

Summary Case for a State Property Takings and Just Compensation Bill

In Western Australia the State's express powers to take land and the compensation payable are primarily contained in Parts 9 and 10 of the *Land Administration Act 1997 (LA Act)*, which generally operates in conjunction with specific legislation connected to the relevant public purpose, for example, the *Main Roads Act 1930*. Land devalued by town planning schemes is the subject of a separate compensation and taking regime in Part 11 of the *Planning and Development Act 2005*.

The State Acts mentioned above contain provisions the objective of which is to give compensation on 'just terms'. This includes an express provision which seeks to ensure that compensation is paid on just terms: s.241(6)(e) of the LA Act.

There is no express provision in the State Constitution which qualifies the State's power to take property. In contrast the Commonwealth power to make laws for the acquisition of property in s.51(xxxi) of the *Commonwealth Constitution* is qualified by a requirement of 'just terms'. This is because the State Constitution plays a role which is very different from the Commonwealth Constitution. The State Constitutions predate the creation of the Commonwealth and assume that the State Parliaments

are sovereign. It was not therefore necessary to give the States specific powers to acquire property in their Constitutions. For this reason there is no equivalent to s.51(xxxi) of the *Commonwealth Constitution* in the *State Constitution Act 1889* and therefore no express 'just terms' qualification on the power to take land. It was implicit in the form and content of the State taking statutes. This was a reflection of the common law inheritance of the Colony and the State.

Essentially, the principle is that where there is a taking, it must be on just terms and the citizen can take the acquiring authority to court to recover compensation. The same principle is reflected in the 5th Amendment of the United States Constitution. There is a disparate range of relevant Australian, English and other common law jurisdiction authorities which also reflect the principle. For the purposes of this paper it is sufficient to quote Pidgeon J in one of the few relevant Western Australian cases:

'The Crown is not entitled by virtue of the Royal Prerogative to take possession of a subject's property for reasons of State without paying compensation. (8 Halsbury's Laws of England 4th Edition, para 920).

The common law principles are reflected in s52(xxxi) of the Australian Constitution empowering the Commonwealth to make

laws with respect to the acquisition of property on 'just terms'. While this does not bind the State to do the same it shows a consistency with the common law principles. The common law principles would apply in this State unless abrogated by statute, which gives rise to the canon of construction referred to by Lord Atkinson in Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd [1919] AC 744 at p752:

'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.'

The Public Works Act does not detract from these common law principles. On the contrary it aims to give effect to them in their widest sense and I would interpret this as the policy and intention of the Act [referring to the Public Works Act 1902].¹

¹ *Battista Della-Vedova and Ors v State Planning Commission; Battista Della-Vedova and Ors v State Energy Commission* 1988, unreported decision of the Compensation Court of Western Australia: 22 December 1988 BCC 8800828 approved and quoted in *R v Compensation Court of Western Australia; Ex parte State Planning Commission and Another; Re Della-Vedova* (1990) 2 WAR 242, per Wallace J at p253.

The presumption against the curtailment of private property rights was once characterised by McTiernan J. in the High Court as an important 'rule of political ethics'².

The common law pedigree clearly distinguishes proposed legislation which reflects a citizen's entitlement to compensation for a taking from recent calls for a "bill of rights". The latter is a call for the creation of new rights, the former for a legislative expression of an entrenched common law entitlement, the primary purpose of which is to provide a convenient and clear framework within which the right can be properly exercised. The established common law entitlement to compensation on just terms is also important and distinguishable from proposed new statutory rights because of its fundamental economic and social importance.

State Parliament can by very specific legislation override common law principles, but cannot do so by implication. It is clear that the power of the Crown does not extend to the taking of property or injuriously affecting it unless specifically authorised by Statute.

² *Minister for the Army v. Dalziel* (1944) 68 CLR 261 at 294-295. See also *Mabo v. Queensland* (1988) 166 CLR 226 at 63 per Deane J.

However, there are now many statutes and State Acts which may injure property or effectively take or sterilize it as if they were takings statutes, without any express provision for the payment of compensation.

Examples include:

- Environmental Protection Policies (**EPPs**) under Part III of the *Environmental Protection Act 1986 (EP Act)*.
- EPPs (wet lands, buffer areas)
- Water protection zones/policies
- Bush Forever Policy
- Land clearing laws
- Environmental assessment conservation areas
- Blocking of development under the EP Act.

Commonwealth statutes in contrast must contain a provision to avoid the 'just terms' proviso in s5(xxxi) of the Constitution, an example being a s519 of the *Environmental Protection and Biodiversity Conservation Act 1999*.

The necessity or otherwise for the State laws mentioned above is not the issue. However, they may and are being wrongly used to limit the rights of property owners. This can amount to the taking of property, or an

interest in property, or the injurious affection of property. They do not expressly provide for the payment of compensation on 'just terms'.

It was necessary over 100 years ago to address specifically the payment of compensation on 'just terms' in the Commonwealth takings constitution. It is now necessary to do likewise in the State.

Our society is now far more complex. Formerly, Government interfered with private property only in limited circumstances. Now they do so in a wide variety of circumstances.

So that statute law keeps pace with the seemingly ever broadening sphere of Government activity, some specific restatement of the common law is necessary, in particular to provide a clear statutory basis for adjudicating disputes over the effect of government action on the value of property.

The recommended core provisions of a proposed *'Takings of Property and Just Compensation Bill'* are attached.

In conclusion, there is a strong case for legislative confirmation of the common law right to compensation on just terms where there has been a taking of property without recourse to existing statutory processes. As

with the *Commonwealth Constitution*, the relevant property may be in any form, including land: the same principles are applicable to all property.