a new one in the same terms, but without the offending clause.

So here is what might be described as a planning policy of the Crown, namely to register "any lawful rights incident to the alignment of streets or roads abutting on the land". It was simply decided that – it bears repeating – **"…Where a grant of certain land has issued, the grantee and those claiming under him are entitled to a certificate following the terms of the grant, and nothing more. The commissioners are not entitled to insert in the certificate any additions or restrictions which are not contained in the grant.....The insertion of the memorandum complained of is a cloud on the title, and a purchaser is unwilling to have anything to do with the land upon which there is any such cloud."** (Emphasis added.)

The Supreme Court does not specifically state that the insertion of the memorandum by the Registrar was repugnant to the grant and so void, even though the Registrar was acting as the Crown, because, in our submission, such reasoning was blindingly obvious, once it was found that the memorandum was not being supported by any "restrictions" in the grant.

It is the view of this submission that, presented with the same facts, a Western Australian Court would make the same finding today.

Perhaps the fundamental point here is that the Torrens system was designed with the law relating to Crown grants of title in mind. The idea of registering encumbrances unilaterally imposed by the Crown which might have a public benefit, but none for the title holder - if they had imagined it - would have seemed bizarre and nonsensical, because it effectively involved registration of an encumbrance which was repugnant to the grant. If the law is properly understood, such a proposition is still bizarre and nonsensical.

That is not to say that registering such encumbrances on title would be a bad idea, provided that the fundamental property rights of the land owner were protected - for example in cases where the landowner was able to negotiate at arm's length an agreement with the Crown for compensation in return for accepting the encumbrance, then registering that on the title would seem to be entirely appropriate.

Crown leases and licences

Unlike Crown grants of freehold title, Crown leases and licences are not subject to reservations, but conditions and (with the exception of perpetual leases) specified periods. The Crown can elect to terminate a lease or licence for a breach of a condition by the titleholder. Having said that, the purported *ex post facto* imposition of new conditions by the Crown, or an arbitrary termination of a lease or licence by the Crown, would be repugnant to the grant and in principle be unenforceable without compensation.

Terms of Reference & Proposed Courses of Action

1. *Legislation that "nobody shall be arbitrarily deprived of his property"*

The legislative adoption of an equivalent to Article 17 of the UDHR by Western Australia would provide similar protection to all types of property, not just interests in land which benefit from the nature of Crown grants, and would achieve the requirements of paragraphs (a), (c) and (d) of the Terms of Reference. Inclusion of such legislation in the State Constitution (perhaps by double entrenchment) would be consistent with recognising private property rights as being "fundamental".

2. *Legislation to provide for the "acquisition of property on just terms"*

Legislation to provide for the "acquisition of property on just terms" would potentially achieve the requirements of paragraphs (a) and (c) and align Western Australian law with Commonwealth law, but fail to address situations of the paragraph (d) type (for example the published situation of Peter Swift), where there is deprivation of a property rights with no "acquisition".

3. Utilisation of the law relating to Crown grants of title as it currently stands

It is submitted that your Inquiry review the legal argument put here and if its merit is accepted, publish the conclusions. In this context, utilising the existing Crown grant and common law would achieve the requirements of paragraphs (a), (c) and (d) of the Terms of Reference with regard to property interests in land.

Litigants in Western Australia could then immediately utilise the law relating to Crown grants of title as it currently stands: property owners could obtain compensation (or if made in a timely fashion, equitable orders such as injunctions or declarations) for losses of property rights such as those suffered by Peter Swift.

Legislation to the effect that "nobody shall be arbitrarily deprived of his property" would not conflict with the law relating to Crown grants of title, but indeed potentially enhance it by: providing plaintiffs with an alternative ground on which to plead; and applying to forms of property other than Crown grants of title.

Consideration might also be given, as a footnote to the above initiatives, to finally replace *escheat* with *bona vacantia*, and by so doing, make Western Australian law the same as in other States, and also 100% consistent with the non-application of the rule against perpetuity.

4. *Probity of the Torrens system*

With regard to paragraph (b) of the Terms of Reference, the principle of disclosure is in general highly desirable. On the other hand, it would seem that registration of encumbrances unilaterally imposed by the Crown on the Certificate of Title would be susceptible to being struck off on application by the registered proprietor to a court. It would seem that an effective policy with regard to registration could really only be determined once underlying property rights have been recognised, clarified and protected – that is, once paragraphs (a), (c) and (d) of the Terms of Reference have been properly addressed.

Property Rights are Human Rights

Having created an Inquiry into private property rights, Western Australia has created an opportunity to address and remedy long-running property wrongs, as well as setting an example for other jurisdictions in Australia.

As stated by the NSW Bar Association, "property rights are human rights", and shouldn't human rights, like charity, begin at home?

Peter Ingall

30 July 2019

Encl: *Arguments for Property Rights in Australia* v.1.5.2 (2018) (109pp).

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

Citations

1. Boulten, Phillip SC, *Submission of the New South Wales Bar Association to the Just Terms Compensation Legislation Review*, 2013.
2. Callinan J., *Chang v Laidley Shire Council* [2007] HCA 3. His judgment is a fine work of indignant *obiter dicta* on the topic.
3. Callinan, Ian QC, "For the sake of our heritage, the buck must stop somewhere", *The Australian*, 3 Jan 2008 at Summer Living p.10. Clipping of the whole article is viewable online at https://img1.wsimg.com/blobby/go/914d3b45-815f-4128-b43c-ec9d6e068b01/downloads/1c2ob78k1_730844.pdf
4. Boulten, (*supra*).
5. In her foreword to *Australia and Human Rights: An Overview* (4th ed. 2017) (the "*Human Rights Manual*"), the then Minister of Foreign Affairs, Julie Bishop wrote: "Australia will step up its efforts to promote and protect human rights around the world by serving as a member of the United Nations Human Rights Council, the world's peak human rights body, for the 2018-2020 term.

   It is in Australia's national interest to protect and promote human rights, uphold the international rules based order and shape the work of the United Nations. As a founding member of the United Nations, and one of only eight nations involved in the drafting of the Universal Declaration on Human Rights, Australia was, and is, of the view that human rights deliver peace, security and prosperity to Australia and the world....."
6. Fowler, Prof. Mark, "State charters undermine global human rights", *The Australian*, 16 April 2019.
7. What is "property"? The Australian Law Reform Commission provides this handy summary: " The term 'property' is used in common and some legal parlance to

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

8. This is explored in more detail in *Arguments for Property Rights in Australia*
9. Australian Government – Department of Foreign Affairs and Trade “Investor-state dispute settlement (ISDS)” – Circular 2019.
10. *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.
11. *Ibid.* at 158.
12. In the *Mabo No.2* case (*Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992)), the High Court observed at Brennan J. 45:

    “There is a distinction between the Crown's title to a colony and the Crown's ownership of land in the colony, as Roberts-Wray points out (74) ibid., p 625:

    ‘If a country is part of Her Majesty's dominions, the sovereignty vested in her is of two kinds. The first is the power of government. The second is title to the country ... This ownership of the country is radically different from ownership of the land: the former can belong only to a sovereign, the latter to anyone. Title to land is not, per se,

relevant to the constitutional status of a country; land may have become vested in the Queen, equally in a Protectorate or in a Colony, by conveyance or under statute .....'"

13. Neate G., *Indigenous land rights and native title in Queensland: A decade in review* (2001) at 18 observes: "In *Fejo v Northern Territory* (1998) 195 CLR the [High] Court decided that a valid grant of unqualified freehold title extinguished completely and for all time the native title rights and interests of indigenous Australians in respect of that land. [*Fejo v Northern Territory* (1998) 195 CLR 96 at paragraphs 43, 45, 55-58 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ: paragraphs 95, 105-108, 112 per Kirby J.]"
14. Cooper v Stuart (*infra*) at 289-290.
15. John P Bryson QC. *The History of Property Law. Tutorial on Old System Title*, (13 June 2007) at 16.
16. Cooper v Stuart (*infra*) at 289-290.
17. *Dixon v Throssall (supra).*
18. MS Jacobs, *Law of Compulsory Land Acquisition*, 2nd ed., (2015) at 26.
19. This principle is quoted with approval by Lord Templeman in *British Leyland Motor Corporation v Armstrong Patents Ltd* [1986] AC 477:

    "As between landlord and tenant and as between the vendor and purchaser of land, the law has long recognised that 'a grantor having given a thing with one hand is not to take away the means of enjoying it with the other' per Bowen L.J. in Birmingham, Dudley and District Banking Co. v. Ross (1888) 38 Ch. D. 295 at 313. In Browne v. Flower [1911] 1 Ch. 219, 225 Parker J. said that:'... The implications usually explained by the maxim that no one can derogate from his own grant do not stop short with easements. Under certain circumstances there will be implied on the part of the grantor or lessor obligations which restrict the user of the land retained by him further

than can be explained by the implication of any easement known to the law. Thus, if the grant or demise be made for a particular purpose, the grantor or lessor comes under an obligation not to use the land retained by him in such a way as to render the land granted or demised unfit or materially less fit for the particular purpose for which the grant or demise was made.'

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

I see no reason why the principle that a grantor will not be allowed to derogate from his grant by using property retained by him in such a way as to render property granted by him unfit or materially unfit for the purpose for which the grant was made should not apply to the sale of a car. In relation to land, the principle has been said to apply: 'beyond cases in which the purpose of the grant is frustrated to cases in which that purpose can still be achieved albeit at a greater expense or with less convenience'; *per* Branson J in *O'Cedar Ltd v Slough Trading Co Ltd* at 127."

20. The context of this case is outlined in: JM Bennett, *Sir Alfred Stephen: Third Chief Justice of New South Wales 1844-1873*, (2009) at 175-177.
21. *The Commonwealth v. Hazeldell Ltd.* [1918] HCA 75; (1918) 25 CLR 552, at p 563. See also *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427 per Mason CJ, Brennan, Gaudron and McHugh JJ at 437: private rights are not abrogated by a statute unless clearly stated to do so.
22. Justice Michael Barker of the Federal Court of Australia has pointed out (at Barker M., *Background to the establishment of the State Administrative Tribunal of Western*

Australia, at Town planning law – past, present and future Conference to mark 80 years of town planning law in Western Australia (1989)) that when:

"....the Town Planning and Development Act 1928 [WA] (TP Act) took effect in 1929, it was one of the first of its kind in Australia. Town planning was then a very new discipline. The world then, as now, no doubt was an exciting place.....The TP Act followed the model of a 1926 New Zealand planning act, which in turn was modelled on a 1909 British Act."

23. This process is illustrated in some detail in *Arguments for Property Rights in Australia*.
24. See again *Arguments for Property Rights in Australia*.
25. This is illustrated in some detail in *Arguments for Property Rights in Australia*.
26. Wickham, John --- *Power Without Discipline The 'Rule of No - Law' in Western Australia: 1964* [1965] UWALawRw 4; (1965) 7(1) University of Western Australia Law Review 88 at 97: "Our statutes provide for the 'rule of no-law' varying from rights without remedies, through no rights at all to inadequate rights or inadequate remedies…"
27. *Southern Centre of Theosophy Incorporated v State of South Australia* [1982] AC 706.