From:	Peter Ingall
To:	Public Administration Committee
Subject:	Submission to the Public Administration Committee - Inquiry into Private Property Rights
Date:	Tuesday, 30 July 2019 5:12:11 PM
Attachments:	WA Submission Property Rights 719.pdf ATT00001.htm Arguments for Property Rights v1.5.2.pdf ATT00002.htm

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Attn: Kristina Crichton

Dear Madam,

Please find attached:

1. Submission to the above Inquiry; and
2. Supporting document - *Arguments for Property Rights in Australia v.1.5.2*

Hard copies of either document can be supplied on request. If you require any further information, please feel welcome to contact me.

Thank your your assistance.

Yours faithfully,

Peter Ingall
M: [redacted]

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.

Arguments for Property Rights in Australia

[NB: This working paper may be read in the context of other material published at www.adverse-rezoning.info. It is presented as a research essay, and constructive comments or suggestions by readers with regard to the substance of the argument are welcome. This article is not legal advice. In making any legal decision, the advice of your legal practitioner should be obtained. Style note: Times font text indicates quotation.]

1.0 Introduction

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.)

This paper focuses primarily on property interests in land.

It is clear that an Australian State (or previously Colony), has always had the Sovereign power to alienate parcels of land from the Crown by making grants of freehold or leasehold interests in such land.

The State (or Colony) has always retained the Sovereign power to resume such granted interests, yet it is manifest that any subsequent uncompensated restriction imposed on a Crown grant is void in principle as being repugnant to the grant, where such subsequent restriction: either impairs the title owner’s pre-existing right under the grant to use the land; or thereby causes financial loss.

Well, so much is clear to the author, and it was evident to Santo Cilauro’s out-of-his-depth lawyer character in “The Castle” movie, who valiantly and comically relied on “The Vibe” - evidently his word for the plain justice inherent in the above view. Well, the judge in the movie was unimpressed with “The Vibe” argument, and so in fact would any real life judge.

Like Darryl Kerrigan’s challenged lawyer, Wilcox (infra at 277-278) in his 1967 text *The Law of Land Development in New South Wales,* writes that “Common sense and justice demand” that the “sacrifices” imposed on individuals should be compensated.

In the legal world, to state what might seem to be the obvious does not make it so. To find that it is so, a court has to be satisfied that such a view is supported by the body of law available to it.

None of the States has a specific constitutional provision that property owners should be compensated for loss or damage caused by the resumption or other legal impairment of their land ownership (eg., "adverse rezoning") by the State. Equally, none of the States has a specific constitutional requirement that Native Title exists and must be recognised, with compensation paid for any expropriation, but it does exist and is so recognised.

How can these two things be simultaneously so?

In the latter instance, it can so exist simply because the High Court of Australia, on the basis of (very extensive) legal reasoning, found it to be so - and the States cannot legislate Native Title away, without having to provide compensation to the Native Title owners. In the former ("adverse rezoning") instance, it seems, the High Court has not been presented with a suitable case to consider. Hence, perhaps, the views of a former High Court Justice, Ian Callinan QC, as reproduced at www.adverse-rezoning.info and considered at **4.1D**.

While all States do have legislation which provides for compensation in cases of resumption of land for public purposes, they have no recognised constitutional obligation to maintain such laws and, more to the point, as the President of the NSW Bar Association, Phillip Boulten SC has accepted: "...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*."' (*Infra* at 4.)

1.1 A Confusion of Property Rights Laws

The abovementioned example of contradiction in policy, where Native Title holders are necessarily entitled to compensation for deprivation of property rights, while holders of freehold or leasehold title are not, is just one illogicality amongst many. Here is a brief summary.

(a) In 1948, Australia was actively involved in the composition and adoption of the *Universal Declaration of Human Rights* by the United Nations, including Article 17 thereof, which provides in part that: *No one shall be arbitrarily deprived of his property*. (Discussed *infra* at **4.1A**.)

(b) In 2017, the Australian Foreign Minister wrote: "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....." (*Discussed infra* at **8.4**.)

(c) In 2018, notwithstanding the above, Australia has never adopted Article 17 UDHR into domestic law, except with respect to the possible effect of laws made by the

Commonwealth only (not the States) in relation to the property of people with disabilities. (Discussed *infra* at **8.2**.)

(d) So, even though Australia describes itself as a model of human rights and was instrumental in the adoption of Article 17 UDHR by the United Nations General Assembly in 1948, the current position is, with respect to Article 17 in Australia is that it:

- effectively applies only to Commonwealth laws affecting people with disabilities (and then only by means of a separate treaty with the same provision);

- does not apply with respect to Commonwealth laws affecting people without disabilities, so that (while not quibbling with the rights of people with disabilities in this respect) there is now also effectively discrimination in this regard against people without disabilities; and

- does not apply in any of the States at all.

(e) Perhaps even worse, Article 17 of the UDHR, is not a "human right" as defined by the, the *Human Rights (Parliamentary Scrutiny) Act 2011*. (Discussed *infra* at **8.3**.)

(f) Australia has, or is, concluding free trade agreements (FTAs) with dozens of countries, each of which typically provides that if a citizen or entity of the trading partner has property expropriated by any government entity in Australia, the Australian Government shall provide compensation to the foreigner. This guarantee is not provided to Australian residents. (Discussed *infra* at **4.1A**.)

(g) S. 51 (xxxi) of the Australian Constitution provides for "the acquisition of property on just terms" by the Commonwealth. The High Court has pointed out that the "deprivation of property" is wider in scope than "acquisition of property", because it is possible for a government to deprive an owner of property without actually acquiring anything for itself. (Discussed *infra* at **4.2**.) Accordingly, it can be seen that:

- there is a "deprivation of property gap" in Commonwealth law between what would be protected by Article 17, and the lesser scope of protection offered by s. 51 (xxxi); and

- given that there is no constitutional provision equivalent to s. 51 (xxxi) in the States at all, the "deprivation of property gap" in State laws is a yawning one and much more significant.

Consider hypothetical examples of the current state of Australian laws.

Example A: The Commonwealth introduces restrictions on owners' use of their freehold land. The restrictions do not amount to an "acquisition" by the Commonwealth. Such a restriction, by law, should provide for compensation to owners with disabilities. In this case, an owner (say hypothetically a contemporary version of the late Franklin Delano Roosevelt) with disabilities, who is a foreigner of a free trading agreement partner country (in FDR's case, the USA), would qualify for compensation on both grounds. In contrast, an Australian citizen without a disability would not qualify for any compensation, unless he or she was an Aboriginal or Torres Strait Islander whose Native Title rights were impaired.

Example B: A State introduces restrictions on owners' use of their freehold land. Again, hypothetically, an FDR who is a foreigner of a free trading agreement partner, would qualify for compensation from the Commonwealth Government, although not on the basis of his disability. No Australian owner - whether disabled or not - would be entitled to compensation, unless he or she was an Aboriginal or Torres Strait Islander whose Native Title Rights were impaired, in which case the State would have to provide the compensation, not the Commonwealth.

It is clear that this bundle of legal inconsistencies is in stark contrast to, and falls lamentably short of, Australia's proud boast about its championing of human rights, including in particular Article 17 of the UDHR. Australian owners of freehold and leasehold land (with only the limited exception of people with disabilities) do not have the protections many foreign property owners enjoy in Australia, or that Native Title owners have.

The current hodge-podge of laws relating to the deprivation of property gap exists due to a lack of focus over many decades by both legislators and the legal profession.

Even fundamental aspects of Crown grants of freehold and leasehold interests in land are being forgotten, as shall be made evident below.

So having stated what, to the lay property owner would seem to be the obvious, namely that compensation ought to be made by State governments in particular (or their authorities - Councils etc., and the Commonwealth) where their rights to use their land have been reduced, what remains is to find the legal principles and strategies that would support such a view, to the satisfaction of a superior court. This working paper proposes to do just that. The journey's next chapters are:

2.0 - The Source of Land Ownership in Australian States

2.1 - The Nature of a Grant

2.1A - Crown Grants: Prerogative Right, and Reservations

3.0 - From Order, to Adverse Rezonings without Compensation - How Did That Happen?

3.1 - The Initial Development of Town Planning in Australia - A Brief Outline

3.2 - Crown Grants, Estates in Fee Simple and Town Planning Law

3.3 - Uncompensated Losses by Landowners

3.4 - The Nature of Resumption

3.5 - The Rule of "No-Law"?

4.0 - The Right to Compensation - Supporting Considerations

4.1A - High Court of Australia - Some Property Principles: : External Affairs Strategy

4.1B - High Court of Australia - Some Property Principles: Recognising Grant Power

4.1C - Reconciling Crown Grants and State Powers

4.1D - Other Implications for Landholders

4.1D(a) - Injurious Affection Caused by a State's Activities on Crown Land or Other Private Land

4.1D(b) - Destruction of Private Land Enforced by Council (with no Compensation)

4.1D(c) - State & Intra-State-Authority Land Transfers: Avoiding a Possible Trap

4.2 - S. 51 (xxxi) of the Constitution - A Red Herring

5.0 - Footnote - The Role of Equity

6.0 - Conclusions

7.0 - Appendix A: Guidelines for Action re Crown Grants of Title

8.0 - Appendix B: Adopting UDHR Article 17 as Domestic Law - Implementation

8.1 - Australian Government Fallacies

8.2 - Treaty Obligations Re Property Rights

8.3 - Article 17 UDHR: Ratifying and Adopting as Domestic Law

8.4 - Article 17 UDHR: Let's Practise What We Preach

2.0 The Source of Land Ownership in Australian States

To understand best what property rights with respect to land in Australia might actually be, reviewing the historical development of the relevant legal framework is essential. In this regard, an excellent outline is fortunately provided by Dr T.P. Fry and a lengthy extract is reproduced here. Dr Fry's observations that impliedly relate to Native Title have been overtaken by more recent High Court decisions (eg., *Mabo v Queensland* (No 2) ("*Mabo case*") [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992)), but his historical observations are otherwise substantially unaffected by that development.

Dr. T. P. FRY. B.O.L. (Oxon.). S.J.D. (Harv.). Senior Lecturer in Law in the University of Queensland,
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I *The reception in Australia of the law as to freehold tenure*.

When Australia was annexed by the Crown, the Crown became the "ultimate" or "radical" owner of all land in Australia. Rights in respect of any land in Australia must therefore be derived either directly or indirectly from the Crown, or not at all.

.....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. '

It was, likewise, impossible for anybody to acquire title to any Australian land merely by "squatting" on it. He had to obtain a grant, lease or licence from the Crown in respect of it, or he was a mere trespasser.

[Ed. - In the *Mabo No.2* case, 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 ....."]

1. The Crown could have confined the title of the aboriginal natives of Australia to the lands they had previously possessed. subject only to the new paramount title of the Crown; but, in fact, it did not recognize any aboriginal legal rights to land on the Australian mainland. However, when the Crown became paramount landlord of the lands of Papua and New Guinea more than a century later, it confirmed the aboriginal natives of those Territories in their owner- ship of legal rights to the lands they had previously possessed, subject however to the new paramount title of the Crown.

2. (1913) 16 C.L.R., at p. 439.

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.....In 1828 the Imperial Parliament enacted the Australian Courts Act which, in Section 24, applied to New South Wales all the laws in force within the realm of England on 25th July 1828, " so far as the same can be applied within the said Colony." By virtue of the Common Law and this 1828 Act the English law as to land tenure was introduced into Eastern Australia, as far as it was applicable. A century of subsequent legislation by the various legislatures of Australia has developed a new system of land tenures in the

various Australian States and Territories, so that it is now possible to say, with a very high degree of accuracy, that the constitutional supremacy of Australian Parliaments and the Crown over all Australian lands, as much as the feudal doctrines of the Common Law, is the origin of most of the incidents attached to Australian land tenures. This does not mean, however, that the law as to tenures has suffered an eclipse in Australia. The reverse is the case. Legislation has revitalised and developed it, and has given it an importance in modern Australian land law which it has not had in England at any time since the sixteenth century.4

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.....

3. A.-G. v. Br(}Wn, (1847) 2 N.S.W. S.C.R. App. 30, at p. 39.
•. Professor Maitland, indeed, once expressed the view that in modern English land law the doctrine

of tenure had become an almost useless survival: *Collected Papers,* vol. I., p. 196.
5. It is of interest to note in this connexion that in a Colonial Office Circular of January 1829 (Dr. Battye, *History of Western Australia,* p. 87), dealing with grants of land to be made in Western Australia, it is stated that, .. Land thus granted will belong in perpetuity to the grantee, his heirs aI).d assigns, to be held in free and common socage, subject, however, to such

reservations and conditions as may be stated in conveyance."

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.....There should also be kept in mind as a general source of divergences and differences between English and Australian freeholds, the fact that, whereas most of the instruments by which English lands were first granted to the predecessors in title of the present Crown tenants have been lost, with the result that the incidents of socage tenure in England depend upon general rules' of the Common Law and upon evidence of the practice of the Crown and its Crown tenants, in Australia it is nearly always possible to refer to the precise words of the instruments of grant, and to any statute or ordinance modifying or supplementing the effect of those words.

It might prevent ambiguity if Australian freehold tenure were described simply as tenure by a Crown grant of freehold. This would emphasise that it is to the precise terms of each Crown grant, and to the provisions of relevant statutes, and not primarily to generalized rules of the Common Law concerning the incidents of socage tenure, that it is necessary to look in order to ascertain the restrictions in favour of the Crown imposed in the Crown grant upon the Crown tenant's rights to the land.

The reservations and conditions contained in each Crown grant are supplemented by certain statutes which have brought about the eclipse in every Australian State of the Common Law maxim *cujus est solus, ejus est usque ad coelum et ad inferos. ["whose is the soil, is his also up to the sky and down to hell -Ed.]* From these statutes will be learnt the precise extent to which that eclipse has resulted in a contraction in Australia of the Common Law rights of enjoyment which belong to freeholders in England.[6]

I I *The invention of Australian tenures of new types.*

The year 1846 saw the first step taken along a road which led to the subsequent invention of a multitude of Australian tenures of new types. In that year an Imperial statute authorized the making of Orders in Council. These were issued in 1847 in respect of New South Wales and 1850 in respect of Western Australia.

The 1847 Order in Council had a two-fold significance in the New South Wales of the day. It bought to an end the policy of concentration of settlement,[7] which was to have been achieved by the Crown refusing

tY. A discussion of this topic is to be found in the writer's *F,eekold and Leasehold Tenancies of Queensland Land,* pp. 83·153.

7. South Australia and Western Australia did succeed in enforcing the policy of concentration Of settlement, and, as a consequence, freeholding is the normal method of landholding in those States.

to alienate the fee simple of, or to lease, any land outside" the nineteen counties" around Sydney or outside small areas around Hobart, Melbourne and Brisbane. It also introduced a system of Crown leasehold tenures which led to the whole of Australia being transformed in subsequent decades into a patchwork quilt of freeholdings, Crown leaseholdings, and Crown "reserves."

Before 1847, and especially during the "squatting age" in New South Wales between 1835 and 1847, many thousands of people left the "settled districts" and went into the back country beyond. These "squatters", as they came to be known, took possession of unoccupied land without having any right or title to it. Technically, they were trespassers, but the New South Wales legislature, faced with *a fait accompli,* enacted the 1839 Squatting Act which instituted a system of pastoral licences which, for a fixed annual licence fee, entitled their respective holders to occupy for pastoral purposes land outside the settled districts. The device of pastoral licences was, however, satisfactory neither to the squatters nor to the Crown. The 1846 Imperial statute, as implemented in New South Wales by the 1847 Order in Council, conceded most of the pastoralists' demands. Most pastoralists outside the settled districts thereafter held their lands on leases of 8 or 14 years duration, for low annual rents, a right of resumption being retained by the Crown

and a right of pre-emption of the fee simple of the land, or part thereof, being granted to each of these Crown leasehold tenants.

The present States of New South Wales, Queensland, Victoria and Tasmania, have therefore had a common starting point in the evolution of Crown leasehold tenures. South Australia and Western Australia were destined to develop along similar lines, but from different starting points.

The 1847 Order in Council created new pastoral tenures. In 1861, Sir John Robertson secured the enactment in New South Wales (which, by then, had dwindled into its present boundaries) of a statute which introduced a new kind of agricultural tenure. This was called Selection tenure, but is more accurately described as "conditional purchase." It enabled a "cockatoo farmer" of the Colony to obtain a freehold title to his agricultural farm, after the payment (usually in instalments) of a prescribed purchase price, and after fulfilment of conditions such as personal residence on his Selection for a prescribed period and the expenditure of a prescribed sum on making permanent improvements on the Selection. One of the essential features of this kind of tenancy is that, after a prescribed period of years, it changes its nature, as in a kaleidoscope, from a Crown leasehold tenure to a freehold tenure; and may therefore be said to be a "convertible" tenure. Until the conditions of purchase are fulfilled and the purchase is completed, it has many of the characteristics of a Crown leasehold tenancy with onerous incidents; afterwards it becomes an ordinary type of freehold.

Later, Selection tenure was introduced also into the other Australian colonies. It is still to be found, in various forms, and under various names, in each Australian State. Although originally an agricultural tenure, it became the prototype of other tenures, such as Miners' Homestead Leasehold tenures in Queensland, which are available for residential purposes in localities which are not necessarily agricultural in nature.

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The original type of pastoral leasehold tenures, those which originated in the 1847 Order in Council, imposed few incidents of tenure other than payment of annual rent-services. The agricultural Selection type of tenure had imposed onerous developmental and occupation conditions in addition to the payment of annual rent-services. In the course of time, similar conditions of development or occupation were imposed in respect of some of the pastoral tenancies. Queensland examples of this cross- fertilization are the Grazing Farm Selection tenures (first introduced by the Crown Lands Act 1884) and the Grazing Homestead Selection tenures (first introduced by the Crown Lands Act 1894).

The Crown leasehold principle has been applied not only to lands for pastoral and agricultural purposes, but also to those for mining, fishing, water utilization, residence and other purposes.

For example, mining lands, like pastoral lands, are mostly held on Crown leasehold or Crown licence tenures. The great Australian gold rushes of the 1850's and 1860's had led to the introduction of a system of gold-mining licences and gold-mining leases which, in their own way, were counterparts of the pastoral licences and pastoral leases of 1839 and 1847. The glamorized Eureka Stockade of 1854 was the result of opposition by goldminers at Ballarat, Victoria, to the imposition of a system of miners' licences similar to the "miners' rights" of to-day (but much more costly), and similar to the pastoral licences which had been imposed upon"squatters" by the 1839 New South Wales Squatting Act. Their opposition did not secure the abolition of the system of Crown licences, indeed, in the course of time, Crown grants of mineral freeholds ceased to be made. In Queensland no grant of any mineral freehold has been made by the Crown since 1882, and, as a consequence, most Queensland mining lands are held from the Crown on various non-perpetual tenures, each of which imposes *(a)* a licence fee or annual rent, and *(b)* tenurial incidents designed to ensure that the Crown tenant continues to utilize and develop for mining purposes the lands which he holds.

Probably the zenith of the Australian system of Crown leasehold tenures was reached when there was evolved in the closing decade of the nineteenth century the first of the Crown perpetual leasehold tenures. By means of these tenures Crown tenants can obtain a title to a statutory perpetual term of years instead of a Common Law fee simple estate, this perpetual term of years usually being subject to important incidents of tenure to which freehold grants in fee simple are not subject.

Crown perpetual leasehold tenure was first introduced in Queensland in 1907. Since 1917 (with the exception of the three years from 1929 to 1931) it has been the policy of the Queensland Government not to make freehold grants of Queensland land, and during this period Crown perpetual leaseholds have been offered instead of freeholds. It is possible to obtain Crown perpetual leaseholds in New South Wales, but there is no bar to the acquisition of land in New South Wales on freehold tenure.

III *The Queensland system of non-perpetual Grown leasehold tenures.*

Legislation during the century since 1847 has thus brought into existence in each Australian State a complex and diversified system of

Crown leasehold tenures. The development of these laws as to tenures has been most marked in New South Wales and Queensland.

The Crown leasehold principle, introduced during the Imperial period, was developed in scores of New South Wales statutes enacted after the grant of self-government in 1855 and of Queensland statutes enacted after Separation in 1859. The undoubted constitutional right of the Queensland and New South Wales Parliaments to create whatever tenures each think fit has been exercised actively. The result in each State, as Millard has said of New South Wales, is " a bewildering multiplicity of tenures. " [8] Gone is the simplicity of the modern English law as to tenures. Gone is the senile impotence of the tenurial incidents of modern English law. New South Wales and Queensland are in the middle of an historical period in which the complexity and multifarious nature of the laws relating to Crown tenures beggars comparison unless we go back to the mediaeval period of English land law. The relevant laws in the other States of Australia are perhaps less complex and multifarious, in comparison with those of New South Wales and Queensland; but in no Australian State or dependent Territory are these laws nearly as simple as is the modern English law as to tenures.

Mr. Fyfe, Surveyor-General of Western Australia, who recently investigated the land tenures of all Australian States has said in his Report that Queensland's various Crown leasehold tenures "represent the most comprehensive system in operation in respect of country lands in Australia." Of all Australian States, Queensland is that in which the largest fraction of total area is held by Crown tenants on various kinds of non-perpetual Crown leasehold tenures,[9] and in which there exists a remarkable multiplicity of Crown leasehold tenures.

There are approximately seventy different kinds of Crown leasehold and Crown perpetual leasehold tenures in Queensland.

Details as to these are to be found in the writer's *Freehold and Leasehold Tenancies of Queensland Land,* and it is not proposed to enumerate them here or describe their individual characteristics. However, in the Table printed on next page, the major groupings of Queensland tenures are classified *(i)* according as they are perpetual or non-perpetual, and, *(ii)* if non-perpetual, according as they are or are not, at the option of the Crown tenant, " convertible" to freehold tenure.

This Table is supplemented hereunder by a general analysis of the principal characteristics of Queensland's Crown Leasehold tenures. This analysis may also serve to convey some idea of the general characteristics of the tenures in each Australian State.

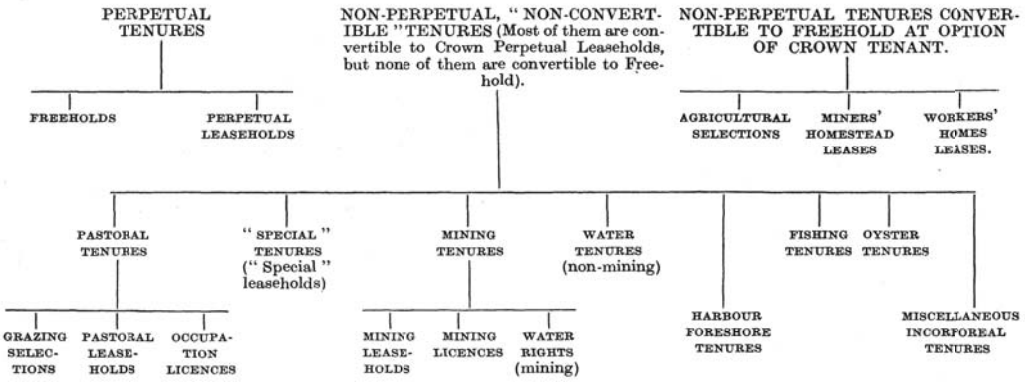
Crown leasehold tenures (with the anomalous exception of Crown perpetual leaseholds, which are to be discussed later) confer on the Crown tenants only a term of years, such as

1, 2, 10, 20, 28, 30, 40 or 50 years. These Crown tenants do sometimes retain their holdings for longer periods by virtue of a right (sometimes conditional, sometimes uncon-

8. Millard on Real Property (N.S.W.), (4th edn.), p. 474.

9. In contrast with the 8% of Queensland which has been alienated on freehold tenure or Is In process of alienation, is the 34% of New South Wales land and the 54% of Victorian land which is alienated or in process of alienation. Statistics for New South Wales further show that the area held in 1943 in that State under Crown perpetual leasehold tenures was 21,354,935 acres, compared with the 6,390,887 acres of Queensland land held under Crown perpetual leasehold tenures at the end of 1945.

TABLE: QUEENSLAND CROWN TENURES CLASSIFIED ACCORDING TO THEIR RESPECTIVE PERIODS OF DURATION AND ACCORDING TO THEIR "CONVERTIBILITY."



ditional), which is usually given them in their Crown Lease, or renewing or prolonging their original term, in respect of at least some part of the land they hold. However, in the absence of a statutory right to convert a non-perpetual Crown leasehold into a freehold, no Crown lessee can enlarge his term of years into a fee simple.

Another very important characteristic of the Crown leasehold tenures are the many tenurial incidents imposed upon Crown Lessees. These tenurial incidents are designed primarily to *(a)* provide revenue for use by the Queensland and Commonwealth Governments and the Local Authorities, *(b)* develop the productive capacity and economic value, and the civilized amenities, of lands throughout Queensland, and *(c)*

prevent the rise of a class of absentee owners possessing undeveloped lands, which would hinder the policy of populating the country districts of Queensland.

Amongst these tenurial incidents are: *(i)* monetary exactions in the form of land taxation and Crown land rentals; *(ii)* developmental conditions (such as the erection and maintenance offences or other" improvements," or the eradication of noxious plants) necessitating the expenditure of money, or its equivalent in labour and materials; *(iii)* certain non- mining conditions, such as the condition of "personal residence" and the less exacting condition of "occupation"; and *(iv)* mining conditions, such as the condition of labour-employment and that of continuous utilization. There might also be added to the list: *(v)* various rules as to the maximum areas which anyone person can hold on each particular kind of Crown leasehold tenure; and *(vi)* restrictions placed upon the Crown tenants' rights of alienating or encumbrancing their respective holdings.

In respect of monetary exactions, although there exists an apparent point of difference between freehold tenure and the various Crown leasehold tenures, it is to a great extent illusory on closer examination. In respect of each Crown leasehold an annual Crown rental is usually payable. Although no quit-rents are now payable to the Crown in respect of freeholds, any landowner who holds freeholds, the total capital value of which exceeds a specified sum, is obliged to pay annual land taxes which are not payable in respect of Crown leaseholds. A rose by any other name! Other monetary exactions imposed on land, such as "death duties", stamp duties, gift duties, and Local Authority rates, are usually payable on whatever tenure the land happens to be held.

The principle of periodical re-assessment of the Crown rents due from Crown lessees, led to the establishment in Queensland of an administrative tribunal of specialized knowledge charged with the function of re-assessing these Crown rents. An 1884 Act recreated a Land Board, which became the Land Court in 1897. Important additional functions, including land tax appeals, have been imposed upon it from time to time.

It is in respect of the non-pecuniary incidents of tenure that there exists a very marked contrast between freehold tenure and the Crown leasehold tenures.

Freeholds, like Crown leaseholds, are in Queensland subject to a requirement that noxious plants must be eradicated. There are, however, few if any other non-pecuniary tenurial incidents attached to freeholds.

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Certain of the Crown leasehold tenures are subject to developmental conditions which require the Crown tenant to erect fences, clear the land of prickly-pear or other noxious

plants, employ labour on continuous mining development, or make various other miscellaneous types of improvements; and to maintain such fences, clearances and improvements when made. It should be mentioned that, in most circumstances, a Crown tenant has a right at the expiration of his Crown tenancy to obtain compensation, or concessions of other kinds, for the improvements he has made on the land.

The conditions of personal residence and the less exacting condition of occupation form another important class of tenurial incidents. The *condition of personal residence* is performed by the continuous and *bona fide* residence of the Crown tenant personally on the holding during a specified period, usually of only a few years' duration. Only very occasionally and only in highly exceptional circumstances will any relaxation of this condition be permitted. The *condition of occupation* is performed by the continuous and *bona fide* residence on the holding of the Crown tenant personally or of a registered bailiff who would himself be qualified to become the Crown tenant of such a holding. Usually the condition of occupation, if applicable to a particular holding, is applicable for the whole period of the Crown lease, except in so far as part of such period may be subject to the condition of personal residence.

Very similar in its nature both to the condition of occupation and to the condition of development, applicable to non-mining tenures, is what we may call for the want of a better name the mining condition of continuous utilization. Land held on the various mining tenures must be utilized "continuously and *bona fide*" for the particular purpose or purposes for which they are respectively granted. Most, but not all, of the mining tenures impose a condition that the land must be continuously worked by the employment of a minimum number of workers specified by law.

Tenurial incidents constitute a very real menace to the continuance of any Crown tenant's right to his tenancy. For example, the conditions of continuous utilization and of labour-employment give an ephemeral character to the great majority of mining tenements, and the non-mining condition of occupation is one upon which a Crown perpetual leaseholder must needs look with apprehension.

In order to prevent the accumulation of unduly large areas of land in the hands of anyone Crown tenant, Queensland has adopted a policy of restricting the number and the total area of holdings. Sometimes a maximum is imposed upon the size of any single holding, a maximum number of holdings that anyone Crown tenant can hold is prescribed, and a further maximum is imposed upon the total area of land which the one Crown tenant can hold in Queensland in all of the holdings which he is permitted to hold on any particular tenure. These maxima vary, according to the particular tenure, from the 1/2 acre of Crown Perpetual Town Leaseholds to the 60,000 acres of Grazing Selections, whilst no maximum has been prescribed by Statute in respect of Pastoral Holdings under Part III of

the Land Acts. With only a few exceptions, it is the general rule that the imposition of a maximum in respect of a particular

tenure does not debar a Crown tenant from holding additional areas of land on other tenures, if the maximum in respect of each of those other tenures are not exceeded.

Before the second world war a freeholder was, in general, at liberty to deal with his holding in any way he liked and without having to obtain any administrative consents from the Crown, provided only that he conformed to the relevant rules of the general law applicable to such dealings. This old attribute of freeholds is in violent contrast with the system of close administrative controls which fetter the power of Crown leaseholders to deal with their holdings. The consent of a State Minister [10] is a pre-requisite for the validity of any *assignment* of a Crown leasehold; although there is usually no necessity to obtain such consent to a *sub-lease* or a *mortgage* of the holding if it is subject not to the condition of personal residence but only to the condition of occupation. During the second world war and the transitional post-war period, the necessity to obtain consents from a Commonwealth Minister, as part of a many-sided system of control of the economic affairs of the nation, has also fettered free- holders' freedom to deal with their holdings; but this development will probably prove to be of a merely temporary nature.

In all Australian States the laws as to tenures are evidence of a cogent and administratively enforced policy of making land serve as an instrument of national and social purposes. It will probably not be until current Australian ideals are abandoned by some future generation of Australians (and, it would seem, most political ideals are abandoned sooner or later) that the present systems of Crown leasehold tenures will collapse, as the feudal system of land tenures did in England progressively from 1330 to 1600.

IV *Comparison of Crown perpetual leasehold tenures and freehold tenure.*

Freehold tenure confers upon the Crown tenant, his successors and assigns, an estate in fee simple, which is usually said to confer "perpetual" title. "Tenant in fee simple," it is said in *Coke on Littleton's Tenures,* "is he which hath lands or tenements to hold for him and his heirs for ever." It is a rule of the Common Law which cannot be disproved by any mathematical or other argument, that a fee simple is a "larger" estate than any leasehold estate, however long the term of years conferred by the latter, even if it be lO,OOO or lOO,OOO years....."

Well, it's an interesting history. Key points which might be taken from it which are relevant to our concerns are as follows:

A. It is very clear from the operation of Crown grants during the 19th and into the 20th century, that a grant was a grant. Even if a grant was a leasehold rather than a freehold, the conditions and limitations which characterised the grant were clear to all from the outset. The type of grant carried with it certain entitlements, which could not and were not suddenly (or capriciously) diminished by planning or executive orders (except perhaps during the passing emergency of World War II). There were no surprises for property owners. Indeed, as Fry points out, the Crown was so scrupulous as to provide at the expiration of a Crown leasehold tenancy, a right of compensation, or concessions of other kinds, for improvements the leaseholder had made on the land. Equally, where the Crown attached conditions of conduct to a grant, the Government of the day was entitled to require performance of the conditions by the grantee.

B. It is very clear that there was great innovation in the design of grants to achieve social and planning objectives - there having been counted, as noted, approximately seventy different types of Crown leasehold tenures in Queensland - and that there was no practice of any Colonial or (later) State government arbitrarily impairing the scope or operation of a grant.

C. By the use of Crown leaseholds - generally of a defined length of time, Governments retained a flexibility in future planning without bad "surprises" - i.e., the avoidance of *ex post facto* imposition of rights to use the land - for leaseholders, or indeed freeholders.

D. There is no apparent record during this period of the Crown repudiating a grant - in whole or part - no doubt, one might deduce - because it was unthinkable, and because it could have fundamentally undermined confidence in the system of property ownership in Australia.

On this very point, in 1924, the Lands Department (Qld) found it necessary to publish "Leaflet H", entitled: *The Perpetual Lease System of Land Tenure*. It read as follows:

The popular mind has it that the Crown has the right to take the land from the lessee whenever it so wishes. No such right exists. So long as the lessee pays his annual rental and fulfils the conditions of the lease, the Crown cannot interfere with him. He is equally as secure in his title as if the land were held under freehold tenure. The Crown has no other means of regaining possession of the land than it has of regaining possession of freehold lands. In both cases the Crown can resume possession only by the operation of the laws for the resumption of any lands for public purposes. When these laws are put into operation the owners or lessees of land are entitled to compensation, which is determined by the Land Court,.... Cited by *Fry (supra* at 72).

Leaving aside the (for us irrelevant) issue of the precise legal difference between "freehold" and "perpetual leasehold", this is a very clear statement, which has the same

progenesis of legal development as the other States, and which has not been rejected by any Court. It is clear and one might say, completely conventional.

Nearly a century earlier, in Sydney, when landowners were "adversely affected" by Surveyor General Thomas Mitchell's proposed realignment of roads and boundary lines, which were proclaimed in 1834, the landowners "swamped the government with claims for compensation, leading subsequently to a select committee to untangle the web of claims and counterclaims. Private property interests won out....." [Ashton P. & Freestone R., *Planning, Dictionary of Sydney*, 2008, http://dictionaryofsydney.org/entry/planning].

It is clear that landowners in 1834 would have agreed with the Lands Department (Qld) statement of ninety years later. Their shock and horror would have been also understandable due to the care which had been taken previously to issue Crown grants, where appropriate, with detailed conditions, which gave any prospective purchaser notice of planning limitations in advance. As noted in *The History of Property Law. Tutorial on Old System Title*, John P Bryson QC (13 June 2007) at 16:

> Early Crown Grants contained conditions and reservations 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.

With respect to such Grants with conditions made from the early days of NSW settlement, four points might be noted in passing:

1. Already, the Crown was effectively designing and using grants as planning instruments;

2. The absence of any particular type of condition or reservation to a grant necessarily implies the right to such a use by the title holder. For instance, in the absence of the reservation of timber, or a prohibition on cutting down timber suitable for naval purposes, a Crown grant necessarily implied a right to do either.

3. There was great flexibility available to the Crown in the types of reservations and conditions which might be incorporated in grants of title, and each type of reservation or condition can be seen as a legal interest, and an aspect of title, which is in principle severable from other aspects of a title. It follows that if in any case, a condition or reservation is fixed to a grant by the Crown at some time after the fact, then that may be characterised as a partial resumption of the grant, the Crown having resumed from the title holder that aspect of right previously held by him/her under the grant.

4. A feature of the Crown practice during early settlement (as with, for example, Queensland later in the nineteenth century), was that as reservations or conditions were included as part of a grant, notice of such was available to any prospective title holder from the very beginning: no surprises for anyone taking reasonable care to assess the property.

As a footnote to this general point about the axiomatic security of Crown land tenure, the reader might be reminded that the seriousness with which property rights were taken by the Crown was a key reason for the existence of Sydney and First Fleet itself, and it was of course reflected in the fact that NSW (and later all the other Colonies (except South Australia) - and including Norfolk Island) were founded as penal settlements for convicts who, more often than not, were convicted for committing property offences (such as theft or fraud), many famously trivial and sentenced to transportation to the other side of the world, often for periods of seven or fourteen years. Taking property without compensation was not accepted and the Crown enforced the policy diligently!

It might be noted that Crown grants have been generally acquired by purchase, often at auction, but that was not necessarily the case. From 1791 to 1831 Governor Phillip, and later Governor Macquarie, issued free grants of land on behalf of the Crown to encourage and advance settlement of the State: *NSW Land Registry Services* http://www.nswlrs.com.au/land_titles/land_ownership/crown_land.

Much later on, the Colonies adopted a practice of offering free land grants to migrants who paid their fares in full: for example, the *Immigration Act* 1872 (SA). The *Immigration Act* 1869 (Qld) provided, *inter alia*, that people paying for their own passages were entitled to 40 acres of land for each adult, provided they resided on it for three years and cultivated one-tenth of the area.

This was not an original idea - in 1618, in the Colony of Virginia, a shareholder of the Virginia company, Sir Edwin Sandys, decided to attract migrants by offering a "headright" of 50 acres to anyone who crossed the ocean at his own expense, and as much again for every adult he brought with him. "The lure of free land brought a stream of would-be settlers, most of whom died, but by the 1630s the flow of migrants outstripped the death rate from fever, and soon land was being bought and sold at five shillings... for fifty acres": *Measuring America*, Andro Linklater (2003) at 29, 33.

A century and a half later, after American independence was declared in July 1776, none other than Thomas Jefferson introduced a bill in (the State of) Virginia "to offer a 'head-right' grant of fifty acres to every landless immigrant who arrived in the state from overseas" (*Ibid.* at 55).

The reason for the cheap or free issuing of Crown grants in New South Wales was clearly understood and recognised by the Courts. In Cooper v Stuart (*infra* at 293), Lord Watson, for the Privy Council, observed: "The object of the Government, in giving off public lands to settlers, is not so much to dispose of the land to pecuniary profit as to attract other colonists." In *Lord v The City Commissioners* (*infra* at 929), it was observed: "...in an infant colony....it was the manifest and avowed policy to encourage settlement and the cultivation of land by grants on the easiest and most favourable terms."

2.1 The Nature of a Grant

"LETTERS PATENT *erecting Moreton Bay into a Colony, under the name of* QUEENSLAND, and appointing SIR GEORGE FERGUSON BOWEN, K.C.M.G., *to be Captain General and Governor-in-Chief of the same*.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith to Our trusty and well-beloved SIR GEORGE FERGUSON BOWEN, Knight Commander of Our most distinguished Order of St. Michael and St. George, -greeting.....

5. And we do hereby give and grant to you, the said Sir George Ferguson Bowen, full power and authority, by and with the advice of the said Executive Council, to grant in Our name and on Our behalf, any waste or unsettled lands In Us vested within Our said colony, which said grants are to be passed and sealed with the Great Seal of Our said colony, and being entered upon record by such public officer or officers as shall be appointed thereunto, shall be effectual in law against Us, Our heirs or successors: provided nevertheless, that in granting and disposing of such lands you do conform to and observe the provisions in that behalf contained in any law which is or shall be in force within our said colony, or within any part of our said colony, for regulating the sale and disposal of such lands.

The above quoted extract of Letters Patent dated 16 June 1859 (emphases are in the original), is one of the source documents in which the Constitution of Queensland is to be found pursuant to (according to Twomey, Anne, *The Constitution of New South Wales*, Federation Press (2004) at 39): "... s 34 of *Australian Constitutions Act (No 2*) 1850 (Imp) 13 & 14 Vic, c 59; s 7 of the *Constitution Statute* 1855 (Imp) 18 & 19 Vic, c 54; and s 46 of the *Constitution Act* 1855, Sch 1 to 18 & 19 Vic, c 54."

This Queensland example of the immediate priority and power given with respect to the making of grants of land in a new colony is not surprising, but nonetheless demonstrates the importance of the subject to the Crown. The grant of authority in the Letters Patent also appears to authorise plenty of scope for using creative terms of "sale and disposal" of such lands, which as we have seen from the observations of Fry (infra), were very much exploited in the ensuing decades.

What the Letters Patent do not do, is to authorise the new colony of Queensland to revise the meaning of the term "grant" itself. Certainly, the terms relating to the grant of "any waste or unsettled" land might be varied significantly, but they nonetheless remain in the form of a grant.

To the extent that a document such as the Letters Patent might be considered to be a part of the Constitution of Queensland, and if it is an entrenched part of its Constitution, then it

would follow that the meaning of the term "grant" in this context would be constitutionally fixed to the extent of the entrenchment. We have not examined this point with respect to Queensland or the other Colonies/States, but simply pose the question here.

Whether or not the meaning or effect of "grant" is entrenched in any State Constitution, its meaning and effect might be better understood by considering the history of its development, which is succinctly outlined by Chambers, Robert, *An Introduction to Property Law in Australia*, IBC (2001) at 92ff:

"The fee simple estate is the greatest right to land recognised at common law. "Fee" means that the estate is inheritable and "simple" means that it is not qualified in any way. Although it is now equivalent to ownership, we still refer to the owner of land as the owner (or holder) of an estate in fee simple. This can be explained by tracing the development of this estate.

A fee simple estate is created by a grant of land to a tenant and her or his heirs. Originally this would create an estate that would last as long as the tenant and any of his or her heirs survived. On the death of the last heir the estate would come to an end and the land would escheat, meaning it would return to the Crown or lord, from whom the tenant held tenure.

By the 13th century, it came to be understood that a grant to a tenant and her or his heirs did not give the heirs any right to the land. No one could know who the tenant's heirs would be until he or she died. Therefore, while the tenant lived, there were no heirs who could have property rights to the land. The estate in fee simple belonged wholly to the tenant and could be dealt with as he or she pleased.

For example, a grant of land to Steve and his heirs would give Steve a right to possess the land, which would pass to his heirs if he died (or would escheat if he died without heirs). However, Steve was free to transfer that estate before he died. If he sold the estate to Joan and her heirs, Joan would get the fee simple and Steve's heirs would get nothing. After the transfer, the estate would no longer depend on the survival of Steve's heirs, but would continue for so long as her heirs were living. However, if Joan transferred the estate to Susan, it would then be measured by the lives of Susan and her heirs.

Another important change occurred when people gained the right to transfer their freehold estates by will (under the *Statute of Wills* 1540 and *Tenures Abolition Act* 1660). This means that a fee simple estate would not come to an end when the tenant died without heirs, so long as it passed to a beneficiary of the tenant's will...the estate would only escheat if there were no heirs and no one entitled to receive the estate under the tenant's will.

A further change was the abolition of escheat in every state and territory but Western Australia....if the tenant of a fee simple estate (outside Western Australia) dies without heirs and without disposing of the estate by will, it does not escheat, but is treated like all the tenant's other property rights and goes to the Crown as **bona vacantia** (ownerless goods). The right to possession of the land passes to the Crown, not because the estate has ceased to exist, but because it has become ownerless.....

It can be seen from this that grants of estates in fee simple in particular developed over the centuries and certainly by the late 18th and the 19th centuries when Australia was being colonised, the idea of such grants being virtually permanent in nature, outlasting generations of tenants, their heirs and purchasers alike, was very well established. Such is the nature of a grant of land as it would have been understood by Sir George Ferguson Bowen and his contemporaries."

The significance of the replacement of escheat by *bona vacantia* is also explained in *Australian Principles of Property Law*, 2nd ed., (2001), Samantha Hepburn at 44:

"One of the most important incidents of the doctrine of tenure which the Australian colonies inherited from the English system was the concept of escheat. Escheat essentially gave the Crown the right to the property of a deceased, intestate person without any heirs (*proper defectum sanguinis*) or in circumstances where the tenant had committed a crime. Today, the concept of escheat has been abolished and replaced by the [already existing] notion of *bona vacantia* (Lang's Act 1863 (26 Vic c 20)). *Bona vacantia* means that property may pass on to the Crown as 'property without an owner' rather than reverting to the Crown as ultimate owner. The eradication of escheat and its replacement with *bona vacantia* can be seen as an important watershed for the operation of tenure in Australia, indicating the altered character of the Crown's right to title. Under escheat, the Crown resumed control over land in which it had always had ultimate ownership, and therefore the title was reverted; under *bona vacantia*, the Crown acquires subsequent rights to the land because the deceased has left no heirs, and therefore the title is successive. *Bona vacantia* effectively means that the Crown acquires a new title rather than resuming control over property it had always owned." See also: Enid Campbell, *Escheat and Bona Vacantia in New South Wales*, (1965) 38 ALJ 303

In short then, escheat was a form of passive resumption, but *bona vacantia* preserves the grant of title, ready for further transfer. Indeed, the nature and extent of the distinction might be realised in terms of the adoption by Brennan J. in the *Mabo No. 2* case of Professor Roberts-Wray's observation (as cited above at **2.0**) that with respect to her dominions: ".....the sovereignty vested in [Her Majesty] 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.." In this sense, with respect to land, *bona*

vacantia preserves both forms of sovereignty, and in escheat the land reverts solely to the former “ownership of country” type of sovereignty.

It is clear from the above generally, that the idea that a grant could be “diminished”, or repudiated, without compensation for same, would fundamentally undermine the nature of the legal interest.

This point is, in a way, alluded to by Chambers (infra at 169-170) in the context of mineral rights in the States:

Australia adopted the rule of English common law that a grant of an estate by the Crown did not include gold and silver unless it was stated otherwise: see *Wade v NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177. The existence and nature of the Crown’s right to gold and silver was debated at length in the *Case of Mines* (1567) 1 Plowden 310 at 336, 75 ER 472 at 510, where the court declared “that by the law all mines of gold and silver within the realm, whether they be in the hands of the Queen, or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore”. This rule means that no grant of Crown land will include a right to gold or silver unless the grant specifically stated that the gold or silver was intended to pass to the recipient.

....Today a grant of land by the Crown does not include the mineral rights, unless they are specifically included as part of the estate. This is accomplished in each jurisdiction by a statutory reservation of minerals to the Crown.....

The Crown’s right to minerals in the earth is a property right. This is true even where the Crown has granted a fee simple estate, reserving only the mineral rights to itself. The Crown would not be free to enter that estate to explore for or take those minerals without providing compensation to the owners of the fee simple for interfering with their right to possession of the land. [Yes, but no authority cited.] Therefore its right to minerals is only a right to possession of those minerals. Nevertheless, it is a property right which can be transferred to, and enforced against, other members of society....

Having reviewed this history of Crown grants, an observation of the nature of grants in general might be made.

“A grantor having given a thing with one hand is not to take away the means of enjoying it with the other". 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.

These judicial observations go to the essential nature of a grant of property (which must include a land grant), namely that where the grant's purpose is purportedly impaired by the grantor, that impairment is inherently repugnant to the grant and cannot be allowed to stand - or if it does, then compensation must be made.

This indeed was the view taken in a water rights case by the Supreme Court of New South Wales in *Cooper v Corporation of Sydney* (1853) 1 Legge 765 at 771-772: "...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". (The context of this case is outlined in *Sir Alfred Stephen: Third Chief Justice of New South Wales 1844-1873*, JM Bennett (2009) at 175-177.)

It might be observed that the common law right of compensation inherent in Crown grants as noted here would be entirely consistent with Article 17 of the Universal Declaration of Human Rights http://www.un.org/en/universal-declaration-human-rights/ 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 for about 150 years.

Speaking about property in general, not Crown grants of land in particular, a State can have the power to take away property without compensation, but subject to these qualifications, see: *The Commonwealth v. Hazeldell Ltd.* [1918] HCA 75; (1918) 25 CLR 552, at p 563: "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." 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.

This view is reiterated by Chief Justice French of the High Court of Australia in his speech extract reproduced below.

Whether such an expressed intention (i.e., to abrogate private property rights by statute) would be enforceable, would depend on the relevant common law (criminal confiscation laws versus contractual matters for example), but such express intentions to broadly disqualify compensation are not in any case a feature of State planning laws, as we shall see.

Another example of the making of grants since Federation is section 96 of the Australian Constitution, which provides that the Commonwealth with the power to grant money to any State. These monetary grants are typically tied to certain terms and conditions (often legislative) that the states must adhere to in order to receive the grant. As these grants are linked to a particular purpose, they are known as 'tied grants'.

Provided the States agree to accept a grant and then comply with the terms and conditions, the grant cannot be revoked by the Commonwealth, one would expect (relying on the “grantor principle” cited above), unless it provided compensation to the State for the revocation, which would make such an exercise seem pretty pointless. While there have undoubtedly been many discussions, even arguments, between the States and the Commonwealth about the terms and conditions of s. 96 grants over the years, revocation of a valid grant is not something that seems to have been attempted by the Commonwealth.

The same might be said for the idea that, a grant having been settled, the Commonwealth might purport to *ex post facto* add more conditions to the grant, thereby reducing its value to the grantee State(s). Quite apart from the possible operation of s.51(xxxi) of the Constitution (examined subsequently), such steps would in principle be repugnant to any grant and capable of being declared void.

The word “grant” in s. 96 seems to have been given its ordinary meaning, but an interesting point is made in *Victoria v Commonwealth ("Second Uniform Tax case")* [1957] HCA 54; (1957) 99 CLR 575, where Webb J. states at para. 14: “Section 96 gives power to make a grant of financial assistance to a State on terms and conditions; but naturally the terms and conditions must be consistent with the nature of a grant, that is to say, they must

not be such as would make the grant the subject of a binding agreement and not leave it the voluntary arrangement that s. 96 contemplates."

So a grant may be subject to conditions (which is nothing new), but it is not a binding agreement - one might say contract - simply a voluntary binding arrangement. Perhaps, a grant might be distinguished from a contract by pointing out that in a contract, consideration flows both ways, but with a grant it only flows one way, from the grantor: any conditions which might be tied to the grant simply relating to the quantum of consideration from the grantor.

2.1A Crown Grants: Prerogative Right, and Reservations

All Crown grants in the Australian colonies did not alienate the Crown's ownership of "royal metals", unless in a particular case, express provision was made to the contrary - and such an express provision did not ordinarily exist. In *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 186; [1969] HCA 28, Windeyer J observed:

The mining law of Australia begins with the gold rushes and the roaring days of last century. Gold, the 'royal metal', has always had a special position in law: a position which silver is perhaps entitled to share. Gold in the Australian colonies belonged always to the Crown, whether it was in Crown land or in lands alienated by the Crown. No express reservation was necessary to preserve the Crown's rights. They depended upon prerogative rights recognized by the common law. Thus gold did not pass by a Crown grant of the land in which it lies.

The Crown's prerogative right to retain ownership of minerals in its modern form developed from the 17th century and is explored in detail by the High Court in *Cadia Holdings Pty Ltd v State of New South Wales* [2010] HCA 27.

Any reservation, on the other hand, must be clearly specified in each Crown grant. The Crown may reserve by this means particular uses on a grant of title for itself. Here follow some examples.

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

In New South Wales, the case of *Lord v The City Commissioners* (1856) 2 Legge 912, grants obtained by purchase from the Crown in 1823 related to land bounded by a creek (a tributary of Cook's River which flowed into Botany Bay), and 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: *Sir*

Alfred Stephen: Third Chief Justice of New South Wales 1844-1873, JM Bennett (2009) at 177.

It seems 1823 was a busy year for Crown grants giving rise to litigation in New South Wales. Lord Watson for the Privy Council observed: "His Excellency Sir Thomas Brisbane, then Governor-in-Chief of New South Wales and its dependencies, on the 27th of May, 1823, made 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.

In *Campbell v Dent* (1864) SR (NSW) 58 at 61 and 63, Stephen CJ observed: "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. The reclamation by the Crown would depend, wholly, on the contingency of the subject matter being found necessary to be used at some future time, for the public service. Until the happening of that contingency, which might never arise, there is nothing in the clause to restrain the most absolute enjoyment of the property. The uncertainty, however, does not, in our opinion, render the stipulation-for such in effect it is-inoperative. The clause, on the contrary, appears to us to be a perfectly valid and effective one."

The absence of a right of compensation with respect to reservations was clearly stated in *Allen v Foskett* (1876)14 SCR (NSW) 456 at 460 that it "is clear that where a right of road is reserved in the grant, no compensation can be claimed".

It has been observed that the *Foskett* case is unique "in that the [New South Wales] government overlooked its right to obtain the road under the reservation and instead obtained it under a road Act which required compensation. The Court ruled that compensation was therefore required, even though it would not have been required if the

government had acted under the reservation rather than the road Act": DL Ostler, *A Case of Non-Identical Twins - Comparing The Evolution Of Acquisition Law In Australia And The United States* (2011) Canb LR 66 at 104. (For a more irreverent exposition of these and related issues, see: Ostler's *alter ego*, Silas Flint, *The Government Took My Property! A Comparison of Acquisition Law in Australia and the U.S.*" (2014).)

In *Cooper v Stuart (supra*), the Privy Council made a number of useful observations about Crown grants and reservations with respect to land in New South Wales, viz.:

(a) a resumption, when carried into effect on the basis of a reservation, operates as a defeasance;

(b) a reservation does not constitute an exception repugnant to the grant and therefore void.

(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;

The implications of these findings may be explored briefly.

With regard to (a) and (b), Lord Watson (*ibid. at 289-290*) stated: "An exception is that by which the grantor excludes some part of that which he has already given, in order that it may not pass by the grant, but may be taken out of it and remain with himself. A valid exception operates immediately, and the subject of it does not pass to the grantee. Their Lordships are of opinion that the grant to Hutchinson carried to him the whole 1400 acres, but subject to a defeasance as to 10 acres. The whole and every part of the lands granted vested, and have, from the 27th of May, 1823, to November 1882, been in the ownership and possession of the grantee or his representatives, subject to that provision, which the plaintiff describes in his statement of claim as 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."

In *Sackville and Neave Australian Property Law*, 10th ed., (2016) [5.128], it is written: "In states where there is no express statutory exception for reservations in the Crown grant, the same result has been reached by administrative action. In New South Wales for example, certificates of title have long been endorsed to the effect that they are issued subject to the reservations and conditions, if any, contained in the Crown grant. The terms of the Crown grant are not mentioned on certificates of title subsequently issued in respect of the land. A searcher therefore cannot ascertain from the register book (the original certificate of title) what reservations or exceptions were contained in the Crown grant. In practice, no serious problem is caused, since the most common reservations or exceptions

in the Crown grant relate to the Crown's right of resumption (now governed by legislation)...."

To the extent that Crown grant reservations remain, but are unidentified on certificates of title, one might nonetheless wonder about this apparently sanguine opinion - that reservations are now governed by legislation - and the possible extent to which they nonetheless remain available to the Crown, to lawfully acquire property rights by defeasance without compensation - but without any actual cognizance by the modern owner. In such a case, effective notice would always have been available to any prospective owner who would ordinarily rely on a solicitor to identify such a risk in a timely manner. Any loss caused, by potential exercise of such a defeasance, to the unwitting owner might be (in theory anyway) prospectively passed to the the acting solicitor.

With respect to (c), the inapplicability of the rule against perpetuities with respect to Crown grants, Lord Watson observes (*Cooper v Stuart (supra*). 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."

While the Crown may (leaving aside for the moment issues of compensation) resume a grant at any time, the perpetual nature of a Crown grant of freehold tenure (in particular) makes it virtually indestructible by a grantee or subsequent title holder. This is a most fundamental aspect of the appeal of the legal artifice created by a Crown grant, which is referred to in the vernacular as "real estate". The title may be mortgaged, leased, made subject to licence by agistment, entailed, bequeathed, made subject to equitable interests, sold, etc. etc., but through all such developments, it persists.

The only exception to this indestructibility would seem to be where the title can escheat (in Western Australia), which might be characterised anyway as a passive type of resumption.

In other words, the only way for an owner to terminate a Crown granted estate would be to die with an unencumbered estate, without heirs and no will, in Western Australia - most unlikely. Thus the title granted by the Crown is indestructible for practical purposes, in contrast to other instruments such as contracts.

Having seen above some examples of reservations in Crown grants, the existence of a right to compensation by the landowner for impairment by the Crown of its enjoyment of *unreserved* title is demonstrated by cases where the Crown has sought to rely on defeasement pursuant to a reservation, sometimes unsuccessfully.

In *Ex Parte Smart* [1867] 6 SCR 188 (NSW), there was no valid 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.

In *Dixon v Throssell* (*supra*), 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. For instance, 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."

S. 9 of the *Land Resumption Act*, 58 Vic., No. 33 provided that "When any land is taken under the authority of this Act the whole of which the Crown is entitled to resume under the powers in the Crown Grant....no compensation shall be paid for that land." Because the Court found that the Crown could not resume for the purposes of a botanical garden under the reservation contained in the grant, the owner was entitled to compensation.

So *Dixon v Throssell* is a case where the Crown resumed land outside the scope of the reservation and accordingly had to pay compensation. Relevant legislation did not attempt to deprive the landowner's right to compensation for resumption of land for a purpose not within the reservation.

Reference to the Privy Council decision ten years earlier in *Cooper v Stuart* (*supra*), reveals that the courts paid attention to the particular meaning of the words in each

reservation. The landowner must have got the shock of his life when on his land in1882, which was the subject of a grant in 1823 which contained a reservation "for public purposes", officers authorised by Governor Loftus took possession of a parcel of ten acres pursuant to that reservation, fenced it off, and excluded the landowner, for use as a public park. In that case, the reservation wording differed from that in *Dixon v Throssell*, and the Privy Council agreed that a public park was a "public purpose".

Another type of situation is one where, the Crown exercises its reservation rights, but also resumes adjacent land not so reserved. JM Bennett (*supra* at 177-178) provides the context for a case which ended up in the Privy Council: *Lord v Commissioners for City of Sydney* (1859) 12 Moo PC 473, 14 ER 991. Before reaching the Privy Council, in *Lord v The City Commissioners* (1856) 2 Legge 912, grants obtained by purchase from the Crown in 1823 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. In 1856, in addition to exercising its rights under the reservation, the City Commissioners, in pursuance of statutory powers, resumed the whole of an adjacent creek and some adjoining parcels of land, forcing a water mill to be closed. Compensation was paid to the plaintiffs for the land resumed (not the reserved land defeased) and the loss of motive power to smaller mills on the creek, but the plaintiffs were not satisfied with respect to sums paid for the resumed land. On appeal to the Privy Council, the higher compensation awards were affirmed: "The City Commissioners thus had to pay an astronomical sum to satisfy Sydney's insatiable thirst for fresh water, while, in the process, extinguishing the initiative of pioneer industrialists" (JM Bennett *supra* at 178).

JM Bennett (*supra* at 167) comments that: "Looking at the variety of cases entertained by the Supreme Court in the period 1844 to 1856, one is struck by the relatively large number of actions concerning land". "Flint" (supra at chapter 4) observes that whereas the USA had no Crown grant cases at all other than in Pennsylvania, in Australia, "there were (*sic*) a significant number of Crown grant cases throughout the 1800s - fully 20% of the Australian acquisition cases in the 1800s. The number of Australian Crown grant cases in the decades of the 1800s remained remarkably consistent. There were four such cases in the 1820s (the decade between 1821-1830 inclusive) three in the 1830s, four in the 1840s, four again in the 1860s, three in the 1870s, five in the 1880s and one in the 1890s.These numbers are the author's best estimate based on his personal, detailed review of the cases in the reported digests for all the Australian states, and also Australian newspaper reports of cases."

It seems very clear from such observations that there was a significant amount of litigation with regard to land, and grants of land, during the 19th century. Notwithstanding that, it is not evident that the courts had any doubt that while reservations of property use, and prerogative right, might be exercised by the Crown without compensation to title holders, resumptions of property uses otherwise made carried with them an obligation by the Crown to compensate the title holders so affected.

Just as the background of a moonlight night might reveal by silhouette the existence of some thing - an owl, a cat burglar, or a skyscraper - so might the existence and enforceability of the prerogative right and reservations serve as a background to reveal the precise form and existence of a grantee's compensable title. The key point of the Crown's use of its prerogative right, and reservations, is to enable it to exercise those rights to the exclusion of the title holder, without payment of compensation. If the balance of the titleholder's entitlements associated with the use of the land was not in principle compensable on deprivation by the Crown, then the Crown's exercise of prerogative right and the use of reservations would lose all practical meaning. That would be so, because in such a circumstance, where the Crown might at any time assert a right to any aspect of enjoyment of a property without compensating the title holder, the use of prerogative right or reservations would be mere, non-limiting, indications of future intentions and nothing more.

Indeed, in the absence of a right to compensation for a resumption not authorised by reservation or prerogative right, the use of Crown grants, ostensibly as a form of title not subject to the rule against perpetuity, would be nothing more than a sham. Fry's "tenure by a Crown grant of freehold" would in effect be little more than a licence at the will of the Crown. The Crown would be in such circumstances be in the role of a mere "indian giver".

3.0 From Order, to Adverse Rezonings without Compensation - How Did That Happen?

3.1 The Initial Development of Town Planning in Australia - A Brief Outline

In 1916, New York, New York adopted a process called "zoning", to help regulate development, initially in Manhattan. There was a legitimate need for land planning, especially in such a densely occupied and rapidly growing city. American property law is very different from Australian property law - for a start, they did away with the Crown in the Revolution of the 1770's. Rather than explore American property law here, it may suffice to say that, like many other American innovations, the spreading concept of zoning and town planning eventually (it seems via Great Britain and New Zealand in this case) reached Australia and, local planners facing the prospect of an ever rising population, adopted the idea. The first major use of the concept was the creation of the County of Cumberland - a large area in and around Sydney, after the Second World War.

Ashton & Freestone (ibid.) write: 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.

Wow - 22,000 claims. Of course, Australian governments had to plan for future land use, so their exploration of new methods was entirely justified. However, the concept of zoning was a legally foreign idea to the Crown grant structure which had evolved in Australia. Being of foreign (even if British) origin didn't make it bad, but from a legal viewpoint, it potentially had a fundamentally alien legal premise, which if not reconciled with the existing structure of the law of property in the States (i.e., not be within skeletal framework of Australian law, as it has been said), might produce undesirable results.

One might deduce from the above that this disconnection indeed is what has happened, to the cost of many. To draw such a conclusion though, what is the evidence?

Prior to reviewing the development of town planning in Australia, the reader might be reminded that (lest it be thought that no planning existed prior) extensive developments in planning (though the word "planning" seems not to have been used) had been achieved, evidently without injurious affection, as Fry ([1947] infra at 163) states : "....The undoubted constitutional right of the Queensland and New South Wales Parliaments to create whatever tenures each think (*sic*) fit has been exercised actively. The result in each State, as Millard has said of New South Wales, is 'a bewildering multiplicity of tenures'.....New South Wales and Queensland are in the middle of an historical period in which the complexity and multifarious nature of the laws relating to Crown tenures beggars comparison unless we go back to the mediaeval period of English land law."

Wilcox, M.R., *The Law of Land Development in New South Wales*, Law Book Co., (1967) details the development of town planning law in Australasia (at 181ff, citations omitted):

The first true town planning legislation in Australasia was the *New Zealand Town Planning Act* 1926. The Act was obviously modelled upon the English legislation....Curiously it was the less populous States which pioneered town-planning legislation in Australia. The first Australian legislation to provide for planning schemes on private land was the Western Australian *Town-Planning and Development Act*, 1928.....It was closely modelled on the New Zealand Act of 1926...the first town-planning Act in Queensland was the *City of Mackay and Other Town-Planning Schemes Approval Act* of 1934.....Tasmania entered the town-planning field in 1944 with its *Town and Country Planning Act*. The scheme of the Act followed that of the other states.....[with also in same year, the] *Town and Country Planning Act,* 1944 of Victoria.....Not until 1955 [in South Australia] was statutory provision made for a comprehensive development plan for Adelaide...

.....it is obvious that the basic scheme of legislation in the United Kingdom, in New Zealand and in the other Australian states (sic.) is similar. That scheme was adopted by the New South Wales legislation of 1945.

.....In New Zealand and in each of the other States (*sic*.), other than South Australia, the original intention was that planning schemes should be prepared by a single local council for its own area: even where, as in Victoria, there was, from the outset, provision for a joint scheme this remains true - the local council was the planner for its area. Save in the special case of Queensland (where the whole metropolitan area of its capital city Brisbane was within the area of a single local authority, the Brisbane City Council), time proved that such local control was not enough; at least in the capital cities a regional or metropolitan authority was necessary to plan for the city as a whole: in each case such an authority has been created, sometimes tentatively and with the idea of limiting it to planning functions, and has remained to enforce the regional scheme. This was also done in New South Wales, with the constitution of the Cumberland County Council. Significantly, however, the provision was included in the original Act: sooner rather than later. The result is that New South Wales, whilst late into the town-planning field, has been one of the first States to provide a comprehensive plan for its major metropolitan area.....

...No survey, however brief, of town-planning in Australia could omit reference to Canberra: the most completely planned, most beautiful and fastest growing major city in the Commonwealth. However, whilst Canberra may form a model and an inspiration for the planner, it is of little assistance in considering the legal problems raised under the New South Wales Act. *There were no problems of private ownership: Canberra is a new city built upon lands owned by the Commonwealth. Land has not been granted by the Crown in fee* [emphasis added - Ed.]: it has been leased, normally for lengthy terms, upon covenants restricting the use of the land.There is thus no need for a statutory planning scheme. In the case of leases for business purposes (including residential flats) it is usual for the Commission to specify the permissible size and form of the building which may be erected. The Commonwealth, through the National Capital Development Commission, prepares its own plan before granting leases and then grants leases whose provisions ensure compliance with that plan. Compliance is ensured by the Commonwealth as lessor - there is no need for a "responsible authority".

Bearing in mind the existence of s. 51 (xxxi) of the Constitution, which provides for "..... 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;".....then if the Commonwealth were ever so minded to adversely limit the use of a parcel of land in the Australian Capital Territory (or other Commonwealth Territory), the scope for sovereign risk posed by the Commonwealth would be limited to the more narrow property rights gap (compared to any State) that lies between the scope of s.51(xxxi), and Article 17 of the UDHR.

3.2 Crown Grants, Estates in Fee Simple and Town Planning Law

What is the express legal relationship between the Crown grants of land in freehold or leasehold, and town planning legislation in the States? Precious little apparently.

Take the authoritative textbook of Mr Wilcox (supra), *The Law of Land Development in New South Wales,* which contains approximately 700 pages of dense prose. The references to Crown grants and the relationship between town planning laws and the pre-existing laws of property are scant, to say the least. His observations with respect to common law rights amount to this (at Chapter 1):

At common law a landowner who was desirous of subdividing his lands or of opening a new public road through them was perfectly free to do so. He required the consent of no-one. He subdivided by conveying different parcels of land to different purchasers and the subdivision was as good as his title to convey.

Those were the good ol' days!

Seriously though, apart from his observation (see above) that in Canberra, "Land has not been granted by the Crown in fee", that's it! That's all! That's the sum total, evidently, of the amount of thought put into the relationship between State property law and town planning law. This is not to pick on Mr Wilcox, but (to the contrary) to make the point that if that's all that can be found in a detailed, scholarly, authoritative text on the field of town planning in Australia, it obviously was not considered worthy of attention by practitioners or lawmakers either.

In his book, Mr Wilcox provides much detail about provisions for compensation made by various State town planning Acts. The repeated assertions by Mr Wilcox (see below) that property owners adversely affected by town planning decisions, zoning and the like, should be compensated for their losses are not accompanied by any observation as to whether there was any legal basis for this view, other than the observation that (supra., at 277-278): "Common sense and justice demand" that the "sacrifices" imposed on individuals should be compensated. It is seemingly taken as self-evident. Maybe it is, but absolutely no attention is paid as to upon what legal basis a State must provide compensation in such circumstances. The subject is just unexplored.

More recently in, 2013, in a speech (reproduced more fully below), the then Chief Justice of the High Court of Australia did make some evidently relevant extrajudicial observations, some of which are:

Acquisition is not the only way in which property rights can be affected by the exercise of public power. They may also be affected by 'acts of government that do not directly or formally touch the property in question, but which nevertheless damage its value and enjoyment'. This is what is sometimes called 'injurious affection'. Compensation for compulsory acquisition and injurious affection by State or Territory governmental action depends upon statute law. *The question arises why is such compensation provided for by*

parliamentary enactment when it is not constitutionally required? One answer is that respect for property rights is a deeply embedded aspect of our legal tradition. It is also an aspect of our culture. It was reflected in the film 'The Castle' and the immortal line 'tell them they're dreaming'. [Emphasis added.]

Darryl Kerrigan's assertion of his property rights was reflective of the common law's protective approach to property rights generally.

Well, that's something. Poor old Wilcox pre-dated Darryl Kerrigan, so couldn't cite him as an authority!

Looking further afield, there is a real dearth of evidence of any considered legal opinion with respect to town planning legislation and its interaction with Crown grants and the latter's legal character.

Nineteenth century cases relating to alienated Crown land (as cited above) sometimes considered an interaction between Colonial legislation and Crown grants, but it is a clear feature in such cases that relevant legislation did not intend to repudiate any grant, but simply to complement it. The *Foskett* case (*supra*), might be regarded as an early example where the government forgot its rights under a Crown grant reservation, and was saddled with having to pay compensation under its own legislation, when it was not necessary under the grant reservation. There was in that case no issue as to a repudiation of the grant to the detriment of the title holder.

Twentieth century town planning legislation does not specifically address the relationship between it and Crown grants of land. The principal land acquisition statutes in Australia are listed by MS Jacobs, *Law of Compulsory Land Acquisition*, 2nd ed., (2015) at 26. 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".

It may be said that to the extent that these statutes provide for compensation for resumption of any granted land, they are consistent with the legal character of such grants, and do not repudiate them. However, there being no express attempt to reconcile the scope of such legislation with the legal scope of entitlement inherent in any grant, it is perhaps not surprising that a gap might be found between the coverage of the acquisition statutes and the extent of legal interests attaching to the grants. This "acquisition law gap" as described by the NSW Bar Association, which thereby assumes away the very existence of that gap, is the cause of significant and ongoing uncompensated losses by too many landowners.

3.3 Uncompensated Losses by Landowners

While town planning legislation generally made some provision for compensation to owners adversely affected by town planning decisions due to unfavourable rezonings etc., in practice the result has generally been very different.

Wilcox (supra at 206): "The object of a planning scheme is to so regulate the use of land as to improve the area generally - aesthetically, socially, and economically. But, inevitably, some individuals must sacrifice for the common good. This they may do because their land has been reserved for a public purpose or zoned for a less profitable one, It is proper and, in a democratic system almost essential, that the community as a whole compensate them for their individual loss....."

At 277-278, Wilcox repeats and expands on this: "The essence of town-planning law is the subordination of the interests of the individual land-owner to those of the community as a whole. In a different way, this is true of most law. However, in contrast to most other fields of law, the restrictions imposed by [town planning] law do not fall impartially on all. On the contrary the very zoning which denies one owner the most economic use of his land, and thereby depresses its value, may substantially appreciate the value of his neighbours' land, differently zoned to permit that use. The law of supply and demand is most relevant to land values, especially in growing land metropoles.

Fortune [Well, let's accept that only rhetorically - it's really the State governments - don't blame poor goddess Fortuna - Ed.], therefore, dictates that some individuals shall incur substantial sacrifice in the common good while others will not only share the common gain but glean a substantial individual windfall as well."

Writing with respect to NSW legislation introduced in 1945, Wilcox notes that compensation is provided for "in certain cases", but then notes (at 278): "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.*" [Emphasis added - Ed.]

Ashton & Freestone (supra)) write: "....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."

So, there were 22,000 claims (and one can fairly infer that many other landowners affected did not proceed to make a claim), and not a single instance of court awarded compensation.

In the absence of any evidence to the contrary, one has to deduce that precious few, if any of these or subsequent losses, claimed or unclaimed, was ever resolved by appropriate compensation, and they remain unresolved.

Fricke QC (infra) observed: "In the 1970's ....many persons had been denied any right to compensation or the possibility of enforcing acquisition of land which they could not use for any effective private purpose."

Of course, it's not just a matter of statistics. Real people are affected by these injustices. Chief Justice French observed in the aforementioned speech, that : "....as a member of the Claremont Town Council and a member of its Town Planning Committee in the 1970s. That experience gave me the beginnings of an awareness that planning issues are complex and can stir deep passions."

Deep passions indeed. They rarely seem to be published, but in this context, the behaviour of the hunger-striking of farmer Peter Spencer in southern NSW does not seem to be crazy at all. Just desperate.

Another more extreme example of property rage, as a matter of interest, is recounted by Western Australian lawyer John Wickham:

So far in Western Australia we have avoided such scandals in England as the Crichel Down Affair or the case of Mr Ramfield, a case where the Central Electricity Authority had unofficially upheld an owner's representations as to the route of supply line, but its officers went ahead with the original plan any way. Mr Ramfield took defensive measures. These included guard dogs, bulls, booby-traps with sawn-off shot guns, a patrol of ex-army armoured cars and extensive barbed-wire entanglements. The "piece de resistance" was a minefield so cunningly laid that the authority had access to the agreed alternative route but any attempt to carry out construction on the original route would result in everyone being blown sky high.

It sounds like this chap was a former soldier, but in any case one might imagine many frustrated and empathetic property owners cheering him on, even if they would not venture to so act themselves. Such an unusually elaborate response to perceived injustice points to the deep passions which might be aroused in the context of planning decisions observed by Chief Justice French.

Having said all that, Queensland has, it is said uniquely, provided for (limited) compensation, since 1997, for injurious affection for changes to planning schemes or policies under the *Integrated Planning Act (Qld),* and previously, as far back as 1934 under the former *Local Government (Planning and Environment) Act 1990 (Qld)* at 23-25. Maybe someone was taking the Land Department of Queensland's previously mentioned "Leaflet H" seriously!

Nonetheless, injustice can still be perpetrated by Queensland with the resentful concurrence of the High Court: see in particular the observations of Callinan J and Kirby J in the *Chang* case (*infra)* as cited below.

We note also that in recent years, some remedial steps in this are have been taken in Western Australia and Victoria.

Under the *Planning and Development Act 2005* (WA), compensation claims for the value reducing effect of public purpose reservations (under planning schemes) can be made: by the seller of land, if they owned the land at the time the reservation was imposed; or by the landowner when a development application is adversely determined due to the reservation. A recent High Court case shed some light on the operation of the scheme for compensation: *Western Australian Planning Commission v Southregal Pty Ltd & Wee; Western Australian Planning Commission v Leith* [2017] HCA 7 [1].

In Victoria, it is accepted that a restriction on the ability to use or develop land for a particular purpose may have significant financial consequences for the owner if permission to use or develop is refused. In such case, a landowner may be able to claim compensation from an acquiring authority under the *Planning and Environment Act 1987* (Vic). Under the Act, an owner or occupier of land may claim compensation from the acquiring authority for financial loss suffered as a natural, direct and reasonable consequence of:
- land being reserved for a public purpose under a planning scheme, as well as under a proposed amendment to a planning scheme;
- a declaration of the Minister for Planning that land is proposed to be reserved for a public purpose;
- access to land being restricted by the closure of a road;
- a refusal by a responsible authority to grant a permit to use or develop land on the ground that it 'is or will be' needed for a public purpose.

In addition, it is recognised (*cf.*, again, the list compiled by MS Jacobs *supra* at 26) that each State has made laws to govern the resumption of land for public purposes, for example: the *Land Acquisition (Just Terms Compensation) Act 1991* NSW. These laws generate their own controversies, but at least they are a mechanism for compensation when properties are resumed. That's the point though - they only apply to land which has been entirely "resumed" and not to land uses which have been newly prohibited (effectively, resumed), the said land thus being injuriously affected by planning instruments. As has been expressed in NSW in particular: "these activities do not form part of '*acquisition law*'" (*Submission of the New South Wales Bar Association To The Just Terms Compensation Legislation Review*, (2013) Phillip Boulten SC, President at 4.)

Other published examples of uncompensated damage are scattered through the literature and see also www.adverse-rezoning.info. Some more examples:

A. The President of the NSW Bar Association in 2013 (*supra* at 4) cited the High Court *Durham Holdings* case *(infra)* and noted: "the *Mining and Petroleum Legislation Amendment (Land Access) Act 2010* (NSW) ... retrospectively extinguished important property rights of farmers, notwithstanding those rights had been earlier recognised by the

Supreme Court. [Brown v Coal Mine Australia; Alcorn v Coal Mine Australia Pty Ltd (2010) 76 NSWLR 473.]"

B. See reference to: "the economic effect of the *Native Vegetation Conservation Act 1997* (N.S.W.) in the Moree Plains Shire where it is argued that land values have been reduced by 21% and farm incomes by 10%. By 2005 it is estimated that farm incomes will be down by 18%.": *Taking Farmers' Property Rights Seriously and Just Compensation On Their Taking,* Pape Bryan, Australian Centre for Agriculture and Law, UNE (2003).

C. In *Chang v Laidley Shire Council* [2007] HCA 37, as Kirby J. explains (at paras. 1 to 3): "The [subject] appeal concerns the interpretation of successive provisions of Queensland planning law affecting a parcel of land at Blenheim in South-East Queensland.

Under earlier provisions of the planning law, the land in question could, with the requisite approval of a development application, have been reconfigured (in the old language "subdivided") into lots of a modest size. After supervening changes to the planning law, reconfiguration as sought was prohibited. In these proceedings, the owners of the land have been seeking to recover what they claim is their entitlement to statutory compensation, accrued before that change took effect.

The owners' claim has been rejected (so far successfully) on the basis that, although the compensation sought was available for a time, it was removed by an amendment to the planning law which rendered the development application invalid."

Kirby J. continues (at paras 84, 85): "the appellants have identified an unfairness flowing from the drafting technique that was used, in effect, to destroy their surviving entitlement to make a viable DA(SPS).....the change was effected by stealth. (See also reasons of Callinan J at [125] .) The parliamentary process did not operate as it is intended, so that those who were depriving people, such as the appellants, of their entitlements and expectations, shouldered the responsibility and assumed public accountability for the amendments which they enacted. (See *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131: "the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost"; approved in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30] per Gleeson CJ, and in my own reasons in *Daniels Corp* (2002) 213 CLR 543 at 582 [106].)

It might be noted that above, Kirby J. refers the reader to the reasons of Callinan J. in the same matter - indicating his concurrence. Callinan J.'s judgment might fairly be considered to be a very fine piece of indignant *obiter dicta*. From the point of view of this working paper, it really deserves to be reproduced in full:

CALLINAN J. It is with regret that I find myself obliged to agree, subject to what I set out below, with the reasoning and conclusion of Hayne, Heydon and Crennan JJ, regret, I hasten to say, not because of any perceived deficiency in the reasoning of their Honours, but because the relevant statutory language, whether unintentionally, or deliberately and cynically, necessarily does take away the appellant's valuable proprietary and statutory rights, suddenly and without compensation.

I refer to the appellants' right to subdivide their land as a proprietary one at common law, because that is the language of Kitto, Menzies and Owen JJ in *Lloyd v Robinson* (1962) 107 CLR 142 at 154 with respect to freehold land. That proprietary character was not lost because the appellants, before October 2004, might need to seek the approval of the respondent to undertake a subdivision, as, on the rezoning of the land to Rural Residential "A" in 1992, subdivisional approval, subject to reasonable and relevant considerations only, was a virtual certainty. That this is so is confirmed by a letter sent by the respondent to the appellants on 18 May 2000 which relevantly reads as follows:

> "I advise that as the property is currently zoned Rural Residential 2 'A', subdivision is possible creating allotments ranging from 4,000m to 7,900m2 provided that an overall average of 6,000m2 is maintained.
>
> However ... whilst the Planning Scheme provides for subdivision of the subject land, the provision of infrastructure and developer contributions may impact any decision to further develop the land.
>
> As part of any development approval, [the] Council's Planning Scheme requires that a reticulated water supply be provided including external mains and headworks charges, bitumen access and internal road network including kerb and channel, contributions to bus shelters and parks and recreation.
>
> However, the final conditions which would be imposed could only be determined upon lodgement of a development application.
> ...
> [signed]
> MANAGER PLANNING SERVICES"

By definition, a subdivision is a reconfiguration of the land.

> (s 1.3.5 Integrated Planning Act 1997 (Qld):
> "In this Act –
> ...
> **reconfiguring a lot** means –
> (a) creating lots by subdividing another lot; ...")

Both zoning and an approval to subdivide run with the land.

> (s 3.5.28 *Integrated Planning Act* 1997 (Qld):
> "(1) The development approval attaches to the land, the subject of the application, and binds the owner, the owner's successors in title and any occupier of the land."
> See also *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 81 ALJR 352 at 385 [159], 386 [163] per Callinan J; 231 ALR 663 at 705, 706.

Although the States are unfortunately not constitutionally bound to provide just terms on the compulsory acquisition of property, (In 1988, as one of 4 proposals, the others of which were far less agreeable, and none of which could be dealt with separately rather than compositely, the following Constitutional changes were rejected in a referendum held pursuant to s 128 of the Constitution:

> "Question 4
> A Proposed Law: To alter the Constitution to extend the right to trial by jury, to extend freedom of religion, and to ensure fair terms for persons whose property is acquired by any government.")

by long practice and convention, sensitivity to the disparity between State and subject, and historical respect for property and like rights, (See Coke, *The Third Part of the Institutes of the Laws of England*, (1809) ch 73 at 161:

> "a man's house is his castle ... for where shall a man be safe, if it be not in his house?"

The principle may however have more ancient origins, with some scholars pointing to a passage in the *Pandectae (lib. ii. tit. iv. De in Jus vocando)*, one part of the *Corpus Juris Civilis* as the basis. rarely do they fail so to provide.

See also the Fifth Amendment to the US Constitution:

> "nor shall *private property* be taken for *public use* without just compensation".)

rarely do they fail so to provide. [Bold added for easier reading. The “rarely” view may be questioned in the light of published evidence at www.adverse-rezoning.info and elsewhere in this paper, but this point is either irrelevant to the thrust of the argument, or indeed makes the argument more compelling.]

Indeed, since at least 1936 planning legislation has so provided in respect of the sorts of events which have happened here (s33(10) *Local Government Act* 1936 (Qld)). It is on the

basis of such rights, and the expectation of compensation for their destruction or impairment, that transactions take place, plans are made, money expended, and people order their lives. To destroy legislatively such a valuable right, here to subdivide, in some apprehended public interest is one thing, but to exonerate the public from paying the deprived landowner is entirely another, and unacceptable thing. What the public acquires or enjoys the public should pay for.

It seems to me that to take away completely, by a few strokes of the legislative pen, the appellants' right to seek to have, and undoubtedly in substance to have, their land subdivided, is to do much the same as was done by the Commonwealth Parliament by the *Seafarers Rehabilitation and Compensation Act* 1992 (Cth) considered by this Court in *Smith v ANL Ltd* (2000) 204 CLR 493. Mr Smith however had the right to just terms as mandated by s 51(xxxi) of the Constitution. The appellants here unhappily do not. Increasingly prescriptive, restrictive, intrusive and even wrong-headed planning and heritage (See for example the oppressive and entirely unjustified heritage listings considered and rejected in *Advance Bank Australia Ltd v Queensland Heritage Council* [1994] QPLR 229 and *Reelaw v Queensland Heritage Council (No 2)* [2004] QPEC 79.) legislation and instruments, which go far beyond what a modern law of nuisance, taking account of denser populations, closer settlements, burgeoning industries, and other contemporary conditions could possibly insist upon, should not, as I fear they oppressively are, be used as a cloak to reduce, or extinguish valuable rights of, or attaching to, property.

"Cloak" is an especially apt term here because, instead plainly and openly, of legislatively declaring that the various changes to zoning and uses within the designated area or region, will not attract compensation, that result is achieved by the device, clumsy and obscurantist, of a "properly made application" and the fiction of an application which is not to be treated as an application in fact and in law. 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.

I would join in the orders proposed by Hayne, Heydon and Crennan JJ."

D. The Law Council of Australia has submitted to the Australian Law Reform Commission (ALRC) that "the lack of any constitutional or general protection from acquisition other than on just terms under State constitutions or statutes' amounted to 'a significant gap in property rights protection.....In some cases, this has resulted in States compulsorily or inadvertently acquiring or interfering with property rights, without any corresponding compensation for the right-holder": ALRC, *Traditional Rights and Freedoms—*

Encroachments by Commonwealth Laws (ALRC Report 129) (2016), Chapter 20 *Property Rights—Real Property,* at 20.21.

The uncompensated losses by landowners due to the legislated impairment of their property is demonstrably substantial, on the published evidence. And then there are the unpublished examples.....

Indeed, few of the personal stories of the victims of such legislative behaviour are ever published. *NuCoal seizure by NSW casts pall over US tariff talks*, Chris Merritt, The Australian, March 9, 2018 reveals the cost to just two families:

"NuCoal shareholder Peter Harvey, who lost $110,000 due to the expropriation, complained last month to NSW Attorney-General Mark Speakman about the impact of the decision on his disabled daughter.

Eliza Harvey, 18, has Angelman's syndrome, an extremely rare genetic disorder that leaves people with developmental delays, intellectual disabilities and limited mobility.

Until now, Eliza's story has not formed part of the debate about the NuCoal expropriation but Mr Harvey has reluctantly agreed to have her story told in public.

'I have kept my story out of the media for as long as possible. If we could have won the battle without it, I would have preferred to have kept it under wraps. But we have got to the point now where it needs to be told,' he said.

In a letter to Mr Speakman, he said his Newcastle-based family had been treated unjustly.

> 'My family had purchased the shares as an investment to eventually build a group home for my severely disabled daughter to ensure she was not a burden to the state of NSW upon my wife and I passing,' Mr Harvey wrote. 'Your government has effectively eliminated that opportunity for Eliza and her three siblings to have independence.
>
> 'I am not a criminal. I am certainly not a big fish but I am an honest family man trying to future-proof my daughter's quality of life.
>
> 'To suggest, infer or legislate that no compensation will be offered to NuCoal shareholders is outright discriminatory, unfair, grossly unjust and politically flawed and you need to address it.
>
> 'I implore you to think about all the innocent mum-and-dad investors that have had their money stolen by the actions of the O'Farrell government."

The family of another NuCoal shareholder, Darrell Lantry, lost $600,000 because of the expropriation.

Mr Lantry said he was still annoyed that Mr O'Farrell had played down the potential losses for innocent shareholders by describing investing in listed companies as similar to gambling.

The expropriation placed the Lantry family in financial difficulties. It left them with an investment loan that was secured by their home, and holdings in a mining company that were practically worthless.

'This is like someone coming in to your house and stealing everything," he said. When the company's share price collapsed, he said he had to explain to friends that it was not due to any mismanagement but was entirely due to the actions of the state government.' "

We note in passing that to the extent that Eliza Harvey, as a person with disabilities, might have had a beneficial interest in the devalued shares, and accordingly suffered a loss as described by her father, Peter Harvey, it would seem in the circumstances that the Crown in right of the NSW Government, breached Article 12(5) of the Convention on the Rights of Persons with Disabilities ("CPRD") which was adopted and proclaimed by General Assembly resolution 61/106 of 13 December 2006 ratified by Australia 17 July 2008, which provides: "Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that **persons with disabilities are not arbitrarily deprived of their property**. (Emphasis added.)

In such circumstances, it would seem that Eliza Harvey would, by Australian adoption of the CPRD, properly be entitled to compensation for her loss. However, notwithstanding the ratification of the CPRD and its adoption (including Article 12(5)) at Commonwealth level by the operation of the *Human Rights (Parliamentary Scrutiny) Act 2011* as explained at **8.2** (infra), it has not been adopted so as to be operable at State level, and so would remain unenforceable in New South Wales - a cruel irony for her and any other people with disabilities so affected.

3.4 The Nature of Resumption

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.

We have seen above how, from the early days of settlement in NSW, grants of freehold - and after the formation of Queensland in particular, grants of leasehold - were commonly issued with reservations or conditions, which could vary significantly in nature and type. It is clear that in making such grants, the Crown had no difficulty in characterising the limitations imposed by such reservations or conditions - and conversely the remaining uses which were not so limited - as separately identifiable aspects of title. Clearly, a waiving of a condition could in principle be made by the Crown at some later time, with or without consideration from the landholder. Similarly, the Crown might choose never to exercise its reservations in defeasement of title.

It also follows that a “resumption” of legal interests, though frequently made by a formal legal process resulting in a transfer of legal title back to the Crown, can in principle take effect in other forms. For example, the imposition of an Interim Development Order, restricting uses of some land, is effectively a resumption of legal interests to the extent of the new restriction.

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 defeasement of title, with its necessary consequences of an entitlement of the title holder to compensation or rectification.

What matters in these instances, is the substance of the legal effect on the scope of the title, not whether, for example, a restriction has formally been placed on the title itself, by means of a caveat etc. The fact that nothing has been noted on the title might make the restriction less easily discoverable, but the legal consequence for the property owner is no less real.

An analogy might be made with determining the nature of a contract - say for example where a lease has been entitled “Licence” because characterisation of the agreement as a licence rather than a lease might incur certain benefits to one or both parties. In evaluating whether the document is one or the other, a court will view the substance of the agreement, and if it forms the view that it clearly is in the nature of a lease, it will hold so, regardless of it being entitled “Licence”.

3.5 The Rule of “No-Law”?

Above, we have already pointed out the scant attention paid to the relationship, or lack thereof, between settled property law and the relatively new and experimental field of town planning law, and the unexplored legal bases for a right of compensation for adversely

affected property interests. In this context the “rule of no-law” comes to mind as an apt description of the situation.

The term was coined by John Wickham (later Wickham J. of the Supreme Court of WA) to describe the lamentable situations arising as a consequence of that State’s town planning laws - which, the reader might recall, was, in common with other States, substantially based on New Zealand and English laws.

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..

At 95-96: ...a topical example of the “rule of no-law” in Western Australia and which directly affects the interests of individuals is contained in the Metropolitan Region Town Planning Scheme Act 1959-1962 [MRTPSA]. The procedure is laid down by section 31.....The interesting thing about this procedure is that it is dressed up with some democratic trappings: the publication of the scheme, the right of objectors to be heard, the laying of the scheme before the Houses and the right of the Houses to disallow. The untutored might think that this provides an example of the Rule of Law. Actually, it is an example of some artificial legal flowers being planted in an arid area of no-law....If Parliament proclaims the rule of “no-law” then administrators and ministers can do nothing but make the best of it.

Mr Wickham was arguing for a better system in WA, but a point which can be taken from his views is that there was much confusion and potential for unremedied injustice in the development of land planning in WA. He comments (at 91) that the: “legal profession has been largely inert because it has continued to believe in some vague way in the existence of the Rule of Law - to put faith in a myth of uncertain and perhaps no content. We have declined to enter the public arena and instead are loyal to a spook.”

Perhaps that could equally apply to the situation of concern here.

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) [a predecessor to the MRTPSA, savaged by Mr Wickham - Ed.] 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.”

Is it any wonder, that this new WA law, based on foreign models, none of which had experienced the Australian developments in Crown grants as the basis of legal titles, seemed to float in a separate legal universe?

In a context where the consensus is that land owners adversely affected by the new (i.e. since the mid-20th century), complex and essentially experimental town planning laws and practices should be compensated - but if the compensation system is inadequate or is practically non-functional, it's just a fact of life to be accepted because there is no constitutional and therefore no legal duty for States to provide such compensation, then the failure to adequately compensate (or indeed, to avoid unnecessarily adversely affecting) landowners seems like the pretty inevitable result.

As Ian Callinan AC QC, former Justice of the High Court of Australia observed, "For the sake of our heritage, the buck must stop somewhere", *The Australian - Summer Living* at 10, 3 January 2008 (as reproduced at www.adverse-rezoning.info).

This type of development might be exemplified by taking a closer look at the County of Cumberland and subsequent experiences in NSW, where provision for compensation was made, but never took place. Why not? Wilcox provides some more detail on the subject (supra at 278):

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

In introducing the *Local Government (Town and Country Planning) Amendment Bill* in 1945 the then Minister for Local Government, the Hon. J.J. Cahill M.L.A., made much of these provisions. He said of them: "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." *New South Wales Parliamentary Debates*, vol. 176 at 1720-1721.

Both Divisions are elaborately designed - but their practical value has been very limited. Betterment charges are only payable if individual prescribed schemes so provide: to date only four have done so and in no case have the responsible authorities actually recovered betterment. Individual owners have ben allowed to retain the whole of their unowned

capital increment - to the jeopardy of the financial viability of the schemes. Without betterment, revenue compensation funds are bound to be small: they may only remain solvent if claims are restricted. In New South Wales the compensation funds have been so limited that compensation rights have almost disappeared.

The injustice to individuals is obvious. Of equal importance is the prejudice to the scheme itself through the inability of responsible authorities to deal firmly with existing non-conforming uses. Where the compensation fund is inadequate it is politically impossible to terminate substantial non-conforming uses: termination is only tolerable to the community where adequate compensation is properly available. The result has been that the majority of the present prescribed schemes make no provision for termination of non-conforming uses - whatever their effect upon the locality and the scheme. The present schemes are blueprints for future development but are of little value in unravelling the chaos of the past.

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, there is not one single reported case where compensation has been awarded by a court.

The story is briefly continued by Fricke, G.L. QC, *Compulsory Acquisition of Land in Australia*, 2nd ed., Law Book Co. (1982) at 114-115, where he refers to the *Environmental Planning and Assessment Act 1999* whereby "the repeal of the provisions in respect of injurious affection and betterment will remove a significant difficulty and inconsistency reflected by the practice which had developed under the former Act. Whereas planning schemes provided compensation for injurious affection [but as we have seen already, while it provided for such compensation, none was actually made -Ed.] and in recent yours an opportunity [not with any obligation, absent compensation! -Ed] to require the relevant authority to resume the affected land, Interim Development Orders did not. In the 1970's planning authorities attracted no doubt by the procedural simplicity of the making of an Interim Development Order, had consistently utilised them as a means of permanent planning control. In these circumstances many persons had been denied any right to compensation or the possibility of enforcing acquisition of land which they could not use for any effective private purpose.

Observations which might be made about this experience are:

1. It is clear that at the time of the creation of the County of Cumberland, the State legislature presumed that owners who were injuriously affected by planning schemes (or, we would prefer to say, where planning schemes operated as defeasements) were entitled to compensation. It is not known if this presumption was based on the view that it was:

- an inherent consequence of the legal impairment of the grant; and/or

- a matter of “common sense and justice”; and/or

- consistent with Article 17 of the Universal Declaration of Human Rights, which had recently been adopted (in 1948) by the UN General Assembly under the direction of NSW QC and former High Court justice, ‘Doc” Evatt; and/or

- politically necessary to avoid unpopularity.

Whatever the basis for the presumption, it is worthy of note that this pioneering town planning legislation did in fact exist with that very presumption. Such a presumption would also have been entirely consistent with Fry’s previously cited “bewildering multitude of tenures” which had no recorded history of creating injurious affection or a corresponding need for compensation. Perhaps the experience of Sir Thomas Mitchell in Sydney in 1834 was long remembered!

2. Due to the failure of the betterment taxation scheme, there was in practice no funding available for compensation for injurious affection (a strange legal term which might seem to bear comparison with the negative social behaviour of “passive aggression”, both of which concepts can have unfortunate consequences largely invisible to non-participants).

In passing we note that in *Marshall v Director-General, Department of Transport* [2001] HCA 37 at 19, the majority judgment of the High Court referred to Harman LJ’s description of “’injurious affection’ as a piece of jargon. It is more than that. It is a neat, expressive way of describing the adverse effect of the activities of a resuming authority upon a dispossessed owner's land. Reference to it in disparaging language does nothing in our view to assist in the elucidation of what it involves. The use of this common expression serves well to distinguish the statutory right from the common law claim in nuisance.”

3. Wilcox notes that as a consequence “the majority of the present prescribed schemes make no provision for termination of non-conforming uses”, but of course, then and after, some property owners did have substantial newly non-conforming uses terminated, to their uncompensated cost.

4. The failure to compensate injuriously affected property owners became “normal” in subsequent NSW planning legislation and the topic neglected. The development of the (ab)use of Interim Development Orders as permanent planning instruments, as noted by Fricke (supra), confirms the practical development by State authorities of the dropping of even any pretence that affected owners should be compensated.

5. There was no express provision in the (1940’s and subsequent) State legislation to the purported effect that injuriously affected property owners should not be compensated.

The failure to effectively use betterment as a revenue raising measure should not be surprising. It might be regarded as a type of capital gains tax, but a normal capital gains tax 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.

Betterment tax is vastly more complicated, inefficient and expensive to administer because:

- betterment value is not received in cash by the owner, so if the tax is to be paid in a timely fashion, it has to be paid by forced sale of property (in itself a down-driver of values), or by incurring debt (with interest payments possibly being borne by a non-cash income producing asset), or securing funds from other sources unrelated to the land; and

- the betterment value has to be separated out from other land value affecting events - easier said than done - there is no market transaction value - and over what time frame should the betterment value be calculated? This answer might also vary for different situations. There is endless scope for argument about what the correct betterment value might be, especially compared to a straight capital gains tax; and

- if the betterment tax is deferred until the eventual (unforced) sale of the land, which might be many years into the future, so deferring revenue benefit to the State, landholders will typically add the value of the tax to the price of the land, so that the tax will be passed on to the eventual land users - such as first home buyers!

The *Australia's Future Tax System: Report to the Treasurer- Part Two: Detailed Analysis 2009 "Henry Review"* at Box E4-2 noted that: "in practice, betterment taxes can increase the uncertainty associated with land development....[and]... can involve lengthy disputes".

It's no wonder there was no revenue received from betterment. King Louis XIV's Finance Minister, Jean-Baptiste Colbert, famously declared that "the art of taxation consists in so plucking the goose as to obtain the largest possible amount of feathers with the smallest possible amount of hissing." Well, imposing a betterment tax might be compared to trying to pluck a goose with a live hand grenade inside....

In practice, governments are better off collecting revenue associated with increased economic activity resulting from betterment, such as council rates, stamp duty and GST.

Notwithstanding all this, and the repeal of the provisions in respect of injurious affection and betterment in NSW in the 1970's, a betterment tax has been re-introduced in NSW, but with new euphemisms: variously "value capture" or "profit capture" in the context of "voluntary planning agreements". Worse, this has been done without any concept at all that such "value capture" might be directed to pay compensation for injurious affection. In *Green light for value capture in planning agreements – taking the 'voluntary' out of VPAs,* Aaron Gadiel & Anthony Whealy, Mills Oakley (2016), it is observed that "The NSW Government has given its official seal of approval to the push by local councils to

'capture' a share of development profits through planning agreements (often referred to as voluntary planning agreements or VPAs)." Mills Oakley also point out "the problems with 'value capture' arrangements [that] were set out in the Federal Government's independent Henry Tax Review in 2010". For the full detail of the Byzantine-like complexity of the State practice note outlined by Mills Oakley, we refer the reader to their article. We simply note some of their most relevant observations here, namely that:

"In a nutshell, the Government has acknowledged that there is 'growing concern' that the development industry is being 'held to ransom by some councils'....[and that the Government's statement of policy was in response] to 'growing concerns the process is pushing up new apartment prices'.

Developer industry groups have been critical of the way in which many local councils have been using (or misusing) planning agreements. In essence, developer representatives have argued that (in many instances) planning agreements are being used to simply tax perceived profits, rather than overcoming infrastructure or conservation problems. For example, many developers have found that once an offer is made, the Council may simply ask for more money — often for example a 50% share in the profits of the development — and will threaten to otherwise stall or oppose the planning proposal entirely....

Remarkably, the state government is not proposing to make compliance with its practice note mandatory for any local councils or state government agencies (even when it is finalised).

Despite the broad powers available to the Minister for Planning, the draft direction merely requires local councils to 'have regard' to parts of the practice note. The direction will not even be issued to state government agencies.

Local councils will be free to adopt their own policies that are inconsistent with the practice note. Each time they negotiate a planning agreement they will need to consider the practice note, but will have the discretion, if they wish, not to follow it and instead follow their own local policy."

So, in a strategy which would seem worthy of *Yes Minister*'s Sir Humphrey Appleby, who famously exemplified the "capture" of ministers by their public servants, the NSW minister would seem, in this case, to be deflating concerns about rising apartment prices and complaints by developers by producing a "practice note" directing councils etc. to be "reasonable", but simultaneously noting that they can ignore it. In other words, he has said some reassuring things to settle people down, but nothing has really changed.

To extend Colbert's metaphor, it would seem that in response to uncomfortable screeching by industry geese, the minister has recommended to councils that they only pluck feathers from geese who voluntarily agree to be plucked, but that in the absence of any real

voluntary agreement, they can ignore his direction and pluck the geese involuntarily anyway.

Sir Humphrey would have been delighted, and Colbert appalled.

In the context of the longer history of injurious affection and betterment tax, the sad conclusion is that in NSW, the failures in the 20th century have not been followed by failure now, but even worse, by ignorance and duplicity. Regardless of the inefficiency of betterment tax, Wilcox (supra), Fricke QC (supra), and even the Hon. J.J. Cahill (supra) - on the basis of their published observations - would have been dismayed that a betterment tax, or "value capture" would have been used in the 21st century, without any concern for using any proceeds to compensate injuriously affected property owners.

A key point of principle governing all policy here is that the failure of the State to source revenue to compensate property owners injuriously affected by property schemes does not of itself absolve or excuse the State from failing to do so where such loss is by virtue of a repudiation, or a partial repudiation, of a Crown grant. If a State is not, one way or another, in a position to provide such compensation, it should remove, or avoid the injurious affection (or, as we would prefer to say, the *de facto* defeasement). If the injurious affection is not socially valuable enough for the State to pay for, it shouldn't be imposed - a position that had been actually achieved by the States/Colonies in the 19th and 20th centuries, prior to town planning legislation. This point might be seen to be accentuated by the fact that, in more recent years, the introduction of the more economically efficient capital gains tax and GST have provided the States with significant revenue flows from betterment and other causes of increase in land value and investment, so that States have in fact had new revenue available to assist with compensating for injurious affection, quite apart from so-called "value capture".

Hence, political and ethical considerations, and possibly legal presumptions, generally caused the States to initially include provision for compensation in cases of adverse rezoning. However, over time, as provisions for compensation failed, without any significant political cost to governments, affected landowners, tending to be isolated and newly impoverished, and in the absence of any clearly expressed juridical reconciliation between the nature of Crown grants as legal instruments on the one hand, and planning legislation on the other, it seems that a sort of amnesia developed with respect to these issues on the part of legislators and lawyers generally.

Given such a failure of legal analysis, the High Court's clear general rulings that there's no constitutional requirement for States to provide compensation might have been, unintentionally, an aggravating factor. (For more detail on this point, see: **4.2**.)

A further example of this collective "amnesia" might be provided by a textbook in the field: *Land Acquisition: An examination of the principles of law governing the compulsory acquisition or resumption of land in Australia*, D. Brown, 5th ed., (2004).

(a) At 5 it is stated: "Resumption is concerned with one principal activity and its consequences: the compulsory eviction of a landowner from the property and the payment of compensation to the owner for the loss of the land."

This might be correct as being the focus of acquisition legislation, but evidence in this paper demonstrates that entitlements of a landowner under a Crown grant may be of many different kinds (*cf.* the types of uses described in grant reservations), and impairment of any of those short of eviction is effectively a resumption of grant entitlement to the extent of that impairment (*i.e.*, a defeasement). In terms of the nature of the legal instrument of a Crown grant, resumption can be partial, and not necessarily the all-or-nothing event of an eviction. By defining "resumption" in terms of eviction, all other types of resumption by a State (*i.e.*, Boulten SC's "acquisition law gap") are being assumed away.

(b) At 1 it is stated: "...when privately owned land is taken, its owner must be fairly compensated. There must be the occasional exception to this principle but the various legislatures have enacted legislation to ensure that dispossessed landowners are fairly compensated."

Again, what about affected landowners who are not evicted, but are dispossessed of a significant portion of their granted property rights? What about the *Chang* case (*supra*) where the High Court described the State Government's behaviour to deny compensation as "stealth"? What about the numerous reported instances at www.adverse-rezoning.info? These are not mere "occasional exceptions". It might be noted that by the time of publication of Brown's textbook, the significant and troubling concerns expressed by earlier authors (Wilcox and Fricke (*supra*)) have been totally overlooked.

(c) At 14 it is stated: "The law of land acquisition is the creation of statute."

It is true that the practice of land acquisition is being governed by statutes, but this statement ignores the role of Crown grants and the extensive common law relating to them, particularly through the nineteenth century, and thereby assumes away any need to consider the relationship and disparity between them and the potential implications of same. Use of the term "land acquisition" itself assumes away the underlying legal act of "resumption" which applies to all granted title.

(d) At 15 it is stated: " Formal title to land depended upon a grant being made by the Crown to owners and occupiers. The relationship between the Crown and holders of land made under the relevant land laws was that of contract. The grant was in essence a contractual document."

The characterisation of a Crown grant as a contractual document is wrong, and indeed a trivialisation and fundamental misunderstanding of the nature of title provided by a Crown grant. A Crown grant is not a contract (or for that matter a mere chattel or a building), 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 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). Unlike a contract between parties which which may be subject to conditions, a Crown grant may be subject to a defeasement, which is a separate instrument from the grant, exercising the Crown's reservation of some aspects of the title contained in the grant. Contracts cannot contain defeasements, only conditions. Now, it may be that where a Crown grant is made to a grantee for free, there is no contract, merely a grant granted - whereas, where the Crown grant is purchased, yes, there is a purchase contract, but the Crown grant itself is not a contract. Where the grant of title is (and often is) transferred to subsequent title holders, there is in each typical case a purchase contract, but still, the Crown grant itself is not a mere contract.

Again, a fundamental misunderstanding of the nature of Crown grants serves to trivialise them as mere contracts, a consequence being a presumption of lesser legal importance for such grants.

(e) At 16 it is stated: "The terms of reservation clauses giving the Crown the right to resume part of the land granted varied."

Indeed, reservations did vary, but they did not "give the Crown" the right to resume part of the land: the Crown always retained the right to resume all or any part, or indeed any particular conceivable use, of the granted land. Reservations retained a right by the Crown to *defease* the reserved part of the grant at any time into the future, without compensation - as opposed to a bald resumption, which did not, by definition, relate to a reservation and which always presumptively attracted compensation.

By confusing reservations with resumptions not made pursuant to reservations, the fundamental distinction with regard to the landholder's entitlement to compensation is trivialised, misunderstood and made easily dismissible.

(f) At 13 it is stated: "...courts will presume that legislation - federal, state or territory, or subordinate rules or regulations made under such legislation - does not amend the common law to derogate from important rights enjoyed under that law, except by provisions expressed in clear, unequivocal language: *Durham*...177 ALR at [28]. The High Court has stressed this principle on numerous occasions...."

That's true enough, but where is the planning (or other) legislation which, in such a manner, expressly repudiates an owner's right to compensation for the resumption of any aspect of the owner's entitlement pursuant to a Crown grant? Where are the cases where courts have been asked to decide the effect of such express legislative provisions? There aren't any, because given that the nature of Crown grants is now - as shown in the above paragraphs - fundamentally misunderstood and consequently dismissed as of being no real continuing relevance, why would any legislator bother? To be fair to the author of this

textbook, this is a failure of the legal profession in general, of which Brown's text is just a relevant example - or as Wickham (supra) put it in the WA context, the "legal profession has ... continued to believe in some vague way in the existence of the Rule of Law - to put faith in a myth of uncertain and perhaps no content."

Another textbook of recent times, *Law of Compulsory Land Acquisition*, 2nd ed., MS Jacobs (2015) at 1, describes the term "resumption" merely as a label. There is a discussion of the jurisprudential basis for "resumption", but it totally ignores: Australian common law cases considered in this paper on the point; and the fact that the existence of "resumption" as an essential aspect of the Crown grant - which, as indicated elsewhere in this paper, was found by the Privy Council to have a unique character in New South Wales (and by implication, in the other subsequently formed Australian Colonies) rendering jurisprudential speculation in foreign (even UK) jurisdictions somewhat moot.

This above-mentioned failure of the legal profession extends, with respect, to the High Court. For example, in the *Chang* case (supra at 15), Kirby J states: "...for decades (since at least 1936), provisions had existed in various forms entitling the owners of interests adversely affected by supervening changes in planning law to apply for redress.....

....Such statutory provisions reflected the Queensland Parliament's attempt to balance the public interest in a principled development of planning law against the impact which changes in planning law inevitably have on the value of individual interests in land. The hypothesis behind the successive statutory provisions was that ratepayers generally should contribute to reasonable compensation of individuals who suffer loss as a direct result of supervening changes. In this way, the legislative provisions, carried into the 1997 Act, were designed to ensure overall fairness."

His Honour's observations might be regarded as a completely fair and accurate summary of that particular situation, but the point is that the legislative basis for providing compensation at all is attributed to a mere "hypothesis". In the context of planning law, the whole common law history of land title as it relates to Crown grants in Queensland and (as it was previously) New South Wales has been reduced to and replaced by - without discussion - a mere "hypothesis".

The ALRC, in its report - *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Report 129)* (2016) - completely failed to consider the existence or potential relevance of Crown grants in the States, even in Chapter *20 Property Rights—Real Property.* While the ALRC's focus on Commonwealth laws might have excused it from a focus on State laws, including the operation of Crown grants of title, it does canvass other areas of common law in relation to the States - for example, the right to exclude others from private land - so, such an excuse for omission could only be regarded fairly as a thin one.

The apparent “amnesia”, or blind spot, even extends to Australia’s official diplomacy, as explained at **8.1 Australian Government Fallacies.**

Thinking like this amongst practitioners, which assumes away the gap between legislative acquisition law and the pre-existing and still existing title by Crown grants would explain why the States would cause (even if unintentionally) huge financial damage to large numbers of isolated landowners over a period of decades and get away with it. So far.

One can see how unsuspecting 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 “non-law” - a world away from “common sense and justice”.

A published example of this type of struggle may be found at *Ralph Lauren 57 v Byron Shire Council* [2016] NSWSC 169. The Council had performed beachfront work which evidence showed caused erosion of the landowners’ properties at Belongil Beach, and then sought to prevent the owners from protecting their land.

Legal action against the Council spanned six years. Although the factual dispute could be explained quite briefly, Hidden J (*ibid.*, at para. 3) described the proposed pleading as “lengthy and complex” and indeed it details a complicated administrative maze of adverse regulatory developments with respect to the affected land. This case was perhaps unusual in that as well as challenging the adverse rezoning imposed by the Council, there was a credible claim by the plaintiffs with respect to nuisance and/or negligence by the Council. This, and the fact that at least fourteen landowners banded together to challenge the Council in court allowed sufficient success to achieve the right to protect their own land and obtain some damages.

Thus, it took at least fourteen landowners with a common cause six years of litigation to prevent them from being forced to stand by and watch their land being washed away as a result of Council works. One might fairly speculate that if only two or three landowners had been affected, they would not have had the resources to mount such a legal challenge, and their rights, including those under the Crown grant of freehold title, would have been quietly and unjustly extinguished, without compensation of any kind.

Ironically perhaps in light of the above, it might be argued by a State that a court should not agree, in any particular case, to the making of compensation by a State with respect to injurious affection caused by planning instruments because it would “open the floodgates” to litigation against the State.

The old “floodgates” argument is a pretty weak one, because the larger the prospective “flood”, the greater the sum of past and prospective injustices the court is being asked to ignore.

Also, given that: the motto of the English monarchs 'Dieu et mon droit' (God and my right), in recognition of the reception of the British common law in Australia, is routinely displayed in Australian courts; and the monotheistic Abrahamic religions of Judaism, Christianity and Islam prominently feature floods as a purifying force (think of Noah's Ark surviving the great flood and the destruction of the Egyptian army by the inundation of the Red Sea), a court might well take the view that the use of the "flood" metaphor does not support its proponent's argument as something necessarily to be avoided.

Be that as it may, a couple of supplementary observations might be made on the point.

1. Particularly in a growing economy, with a growing population, such as Australia, most planning decisions should result in betterments for landholders. It should be only in a small minority of cases (even if this still generates large numbers) that landholders are adversely affected. So a sense of proportion might be adopted here.

2. In the case of NSW as an example, according to the NSW Land Registry Services website (2018) at *Land Ownership* "Crown land is owned and managed by State Government and accounts for almost half of all land in New South Wales." So nearly half of all land in NSW is unalienated from the Crown. It would be open to the State to negotiate compensation in the form of land rather than cash, and even if there were, say, 22,000 parties to be compensated, the State would have more than ample resources to meet any claims - or, it might be said, earth to manage any flood.

4.0 The Right to Compensation - Supporting Considerations

The laziness of the argument that State governments do not have a duty to compensate landowners for impairments in the use of their title because such duty is not entrenched in any State constitution is simply and amply exposed by the legal existence of Native Title land, in all States. No State constitution provides for, contemplates, or mandates the existence of Native Title. Yet it exists. And the States cannot make laws to stop it existing without providing compensation to the Native Title owners, whose title is thereby adversely affected or terminated.

As the late Professor Julius Sumner Miller might have asked: *How is it so?*

4.1A High Court of Australia - Some Property Principles: External Affairs Strategy

The short answer is because, initially on the application of Eddie Mabo and his supporters, the High Court found a set of principles and circumstances which caused it to be so. If the States attempt to ignore this common law, any aggrieved person can seek relief in the Courts.

Essentially, the Commonwealth was able to rely on its Constitutional external affairs power to legislate the *Racial Discrimination Act 1975* (Cth) *which gave effect to* , the *International Convention on the Elimination of all Forms of Racial Discrimination.* To the extent that the said Act was inconsistent with State laws, it would prevail over them due to the operation of s. 109 of the Constitution.

Neate G., *Indigenous land rights and native title in Queensland: A decade in review* (2001) at 7 points out:

The significance of [s. 109] for Aborigines and Islanders was demonstrated in two native title cases. In *Mabo v Queensland (No 1)* a majority of the High Court held that the *Queensland Coast Islands Declaratory Act 1985* (Qld) (which purported retrospectively to abolish all such rights and interests as the Murray Islanders may have owned and enjoyed in relation to the Murray Islands) was inconsistent with section 10(1) of the *Racial Discrimination Act 1975* (Cth). In *Western Australia v Commonwealth* (The Native Title Act case) the High Court held that the *Land (Titles and Traditional Usage) Act 1993* (WA) was inconsistent with section 10(1) of the *Racial Discrimination Act 1975* (Cth) and was invalid to the extent of the inconsistency because of section 109 of the Constitution. [Citations omitted.]

The inability of a State to acquire Native Title rights without paying compensation exists in spite of a clear general principle to the contrary with respect to property interests, as enunciated by the High Court: see points 1 and 2 for example.

1. 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.]

2. Section 51(xxxi) of the Constitution provides no protection from the States: for example, 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."

In spite of these very clear and settled statements of law, Native Title holders have such protection against acquisition without compensation, while holders of freehold and leasehold title do not.

If a State ignores the Racial Discrimination Act decisions, any aggrieved party can go to court and seek relief on the basis of the High Court decisions. The fact that there is no

State constitutional requirement to provide compensation does not matter at all - it's irrelevant!

In the same way, if the Commonwealth were to use its external affairs power to validly legislate, say, the *Universal Declaration of Human Rights,* which provides that one of the fundamental rights is that no person should be arbitrarily deprived of his property, then to the extent that a State law were inconsistent, it would be invalidated by the operation of s. 109 of the Constitution, so that the Federal law prevailed.

With a competent execution of such a strategy, it should be possible for the Federal Government to make legislative behaviour by any State which is not subject to a just acquisition law, and so inflicts uncompensated losses on property owners, a thing of the past. Forever.

Indeed, it would seem that given the increasing proliferation of so-called free trade agreements ("FTA's" - they are really preferential trade agreements, but that's another story), between Australia and foreign countries, the Federal Government might well need to ratify such property rights for the purpose of fiscal prudence.

This is because, in order to placate foreign concerns about sovereign risk in Australia, the Australian government is taking responsibility for any acts of the Australian States that contravene an FTA, including expropriation without compensation. This is true of the FTA's with the USA, Singapore and Hong Kong, and prospectively with many more countries in the future. So, if a State engages in such nefarious activity - and it is clear that with the High Court's stated position some frequently do - the Federal Government will have to pay compensation to the foreigners, with in all likelihood no recourse to the offending State(s).

This damage is already happening - in NSW and soon, in Queensland. Let us consider the NSW example in more detail, as it is more advanced.

In January 2014, the NSW Government expropriated a Doyles Creek coal exploration licence without compensation. In *The Australian*, 24/3/2018, legal commentator Chris Merritt wrote: "This state [NSW] stole private property owned by Americans, banned them from seeking redress in court and based this decision on reports that suppressed inconvenient evidence and smeared an innocent man."

Mr Gordon Galt, Chairman of an affected company, NuCoal Resources, commented in *The Australian* on 9/2/2018 in an article entitled *US will not join TPP while NuCoal expropriation case lingers*, that: "US shareholders of ASX-listed NuCoal Resources, which held the Doyles Creek asset, have been, and still are, demanding the Australian government allows them to enter arbitration in the International Court of Justice to seek compensation from the Australian government.

"The reason the Australian government is on the hook over the expropriation is not obvious, but under the existing FTA between the US and Australia, the Australian government took responsibility for any acts of the Australian states that contravened the

FTA. So even though the NSW government was the "expropriator" of the asset, it is the Australian government that has to pay. Several meetings have been held on this matter between the governments of Australia and the US and more are planned. It is difficult to see how Canberra can avoid its responsibility in this case."

In this case, it seems that to progress further trade negotiations, the Federal Government might have to provide the American shareholders compensation for their loss caused by the State of NSW's expropriation - but in this scenario, any Australasian or other shareholders (other than Singapore or Hong Kong owners, who have similar provisions in their FTAs) would not be compensated.

What a ridiculous state of affairs! A state of affairs where Australian shareholders would end up as second class citizens compared to Americans, in their own country! Not only that, but the Australian Government has, perhaps naively, put itself in the position of being a sovereign risk insurer for losses caused by State expropriations - and the cover's premium free! (Except in the long run, by taxpayers.)

Given that the Americans take a very dim view of uncompensated expropriations, and also that any Australian Government wants to generally progress trade relations with the USA, it would be logical for the Australian Government to offer, as part of any Trade Agreement, to give effect to an international convention on property rights as a term of the trade agreement. The Australian Government could then present such a development to voters not only as being inherently just, but also as a step to achieve a more favourable trade agreement with the USA. Win! Win! To the extent that such a "concession" might be more than the Americans would actually require, it would of course be open to the Australian negotiators to use that as a bargaining chip to extract some other concession from the USA, whatever that might be….

More to the point is another potential benefit offered by this strategy, which is highlighted by the NuCoal case. Under current arrangements, if the Australian Government, under FTA terms, ends up having to compensate American shareholders for their loss, it would seem that it would have no recourse of its own against the State government for its loss. Thus, it would seem that the existing FTA agreement with the USA (and any others like it) exposes the Australian Government to potentially significant unfunded and unexpected losses the future. For example, if the 2018 Queensland land clearing legislation affects any land in which American (or Hong Kong or Singaporean or other FTA) entities have a legal interest, it would seem that they could claim compensation from the Australian government. This is a real and substantial financial risk for the Australian Government going forward (the NuCoal case alone could cost the Australian Government hundreds millions of dollars), but if the Australian Government were to ratify an international convention as proposed above, it would eliminate this financial risk.

Whether or not this tactical opportunity presented by the negotiation of FTAs is taken up, the above strategy, if implemented, would ultimately render all State legislation which is not an acquisition law, to an international humanitarian standard, unenforceable.

It might be noted that as well as protecting the rights of property owners in the States, it would bring those rights into broad consistency with Native Title holders, as well as rounding out existing protection of property rights in the Territories which are significant, but tightly limited by the High Court's conservative interpretation of "acquisition" in s. 51(xxxi) of the Constitution.

There is yet another politically relevant reason supporting any Federal Government initiative to adopt Article 17 of the *Universal Declaration on Human Rights ("UDHR")*. This is due, as it were, to the Australian *provenance* of the *UDHR,* which was created and adopted with the active participation of Australia, and substantially under the direction of Labor Party luminary 'Doc' Evatt. According to the Australian Human Rights Commission https://www.humanrights.gov.au/publications/australia-and-universal-declaration-human-rights/:

"Australia was a founding member of the UN and played a prominent role in the negotiation of the UN Charter in 1945. Australia was also one of eight nations involved in drafting the Universal Declaration.

This was largely due to the influential leadership of Dr Herbert Vere Evatt, the head of Australia's delegation to the UN. In 1948, Dr HV Evatt became President of the UN General Assembly. That same year he oversaw the adoption of the Universal Declaration.

....Dr HV Evatt was a prominent figure in Australia politics during the middle of the 20th century. Prior to coming to the UN, he had been a judge of the High Court, Attorney-General and Minister for External Affairs. Dr HV Evatt was renowned for being a champion of civil liberties and the rights of economically and socially disadvantaged people."

'Doc' (or 'Bert') Evatt, as well as helping to draft the *UDHR*, was leader of the Australian Labor Party (and leader of the opposition) from 1951 to 1960, and was subsequently Chief Justice of New South Wales. Although he was a Labor leader during a particularly difficult time for the Labor Party - i.e. which time encompassed the 1955 split, Evatt is not perhaps historically held in such high regard in the Labor Party as some other Labor leaders. (Still, his main political opponent, Sir Robert Menzies was a pallbearer at his funeral in 1965.) Having said that, it would be fair to say that the *UDHR* (including Article 17) was, to the extent of Evatt's active and substantial involvement prior to his becoming leader, an achievement which the modern Labor Party could not deny or repudiate.

The proposed adoption of Article 17 of the *UDHR* by the Australian Government, which Article has such a positive Australian *provenance*, and the associated (external affairs and s.109) course of action offer such a confluence of potential benefits for property owners, the Australian government and international trade, that - to lapse for a moment into the contemporary vernacular - it's adoption should be a no brainer.

Indeed, the only logical political opponents to the adoption of Article 17 would be those whose behaviour the Article seeks to prohibit in the first place - i.e., those in favour of

arbitrarily depriving others of their property, including taking property without compensation.

It might also be noted at this point that the equivalent of the Article 17 UDHR right not to be arbitrarily deprived of property, is possessed by "persons with disabilities", by virtue of Article 12(5) of the *Convention on the Rights of Persons with Disabilities* ("CPRD"), which as discussed later in this paper, has already been ratified by the Australian Government on 17 July 2008. So it would seem, extraordinarily enough, that Article 17 only needs to be ratified to the extent that it applies to people without disabilities, in order to allow the Commonwealth Government (with or without the agreement of the States) to pass legislation adopting these property rights into domestic law with respect to every property owner in Australia, with or without disabilities.

The proposed external affairs-s.109-property-rights strategy is not that complicated in principle, but has not been considered it seems, simply because no-one has thought of it before, notwithstanding the Racial Discrimination/Native Title precedent.

Be that as it may, it is perhaps doubtful that the success of such a strategy would have any retrospective application - possibly applying only to current and future State legislation. To the extent that justice for past wrongs would thereby be eluded, the argument below in relation to the nature of Crown grants, could provide a remedy.

Before proceeding to that, further consideration might be given at this point to the *Universal Declaration of Human Rights,* as to its potential suitability for ratification by the Commonwealth Government. In this regard, we reproduce an extract from the considered opinion of Phillip Boulten SC, for the NSW Bar Association (*supra* at 1 - 4, emphases in original):

"2. This submission advances three general propositions to be taken into account in the consideration of reforms to just terms compensation legislation for the compulsory acquisition of property:

a) *First*, the reform of Just Terms Compensation Legislation should acknowledge and reflect that property rights are human rights.....

b) *Secondly*, Just Terms Compensation Legislation should provide for compensation for the compulsory acquisition by the State of New South Wales (or by any State agency, authority or statutory corporation) of all species of property, and not just the acquisition of real property rights or interests.....

c) *Thirdly*, ...there is a strong case for amending the State's Constitution so as to include an appropriate guarantee that private property rights or interests will only be acquired on just terms.

Property rights are human rights

3. The right to own property, and the right not to be arbitrarily deprived of property, are human rights. 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.

4. Nations may regulate the property rights of individuals, but must do so according to the rule of law and in accordance with international obligations.

5. An acknowledgement of human rights stated in Article 17 of the UDHR provides important context for the formulation of a set of principles to guide the process for how the acquisition of real property should be dealt with by government.....

7..... legislation and regulations that permit the compulsory acquisition or expropriation of property should acknowledge and reflect the human rights at stake, including ensuring administrative justice to affected property owners by enactment of provisions that:

a) operate fairly (such as by affording procedural fairness to affected persons, and applying consistent rules to similar cases).....

b) be capable of rational application (such as by containing clearly defined matters which have to be taken into account, or disregarded, when a decision is made to acquire property rights or interests). The conferral of statutory powers to acquire property rights or interests should be confined to particular purposes.....

Extension of Just Terms Compensation Legislation to other species of property

8. Just Terms Compensation Legislation should provide for compensation for the compulsory acquisition by the State of New South Wales (or by any State agency, authority or statutory corporation) of all species of property,and not just the acquisition of real property rights or interests.....

12.....the processes and protections that are continued and developed for the acquisition of real property should be capable of application to the acquisition of other species of property.....

14.....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'...

15. The [NSW Bar] Association considers that there is a strong case for amending the State's Constitution so as to include an appropriate guarantee that private property rights or interests will only be acquired on just terms."

The NSW Bar Association thus takes a clear stance in support of Article 17 of the *UDHR*. However, it would seem highly unlikely that NSW in particular, or any other State making a practice of trampling on such rights, would go to the trouble and inconvenience of changing the State constitution on the subject.

The suggestion that "acquisition on just terms" should be a standard adopted might also seem, with respect, unnecessarily restrictive given the High Court's established narrow interpretation of s.51(xxxi) of the Australian Constitution. For example, in general terms if a government were to merely destroy a property right without thereby "acquiring" an interest for itself, then no compensation would be payable, which would seem to be significant diminution of the scope of Article 17: for High Court decisions on this, see below under the heading ***4.2*** - **S. 51 (xxxi) of the Constitution - A Red Herring**. Having said that, it might be speculated that in the context of political possibilities in NSW, the Association was aiming too high already!

It is proposed here that the Association's references to Article 17 should be considered by the Federal Government in relation to its possible ratification. See: **7.2 - Appendix B: Adopting UDHR Article 17 as Domestic Law - Implementation Considerations.**

At this point, the *Human Rights Bill* 2018 Queensland might be noted. S. 24 contains a replica of Article 17 UDHR. S.108 provides that the Bill applies to pre-existing legislation as well as future legislation. However, 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. To the extent that vegetation clearing, heritage and other legislation restricting owners' pre-existing land usage rights without compensation are "arbitrary deprivations of property", there would thus seem to be scope for such property wrongs to be clearly exposed by declarations of incompatibility in the State Parliament. Enactment of the Bill by Queensland would be a step forward, but would be subsidiary to any subsequent Commonwealth legislation which covered the field.

So, now to proceed to the nature of grants, and the potential for common law revision to protect property rights, which does not rely on legislative action by State of Federal Governments, and which might operate with retrospective effect.

4.1B High Court of Australia - Some Property Principles: Recognising Grant Power

Familiarisation with at least some of the High Court's general views as to property rights would seem to be essential.

As a preliminary point, attention may be drawn to Neate's (supra at 18) observations which touch on the nature of freehold land grants in particular:

"In *Fejo v Northern Territory* (1998) 195 CLR the 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.] Six of the justices wrote, in relation to decisions from courts in the United States, Canada and New Zealand:

'Although reference was made to a number of decisions in other common law jurisdictions about the effect of later grants of title to land on pre-existing native title rights, we doubt that much direct assistance is to be had from these sources. It is clear that it is recognised in other common law countries that there can be grants of interests in land that are inconsistent with the continued existence of native title; the question in each case is whether the later grant has had that effect. In some cases the answer that has been given in other jurisdictions may have been affected by the existence of treaty or other like obligations. Those considerations do not arise here. In this case, the answer depends only upon the effect of a grant of unqualified freehold title to the land.' " [Citations omitted.]

What implications does the High Court's view - 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 - have with respect to the characterisation of the nature and effect of a freehold grant itself? Though the grant might be provided in consideration of a sum of money, the grant itself is not a mere contract - it is a grant. Once created, it continues to exist for the benefit of heirs and successors, until resumption by the State, if any, or ever.

As to the High Court's general views as to property rights, there is probably a large number of possible starting points, but some extracts of Brennan J.'s Judgment in the *Mabo (No. 2)* case below seem most apposite. The judgment outlines: the Court's reasoning process; the existing legal principles which it finds to be relevant; and how those principles apply to native property rights, or the lack of them.

Although many observations in the judgment are made with respect to the forms of Native Title, it could hardly be said (and it is not said) that, *a priori*, freehold title granted by the Crown of itself carries a lesser entitlement, or is less secure, than Native Titles. To this extent, many observations favourable to the existence and integrity of Native Title could be said to apply to the integrity of title made by virtue of Crown grants.

Mabo v Queensland (No 2) [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992) *Mabo No 2* - Brennan J

"29. In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their

adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. Australian law is not only the historical successor of, but is an organic development from, the law of England. Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies. It is not immaterial to the resolution of the present problem that, since the Australia Act 1986 (Cth) came into operation, the law of this country is entirely free of Imperial control. The law which governs Australia is Australian law. The Privy Council itself held that the common law of this country might legitimately develop independently of English precedent (19) See Australian Consolidated Press Ltd. v. Uren (1967) 117 CLR 221, at pp 238, 241; (1969) AC 590, at pp 641, 644. Increasingly since 1968 (20) See the Privy Council (Limitation of Appeals) Act 1968 (Cth) and see the Privy Council (Appeals from the High Court) Act 1975 (Cth), the common law of Australia has been substantially in the hands of this Court. Here rests the ultimate responsibility of declaring the law of the nation. Although this Court is free to depart from English precedent which was earlier followed as stating the common law of this country (21) Cook v. Cook [1986] HCA 73; (1986) 162 CLR 376, at pp 390, 394; Viro v. The Queen [1978] HCA 9; (1978) 141 CLR 88, at pp 93, 120-121, 132, 135, 150-151, 166, 174, it cannot do so where the departure would fracture what I have called the skeleton of principle. The Court is even more reluctant to depart from earlier decisions of its own (22) Jones v. The Commonwealth (1987) 61 ALJR 348, at p 349; 71 ALR 497, at pp 498-499; John v. Federal Commissioner of Taxation [1989] HCA 5; (1989) 166 CLR 417, at pp 438-439, 451-452; McKinney v. The Queen [1991] HCA 6; (1991) 171 CLR 468, at pp 481-482. The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed. It is not possible, a priori, to distinguish between cases that express a skeletal principle and those which do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.

42....Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and

Political Rights (68) See Communication 78/1980 in Selected Decisions of the Human Rights Committee under the Optional Protocol, vol.2, p 23 brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands. It was such a rule which evoked from Deane J. (69) Gerhardy v. Brown (1985) 159 CLR 70, at p 149 the criticism that -

'the common law of this land has still not reached the stage of retreat from injustice which the law of Illinois and Virginia had reached in 1823 when Marshall C.J., in Johnson v. McIntosh (70) (1823) 8 wheat, at p 574 (21 US , at p 253), accepted that, subject to the assertion of ultimate dominion (including the power to convey title by grant) by the State, the 'original inhabitants' should be recognized as having 'a legal as well as just claim' to retain the occupancy of their traditional lands'.
43. However, recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system....."

Deane and Gaudron JJ.....

"11. Lord Denning, speaking for the Privy Council in Adeyinka Oyekan v. Musendiku Adele(122) (1957) 1 WLR 876, at p 880; (1957) 2 All ER 785, at p 788, said:
'In inquiring ... what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it: and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law'.

That case was concerned with the position in a Colony established by cession and the above passage needs to be modified to take account of the fact that, as has been seen, the Crown had no prerogative right to legislate by subsequent proclamation in the case of a Colony established by settlement. Otherwise, the "guiding principle" which their

Lordships propounded is clearly capable of general application to British Colonies in which indigenous inhabitants had rights in relation to land under the pre-existing native law or custom. It should be accepted as a correct general statement of the common law. For one thing, such a guiding principle accords with fundamental notions of justice. Indeed, the recognition of the interests in land of native inhabitants was seen by early publicists as a dictate of natural law(173) See, e.g., Wolff, Jus Gentium Methodo Scientifica Pertractatum (trans. Drake), (1934), vol.II, pp 155-160, ss308-ss313; Vattel, The Law of Nations or Principles of the Law of Nature, London, (1797), pp 167-171; F. de Victoria, De Indis et de Jure Belli Relectiones, (ed. Nys, trans. Bate), (1917), pp 128, 138-139; Grotius, Of the Rights of War and Peace, (1715), vol.2, Ch.22, pars 9, 10. For another, it is supported by other convincing authority(174) See, generally, the cases referred to by Professor McNeil in his landmark work, Common Law Aboriginal Title, (1989), pp 173-174, 183-184 and 186-188 applying to a wide spectrum of British Colonies, including a long-standing New Zealand(175) See Reg. v. Symonds (1847) NZPCC 387, at pp 391-392 case and recent Canadian cases(176) See Calder v. Attorney-General of British Columbia (1973) 34 DLR (3d) 145, at pp 152, 156, 193-202; Guerin v. The Queen (1984) 13 DLR (4th) 321, at pp 335-336. In this Court, the assumption that traditional native interests were preserved and protected under the law of a settled territory was accepted by Barwick C.J. (in a judgment in which McTiernan and Menzies JJ. concurred) in Administration of Papua and New Guinea v. Daera Guba(177) [1973] HCA 59; (1973) 130 CLR 353, at p 397; see, also, Geita Sebea v. Territory of Papua [1941] HCA 37; (1941) 67 CLR 544, at p 557 as applicable to the settled territory of British Papua."

Back to Brennan J....

"84.....In Queensland, these powers are and at all material times have been exercisable by the Executive Government subject, in the case of the power of alienation, to the statutes of the State in force from time to time. The power of alienation and the power of appropriation vested in the Crown in right of a State are also subject to the valid laws of the Commonwealth, including the Racial Discrimination Act. Where a power has purportedly been exercised as a prerogative power, the validity of the exercise depends on the scope of the prerogative and the authority of the purported repository in the particular case.

89...By granting the lease, the Crown purported to confer possessory rights on the lessee and to acquire for itself the reversion expectant on the termination of the lease. The sum of those rights would have left no room for the continued existence of rights and interests derived from Meriam laws and customs. [Ed. - *A point which might be drawn here is that a reason for using a lease is that the Crown wishes to "acquire for itself the reversion expectant on the termination of the lease"-IT HAS NO SUCH RIGHT OF REVERSION*

FOR A GRANT OF LAND IN FEE SIMPLE. An arguable corollary of this is that if the Crown grants, say a 5 acre zoning and wishes to "acquire a right of reversion" to some degree, say to 100 hectares, then it should make the zoning - at the time it is created - explicitly subject to a term - eg., a period of time, or to the exercise of the right of zoning by the grantee & successors within a designated period. Failure to do so is (arguably) a failure by the Crown to acquire (or preserve) a right of reversion.]

***British Leyland Motor Corp & Ors v Armstrong Patents Company Ltd & Ors [1986] UKHL 7 (27 February 1986) URL: http://www.bailii.org/uk/cases/UKHL/1986/7.html Cite as: [1986] FSR 221, [1986] 1 All ER 850, [1986] 2 WLR 400, [1986] UKHL 7, [1986] ECC 534, [1986] RPC 279, (1986) 5 Tr LR 97, [1986] AC 577"

In the speech extract reproduced below, Chief Justice French might fairly be said to reflect a predisposition by the High Court to protect property rights: French, Robert, C.J., A.C., *Property, Planning and Human Rights* Planning Institute of Australia, National Congress 2013: (NB: emphases are added.)

"Property rights and interests are valued and protected in the legal tradition of the common law, which is part of the Australian legal tradition. They are also protected to varying degrees by statute law, limiting the purposes for which property can be affected by planning decisions, and providing compensation for compulsory acquisition and injurious affection....

Property rights in Australia are protected by the Constitution to the extent that acquisition of property by the Commonwealth must be on just terms. There is no such constitutional protection in respect of the acquisition of property by State governments or authorities under State law. Nevertheless, each of the States and Territories has laws providing for the acquisition of land for public purposes or public works and for compensation to be paid to the owners of acquired land.[7]

Acquisition is not the only way in which property rights can be affected by the exercise of public power. They may also be affected by 'acts of government that do not directly or formally touch the property in question, but which nevertheless damage its value and enjoyment'. This is what is sometimes called 'injurious affection'.[8] Compensation for compulsory acquisition and injurious affection by State or Territory governmental action depends upon statute law. *The question arises why is such compensation provided for by parliamentary enactment when it is not constitutionally required? One answer is that respect for property rights is a deeply embedded aspect of our legal tradition. It is also an aspect of our culture*. It was reflected in the film 'The Castle' and the immortal line 'tell them they're dreaming'.[7]

Darryl Kerrigan's assertion of his property rights was reflective of the common law's protective approach to property rights generally. That approach was forcefully stated by William Blackstone who endeavoured in the 18th century to set out, in what became a classic treatise, the common law of England. His work also greatly affected the development of the law in the United States. Blackstone regarded the right of property as an 'absolute right, inherent in every Englishman'.[9] He wrote:

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land.[10]

Recognising however, that the legislature could enact laws to override the common law, he said:

In this, and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.[11]

What Blackstone said spoke to another age but also speaks, although in more muted tones, to ours. The common law favours interpretations of statutes which minimise the effects upon property rights. Very early in the history of the High Court the first Chief Justice, Sir Samuel Griffiths, said that:

it is a general rule to be followed in the construction of Statutes ... that they are not to be construed as interfering with vested interests unless that intention is manifest.[12]

9 William Blackstone, *Commentaries on the Laws of England*, (University of Chicago Press, Chicago and 10 London, 1765) vol 1, 134.
10 Ibid 135.
11 Ibid.

12 *Clissold v Perry* (1904) 1 CLR 363, 373 (Griffiths CJ), 378 (Barton and O'Connor JJ concurring). Recently cited in *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 619 [42] (French CJ).

That approach to the interpretation of statutes has been stated more than once in the High Court. It can be regarded today as a particular aspect of the principle of legality — a *principle which says that laws are not to be interpreted as interfering with common law rights and freedoms generally unless that interpretation is required by the clear words of the statute. The principle is one which we share with the United Kingdom. It has been explained in the House of Lords as requiring that Parliament 'squarely confront what it is doing and accept the political cost'.*[13] *Parliament cannot override fundamental rights by general or ambiguous words*. The rationale of the principle is that, in the absence of clear words, the full implications of a proposed statute may pass unnoticed:

In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.[14]

The general principle finds its application in the requirement, affecting the extinguishment of native title, that native title is not to be taken as extinguished by legislative or executive actions unless they are inconsistent with its continuing survival. Thus the grant of freehold title has been held to effect extinguishment. The grant of pastoral leases under statute was held in the *Wik* decision not to do so.[15]

In thinking about the application of this common law principle to the extinguishment of native title rights and interests, it is important to bear in mind that those interests, although originating in traditional laws and customs, are property interests recognised as such at common law and, since 1993, under the NTA. They are also rights protected by the NTA in relation to future dealings which might affect them. Although they have a special character they fall within the general framework for the protection of property rights and interests in the context of planning law and practice which I have outlined. It is of course true that the protection of native title rights has a particular significance and raises practical challenges for planning decisions in regional and rural areas. The statutory framework provided by the NTA puts a premium on negotiation and the use of such tools as Indigenous Land Use Agreements to enable decisions about the use of land and waters to be made in a way that accommodates so far as possible, the continuing existence of native title rights and interests and puts in place mechanisms for the practical management of co-existing rights.

The requirements of administrative justice and the common law principles protective of property rights are applicable to indigenous and non-indigenous interests alike. There are

complexities attached to all aspects of planning law and practice. Native title is one of those.

What all of this tells us is that planning law and practice is not a field for the fainthearted or the blinkered specialist. It exists within the general framework of administrative justice which seeks to ensure that public power is exercised lawfully, fairly, rationally and intelligibly. It is exercised within the framework of constitutional and statutory constraints and the great traditions of the common law applicable to the way in which our laws are interpreted and applied to all Australians in striking a balance between the public interest and the legitimate interests of individuals, communities and corporations in the use and enjoyment of their property."

While acknowledging that the Chief Justice's observations, being merely extrajudicial, would thus carry less weight in a formal legal sense than if they had been made in a judgment to explain a decision, there can be no doubt that they would be substantially indicative of the sentiments of the Court as a whole.

Having said that, attention should also be paid to the High Court's views in *Durham Holdings Pty Ltd v The State of New South Wales* [2001] HCA 7, which were succinctly expressed at (2001) 20 AMPLJ at 10:

"The Universal Declaration of Human Rights provides that one of the fundamental rights is that no person should be arbitrarily deprived of his property. This is an accepted international standard and translates into paying just terms compensation for a compulsory acquisition of property.

The High Court of Australia has stated in *Durham Holdings Pty Ltd v NSW* - that this fundamental right is not part of the common law of Australia. There continues to be a common law presumption that adequate compensation will be paid for the compulsory acquisition of property but that presumption can be rebutted by legislation."

The Justices of the High Court were very clear. The majority at para.7 write:

"The applicant also contends in this Court that the legislation in question is invalid because the Parliament of New South Wales lacks power to enact laws for the acquisition of property without compensation. There are numerous statements in this Court which deny that proposition. [*The State of New South Wales v The Commonwealth* ("the *Wheat Case*") (1915) 20 CLR 54 at 66, 77, 98, 105; *P J Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 at 403, 405, 416, 419; *Pye v Renshaw* (1951) 84 CLR 58 at 78-80; *Minister for Lands (NSW) v Pye* (1953) 87 CLR 469 at 486; *Mabo v Queensland* (1988) 166 CLR 186 at 202; *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 58 [149].]"

In his separate judgment, Kirby J. made the same point at para. 17 & 56:

"Normally, in Australia, where property is compulsorily acquired in accordance with law, the property owner is compensated justly for the property so acquired. Australian society ordinarily attaches importance to protecting ownership rights in property. The present application was brought to test the constitutional right of a Parliament and Executive Government of a State of the Commonwealth to depart from the foregoing norms. The applicant asked this Court to consider whether, under the Act and the Arrangements, properly construed, the State had acquired its property and, if so, whether such laws were beyond the State's lawmaking powers.

....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. "

So, it would seem that notwithstanding all the previously expressed fine comments by Brennan J., French C.J.. *et alia* about the High Court's respect for property rights in principle, it is very clear that the High Court will not impose a duty on a State to pay compensation for expropriated property rights, as it was invited to do in the *Durham* case, on the basis (as unsuccessfully argued) that the State of NSW had no such power.

Kirby J.'s view taken in the High Court is in apparent violent contrast to his own general observations about property rights, made extrajudicially (*Foreword: The Law of Resumption and Compensation in Australia*, Marcus Jacobs QC (1998)):

"The capacity of a sovereign to acquire a subject's property is as ancient as organised human society. But in the place of confiscation by rapacious kings and war lords, civilised communities have developed complex rules to control and regulate compulsory acquisition. In the English legal tradition, to which our legal system is heir, the principle that property should not be confiscated except in accordance with law, can be traced to Magna Carta. In Article 52 of that document of 1215, King John promised:

'To any man whom we have deprived or dispossessed of lands, castles, liberties or rights, without the lawful judgment of his equals, we will at once restore these'.

There you have the two concepts that have been refined by the many subsequent statements of basic principle: the requirement of authority of law and the obligation of restoration and proper satisfaction.

In the French Declaration of the Rights of Man and of the Citizen of 1789, the formulation took on the colour of a basic civil right. Article 17 provides:

‘Property, being an inviolable and sacred right, none can be deprived of it except when public necessity, legally ascertained, evidently requires it, and on conditions of a just and prior indemnity’.

There can be little doubt that this formulation influenced James Madison when he was drafting the *Bill of Rights* for the United States Constitution. The Fifth Amendment provides that:

‘No person shall be ... deprived of ... property without the due process of law; nor shall private property be taken for public use, without just compensation’.

The formulation in turn influenced the Founders in the provision they made in 51 (xxxi) of the Australian Constitution. However, that governs only acquisitions under federal law. An attempt to extend its protections to the Australian States was rejected by the electors in thee bicentennial referendum of 1988. [Footnote: Proposed new s 119A. See T Blackshield, G Williams, B Fitzgerald *Australian Constitutional Law and Theory* 1996, at 974. The proposed law was joined with other more controversial proposals. 68% of the electors voted against the amendment of Only 20% voted for the amendment.]

The notion of providing fair compensation to those whose property is resumed by the state and affording a legal regime for the procedures of resumption, the avenues of redress and challenge and of compensation has remained on the national and international agenda. The Universal Declaration of Human Rights now in its fiftieth year, declares in Article 17:

‘ 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’.

Putting flesh on these concepts, of proper legal procedures and fair compensation, is the purpose of a great deal of lawmaking: legislative and judicial.”

An observer might be excused for wondering if, when contrasting these observations of Kirby J. with those he made in the *Durham Holdings* case (above, which even included (at 21) a reference to: “The statutes by which the Crown [i.e., King Henry VIII validly] appropriated the lands of the monasteries in England”), he were some sort of judicial Dr Jekyll and Mr Hyde character, the apparent contrast in views in and out of Court, being so great. Perhaps it is possible to reconcile the two views by concluding that the States’ power to deprive owners of property without compensation is pre-Enlightenment in nature, and increasingly anomalous in the modern democratic world.

The line of argument being put in this working paper is however clearly distinguishable from that considered in *Durham*. Firstly, the rights extinguished in that case were not evidently grants in fee simple or of leasehold. Secondly and more importantly, our argument does not rely on some general fundamental right which has been found by the

High Court not to exist. To the contrary, it relies on the States' (and formerly as Colonies) creation and use of Crown grants as instruments of alienation - with respect to which there has been no attempt at express revocation - and perhaps also, to the extent that the exercise of the grants power constitutionally provided in Letters Patent etc. cannot as a constitutional matter be revoked - as the basis for rights of compensation.

In passing, it might be noted that both Callinan J in the *Chang* case (*supra*), and Kirby J in the above *Foreword* passage recall a relevant 1988 referendum question, which was rejected, the reported figures being 69% No and 20% Yes:

> "Question 4
> A Proposed Law: To alter the Constitution to extend the right to trial by jury, to extend freedom of religion, and to ensure fair terms for persons whose property is acquired by any government.")

Their Honours might be excused for being somewhat bemused about this statistic. After all, it might be taken on notice that if householders were individually asked if they were in favour of any law preserving a government right to acquire their property on unfair terms, the overwhelming answer would be: NO! So, why did only 20% vote in favour of the proposition put? The answer is largely arithmetical, but also relates to poor questionnaire design.

In any field of research where people are asked questions, a fundamental element of good questionnaire design is to keep it simple. The unintentional confusing of respondents will lead to poor quality survey results.

For example, if one has to find answers on three different topics, the correct approach would be to ask a question about one topic at a time.

If however, the three topics are combined into one "yes or no" question, the usability of results will instantly decline. For those who answer "yes" to the combined question, it will be clear that their answer to all three parts of the question is "yes". For those who answer "no" however, are they so voting because they reject one option only - and if so, which one? - or two options only - and if so which two? - or all three options? The clarity of data which would have been obtained by asking three separate questions is lost.

However, even worse, the inclusion of three questions in one will definitely increase the complexity of the question, and with complexity comes increased risk of respondent confusion - for example, the respondent has to:
1. decide whether agreeing with two means an overall "yes", or is strictly speaking a "no"; or
2. perhaps whether the inclusion of three different items itself suggests an agenda of the proponent which escapes and so troubles the respondent; or,
3. focus quickly on three apparently unrelated items, which is itself confusing.

This sort of thing will increase the rate of noes significantly above what it would have been had the questions been separated.

Having said that, a simple piece of arithmetic can show why even where a good majority of voters were willing to vote yes on each of three questions, the combination of the three into one question would cause the majority to disappear.

So, imagine three referendum questions, each of which is supported by a majority - say 70% of voters. In this example, 70% of voters would vote “yes” to each of the three questions. Success and glory for the referendum proponents!

Now, what happens when the three topics are combined into one question? 70% of voters are happy with one topic, 70% with the second, and 70% with the third, but to answer “yes” in this referendum situation, one really needs to support all three topics. So, in this example, what proportion of voters would support all three topics? The answer: 70% x 70% x 70% = (calculator handy?) 34.3%. So, even though a clear, healthy majority might support all three topics, this is by the force of simple arithmetic instantly converted into a low minority. To the extent that the above-mentioned voter confusion is also considered, the “yes” vote would inevitably be further depressed. 20% support here we come! Despondency for the referendum proponents!

Varying the assumed level of support provides these results:
(a) two thirds majority support for each item in each state converts to 29.54% less the confusion factor;
(b) 88% majority support for each item in each state converts to 68.1%, enough for the referendum to pass, subject to the unquantifiable confusion factor.

In other words, by combining three topics into one question, the referendum could only reach a two-thirds majority “yes” vote, if support for each of the individual items had been, at a bare minimum, 88%, but probably more to allow for the confusion factor.

Accordingly, Question 4 of the 1988 Referendum was a question designed, and doomed, to be rejected. Whether it was so because of the political exuberance of the bicentennial year, or because it was designed by a committee (recall Sir Alec Issigonis’ comment that “a camel is a horse designed by a committee”) or just sheer incompetence, might best be a question for historians.

The conclusion to be drawn from all this is that Question 4 of the referendum cannot be taken to demonstrate that voters were in favour of having governments take their property without compensation, but simply that the Question was incompetently designed.

4.1C Reconciling Crown Grants and Other State Powers

Consistent with the above analysis of settled law that a State may acquire property without the payment of compensation, Griffith CJ in *New South Wales v Commonwealth* (1915) 20 CLR 54 (the *Wheat case*) at 66-67 observed: “the power to expropriate private

property, ...is generally, and I think rightly, regarded....as a power inherent in sovereignty. In my judgment the only condition of its exercise is that the property, whether real or personal, shall at the moment of the exercise of the power of expropriation be within the territorial limits of the State...The general power of expropriation is a power which is by the [Australian] Constitution neither withdrawn from the States nor exclusively vested in the Commonwealth."

While Griffith CJ found one condition only - of territoriality - Barton J found another at 78: "...in respect of property real or personal, the power of the Parliament to assume or resume property is as absolute *quoad* New South Wales as the power of the Parliament of the United Kingdom in its sphere, with this qualification only, that the power of any State of the Commonwealth must be exercised subject to the Federal Constitution."

Barton J's qualification might be taken as an allusion to, for example, s.109 of the Australian Constitution - which, as we explored above at **4.1A** - when used in conjunction with the Federal Government's external affairs power - as it now already has done, and could more extensively do in the future - can limit or terminate a State's ability to destroy or acquire property without compensation.

These two limitations to State power to expropriate property without compensation might be joined by a third - the State's own power to prohibit that power. There are two techniques which might be used to achieve this. Neither was considered by any of the High Court decisions relating to a State's power to expropriate property, because they have not been argued, or considered relevant to the issues at hand.

The first limitation is that of "double entrenchment" where a State legislates so that a particular statute can only be amended by a specified step outside the State's power to control (typically by the decision of a popular referendum), and the law specifying such can itself only be changed by another such specified step (again, conventionally, a popular referendum). So far, no State has double entrenched an obligation on Itself to pay compensation for expropriated property and in all truth, such a future prospect would seem to be most unlikely. Still, it is a technique for a State to limit its own sovereignty which has been used for other purposes.

The second technique for a State (or previously, as a Colony) to limit its own power is to issue Crown grants of land. It is clear at common law, as noted above at **2.1** that resumption of a grant without compensation for any associated loss would be a repudiation of that grant (except of course in the case of defeasements validly exercised pursuant to reservations).

To this, it might be argued that a State (i.e., the Crown) may legislate to expressly terminate any right to compensation which a Crown grant might carry with it and in so doing: seek to abolish the common law rule with respect to repugnancy in the context of Crown grants; and/or seek to retrospectively apply the rule against perpetuity to Crown grants of freehold title.

Putting aside the possibility that the State's power to make grants of land is a constitutional power by virtue, for example, of its inclusion in Letters Patent (as in the case of Queensland as outlined above), there would be a most formidable difficulty facing such legislation.

Essentially, this difficulty is a dilemma. The dilemma created would be: can the Crown (i.e. the State) defeat an instrument - namely a grant - which the Crown itself has previously created, where that instrument, not being subject to the rule against perpetuities, is perpetual, and where an essential part of that instrument is the right to compensation on resumption of any part of the landholder's right to enjoyment of the title?

Here we face a paradox of omnipotence as exemplified by the question: "Can God make a stone so heavy that He can't lift it?" The answer, whether yes or no, implies a limitation to God's power, but God is, by definition, omnipotent. We'll leave that solution to the theologians - or check out Peter Suber's *Nomic: A Game of Self-Amendment* in Hofstadter's "Metamagical Themas", *Scientific American* (June 1982).

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, 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 does 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 sham, as would be the role of defeasements. (This is consistent with our concluding observation at **2.1A** above.) 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.

Ultimately, the resolution of this dilemma is potentially by a decision of the High Court. In the end, it would have to choose between destroying the integrity of the system of Crown grants as a basis for land title in Australia, 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.

4.1D Other Implications for Landholders

As noted above at **3.5**: A Crown grant is 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 compensation must be paid on any termination by resumption.

Further, as noted above at **2.1A**: the existence of a right to compensation by the landowner for a mere impairment (as opposed to a complete resumption) by the Crown of its enjoyment of *unreserved* title is demonstrated by cases where the Crown has (successfully) relied on defeasement pursuant to a reservation to establish an absence of right of compensation.

So far, our focus has been on situations where a landholder's use of land has been (or at least, purportedly been) directly adversely affected by State legislation or other regulatory instruments. However, attention might be paid two two other types of situation, namely where:

1. the State's activities on other land (i.e., on Crown land or other private land) practically impairs the landowner's enjoyment of title; and

2. the State acts to prevent a landowner from physically protecting his/her entitled land from destruction by natural forces.

These are both cases where a State causes or exacerbates a physical detriment to the landowner's property. The nature of the title provided by a Crown grant should, in such circumstances, provide the landholder with protection from the State in the form of injunctive relief (where timely and practical) or an entitlement to damages.

4.1D(a) Injurious Affection Caused by a State's Activities on Crown Land or Other Private Land

Consider an example. A State road authority builds a new bridge over a creek. Upstream from the bridge, above the creek, is a house, situated on a Crown grant of land, which has previously had no recorded cases of being flooded. You guessed it - after the construction of the new bridge, in times of very heavy rain, the creek waters back up from the bridge and flood the house. This happens on several occasions. The owner seeks compensation for his losses, but the State has passed legislation granting itself legal immunity in such cases.

In this case, the landowner has suffered damage because of activities undertaken by the State on other land, which might not even have any contiguity at all with the owner's property.

Two possible arguments relating to the grant might be considered:

A. Work by the Crown has caused the amenity of the homeowner's property to be significantly and adversely affected, so that the quality of the land is materially different from the land when originally granted. Now, it might be said that the amenity of land might be affected for all sorts of reasons over an extended period of time (eg., transition from a rural setting to a busy suburban neighbourhood, or to an industrial neighbourhood, climate change, or an untidy neighbour), but such changes might be caused for all sorts of reasons which have nothing to do with activities of the Crown, and the Crown would have no prospective liability for any damage caused by any such things. The distinguishing point in this example is that the Crown has directly caused the damage to land which it has granted in freehold or leasehold, so in principle, it must bear liability for that damage, or remove the cause of that damage.

B. Legislation granting the State immunity from liability in this situation is itself repugnant to the grant. It is in the nature of a defeasance, and a defeasance not made for the purpose defined by a reservation contained in the grant must carry with it an obligation to compensate the affected owner. Accordingly, to the extent that the legislation is repugnant to the grant, it must be unenforceable, or be found to carry an obligation by the Crown to pay compensation.

This example demonstrates how the existence of a Crown grant might be used to:

(a) found a right of action for injurious affection;

(b) invalidate State legislation purporting to avoid the Crown's liability for damage caused; and

(c) serve as an alternative legal argument to the common law right of nuisance, which would not offer the advantage of (b).

Facts very similar to this example were considered by the High Court in *Marshall v Director-General, Department of Transport* [2001] HCA 37 , where the landowner had claimed:

"As a direct consequence of the construction of the road on the land resumed by the respondent Authority, the claimant has suffered loss, damage and a diminution in the value of the balance lands in that as at the date of resumption such lands could reasonably have been foreseen to be rendered more susceptible to flooding. The claimant's claim for compensation is calculated by reference to the cost of flood mitigation works already carried out and remaining to be carried out on the balance lands sufficient to return the said lands to the same degree of susceptibility to/immunity from flooding as was the case at the date of resumption for rainfall events in the Eudlo Creek catchment. $651,325.00"

The High Court gave no consideration to the possible implication or relevance of any Crown grant of title - it was not raised or argued - but examined the language of a section of Queensland legislation which provided for compensation to be paid in cases of injurious affection, in order to determine its precise scope. See per *Gleeson CJ Gummow J Kirby J Callinan J* (*ibid.,* at 12 & 13):

"In our opinion, however, the language of s 20(1)(b) of the Act could hardly be plainer. In assessing compensation, regard is to be had not only to the value of the land taken but also to the damage caused by the exercise of *any statutory powers* by the constructing authority otherwise injuriously affecting *such other* [the remaining, severed] *land*. The section does not say "the exercise of any statutory powers by the constructing authority on and only on the land taken ...". The section clearly distinguishes between the land taken and the severed land. It does not seek to distinguish between the various activities carried out by a constructing authority in the exercise of its statutory powers: for example, the conduct of a survey, the construction of a road, the building of a bridge, the installation of drainage or footpaths beside the road, and the subsequent use of everything that has been done or brought into existence as, and for the purposes of, a road. In truth, all of these can relevantly and properly be characterised as part and parcel of the construction, and subsequently the use of the road. Once the constructing authority acquires land for a statutory purpose and carries out the statutory purpose, it must, pursuant to s 20(1)(b) of the Act, compensate the dispossessed owner for the injurious effect upon the residual land resulting from the undertaking and the implementation of that purpose, actual and prospective....

A constructing authority does not have an unfettered right to resume land. Unless the authority has a *bona fide* purpose of exercising a statutory power in respect of the land, a purported resumption of it would be unlawful. (Cf *The Queen v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 187 per Gibbs CJ.) There is no suggestion of unlawfulness here."

The Court subsequently considers some other comparable cases (*Ibid.*, at 17-18):

"In *Treston v Brisbane City Council* (1985) 10 QLCR 247, before the implementation of the statutory road scheme, the claimants' suburban allotment on which their residence stood was adjoined by a like allotment similarly used. After it, there ran beside their reduced allotment a footpath and a busy roadway constructed on the neighbouring allotment. The footpath was constructed on the sliver of land acquired by resumption from the claimants. The respondent there argued that the claimants were not, or were hardly, injuriously affected by the relatively innocuous use to which the actual land taken from them was put, as a footpath, and that they were not entitled to be compensated for injurious affection caused by the noise and fumes resulting from the use of the new road.

The Land Court (1985) 10 QLCR 247 at 256-259 (Mr White) found itself able to reject that argument by adopting the same sort of approach as the Land Appeal Court had adopted in *Beaver Dredging* (1985) 10 QLCR 166. See also *Vanhoff Pty Ltd v The*

Commissioner of Main Roads (1992) 14 QLCR 331 . It is no answer to say, as was suggested by the respondent in argument here, that there may be others who have lost no land but who may be either equally, or almost equally, injuriously affected in the enjoyment of their land by the implementation of a constructing authority's purpose, yet have no entitlement to any compensation. That is irrelevant. The fact that the enjoyment or utilisation by them of their property may have been adversely affected, and indeed, perhaps unfairly so by reason of the unavailability to them of compensation, provides no reason to distort the language of the Act, and to deprive others, who have lost land, of compensation for injurious affection.....

Further, (*Ibid.*, at 17-18): The appellant is entitled to have compensation assessed for injurious affection to his remaining land resulting from the exercise of the respondent's power in duplicating the highway. Just as each pylon in *Beaver Dredging (1985) 10 QLCR 166. See also Vanhoff Pty Ltd v The Commissioner of Main Roads (1992) 14 QLCR 331* was an integral part of a power line constructed by the authority there, and, as Barwick CJ in *Morison (1972) 127 CLR 32 at 39* said, regard should be had to "the use of the constructions on the acquired land in combination with other land and the constructions thereon". The use of the appellant's land acquired here should be taken in combination with the use of other land for the duplication of the highway, for the purposes of assessing the damage to the appellant's remaining land by reason of injurious affection to it.

The acquisition of the land, the work done on it, and the use, passive or active, to which it is put in pursuance of a statutory purpose such as that involved here, will form part of the exercise of the relevant statutory power so as to give rise to a right to compensation for such injurious affection as is caused to remaining land by reason of the exercise of the power. If it were otherwise, the authority would have neither the need nor the legal right to acquire the land in question."

The allusion in the above quoted judgment "that there may be others who have lost no land but who may be either equally, or almost equally, injuriously affected in the enjoyment of their land by the implementation of a constructing authority's purpose, yet have no entitlement to any compensation" hints of an awareness of the possibility that other landowners might suffer injurious affection as the result of the exercise of statutory power without any statutory or other entitlement to compensation. Thus, even where legislation provides for compensation for injurious affection, there can be a so-called "acquisition law gap": that is, impaired enjoyment of usage rights (theretofore existing pursuant to a Crown grant) is not compensated.

Having said that, it would seem that in the above *Marshall* case, the High Court has interpreted the relevant operating legislation in a manner that would be substantially consistent with the measure of compensation for this particular landowner which would have been determined if the circumstances had been considered as a defeasement of title, with no operative reservation.

4.1D(b) Destruction of Private Land Enforced by Council (with no Compensation)

Consider an example. Beachfront homeowners find that over time, foreshore sea currents commence to progressively wash away their land. Landowners naturally wish to protect their land with boulders or a form of seawall. The local government council (acting under the authority of the Crown) makes orders to prevent any such protective work from being done.

Now, it may be said that a usual Crown grant does not carry any warranty as to the quality of the land - as to whether for example, it has good soil or not, or is subject to flooding or not, or whether it is suitable for cattle grazing, or not. A grant simply identifies the precise location of a plot of land, not its quality. It is up to the grantee or prospective purchaser to make a judgment about the utility of the land.

It would follow from this that the Crown grant of title does not burden the Crown with any duty to maintain or warrant the quality of the land. The role of the Crown in granting title is simply to: define the land by survey, so that the landholder can identify its boundaries and occupy that area within, to the lawful exclusion of others; and to provide a judicial system to allow the landowner to lawfully enforce his rights of possession. (It may be that the Crown might by its later dealings assume an obligation to preserve private land from destruction, but we focus here on obligations associated with the grant itself.)

Having said that, it is clear that the physical land itself is an integral and essential element of a Crown grant. It follows that if such land is threatened with destruction by natural forces, the title holder is entitled (subject only in practice to considerations of nuisance and the like with respect to neighbours) to protect that land with practical measures. In the case of encroachment by the sea, such measures might include foreshore reinforcement.

If the State were to act to forbid the title holder from taking such protective measures, it should be properly regarded as being repugnant to, and a derogation from, the Crown grant. It is fundamental to any freehold or leasehold title that the land to which it relates must actually exist, so it follows that if the Crown seeks to prevent a landholder from protecting the granted land against permanent destruction, the affected landholder should be able to secure: with a timely application, an injunction or other equitable relief from such a Council prohibition; or otherwise compensation for the damages caused by loss of land to the sea which loss could otherwise have been prevented.

Any State law preventing the landowner from protecting land in such circumstances might be characterised as being in the nature of a defeasement.

This example demonstrates how the existence of a Crown grant might be used to:

(a) invalidate council orders made to prevent landholders from protecting their land; and

(b) serve as an alternative legal argument to other common law rights of nuisance.

Facts very similar to this example were considered by the New South Wales Supreme Court in the previously mentioned case *Ralph Lauren 57 v Byron Shire Council* [2016] NSWSC 169, where fourteen plaintiffs, who were owners of property on Belongil Beach in the Byron Bay area, as part of legal actions which spanned six years, sought relief from the council's physical and legal interventions in their use of the land.

Hidden J notes (*ibid.*, at para. 15), the claim that the council acted by use of a Coastal Zone Management Plan ("CZMP"): "to prevent residents, including the plaintiffs, from carrying out any protective works, such as a terminal wall, to protect their properties; and the Council was to develop "an enforcement policy for retreat of development in accordance with consent conditions, and develop an infrastructure and utility services retreat policy." Finally, the Council would itself "fail and refuse to take any other steps, by way of beach nourishment, terminal wall or end control structure ... so as to provide protection to the properties of residents." In other words, there was a policy of planned retreat, where the council expected landowners to watch their properties being washed away with no prospect of compensation or acquisition (resumption) by the Crown.

The Supreme Court gave no consideration to the possible implication or relevance of the Crown grant of title - it was not raised or argued - but examined closely arguments as to the validity of government decisions under the legislation, and the plaintiffs' reliance on a claim in negligence, and alternative claims in nuisance and under s 177 of the *Conveyancing Act* (NSW) 1919.

As His Honour notes (*ibid.*, at paras 4 and 5), the background to these claims may be sketched briefly: "Between the 1960's and the 1970's, the Council constructed an artificial headland protected by a rock seawall adjacent to Jonson Street, Byron Bay, referred to in the pleadings as the "Jonson Street Structure." The plaintiffs allege that the structure has caused erosion of the beach to the northwest, in particular, at Belongil beach. Consequently, their properties have been exposed to seawater and wave action. It is also alleged that the Council failed to take reasonable steps to protect the plaintiffs' properties by, among other things, failing to modify or remove the Jonson Street Structure, and provide further seawalls to protect the beach. It is also alleged that the Council failed to allow the plaintiffs to take such protective measures.

The plaintiffs claim damages, in some cases for the cost of protective works to their properties, and in all cases for diminution of the value of their properties said to be due to their exposure to the effects of erosion."

The plaintiffs were forced, by dint of the law known to them, to place heavy reliance on the evidence presented that the erosion of their properties was in fact caused by the erection of the structure by the Crown. From the point of view taken in this paper with respect to the true legal effect of Crown grants of title, three observations might be made (on the working assumption that the land title concerned was pursuant to Crown grants of freehold title):

(a) just as, in the previously outlined example of water backing up from roadworks performed by the Crown, so might the damage to the beachside properties by works of the Crown in Byron Bay be characterised as an injurious affection to the granted title, and subject to rectification or compensation; but also

(b) the enforced policy of "planned retreat" itself should be regarded as being repugnant to the Crown grants of title and so, of itself, entitle the landowners to remedies of rectification or compensation, without any need to demonstrate causation of damage by Crown works in Byron Bay; and

(c) any statutory exemption from liability which the Crown might claim would be itself repugnant to the Crown grants of title and so rendered void.

The reader might conjecture that the Byron Shire Council is an extreme case, and that councils would not ordinarily attempt to prevent a landowner from protecting his land. Not so! In this respect, we note the claim that there are "examples from Byron Bay to the *(sic)* Eurobodalla where defensive engineering solutions have been rejected or delayed": NSW Coastal Alliance *Media Release* 15 April 2018.

To exemplify the point, here is another litigated case in the northern beaches area of Sydney: Warringah Council sought a mandatory injunction requiring the demolition of a seawall erected by a property owner to save the land. The Court refused to grant the injunction and allowed the wall to stand. In *Warringah Council v Franks & Ors* [1999] NSWLEC 65, Bignold J observed: "...the first Respondent in so acting to protect his property, was doing no more than what other beachfront owners had apparently done to protect their properties from damage by avulsion by the sea during the significant storm events experienced at Collaroy/Narrabeen beaches in the 1960s and 1970s....what the Respondent did....appears to be indistinguishable from what other beachfront landowners have done over the past decades to protect their valuable properties from storm damage caused by the sea, inasmuch that in the emergency conditions then prevailing, seawalls have been erected without regard to the relevant planning laws...."

4.1D(c) State & Intra-Sate Authority Land Transfers: Avoiding a Possible Trap

It's not only private landowners who have reason to beware of the States. Even councils themselves could in principle become victims as well.

The Crown, in right of each State (and formerly, Colony) has the power to create statutory authorities to which it can delegate defined powers. This power has been used very extensively in the creation of town and shire councils and other authorities.

A State may transfer land to councils for the councils to manage. This might be done by negotiation of a price to be paid by the council to the State. Councils have budgets to manage and in such circumstances, they can be expected to prefer to obtain such land from the State at the lowest achievable price.

From the macroeconomic point of view of non-State entities (collectively: private individuals and organisations, and the Federal Government), such bargaining between councils and a State would be of no consequence: councils are entities of the State, and whether any such bargain favoured a council or the State would ultimately not of itself affect the consolidated financial position of the State, which includes the financial position of the councils.

Nonetheless, as a party to the negotiation, it would benefit a council (or other State authority) to obtain the best terms it could, and a State's past record with respect to adverse rezoning of privately held freehold land is something that a council might find worth raising in the course of negotiations with the State in order to achieve a more favourable outcome.

Take for example, the *Crown Land Management Act* 2016 (NSW). Among various provisions of the Act is the Land Negotiation Program. According to *NSW Crown land reforms have commenced - what do local councils need to know?*, Maddocks, Lexology (30/7/2018):

"the Act provides for land that meets specified criteria to be transferred for local ownership to councils by voluntary negotiation. This aspect of the Act commenced in 2016 and the NSW Government has been offering negotiations to local government areas on a staged basis.

Land can be vested under these provisions where:

> - the Council agrees (where land is transferred in these circumstances the Council will take on the liabilities associated with the land so the Council needs to be comfortable with this in the circumstances)
>
> - if the land is subject to a claim under the *Aboriginal Land Rights Act 1983* (NSW), the claimant land council has consented

- the land is located wholly within the local government area

- the Minister is satisfied, after taking into account criteria prescribed in the regulations, that the land is 'suitable for local use'.

Once the land is vested, the Council obtains a freehold interest over the land, subject to native title interests and any reservations and exceptions listed in the land. The land is taken to have been acquired by the Council as 'community land' under the *Local Government Act 1993* (NSW) (or in specific circumstances can be taken to be 'operational land' under the *Local Government Act 1993* (NSW)). The Council will be entitled to all income generated from the land."

In negotiation of the acquisition of freehold land from the State (subject to native title interests, and any listed reservations or exceptions), a council might have regard to the State's past practice with respect to privately owned land, of *ex post facto* introducing limitations on permitted uses without compensation.

Take for instance a hypothetical example of the acquisition of freehold land by a NSW council under the above legislation for the purpose of eventually constructing a sports stadium. Suppose, after some years, a State Planning Authority decides to rezone the land so that it can only be used as parkland and refuses to provide any compensation. In this situation, the council would lose the prospective income stream from the stadium, and be left with an expense-generating park (and the now diminished uses of freehold title).

To the extent that a State considers that it has the power to take such action, it must be said that the council's freehold title is subject to an undocumented, inchoate reservation of indeterminate scope. Such a reservation cannot legally exist, but it describes the limited and uncertain freehold title that the State is actually offering the council.

Now, it must be self-evident that freehold title which is *seen to be* subject to an undocumented, inchoate reservation of indeterminate scope must be worth significantly less than freehold title which is not so subject. How much less would vary from one situation to another, but the very significant, long term added uncertainty of the former situation could make the percentage loss in value very substantial indeed. This is a potential trap for councils or other State authorities.

In such circumstances, once a council understands the potential sovereign risk it is taking in negotiating with the State (not to mention the irony of the risk being posed by its own creator), it might negotiate with the State in one of two ways, either to:

(a) agree to acquire the freehold title on the specific condition noted on the title - for avoidance of doubt - that should the State subsequently impair or restrict the council's uses of the land, then the State would provide financial compensation for any loss (and if the State were to aver that it would never do any such adverse thing, then it could hardly object to putting the undertaking in writing); or

(b) negotiate a very substantial discount in the acquisition price of the land in recognition of the risk posed by the State's failure to expressly repudiate the undocumented, inchoate reservation of indeterminate scope, which exists as a result of the State's previous (and so far unchallenged) behaviour in the nature of adverse rezoning and the like with respect to other lands.

4.2 S. 51 (xxxi) of the Constitution - A Red Herring

The Constitution reads, in part:

"51. Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power[12] 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;....."

It's an odd thing, that there is no reciprocal, express, provision in the Constitution, namely that a State cannot acquire (or re-acquire) property of and from the Commonwealth on unjust terms - i.e., put positively, that a State must acquire (or re-acquire) property of and from the Commonwealth only on just terms.

In *Grace Bros Pty Ltd v The Commonwealth* [1946] HCA 11; 72 CLR 269; (1946) ALR 209, Justice Dixon of the High Court of Australia stated that the inclusion of the condition [s. 51(xxxi)] was to "prevent arbitrary exercises of the power at the expense of a State or a subject".

Given that prior to Federation, the Commonwealth had no assets of any kind, it is logical that the Colonies were focused on ensuring that the assignment of property to the Commonwealth would be done on "just terms", or otherwise without any Commonwealth coercion, and it was perhaps an oversight that the issue of transferring Commonwealth property to the States was not specifically addressed.

If the view is taken that, absent any State constitutional requirement to the contrary, States can resume, acquire or impair the use of alienated land without compensation, then, given the similar absence of such a provision in the Australian Constitution which applies to the States, then the States could in just the same way "acquire" the use of alienated land of the Commonwealth without compensation (except it would seem, where, under s. 111 of the Constitution, a State irreversibly surrendered its sovereign right of the Crown to designated land to the Commonwealth, as for example New South Wales did with respect to the land for the Australian Capital Territory).

But is that what a Court would find? Perhaps, a Court might read into the Constitution a constructive right on the part of the Commonwealth to be entitled to compensation on just

terms from any State which resumed, or purported to impair the otherwise lawful use of, the land. If the reader can cite any authority one way or another, please advise!

Putting aside that Constitutional quirk, the operation of s.51(xxxi) as it stands is very clear, and settled. 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."

In *Pye v Renshaw* [1951] HCA 8; (1951) 84 CLR 58 at para. 8, the High Court states: "8. As has already been pointed out, the legislative power of the State is not affected by s. 51 (xxxi.) of the Constitution. If a State Act provides for the resumption of land on terms which are thought not to be just, that is of no consequence legally: it cannot affect in any way the validity of the Act or of what is done under the Act."

In *Pye,* the High Court also quotes *Magennis*, to support its view: " Para 6:.....because State powers are in no way affected by s. 51 (xxxi.). As Latham C.J. (1949) 80 CLR, at p 405 said: "There is in my opinion no doubt as to the power of the State Parliament to provide for compensation for land resumed upon any basis which it thinks proper".

Latham C.J. seems to slightly contradict his own words quoted above in the first lines of his judgment in Magennis: "....State Parliaments are not bound by any similar constitutional limitation [to s. 51(xxxi)]. They, if they judge it proper to do so for some reason, may acquire property on any terms which they may choose to provide in a statute, even though the terms are unjust." Here, he says the State may be unjust, but above, he refers to a State's power to provide for compensation "upon any basis that it thinks proper". Perhaps he is implying that a State can behave properly and unjustly, which is a way of emphasising the absence of relevance of s.51 (xxxi) to a State.

However, rather than concluding from these decisions that the States' freedom to act unjustly is a point of general principle, it should, we say, be confined to the particular issues relating to s. 51 (xxxi) which the High Court were considering in those cases. Their focus of concern in these cases was the application and non-application of s. 51(xxxi). Having decided that the section had no application to the States, it was not considered whether the States might have some analogous sort of duty arising from somewhere other than a constitution, and no such submission seems to have been put to the Court. (It is true that a general argument challenging this view was put in the *Durham* case, but the argument put there fundamentally challenged the State's power to acquire property without compensation as a general proposition. The point being made here is very different: namely, that while the State's general power as stated by the High Court is accepted, there may be other sources of limitations to that power.)

In the context of the above line of cases, it was only necessary for the High Court to find that s. 51(xxxi) had application only to the Commonwealth, and so to point out by way of obvious contrast, there was no such provision in State constitutions. Given that it was not

submitted, and so not asked of the High Court to consider, whether there might be another source of such a duty with respect to particular types of property on the part of the States, then nor were authorities such as those at **2.1 The Nature of a Grant** above given consideration.

Nor indeed for that matter - speaking more generally - in the 1940's or 1950's, was any argument put to the High Court on the subject of Native Title or many of the Justices' more recent observations with respect to property as noted above at **4.1A & 4.1B High Court of Australia - Some Property Principles.** Some things change.

It is in this reasoning context, that we are suggesting that by taking the Court's perfectly correct reference, in the context of the Australian Constitution s. 51(xxxi), to the lack of any such equivalent provision in a State's constitution, a generalised view that therefore a State cannot otherwise ever have any obligation to compensate for resumptions is not just lazy, but a serious over-generalisation. Instead, the High Court's observations should generally be confined to the context of those decisions, which was deciding the extent of operation of s. 51(xxxi).

As we have seen, s. 51 (xxxi) of the Constitution clearly has no application to any State, but in the perceived absence of any obligation by a State to provide compensation in these matters, a number of cases have been brought to the High Court seeking a sufficient nexus between laws of a State and the Commonwealth, in an attempt to obtain the benefit of the operation of s. 51 (xxxi). In the course of these cases, there has been some clarification of what "acquisition" means Constitutionally. 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].' "

We have previously observed how s. 51(xxxi) has potential practical effect with regard to land titles in the ACT, but with regard to the States, it is more a distraction - a red herring.

Fundamental differences between a resumption by a State and an "acquisition", we would say, are that:

1. An "acquisition" might, but might not be, a resumption of a grant by the Crown. It could be an aspect of any number of other types of transaction, such as a simple commercial transfer of a freehold title.

2. A resumption is a very particular type of acquisition, namely a reversion to the Crown. It might also be described specifically as a "re-acquisition".

3. An acquisition by the Commonwealth of land situated within any State would not ordinarily be a resumption.

4. While an "acquisition" in the s. 51(xxxi) sense is distinguished from "deprivation", deprivation would be sufficient to evidence a resumption, without having to show "acquisition" in the s. 51 (xxxi) sense by the Crown (although in the theory of Crown grants, the existence of one should necessitate the other).

It is in the context of the observations being made here that it might be concluded that the High Court's repeated and clear decisions that s. 51(xxxi) has no effect, or equivalent constitutional provision, in the States has in fact been so interpreted by practitioners as to have been a giant distraction - a huge smelly red herring - for a full century, from the possibility that State obligations with respect to property justice might arise from a source other than s.51(xxxi) or a similar State constitutional provision.

5.0 Footnote - The Role of Equity

The maxim that "equity follows the law" begs the question: where has equity been? The remedies associated with equity such as injunctions, declarations and mandamus seem to have been rendered largely impotent in the context of the clear and a significant power imbalance between regulatory bodies and property owners. One aspect of regulatory power is the complexity of the planning process, and even if a property owner affected by a decision on one point - which might be, say: a decision made beyond an authority's power; or made incompetently; or endlessly delayed - succeeds in obtaining an injunction or other equitable order, he/she faces the prospect of further regulatory/bureaucratic hurdles, and can't practically go to the Supreme Court endlessly seeking orders.

Original jurisdiction with regard to applications for relief in equity rests with the State Supreme Courts, so they are costly. However, in the right situations, they can be

absolutely brilliant for plaintiffs, because such actions are given high priority by the Courts and decisions can be made quite promptly, unlike say commercial actions for damages etc., which might drag on for years. Such orders can put a plaintiff in a very strong (but not inequitable!) negotiating position.

It does seem that in the legal twilight zone where Wickham's "rule of 'no-law'" holds sway, the potential for equitable relief is impaired also. A corollary of that is if the law is clarified, then the potential for obtaining equitable relief in appropriate circumstances should be correspondingly enhanced.

The main point here is just to offer a general reminder that the potential role of equity should not be overlooked. Equity was developed in England over many centuries by judges of the Courts of Chancery in particular as a complement to the law and exists in Australian superior courts to this day. But what is equity exactly in this context? And why does "equity follow the law"? The best and most succinct explanation as to why a system of justice requires the existence of equity as well as law would seem to have been made by Aristotle some 2,500 or so years ago. Here's what he writes (happily, translated from the ancient Greek!) in Book V of *Ethics* (at *EN* 1137a17 to 1137b24):

"...A digression on equity, which corrects the deficiencies of legal justice

x. Our next task is to say something about equity and the equitable: what is the relation of equity to justice, and of what is equitable to what is just? When we look into the matter we find that justice and equity are neither absolutely identical nor generically different. (They are species of the same genus.) Sometimes we commend what is equitable and the equitable man, to the extent of transferring the word to other contexts as a term of approbation rather than 'good', thus showing that what is more equitable is better. At other times, however, when we follow out the line of argument it seems odd that what is equitable should be commendable if it does not coincide with what is just; because if it is something different, then either what is just or what is equitable is not good; or alternatively if both are good, they are identical.

These, broadly speaking, are the arguments that raise the difficulty about what is equitable: yet there is a sense in which they are all correct, and there is no inconsistency between them. For equity, though superior to one kind of justice (namely legal justice - see below) is still just, it is not superior to justice as being a different genus. Thus justice and equity coincide, and although both are good, equity is superior. What causes the difficulty is that that equity is just, but not what is legally just: it is a rectification of legal justice. The explanation of all this is that all law is universal (i.e., lays down general principles), and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made. And the law is none the less

right; because the error lies not in the law nor in the legislator, but in the nature of the case; for the raw material of human behaviour is essentially of this kind. (The circumstances of our actions are often too particular and complicated to be covered satisfactorily by any generalization.) So when the law states a general rule, and a case arises under this that is exceptional, then it is right, where the legislator owing to the generality of the language has erred in not covering that case, to correct the omission by a ruling such as the legislator himself would have given if he had been present there, and as he would have enacted if he had been aware of the circumstances.

This is why equity, although just, and better than a kind of justice, is not better than absolute justice - only than the error due to generalization. *This is the essential nature of equity; it is a rectification of law in so far as law is defective on account of its generality.* [Emphasis added - Ed.] This in fact is also the reason why everything is not regulated by law: it is because that there are some cases that no law can be framed to cover, so that they require a special ordinance [which "ordinance", we think, in contemporary terms might be described as an equitable ruling - Ed.]. An irregular object has a rule of irregular shape, like the leaden rule of Lesbian architecture (Lesbian moulding (from the Aegean island of Lesbos) was ogival, i.e. took the form of a double curve; its regularity was checked by a leaden rule bent to the required shape.): just as this rule is not rigid but is adapted to the shape of the stone, so the ordinance is framed to fit the circumstances.

It is now clear what equity is, and that it is just, and superior to one kind of justice. This also makes plain what the equitable man is. He is one who chooses and does equitable acts, and is not unduly insistent upon his rights, but accepts less than his share, although he has the law on his side. Such a disposition is equity: it is a kind of justice, and not a distinct state of character."

Too right mate!

6.0 Conclusions

1. Any Australian State (or previously Colony), has always had the Sovereign power to alienate parcels of land from the Crown by making Grants of freehold or leasehold interests in such land.

2. It is very clear from the operation of Crown grants during the 19th and into the 20th century (and in England in previous centuries), that a grant was a grant. Even if a grant was a leasehold rather than a freehold, the conditions and limitations which characterised the grant were clear to all from the outset. The innovative and flexible use of grants achieved social and land management goals without injurious affection to property holders. The relevant law in New South Wales, as observed by the Privy Council in *Cooper v Stuart*

(supra), was distinguishable from English law, and Crown grants in New South Wales were not subject to the rule against perpetuities.

3. It is a clear principle at common law that “A grantor having given a thing with one hand is not to take away the means of enjoying it with the other".

4. The progressive introduction of town planning laws and the use of zoning as a planning technique took place from the mid-20th century.

5. The then very new discipline of town planning and town planning laws was introduced without any express legal reconciliation with the pre-existing tenure relating to Crown grants as they had developed in the Australian States, or to the very nature of a Grant of land itself.

6. Initially, town planning laws seem to have provided for compensation to property owners for injurious affection caused by planning instruments. Due to 5., no explicit legal reasoning for providing compensation was provided, possibly because the need for a principle of compensation in instances of injurious affection was so fundamentally obvious(?)

7. To the extent that such provision for compensation was made, it was not actually carried out, leaving large numbers of affected property owners over many decades uncompensated for their losses.

8. With limited exceptions, any entitlement to compensation by affected property owners affected by planning instruments was lost in a kafkaesque administrative miasma of “non-law”, or expressed otherwise, such losses were outside acquisition law.

9. Injurious affection caused by a planning instrument - by whatever name it might be called - is by its very nature, where title exists pursuant to a Crown grant, inherently a partial resumption of the grant, and so the grantor should at common law be liable to remedy any loss suffered by the property owner as a consequence, regardless of the possible existence of resumption laws which might purport to diminish or avoid such liability.

10. The failure of an affected property owner to qualify for compensation under available State compensation schemes, where such compensation schemes do not provide for the particular type of loss suffered by the property owner, cannot disqualify compensation for 9. That is, a State, by providing for compensation which is more limited than its obligation under 9, cannot thereby avoid or diminish its obligation. (If 10 is repeating 9, it bears repeating!)

11. The courts will infer - given the argument and opportunity - that the Crown intends that the rights of property of the inhabitants are to be fully respected, and while the Crown, as

Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it ought to see that proper compensation is awarded to every one.

12. With respect to resumptions or partial resumptions, where the States at no time expressly made the unequivocal intention to take away the property of a person without giving to him/her a legal right to compensation for the loss, so a court should not see any such intention. If a State did purport to express such an unequivocal intention, we would say that to the extent that it repudiated any Crown grant, it would be held invalid.

13 In relation to legal actions taken by any person against a State in relation to such matters, no statute of limitations can apply, as the purported imposition of same would be a repudiation of the grant.

14. In principle, the loss caused with respect to a grant would be suffered by the owner at the time the affecting planning instrument was published or took effect. A subsequent *bona fide* purchaser may ordinarily be taken to have notice of the instrument and so not suffer any loss as a consequence of it.

15. This working paper has not addressed heritage legislation in particular, but in cases where the imposition of heritage status on a property causes a loss to the owner, then in principle, the same sort of considerations would apply.

16. The views above taken as to a right of compensation, it might be said, adopt rules that accord with contemporary notions of justice and human rights and their adoption would fit naturally within Brennan J.'s skeleton of principle which gives the body of our law its shape and internal consistency, and indeed offer the opportunity to reach a result consistent with "common sense and justice" or even "The Vibe".

17. Separately from the above considerations, the Federal Government may, by ratifying Article 17 of the Universal Declaration of Human Rights, use its external affairs power to adopt Article 17 as domestic law by legislating in the field and so override, by the effect of s.109 of the Constitution, conflicting State legislation.

Any suggestions or opinions in relation this working paper are welcome!

7.0 Appendix A: Guidelines for Action re Crown Grants of Title

If the above legal reasoning and authorities in relation to Crown grants of title in the Australian States are accepted, a cause of action seeking relief may be drafted. Here is a suggested guideline as to content.

1. The Plaintiff [who is the Registered Proprietor, or has some other legal or equitable interest sufficient to provide standing] owns Land [as described].

2. The Defendant/s is/are the Crown in right of [State] and/or [Authority] acting under the authority of the Crown.

3. The Plaintiff acquired its legal [or equitable?] interest in the Land on the Acquisition Date (___/____/___).

4A. The Land Title is by a Crown grant of freehold made in [State] on [date].

or

4B. The Land Title is by a Crown grant of leasehold made in [State] on [date].

5. The Grant of freehold title is not governed by the rule against perpetuity.

6. On the Instrument Date (___/____/___), [which is after the Acquisition Date] the Defendant caused Legislation [or some other Instrument] to take effect with respect to the Land.

7. The Instrument takes effect so as to:

- limit the Plaintiff's prior existing ability to use the land; and/or

- require the Plaintiff to perform certain works on the land; and/or

- practically reduce the value of the Plaintiff's Land; and/or

- cause the Plaintiff to incur costs in relation to complying with, or negotiating against, the implementation of the Instrument with respect to the Land; and

- fails to provide for compensation to the Plaintiff for the above.

8A. The Instrument is not a Defeasement made pursuant to a Reservation in the Grant of freehold title.

or

8B. The Instrument is not a Defeasement made pursuant to a Reservation in the Grant of leasehold title, nor is it made pursuant to a Condition relating to the Grant.

9. The Instrument is in the nature, but not the form, of a Defeasement.

10. Not being made pursuant to a Reservation [or maybe also/instead a Condition - in relation to leasehold], and lacking provision for compensation, the Instrument is repugnant to the Grant of title.

11A. There is no express intention contained in the Instrument Legislation purporting override the repugnancy, or indeed to expressly provide that the Instrument is to be taken to derogate from the Plaintiff's rights under the Grant of title.

or

11B. If there is taken to be an express provision in the Instrument Legislation purporting to override the repugnancy, such intention fails because the Crown grant, being created as a perpetual instrument of title, terminable in part or completely only by resumption by the Defendant State, is not capable of being repudiated by the Defendant, thereby to become a progressively "vanishing title".

12A. Due to said repugnancy, the Instrument is unenforceable with respect to the Land. [This would serve as a defence by the landowner to any action by the Crown.]

or

12B. Due to said repugnancy, the Instrument is unenforceable with respect to the Land to the extent of the repugnancy and the Plaintiff is entitled to compensation for all loss of amenity and/or negative financial impact (as per 7. above) caused by the application of the Instrument to the Land.

or [if the action is commenced reasonably promptly after the Instrument Date, or even in anticipation of the Instrument Date]:

12C Due to said repugnancy, the Plaintiff seeks equitable relief in the form of, for example:

(a) a Declaration that the Instrument is repugnant to the Grant of title and so unenforceable against the Plaintiff

or

(b) an Injunction to prevent the Defendant/s from implementing, or acting, pursuant to the Instrument

or

(c) a Writ of Mandamus requiring the Defendant/s to take steps to remedy damage caused or being caused consequent to the Instrument.

8.0 Appendix B: Adopting UDHR Article 17 as Domestic Law - Implementation

At **4.1A** above, it was proposed that the NSW Bar Association's references to Article 17 should be considered by the Federal Government in relation to its possible ratification. For that to be done, the context and processes which might apply should be considered. First, what is the *Universal Declaration of Human Rights*?

"The Universal Declaration of Human Rights (UDHR) is the foundation of international human rights law. Proclaimed by the UN General Assembly in 1948, it was the first universal statement of the fundamental human rights to which all human beings are entitled.

The UDHR is not a legally-binding treaty – States cannot sign on to the UDHR and it cannot be enforced. Rather, it is an aspirational statement which aims to set 'a common standard of achievement for all peoples and all nations.' Despite not being enforceable itself, the UDHR is widely regarded as a benchmark for a nations' human rights compliance.

Legal enforceability comes via the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These elaborate on the principles outlined in the UDHR and contain implementation guidance. Collectively, the two Covenants and the UDHR are often referred to as the International Bill of Rights." (State Library of NSW- *Legal Answers Chapter 10: Australia's international obligations*.)

As previously mentioned, Australia's foreign minister, as President of the UN General Assembly, was actively involved in the composition and adoption of the UDHR, by the General Assembly (with Australia's support). It has been possible for the Australian Government, with or without the support of the States, to ratify Article 17 at any time since 10 December 1948, but it has not done so.

It might be said that it is not necessary to do so because Australia has ratified the related treaties, the ICCPR on 13 August 1980, and the ICESCR on 10 December 1975. The problem with this view is that neither treaty, and in particular the ICCPR, failed to

incorporate UDHR Article 17 and does not protect private property because, (according to Tomuschat, Christian, *International Covenant on Civil and Political Rights (1966)*, Oxford Pubilc International Law at para. 16) "at the time of the adoption of the Covenant socialist States viewed invested productive capital with the utmost degree of suspicion". That's right - the communists objected to protecting private property, the Cold War was on, and so to negotiate a treaty, UDHR Article 17 was left out, and has not been included since. Thus, ratification of the ICCPR and the ICESCR by Australia has not included UDHR Article 17. Article 17 remains, undiminished, as part of the UDHR, but without being the subject of an international treaty.

8.1 Australian Government Fallacies

The Australian Government takes its treaty obligations seriously. For example, as required by the ICCPR treaty, it has made periodic reports to the UN Human Rights Committee with respect to implementation of the ICCPR.

In Australia's sixth periodic report to the Human Rights Committee (the Committee) on the implementation of the ICCPR, in accordance with article 40 of the ICCPR, it is pointed out at 1[para. 4]:

"*Human Rights (Parliamentary Scrutiny) Act 2011* (Commonwealth): The Act came into force on 4 January 2012. The Act requires that all Bills and disallowable legislative instruments are accompanied by a Statement of Compatibility with Human Rights. A Parliamentary Joint Committee on Human Rights was established on 13 March 2012 with the sole focus of human rights scrutiny. This Committee examines Bills, Acts and disallowable legislative instruments for compatibility with human rights and can conduct inquiries into any matter relating to human rights referred to the Committee by the Attorney-General. These scrutiny processes are designed to encourage early and ongoing consideration of human rights issues in policy and legislative development. They also aim to improve parliamentary scrutiny of new laws for consistency with rights and freedoms in the seven core human rights treaties to which Australia is a party."

Further, at 1[para. 6], it is observed:
"*Human Rights Commissioner*: On 17 February 2014, a new Human Rights Commissioner was appointed to the Australian Human Rights Commission (AHRC) to focus on civil and political rights and common law rights and freedoms."

Notwithstanding such laudable initiatives, the sixth report, in addressing the "Domestic implementation of the ICCPR" observes at 5[paras 28 & 29]:

"28. The Australian Government considers that existing domestic laws and institutions adequately implement the ICCPR at the domestic level. Human rights in Australia are protected by our constitutional system, strong democratic institutions and specific legal protections. State and territory governments incorporate rights under the ICCPR through legislation, policies and programs, including statutory Charters of Rights in the ACT and Victoria. Robust democratic institutions and specific legal protections are an important part of the promotion and protection of civil and political rights in Australia. Among these institutions and laws are the following:

29. *Constitutional Protections*: Australia is a constitutional democracy with a parliamentary system of government based on the rule of law. The Australian Constitution contains a number of express guarantees of rights and immunities. These include:

- any property acquired by the Commonwealth Government must be acquired on just terms (section 51 (xxxi)),....."

This passage contains a number of curious fallacies, namely:

1. a belief that property rights are to be protected under the ICCPR, when in fact there is no such provision therein;

2. the fact that s. 51(xxxi) has no application to the States, which contain the vast majority of Australian land and population, is not deemed worthy of note in a report considered relevant to property rights;

3. the absence of any law equivalent to s. 51(xxxi) in the States is also not deemed worthy of note in a report considered relevant to property rights;

4. in so far as s. 51(xxxi) provides an express guarantee of rights, it is implicitly considered sufficient to satisfy property rights as human rights, when in fact the obligation that any property "acquired" by the Commonwealth Government must be on "just terms" is in fact a much more narrow protection than the UDHR Article 17, namely that people shall not be "arbitrarily deprived" of their property - and that even if, hypothetically, s.51(xxxi) were to be adopted by the States, the protection would similarly be more narrow.

It would have been more correct for the report to have observed that the ICCPR does not protect private property, but note that nonetheless. 51(xxxi) provides a limited degree (i.e., not with respect to States, and not where there has been deprivation without "acquisition") of protection for property owners from the Commonwealth Government.

As discussed previously, the High Court has made its position abundantly clear on two points:

(i) the s. 51(xxxi) "just terms" provision of the Australian Constitution does not apply to the States, and the States have no comparable constitutional provision (see e.g., *Durham Holdings* case (supra));

and

(ii) the "extinguishment, modification or deprivation of rights" in relation to property does not of itself constitute an "acquisition" of property (see e.g., I*CM Agriculture Pty Ltd v The Commonwealth* (supra)).

It is 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.

These large gaps in the definitions of protection of property rights between Article 17 UDHR and Australian law, it might be noted, go completely unremarked in the sixth periodic report to the Human Rights Committee. It's their sixth go at a report, and they STILL haven't realised the major shortcomings of Australian law. They also still haven't realised that protection of private property rights is not included in the ICCPR, so they don't even need to report on it: rather, the legal deficiency invites action outside the ICCPR ambit.

8.2 Treaty Obligations Re Property Rights

As noted at **4.1A**, the equivalent of the Article 17 UDHR right not to be arbitrarily deprived of property is possessed by "persons with disabilities", by virtue of Article 12(5) of the *Convention on the Rights of Persons with Disabilities* ("CPRD") which as noted previously was adopted and proclaimed by General Assembly resolution 61/106 of 13 December 2006 ratified by Australia 17 July 2008, which provides: "Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that **persons with disabilities are not arbitrarily deprived of their property**. (Emphasis added.)

It would seem that the ratified CPRD has been adopted into domestic law at a Commonwealth level by its inclusion in the *Human Rights (Parliamentary Scrutiny) Act 2011* s. 3(1)(g). The Act established the *Parliamentary Joint Committee on Human Rights* ("PJCHR"). However, reference to the CPRD under the Act is only required with respect to the Australian Parliament: the Act does not purport to impose any obligations more generally onto the States, so it may be concluded that Article 12(5) of the CPRD has been adopted into domestic law with respect to the Commonwealth only, and not to the States.

On this basis, it might be said that the Commonwealth, unlike the States, cannot arbitrarily deprive persons with disabilities of their property, which is an improvement anyway on the s. 51(xxxi) requirement that property be acquired on just terms.

Effectively, this is now a legal discrimination at Commonwealth level against people without disabilities, who can still be arbitrarily be deprived of their property, where such deprivation is not also an "acquisition" of property.

We note also in passing the *United Nations Declaration on the Rights of Indigenous Peoples* ("DRIP"), which has not been ratified by Australia, but "supported" on 3 April 2009. It provides, in part with respect to property rights:

"Article 10
Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and **after agreement on just and fair compensation** and, where possible, with the option of return.
Article 11
1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through **effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent** or in violation of their laws, traditions and customs."

Thus the property rights of people with disabilities and indigenous people are in principle protected by treaty in Australia, but thanks to the objections of communist countries in the period to 1966, in the middle of the Cold War, the property of other Australians is not!

Although the CPRD and DRIP provide for property right protections for people with disabilities and indigenous people, the status of Australia's compliance therewith is separate from ICCPR compliance.

8.3 Article 17 UDHR: Ratifying and Adopting as Domestic Law

The *Human Rights (Parliamentary Scrutiny) Act 2011* refers at s. 3(1) to "human rights" as "the rights and freedoms recognised or declared by" a number of international instruments, including *inter alia* the ICCPR, ICESCR, CPRD and DRIP, but not the UDHR. It also creates the PJCHR. Given, as noted previously, neither the ICCPR nor any of the other treaties (with the partial exception of Article 12(5) of the CPRD relating to people with disabilities) gives effect to Article 17 of the UDHR, it would seem clear that if the Commonwealth Government were to consider adopting Article 17 into domestic law (in relation to either just people without disabilities, or all people), the PJCHR would have no authority to enquire, and Members of Parliament would have no duty to comply by providing a "Statement of Compatibility".

Put in an acronym-free way: if the Commonwealth Government wished to ratify and bring into domestic law Article 17 of the *Universal Declaration of Human Rights*, even if only with respect to people without disabilities, the *Human Rights (Parliamentary Scrutiny) Act 2011* could not apply, as the law now stands, with the result that the Parliamentary Joint Committee on Human Rights would have no authority to enquire or otherwise act, and no Member would be required to provide a "Statement of Compatibility" with respect to any legislative instrument.

Article 17 of the UDHR is not currently a "human right" under this Act, so the purported application of the Act by the PJCHR with respect to Article 17 would be ultra vires. To remedy this, the Commonwealth might, if it wished, list it as a source of "human rights" in the Act. It could at the same time ratify Article 17 before adopting it as domestic law within the process of the Act.

There is another potentially relevant Parliamentary process - to facilitate the making and implementation of Australian treaties. However, as noted above, the UDHR is not a treaty. Having said that, the Resolution of Appointment Joint Standing Committee on Treaties ("JSCOT") includes "any question relating to a treaty or other international instrument", which should at face value include the UDHR.

The process is explained by "*About the Australian Treaties Library*" AustLII as follows.

"On 2 May 1996, the Australian Minister for Foreign Affairs, the Hon. Alexander Downer MP, and the Commonwealth Attorney-General, the Hon. Daryl Williams AM QC MP, announced reforms to facilitate the involvement of Parliament, the States and Territories, industry, non-government organisations, and the wider community in the making and implementation of Australian treaties. The effectiveness of the reforms, in promoting consultation and transparency in treaty-making, is currently under review.
The Government decided to: allow more opportunity for Parliamentary scrutiny before final action to undertake international legal obligations; provide National Interest Analyses with all treaty actions being tabled for Parliamentary consideration; establish a Joint Standing Committee on Treaties in the Commonwealth Parliament; establish a Commonwealth-State Treaties Council as an adjunct to the Council of Australian Governments; and make treaties more generally accessible, through construction of an Internet database - this Treaties Library.

I. *Tabling of Treaties*
All treaties (and related actions, including amendments to and withdrawal from treaties) are tabled in Parliament for at least fifteen sitting days in both Houses before the Government takes binding action (with special procedures for instances of exceptional urgency). In most cases, this means that treaties are tabled for consideration after signature but before the final step (e.g. ratification or confirmatory exchange of notes) to bind Australia under international law.

II. *National Interest Analyses*
Each treaty is tabled with a National Interest Analysis (NIA). The NIA gives reasons why Australia should become a party to the treaty. Where relevant, the NIA contains a discussion of economic, environmental, social, and cultural effects. Important elements are a description of the consultation undertaken during the treaty-making process, and a certification that arrangements for domestic implementation (e.g. legislation, regulations) are or will be in place before entry into force.

III. *Joint Standing Committee on Treaties*
The Joint Standing Committee ['JSCOT']was first formed on 17 June 1996. The Committee considers tabled treaties and NIAs, and other questions relating to international instruments that are referred to it by either House of Parliament or a Minister. The Committee conducts inquiries, including public hearings, and reports to Parliament, normally within the period of fifteen sitting days.

IV. *Treaties Council*
The Treaties Council, agreed upon by the Council of Australian Governments on 14 June 1996, consists of the Prime Minister and all the State Premiers and Chief Ministers of the Territories, and has an advisory function. It is co-ordinated by the officials-level Commonwealth-State Standing Committee on Treaties. The Council's inaugural meeting was held in November 1997."

8.4 Article 17 UDHR: Let's Practise What We Preach

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....."

The "*Human Rights Manual*" (at 15) asserts: "Australia considers all human rights to be universal. The *UN Charter* expressly recognises that human rights are universal in

application and the *UDHR* is premised on this same view (see in particular article 2), as are the later Covenants."

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

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v. 1.5.2