Submission No 30

INQUIRY INTO ACQUISITION OF LAND IN RELATION TO MAJOR TRANSPORT PROJECTS

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INQUIRY into the acquisition of land in relation to major transport projects:
SUBMISSION to the Portfolio Committee No. 6 – Transport and Customer Service

Real Property Rights – and Wrongs

By Peter Ingall

Illustration: Sturt Krygsman

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PART I

Crown Grant Derogation & Legislative Invalidity

[1.0] Terms of Reference

The scope of this Submission falls within the Terms of Reference of the Inquiry which, without repeating those Terms in full here, include particular reference to "…the Russell and Pratt Reviews…the acquisition of land….community concerns about current government process…the extent to which acquisition processes are fair, unbiased and equitable… whether government should capture uplift in relevant land and property values …and any related matters".

Thus, please note these observations…..

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

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

> **"COMPULSORY LAND ACQUISITIONS**
> **The Hon. MARK BANASIAK (12:37**:36**):** My question without notice is directed to the Minister for Mental Health, Regional Youth and Women, representing the Minister for Planning and Public Spaces. Is the Minister aware that under proposed precinct plans for the aerotropolis, residents who live along Thompsons Creek have been given certainty that their land will be acquired, but residents who live along Wianamatta-South Creek on the same street have been given no such certainty despite the land already zoned RE1 Public Recreation and rendered unusable and unsaleable? Is the Minister also aware that that contradicts both a promise made by former planning Minister Anthony Roberts and Transport for NSW policies for handling compulsory acquisitions? Why is the Minister's department not treating all members of the area with fairness and respect, and why is her department acting in a contradictory matter?
> **"The Hon. BRONNIE TAYLOR (Minister for Mental Health, Regional Youth and Women) (12:38**:30**):** I thank the honourable member for his question, which is directed to the Hon. Rob Stokes, Minister for Planning and Public Spaces. As the question contained a large amount of detail I will take it on notice and provide an answer to him as soon as possible." (*Hansard* New South Wales Legislative Council, 24 November 2020.)

Reportedly, in extra-Parliamentary commentary, Mr Mark Latham MLC and Ms Jodi McKay MLA have each separately referred to the situation as "legalised theft", as has Mr Greg

Warren MLA in Parliament. (Apologies for omitting any other MPs who've been making the same point.)
The dissatisfaction arises from the injurious affection imposed by the Government on the landowners' properties, accompanied by a refusal to acquire the affected land. It appears that just in the Wiannamatta-South Creek area of the Western Sydney Aerotropolis and the Western Parkland City, approximately 200 landowners (almost all with 5 acre lots) have had some or all of their land rezoned by the New South Wales Government ("NSW") from "RU4 Rural Small Holdings", intended for land which is to be used for small scale rural and primary industry production, to a newly invented "Environment and Recreation" zone. The prior value of a typical 5 acre block approximated $5m, but since rezoning, no "sterilised" land has been sold because no buyer wants the uncertainty associated with the newly imposed restricted use.

All land is evidently held by freehold title, which is a form of common law title. The zoning and governing legislation does not purport to be a defeasement within the terms of any existing reservation to the granted title. There is no time limit to the rezonings, which could in principle last for a lifetime, at the exclusive discretion of NSW.

No doubt the Committee will receive submissions from aggrieved landowners verifying the nature and scope of these circumstances. It is not the purpose of this submission to detail or duplicate the particular claims of all the landholders in this regard, but rather to proceed on the basis of the above general circumstances, in an attempt to clarify for the Committee what is materially happening at law, to facilitate your decision making. Having said that, the speech of landowner Maria Zucco, reproduced below is very pertinent.

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

Part II of this Submission, falls within a further, particular aspect the Terms of Reference of the Inquiry, specifically Term 1(b)(xii), i.e.:

> "whether, and what legislative or other measures should be taken by the government to capture the uplift in land/property value created as a result of such transport projects".

[2.0] The Russell Review & the Fundamental Fallacy

Committee members would be aware of the *Review of the Land Acquisition (Just Terms Compensation) Act 1991* by Mr David J. Russell SC (February 2014) (the Russell Review).

The first term of reference of the Russell Review (at 6) was to "define and clarify what real property rights or interests in real property are".

With respect, the Review's analysis pursuant to the "real property" term of reference might be described as very scant.

Under the heading "Real Property Rights or Interests" (at 23), the Review simply turns to the definition in the *Land Acquisition Act*:

> "Section 4 of the Land Acquisition Act provides that *"land"* includes any interest in land. Section 4 also provides that *"interest"* in land means:
>
> *'(a) a legal or equitable estate or interest in the land,*
>
> *(b) an easement, right, charge, power or privilege over, or in connection with the land.'"*

A further comment was simply that: "Very few submissions received touched upon this first term of reference. It would seem that most acquisitions of land throw up no problems in understanding the meaning of the terms *'land'* or *'interest'* in land".

Although the term "resumption" is used a number of times in the Review, being a term long associated with real property, no attention is paid at all to why such a term is used, or these days, increasingly unused.

In contrast, to take an example, the textbook by Richard Edgar Kemp, *Principles of the Law of Real Property in New South Wales*, Law Book Co. (1903) contains 600 pages or so on the topic.

The lack of insight by the Review into "real property rights or interests in real property" led to the adoption of a set of three fallacies, which in combination, constituted a *Fundamental Fallacy*, which has permitted an ongoing rule of "no-law" for many landowners in NSW.

The three fallacies are:

1. That s.51(xxxi) of the Australian Constitution is in any way relevant to the real property rights of landholders in NSW, when in law it is simply an irrelevant distraction (except where the Commonwealth itself makes an acquisition);

2. Mistaking a "Constitution Act" for "*the* constitution", when "*the* constitution" is, at law, much more than a single Act; and

3. Misunderstanding "real property" usage rights in NSW so as to exclude those usages which might purportedly be regulated without acquiring title.

This unhappy trio of fallacies caused the Review to adopt what might be called the *Fundamental Fallacy*, namely the conclusion that State Parliaments "have no constitutional obligation to provide any compensation whatsoever for such compulsory acquisition" - and, *a fortiori*, no constitutional obligation to provide any compensation whatsoever for injurious affection sustained by legislative impairment.

The substance of each fallacy shall be progressively revealed below.

With regard to "acquisition on just terms", the Review (at 14) correctly observes:

> "The Commonwealth Constitution empowers the Federal Parliament to make laws with respect to "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has powers to make laws". [S51 (xxxi) of the Commonwealth of Australia Constitution Act]…"

The Report continues:

> "…By contrast with the Federal Parliament, the State Parliaments have no constitutional restriction in relation to acquisition of land and have no constitutional obligation to provide any compensation whatsoever for such compulsory acquisition.

> The constitutions of the various States have no equivalent of Section 51(xxxi) of the Commonwealth Constitution. Each State Parliament may enact legislation to compulsorily acquire land with or without the payment of compensation or with reduced compensation. [Commonwealth v New South Wales (1915) 20 CLR 54]."

It is also correct that NSW and other State Parliaments have no constitutional restriction in relation to acquisition of land which is *identical* to s. 51(xxxi).

However, it is at this point that the Review adopts what might be called the *Fundamental Fallacy*, namely the aforementioned conclusion that State Parliaments "have no constitutional obligation to provide any compensation whatsoever for such compulsory acquisition".

[2.1] Judicial Authority Misinterpreted

The only judicial authority cited for this conclusion by the Russell Review is taken from a typical property law textbook, which might be expected to reflect the conventional legal understanding on the subject. The case cited is *Commonwealth v New South Wales* (1915) 20 CLR 54. Yet this is a case about *chattels* – namely wheat – not "real property". Wheat, like cars, handbags and melons, for example, is a *chattel personal*. It is not even a *chattel real*, such as a leasehold interest, much less "real property" as epitomised by an estate in fee simple (i.e. freehold tenure). Indeed, the High Court case cited is popularly referred to in superior court judgments as "the *Wheat Case*".

It is evident at this point that, in adopting a textbook opinion, the Russell Review completely overlooked the common law of tenure, a fundamental and catastrophic omission in any analysis of "what real property rights or interests in real property are".

In the *Wheat case*, the High Court was mainly focused on issues relating to the nature of judicial power, and of "absolutely free" trade between States under the new Federation, which issues are not particularly relevant to your Committee's Terms of Reference. It also had to address the constitutional power of the State of NSW with respect to wheat (a chattel). Accordingly, it was not material for the Court to specifically examine and rule on the constitutional powers of the State with respect to *real property*.

This explains why in the High Court:

1. Isaacs J. on one hand, could refer to two judgments of the Privy Council delivered by Lord Watson with respect to other issues raised in appeals from Canadian court decisions[1], but -

2. on the other hand, all six sitting members of the Court could completely ignore the Privy Council's judgment in *Cooper v Stuart*[2], where the very same Lord Watson detailed fundamental aspects of the nature and role of Crown grants of title in real property law in NSW. (Indeed, it also ignored a significant body of case law of the Supreme Court of NSW which was consistent with *Cooper v Stuart*[3].) This omission was completely logical because the law of real property in NSW was not at issue in a case concerning chattels.

However, Barton J.[4] did provide a relevant observation:

> "I am clearly of opinion that in respect of property real or personal, the power of the Parliament to **assume or resume** that 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." (Bold emphasis added.)

To "assume" property clearly refers to the acquisition of ownership by expropriation, that is, to compulsorily acquire property without an obligation for making any, or "sufficient", compensation.

To "resume" property on the other hand, suggests the taking back of something which had previously been granted by the Crown in right of NSW. Unlike the chattel wheat, which had been created by a farmer and perhaps been sold by contract to a dealer, so that the Crown had no necessary direct involvement in its creation or ownership, a Crown grant of freehold or leasehold (i.e., real property) is a creation of the Crown itself, which is given meaning by the common law (the judiciary).

One fundamental rule of this common law - the law of tenure - is that to be valid, a resumption can be neither a repudiation of, nor (being the same thing) a derogation from, the grant. Barton J. did not state that Parliament could "assume or repudiate". None of the judges in the *Wheat Case* held that the Crown, in resuming property, could validly repudiate or derogate from its grant, and neither has any subsequent High Court case, including *Durham Holdings v New South Wales*[5], which reaffirmed the general reasoning in the *Wheat Case*, and the consistent findings of other High Court judgments in the intervening period.

[2.2] Legislative Context Ignored

For legislation enacted in NSW to be validly enforceable, it must firstly be passed by both Houses of Parliament in the usual, constitutionally required, manner and also receive formal assent by the Governor.

Any such legislation is, *prima facie*, valid and enforceable. Yet, to conclude therefore that it is necessarily valid in all circumstances is too hasty, because any such legislation must be read in the context of what might be called the "general law": which is to say, in the context of other legislation and the common law. This applies to the *Environmental Planning & Assessment Act* 1979 (NSW) (*EP&A Act*) as much as it does as to any other Act: this Act does not float in some kind of unique cloud of immunity.

The power of the Crown in right of NSW to limit its own powers is a fundamental aspect of its sovereignty: once so limited, the State cannot subsequently and simply repudiate the limitation, because that would of itself be a denial of its ability to limit its own power. To explain this, we might consider some hypothetical examples of legislation which might be passed by the NSW Parliament:

1. abolition of the Legislative Council; and

2. abolition of the application of s. 109 of the Australian Constitution in NSW.

Taking the first example, suppose for some reason that members of both Legislative Houses, the Assembly and the Council, decided that the Upper House was no longer required and passed legislation in the ordinary way, to abolish it. Being assented to by the Governor, the legislation would, *prima facie*, achieve its objective of abolition. This is, after all, what happened in the State of Queensland in 1926, and to this day its Parliament remains unicameral, having no Upper House. [6]

To this hypothetical situation, the reader might immediately object that, notwithstanding that such NSW legislation, taken at face value, might appear valid, on application to a court it would quickly be declared invalid *ab initio* because it failed to comply with legislation previously passed by the NSW Parliament, which the Parliament cannot simply repudiate. Thus:

> "….in *Trethowan's* Case (1931) 44 CLR 394, [the High Court considered the] doubly entrenched manner and form provision [in] s.7A of the *Constitution Act* 1902 (NSW) which provided that the Legislative Council could not be abolished nor could its constitution or powers be altered except by a bill which was passed by both Houses and approved by the electors at a referendum. Both the High Court and the Privy Council upheld the validity of s.7A and its binding effect." [7]

Taking the second example, suppose that the NSW Parliament found s. 109 of the Australian Constitution tiresome and wished to abolish it. Perhaps NSW wished to set up its own system of lighthouses, painted green, whereas the Commonwealth, using its constitutional power

under s. 51(vii) with respect to lighthouses, has legislated that they must be painted white. The section provides:

> **"109. Inconsistency of laws** When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

So, suppose that the NSW Parliament had passed legislation in the ordinary way, to the effect that: lighthouses must be green; and to ensure that the Commonwealth's vans of white paint were prohibited, that s. 109 was to be abolished in its application to NSW. Being assented to by the Governor, the legislation would, *prima facie*, achieve its objective of abolition of white lighthouses and Commonwealth "interference".

To this hypothetical situation, the reader might immediately object that, as per the statement by Barton J. in the *Wheat Case*, "the power of any State of the Commonwealth must be exercised subject to the Federal Constitution".[8] Consequently, notwithstanding that such NSW legislation, taken at face value, might appear valid, it would quickly be declared invalid *ab initio* on application to a court because it failed to comply with the process for amending the Australian Constitution as provided in s. 128. This process essentially requires the conduct of a national referendum where a majority of electors vote in favour of the change and in addition, there must be a majority "yes" vote in a majority of States, that is, in four out of the six States.

At the time of federation in 1901, NSW ceded some powers to the Commonwealth, and simply passing legislation will not get any of it back.

These hypothetical examples demonstrate how the validity of any state legislation must be determined from the wider legal context, and also that NSW can deprive itself of powers, in such a way that it cannot get them back simply by passing legislation.

This is precisely the situation with respect to Crown grants and the alienation of title by Crown grant. NSW legislation which, on its face, may appear to be entirely valid can be rendered unenforceable where it is repugnant to a Crown grant, as explained at **[4.0]**.

[2.3] Implications of Misinterpreting Judicial Authority and Legislative Validity

So, considering the misinterpretation of judicial authorities and the ignoring of legislative context, their key implication with respect to the Russell Review is that by following a textbook, it has significantly and substantially misled the government of the day, and indeed

all Parliamentarians, with substantial adverse implications for landholders in NSW, including those in the vicinity of the Aerotropolis.

In this context, the Review (at 7) noted:

> "Many…submissions concerned Government action that restricted the use of land without actual acquisition of the land".

This observation in fact corroborated the insight made in the NSW Bar Association's Review Submission[9]:

> "...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'".

Indeed, former High Court judge Ian Callinan AC has observed, *inter alia*:

> "… the major new legal issue of the coming years….I see the cost, and who should bear it, of environmental, town planning and heritage measures as the most likely candidate….
>
> Land owners are precluded from unlocking the financial potential of their property. Rarely are they given any right to compensation….
>
> The reluctance of governments to provide for compensation, is *a matter that urgently needs addressing*….
>
> 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 *a real challenge to the legislatures and the courts, including the High Court as the constitutional court* for 2008 and beyond." [10] (Emphases added.)

No one has paid any attention to Callinan's observations since 2008. Courts themselves are not in a position to "invite" cases to be put - this sort of comment by a retired High Court judge is the closest thing to that – so the initiative has to come from elsewhere.

However, it is clear that his general concerns were supported by the NSW Bar Association in their Review submission, by the "many" submissions received by the Review, by the Parliamentarians quoted above at **[1.0]**, and currently, by numerous landowners in the vicinity of the Aerotropolis.

Clearly, there is a problem. The Review (at 7) reports:

> "Clarification was sought from the Government as to whether such issues fell within the Terms of Reference of the Review.
>
> The Government advised that the Review would not be considering native vegetation legislation, planning matters, aboriginal land claims, coal seam gas and other mining issues. That direction has been observed….."

Accordingly, the Review ignored the submission of the NSW Bar Association, along with all other submissions relating to Government restrictions on the use of land.

It would seem logical to deduce that consideration of these issues was not politically attractive to the Government, but the desultory analysis of "real property rights or interests in real property" by the Review caused it (and to that extent, the Government) to fail to understand the legal merit of potential claims for compensation in relation to such matters. The opportunity for development of a framework for a "crafting of a means of ensuring a fair and equitable sharing of this" as Callinan[11] has put it, was wasted.

If the topic "urgently" needed addressing in 2008, the urgency is greater now. So, what is to be done? The first step is to properly understand what "real property rights or interests in real property" actually are, with further reference to their constitutional significance.

Let's do that now, by examining:

1. "acquisition" v mere "deprivation" at **[3.0]**;
2. the law of tenure in NSW at **[4.0]***ff*;
3. the potential relevance of the Australian Constitution (other than s. 51(xxxi)) at **[5.0]**, **[6.0]** and **[10.0]**; and
4. the relevant constitutional obligations of NSW at **[5.0]***ff*.

[3.0] Property "Acquisition" v "Deprivation"

In order to understand the nature of "real property rights or interests in real property" in relation to powers of the Government, it is first necessary to understand the distinction between "acquisition" and mere "deprivation".

"Injurious affection" is an expression which is associated with the law of resumption: it is primarily concerned with depreciation to the value of retained land. It can be caused by a public authority in a variety of situations, one of which is, as in the subject instance, by the exercise of a law, rule or regulation, e.g. rezoning. Thus, a landowner's property can be said to be injuriously affected. Injurious affection is a form of deprivation of property, and a government may make provision for compensation for same.[12]

As noted above, it is well known that s. 51(xxxi) of the Australian Constitution obliges the Commonwealth to make "acquisitions" of property on "just terms". It is also well established that this obligation does not extend to the States, and that the States have no identical constitutional provision binding them in the same way.

The High Court of Australia has pointed out that "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. The scope of the term "acquisition" was explained as follows by Deane and Gaudron JJ in *Mutual Pools & Staff Pty Ltd v The Commonwealth*[13]:

> '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…"

The subject landowners who have had their land adversely rezoned are in the position of having been "deprived" of property rights (notwithstanding their continued ownership of title), while NSW has not "acquired" anything: thus for example, it has no new property right that it can trade with anyone. The potential benefit to the public of preventing private landholders from using their land other than to facilitate, say, recreation, is not a new property right "acquired" by NSW.

Contrast the example where a landowner grants an easement over a portion of his land: typically, there is a payment, for an agreed market value, made to the landowner and the new easement is noted on the title. Clearly, there has been an acquisition.

Note also that an essential aspect of "deprivation" in this context is the State's refusal to acquire the property right, either by resumption of the property *in toto*, or by acquiring the adverse restriction for fair (or indeed any) value.

It is of fundamental importance in appreciating the predicament of adversely affected landowners, to understand this distinction between acquisition and mere deprivation of

property. By adversely rezoning properties, NSW sees itself to be freed from any obligation of compensation, which compulsory acquisition laws would mandate with regard to acquisition, because there is no acquisition – only deprivation.

[4.0] The Law of Tenure in NSW

This topic is examined in much greater detail in *Arguments for Property Rights in Australia*[14].

The law of tenure in NSW (and Australia), commenced with the then secret Letter of Instruction of 20 April 1787, composed by Lord Sydney and issued by King George III, on the advice of his Privy Council, to Governor Phillip which, *inter alia*, granted Phillip the power to issue Crown grants of freehold and leasehold. Here is a relevant extract from the Letter:

> "….granted unto you other acknowledgements whatsoever full power and authority to emancipate and discharge from their Servitude, any of the Convicts under your superindendance (*sic*), who shall from their good conduct and a disposition to Industry, be deserving of favor; It is our Will and Pleasure that in every such case you do issue your Warrant to the Surveyor of Lands to make surveys of, and mark out in Lots such Lands upon the said Territory as may be necessary for their use; and when that shall be done, that you do pass Grants thereof with all convenient speed to any of the said Convicts so emancipated, in such proportions, and under such conditions and acknowledgements, as shall hereafter be specified . Viz To every Male shall be granted, 30 Acres of land, and in case he shall be married, 20 Acres more, and for every child who may be with them at the Settlement, at the time of making the said Grant, a further quantity of 10 Acres, free of all Fees, Taxes, Quit Rents, or, for the [DOCUMENT TWENTIETH PAGE ENDS HERE] space of Ten years, provided that the person to whom the said Land shall be been granted, shall reside within the same, and proceed to the cultivation and improvement thereof. Reserving only to us such Timber as may be growing, or to grow hereafter, upon the said Land, which may be fit for Naval purposes, and an annual Quit Rent of Bushel of wheat after the expiration of the term or time before mentioned. You will cause Copies of such Grants as may be passed to be preserved, and make a regular return of the said Grants to the Commissioners of Our Treasury and the Lords of the Committee of Our Privy Council for Trade and Plantations.
> And Whereas it is likely to happen that the Convicts, who may, after their Emancipation, in consequence of this Instruction, be put in possession of Lands, will not have the means of proceedings to their Cultivation without the Public Aid; it is Our Will and Pleasure that you do cause every such person you may so emancipate, to be supplied with such a Quantity of Provisions as may be sufficient, for the subsistence of himself and also of this family for twelve months, together with an [DOCUMENT TWENTY FIRST PAGE ENDS HERE]

> assortment of Tools and Utensils, and such a proportion of Seed Grain, Cattle, Sheep, Hogs etc as may be proper, and can be spared from the general stock of the Settlement.
> And Whereas many of Our subjects, employed upon Military service, at the said Settlement, and others who may resort thither upon their private occupations, may hereafter be desirous of proceedings to the cultivation and Improvement of the Land, and as we are dispersed to afford them every reasonable Encouragement in such an undertaking; It is Our Will and Pleasure that you do with all convenient speed transmit a report of the actual state and Quality of the Soil at and near the said intended Settlement, the probable and most effectual means of Improving and Cultivating the same and in what manner it can best be done and of the mode and upon what terms and conditions according to the best of your Judgements the said Lands should be granted, that proper Instructions and authorities may be given to you for that purpose."

The legal nature of Crown grants is not stated in any detail at all - that is to be found in the Governor's implementation of the power and in the related common law.

Consistent with the Letter of Instruction, the first Crown grant (of freehold title) was made to transported convict James Ruse, for an area of 30 acres at Parramatta, not very far from the Aerotropolis. A copy of another Crown grant, issued by Governor Macquarie in 1816 for an area in the vicinity of the Aerotropolis and Western Parkland City, namely 1,500 acres at Bringelly, is attached, and explained at **[8.0]**.

Referring to "common law" title (as opposed to native title, which is not created by grant), Dr Fry observed:

> "No proprietary right in respect of any Australian land is now, or ever was, held, by any private individual except as the result of a Crown grant, lease, or licence and upon such conditions and for such periods as the Crown (either of its own motion or at the discretion of Parliament) is or was prepared to concede....." [15].

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 (i.e., proprietary) rights at any time.[16] This power is exercised by the Executive Government - typically the case, initially, in the form of the Governor by executive *fiat* – eg., Governor Phillip in New South Wales - and once established, the Legislature. These days, the planning minister, the Premier and other ministers, government authorities and planning bureaucrats, all represent "the Crown", together with the State Governor who acts on the advice of the Government. It follows that where, for instance, the minister causes injurious affection to land by adverse rezoning, then that act has been done by the Crown.

Crown grants in NSW have all been made by the Crown in right of the State (formerly Colony), so the right of resumption rests exclusively with the State. The Crown in right of the

Commonwealth has never had the constitutional power to issue Crown grants in NSW, and so has no right or power of resumption. Accordingly, only NSW has the power to compulsorily acquire granted estates in NSW.

Although the Crown is sovereign and can resume a grant at any time, it cannot derogate from (i.e., repudiate) the grant. It is a fundamental common law rule that a grantor cannot derogate from his own grant, and that includes the Crown as stated by the Supreme Court of NSW[17]:

> **"...**the Crown cannot derogate from its own grant".

Compare also this famous observation:

> "A grantor having given a thing with one hand is not to take away the means of enjoying it with the other".[18]

By using the mechanism of the grant as the basis for the law of tenure in NSW, the Crown has effectively denied itself the power to act arbitrarily to repudiate the terms of the grant. This is the essence of "alienation" of title which is fundamental to the Crown grant, and such alienation is virtually complete in the case of grants of freehold title. Thus, for example:

> The "most valuable incident" of an estate in fee simple (i.e. freehold) "is one that is now inseparable from it, *the unfettered right of alienation,* and along with this is the *right of free enjoyment."* [19]

The alienation of freehold title from the Crown is so complete, that it has been found by the High Court to extinguish native title.[20]

Thus also, according to the High Court[21]:

> "..An estate in fee simple is, 'for almost all practical purposes, the equivalent of full ownership of the land' and confers 'the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination.' It simply does not permit of the enjoyment by anyone else of any right or interest in respect of the land unless conferred by statute, by the owner of the fee simple or by a predecessor in title."

Note also Brennan J.'s *Mabo (No. 2) Case*[22] judgment:

> "As the Crown is not competent to derogate from a grant once made(137), a statute which confers a power on the Crown will be presumed (so far as consistent with the purpose for which the power is conferred) to stop short of authorizing any impairment of an interest in land granted by the Crown or dependent on a Crown grant."

The unfettered right of alienation, which permits every act of ownership which can enter the imagination, does not simply fade away with time. In *Cooper v Stuart*[23], the Privy Council

found that the common law rule against perpetuities was inapplicable to Crown grants of land in New South Wales, or to reservations or defeasances in such grants. That is, the legal force of a Crown grant does not come to an end at a particular point: it continues in perpetuity while the Crown exists, unless the Crown chooses to entirely resume the grant and subsequently cancel it.

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

> "Security in the right to own property carries immunity from arbitrary deprivation of the property....." [24]

The word "arbitrarily" has been interpreted by the High Court to mean not only "illegally" but also "unjustly" [25]

> "....In the development of the international law of human rights, rights of that kind have long been recognised. Thus, the Universal Declaration of Human Rights 1948, Art 17 included the following: '1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property.' (The word 'arbitrarily' has been interpreted to mean not only 'illegally' but also 'unjustly': see Meron (ed), Human Rights in International Law: Legal and Policy Issues (1984), vol 1, p 122, fn 40.)"

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 *Universal Declaration of Human Rights* (examined at **[6.0]**) 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 over 150 years.

[4.1] Resumption

The principal land acquisition statutes in Australia are listed by MS Jacobs[26]. 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, initially enacted over a century ago when "zoning" was not even imagined, relate to the compulsory resumption of land *in toto*, so as a consequence, "resumption" these days is ordinarily understood to be an acquisition (or, more correctly re-acquisition) of the freehold (or leasehold) title, whereas "resumption" is, by the nature of Crown grants and the immense variety of acts of ownership they permit, 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 word 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 of an entitlement of the title holder to compensation or rectification. Logically, this would also invalidate any statute of limitations purporting to apply to claims relating to derogations of Crown grants of title.

[4.2] Common Law v Legislation

None of the cases relating to Crown grants of title (examined more extensively in *Arguments for Property Rights in Australia*[26]*)* 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 and other land use legislation on the other. Courts have not been presented with this line of argument by legal practitioners, and consequently have not had the opportunity to follow, or reaffirm, existing precedent.

It is into this jurisprudential void that legal practitioners and property law textbook authors, as exemplified by the Russell Review, have fallen.

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: 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 for the proprietor.

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 were to have that latter power, i.e., to effectively legislate *ex post facto* to be able to resume without compensation, 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. Put another way, it would mean that the Crown does not have the power to alienate title as understood by the common law since settlement.

Thus, if the latter case were to hold, namely where the Crown did have that power, to retrospectively legislate to be able to resume, in part or whole, 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 reservations to grants, which are intended to permit resumption by defeasement without compensation.

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. Dr Fry's "tenure by a Crown grant of freehold" would in effect be little more than a licence at the will of the Crown.

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. No court has done so.

In fact, this question is easily resolved by noting the instances in which NSW has denied or limited its own ability to change laws, as demonstrated above (at **[2.2]**), with respect to the use of double entrenchment and adoption of s. 109 in the context of the Australian Constitution.

The end result of unchallenged planning legislation might aptly be described as the "Rule of No-Law".[28] 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".

The consternation of affected landowners, who have been effectively abandoned by legal practitioners generally, in lawfully defending their interests in real property - including as an example, the Russell Review - is entirely understandable, and justified.

[5.0] The Unconstitutionality of Crown Grant Repugnance

There is a prevailing tendency to assume that a "Constitution Act" *is* the constitution. Such a view is an oversimplification, and wrong in law.

The abovementioned observation of the Russell Review that "The constitutions of the various States have no equivalent of Section 51(xxxi) of the Commonwealth Constitution" and the Review's resulting inference that State Parliaments therefore "have no constitutional obligation to provide any compensation whatsoever for such compulsory acquisition" may be taken as an example of this. The Review's inference is pre-emptive, by concluding that because there is no such provision in the *Constitution Act* NSW (1902), then there can be no other constitutional limitation on the power of the Crown to be found elsewhere.

Indeed, the parliament.nsw.gov.au website exhibits the same fallacy of oversimplification: "….The NSW Constitution is an Act of Parliament introduced in 1902….."

No, the NSW Constitution is much more than that Act. So, what is a constitution exactly?

In answering that question, the first impulse is to look for a Constitution Act, but if there is one, it is just part of the answer. Bearing in mind that the Constitution of the United Kingdom of Great Britain and Northern Ireland is indeed "unwritten", it follows that the "constitution" may be found in many places. In this context, Twomey[29] makes a number of observations, among which include:

> "A Constitution generally establishes the institutions of government, confers powers upon them, and imposes limits on those powers. While the first real 'Constitution' for New South Wales came into force in 1855, earlier Acts of the Imperial Parliament and letters patent established the institutions of government and conferred limited powers upon them."

The High Court has provided guidance as to what actually constitutes a State Constitution, as for example per Brennan CJ[30]:

> "The Constitution of a State at any time must be ascertained by reference to
>
> (i) its Constitution as at Federation;
>
> (ii) the overriding effect of the provisions of the Commonwealth of Australia Constitution Act and the Commonwealth Constitution;

(iii) the modifications of the State Constitution that have been made either by Imperial legislation or State legislation provided, in the case of State legislation, it has been made in accordance with any relevant manner and form provisions of the particular State Constitution; and

(iv) the Australia Act 1986."

More generally, as Twomey[31] points out:

> "As Isaacs and Rich JJ noted in *McCawley v The King*, 'the Constitution of a colony….may be looked for wherever any provision is made for the Constitution of any of its great organs of legislation, judicature, or executive power'. [*McCawley v The King*, (1918) 26 CLR 9, per Isaacs and Rich JJ at 52….] It includes other legislation….and the common law [(1999) 46 NSWLR 563, per Spigelman CJ at 566.]"

A random example of such "other legislation" would be the Offshore Constitutional Settlement ("OCS") of 1983 where the Commonwealth surrendered to the states jurisdiction over the sea and seabed within three miles of the baselines of the territorial sea. This allowed the states to maintain the traditional control they had enjoyed over the territorial sea prior to the *Seas and Submerged Lands Act*, without the necessity of altering state boundaries. [32]

State jurisdiction over the sea and seabed of the territorial sea to a distance of three miles must be considered to be constitutional in nature, but there is no trace of this augmentation of sovereignty in the *Constitution Act* NSW (1902), and nor need there be.

The point of this line of argument is that, notwithstanding its absence in the *Constitution Act* NSW (1902), the power of the Crown in right of NSW to grant estates in land is essentially constitutional in character, deriving originally from the abovementioned Letter of Instruction, which constitutes a foundational document for the Colony/State of NSW.

This power was substantially unaffected by federation in 1901, when NSW ceased to be a colony, and became a State of Australia. Thus in 1915, Griffith C.J. said in the *Wheat Case*[33]: "The title to property is governed by State law…".

Note also ss. 106 and 107 of the Australian Constitution:

> **"106**. The **Constitution** of each State of the Commonwealth shall, subject to this **Constitution**, continue as at the establishment of the Commonwealth, ……until altered in accordance with the **Constitution** of the State.

> **107.** Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this **Constitution** exclusively vested in the Parliament of the **Commonwealth** or withdrawn from the Parliament of the State, continue as at the establishment of the **Commonwealth…."**

Because the legal character of Crown grants of title, including the associated common law, is properly considered as being part of the constitution of NSW, legislation repugnant to a Crown grant must be in its nature unconstitutional, to the extent of the repugnancy.

This would be an additional, *a fortiori*, reason for courts to deny the enforceability of State legislation, being so repugnant.

Thus, the conclusion of the Russell Review that State Parliaments "have no constitutional obligation to provide any compensation whatsoever for such compulsory acquisition" must be wrong in law, and its failure to look beyond the operation of the *Constitution Act* NSW (1902) is another reason for the adoption of the *Fundamental Fallacy*.

[6.0] Breaching of Human Rights

The subject landowners' human rights are being breached by the NSW Government.

How so?

The *Universal Declaration of Human Rights* ("UDHR") provides:

> ***"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."*

The uncompensated injurious affection caused by imposition of recreation and environmental zoning, which impairs landowners' ability to use their land held under freehold title (or indeed leasehold title) is an arbitrary deprivation of property rights in breach of Art. 17(2).

The refusal of NSW to provide compensation for such deprivation, or to acquire the land at pre-zoning market value, is by its very nature arbitrary, as well as a deprivation.

The UHDR, including Article 17, was adopted by the UN in 1948 when the President of the UN General Assembly was Australia's "Doc" Evatt, who had a hand in its drafting.
The UHDR has enjoyed bipartisan (i.e., by Labor and the Coalition) support at the Commonwealth level for the whole eight decades since 1948.

For example, Julie Bishop, a recent foreign minister, took this view in the 2017 *Human Rights Manual*[34]:

> "*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....*"

So it seems that everyone in the world should enjoy the Article 17 right-not-to-be-arbitrarily deprived of their property, except for NSW landowners? What rot.

It gets even more ridiculous: given that native title holders, by the Commonwealth's adoption of Art. 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (the "Discrimination Convention") scheduled to the *Racial Discrimination Act* (Com.), have the protection of this human right in law, there is effectively a discrimination against common law title holders (of any race) as compared to native title holders. To use, for example, the words of Deane J. in *Western Australia v Commonwealth (Native Title Act Case)* [35]:

> "the moral entitlement to own property alone as well as in association with others and the moral entitlement to inherit which are referred to in Art 5 of the International Convention are "rights" for the purpose of the guarantee against racial discrimination contained in s 10 of the *Commonwealth Act*. Implicit in those moral entitlements is the "right" to enjoy immunity from being "arbitrarily dispossessed of [one's] property" which is expressly recognised by Art 17(2) of the Universal Declaration of Human Rights 1948."

The Commonwealth has also adopted the *Convention on the Rights of Persons with Disabilities* ("CPRD") into domestic law at a Commonwealth level by its inclusion in the *Human Rights (Parliamentary Scrutiny) Act 2011* s. 3(1)(g). Article 12(5) of the CPRD provides, in part: "…States Parties shall take all appropriate and effective measures to ensure…. that persons with disabilities are not arbitrarily deprived of their property".

Common law title holders in NSW do not have such protection, whether disabled or not.

Pointing out human rights breaches to NSW bureaucrats might cause those officers with a conscience to cringe, but they act simply to follow the directions of the minister under the *EP&A Act*, which itself, shockingly, contains absolutely no provision to have any regard for the human rights of landowners affected.

Uncompensated adverse rezoning is a human rights issue. NSW can make whatever environmental or other land use laws that it likes, but where it impairs the private property rights of landowners, it is their human right to receive compensation.

The rezonings are purportedly for the public benefit, so it is proper that the public should pay, rather than unlucky private landowners - and it must be asked: if the "public" doesn't want to pay for the planned public benefit, how much do they really want it?

[7.0] Brief History of the Development of Legislative Injustice in NSW

The County of Cumberland Planning Scheme Ordinance, which covered greater Sydney, including the area now occupied by the subject landowners in the vicinity of the Aerotropolis, came into effect after World War II. Here are some pertinent observations…

In 1967, Wilcox[36] observed:

> "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*....."

Wilcox[37] 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, 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[38] notes that compensation is provided for "in certain cases" (...Part XIIA....included Div. 9, which provided for payment of compensation), but then states:

> "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."* (Emphases added.)

Ashton & Freestone[39] 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'. 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."

At this stage, there was an opportunity for legal practitioners to step in and pursue remedies for affected landowners. Notwithstanding Wilcox's[40] observation that "Common sense and justice demand" that the "sacrifices" imposed on individuals should be compensated, nothing happened. This professional failure might be attributed to two main causes:

1. Individual owners were generally unknown to each other, geographically dispersed, and had no television, internet, mobile telephones, fax machines or social media and nor, quite often, no landlines, to facilitate co-operation and mutual support; and

2. There had never been any jurisprudential reconciliation between the new "imported" planning laws and the underlying law of tenure, which is unique to NSW (and the other Australian States). The resulting jurisprudential void blinded practitioners to the possibility of legal remedies arising from the State's legislative derogation from Crown grants of title, such derogation being in principle repugnant and so unenforceable.

Be that as it may, it seems that over the years, the protests faded in the face of bureaucratic inertia and political directionlessness, so that in the end, governments "got away with it". Subsequently, governance became more brazen.

Fricke QC[41] observed:

> "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."

Mr Paul Landa MLA, a minister in the Wran government, was an avid user of Interim Development Orders. The term "Interim" suggests a fixed period, but was indeed a misleading euphemism, because such orders were in fact indefinite, as Fricke QC indicates. It is not surprising that the *EP&A Act* (1979) entrenched this same philosophy. It does not require compensation to be made to adversely affected landowners, it does not aspire to Wilcox's "common sense and justice", has no regard for their human rights, offers no remedy for injurious affection, has no pretence to equity and conscionability, and no natural-justice-type right to a genuine fair hearing. Indeed, the situation might be described as what the jurist John Wickham described as The *'Rule of No - Law'* [42].

Thus, while the original County of Cumberland planning legislation had the good intention of providing for the compensation of injuriously affected land, any such intentions are now legislatively absent, paving the way to a sort of hell for the subject landowners today.

It should not surprise the reader that in fact, the subject landowners in the region of the Aerotropolis are not the first to have their lands injuriously affected and human rights ignored. It's been happening for decades.

Indeed, according to Gadens[43]:

> "The state government powers to downzone land are very broad. We suspect that there would be more outrage about the nature of these powers, but for the fact that, at any given point in time, only a small number of property owners are affected."

For numerous published examples of such problems experienced by individuals in NSW and other States, please visit: https://adverse-rezoning.info. [44]

Hence, political and ethical considerations, and possibly legal presumptions, caused NSW 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 judicial 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: with the Russell Review effectively constituting a punctuation mark to this sad sequence. Consequently, uncompensated injuriously affected landholders in the Aerotropolis vicinity find themselves in such a predicament.

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1500 Acres

see R. P. A. Vol 4437 Fol 53 app. 30160
see R. P. A. Vol. 4620 Fol 149–157 app 30253
App 30158 ...

Unto John Piper Esquire his Heirs and Assigns to have and to hold for ever, One thousand five hundred Acres of Land, lying and situate in the District of Bringelly – Bounded on the West side by a North line of Ninety eight chains bounding Fowlers Cooling Farm and part of Palmers farm. On the North by an East line of two hundred and twelve chains forty links, bounding ... and sixty eight chains forty links of Blaxlands Inderham farm – On the East by a South line of fifty nine chains fifty links to Mackworths farm bearing West, One hundred and thirty two chains and South thirty-eight chains fifty links thence by Eighty chains forty links of Birch's Grendale Farm bearing West. To be Called Bathurst Farm – Conditioned – Not to sell or alienate the same for the space of Five Years from the date hereof, And to Cultivate twenty five Acres within the said Period, And reserving to Government the right of making a Public Road through the same, And also reserving for the Use of the Crown such timber as may be deemed fit for Naval Purposes.. Quit Rent One Pound ten Shillings ..

In testimony &c this 20th day of June 1816.

Signed L. Macquarie (L.S.)

Witnessed by
~~H.C. Antill~~
Edw. Wollaston

Registered in the Secretary's Office 20. April 1817 – J. T. Campbell Secy

[8.0] Crown Grant of 1,500 Acres at Bringelly - Analysis

On the previous page is a copy of a Crown grant of an estate in fee simple (freehold), as supplied by NSW Land Registry Services. This one page handwritten document, and the common law which governs its interpretation, is the source of title for hundreds of landowners in Bringelly today. Without it, their registrations of title would be attached to nothing and accordingly be meaningless. The grant is reproduced herewith to provide an example of the operation of the law with respect to "real property rights or interests in real property" (to quote again the first term of reference of the Russell Review).

It's probably the case these days that most property owners have never even seen a copy of the original Crown grant from which their title is derived. The success of the operation of the Torrens title system since its introduction in NSW in 1862 has been so great that the typical purchaser has been satisfied to be noted on the certificate of title, without having to view the original grant. When a typical purchaser hands over his/her hard earned (or borrowed) purchase money, the main concerns are that: the purchaser obtains title, rather than someone else by mistake; and that title is obtained to the correct parcel of land. The Torrens system makes the conveyance of land simpler, cheaper and much more reliable than the "old system" where on every conveyance, a chain of proprietors back to the original grantee had to be correctly identified.

Yet, the source of title itself, whether it be freehold (an estate in fee simple) or leasehold is always the Crown grant.

> "The Real Property Act, *while not altering the law as to the estates or interests which may be acquired in land*, yet made a vast difference….in the manner in which those interests may be dealt with in the case of all land subject to its provisions."[45] (Emphasis added.)

In correspondence with NSW Land Registry Services (i.e., the titles office), your humble correspondent observed, on being advised that these days, the main source of interest in Crown grant records was not from solicitors, but from historical and family researchers:

> "I find it striking that solicitors generally take no interest in these Crown grants, which remain, at law, the foundation of all common law title in NSW. They are not simply historical documents: rather, from the hidden recesses of the land registry, they constantly emanate, silently and unseen, to all corners of the state, a foundational legal power which underpins the existence of land ownership: a bit like radioactivity, but with good effects instead. Their half-life is theoretically more durable than radioactive contamination because they are, according to the Privy Council, not subject to the legal rule against perpetuity: i.e., they can last forever."

NSW Land Registry Services replied:

> "..you have perfectly summarised the importance of Crown Grants. I have never heard it so flawlessly described !
>
> [The office] here at LRS … constantly deal[s] with Crown Grants all day, and 100 % agree there is not enough interest or importance weighed on these so thank you."

Reverting to the Bringelly Crown grant document itself, the reader might note that there is no mention of: "Crown grant"; "freehold"; "estate in fee simple"; "leasehold"; "Governor", or indeed reference to any legislation. Indeed, there is no official seal or stamp purporting to verify the document.

So how do we know that it's really a Crown grant of freehold tenure, and not simply some amateur forgery whipped up by, say, a literate convict? After all, the first bookkeeper employed by the Bank of New South Wales (now Westpac) was John Croaker, who arrived in the colony in 1816 under a sentence of 14 years' transportation for embezzlement[46], and it was a convict colony, with seemingly plenty of "talent" available for nefarious schemes.

These and other such questions are answered by the authority of the common law. It is not for nothing that freehold and leasehold tenure is known as "common law title".

In the first place, any court (most often historically, the Supreme Court of NSW, which by the way celebrates its bicentenary in 2023), if presented with such questions, would check that the Governor had the power to make such grants. This power of the office is made clear in the previously outlined Letter of Instruction to Governor Phillip. (After the formation of a legislature in NSW several decades later, the Governor no longer issued Crown grants by executive *fiat*, but on the advice of the relevant ministers. This change of itself had no effect on the operation of Crown grants.) The court could also, if it was deemed necessary, verify the commission of the Governor.

Checking the veracity of the document itself, a court would, if the point was contested, have reference to the signature, handwriting and other *indicia* pertaining to the document. In this case, the signature "L. Macquarie" would be recognised as being that of Governor Lachlan Macquarie, and the date of execution, namely 20th June 1816, being during the period of his governorship.

As it happens, there is no evidence that there was ever any doubt about the veracity of the document: the relevant point here being that if there were any such challenge, the courts would rule on it.

An interesting observation which might be made is that the handwriting in the body of the document appears to be identical to the signature. Notwithstanding the wide executive powers of the Governor, it seems that his resources did not extend to having a scribe or secretary, so it was careful smudge-free pen and ink longhand for him!

More important is the wording: "Unto John Piper Esquire his Heirs and Assigns to have and to hold for ever, One thousand five hundred Acres of Land…"

John Piper (whose nickname was “Prince Dandy”) also held land at what came to be known as Point Piper on Sydney Harbour, and elsewhere. [47]

As to the meaning of the words used, we turn again to the common law, and in particular to a majority judgment of the High Court[48]:

> “Words of limitation in the form "to A his heirs and assigns for ever" have long been recognised as conveying an estate in fee simple.
>
> Co Litt 1a "Tenant in fee simple is he which hath lands or tenements to hold to him and his heires for ever". *Sexton v Horton* (1926) 38 CLR 240 at 244, per Knox CJ and Starke J; at 249, per Higgins J; In re Davison's Settlement [1913] 2 Ch 498 at 502, per Warrington J.”

Thus, instantly by reference to the common law, the comparable wording of the Crown grant at Bringelly gains a clear legal meaning, and the absence of key words (or a seal) is thereby rendered immaterial to its legal force and validity.

That the words “for ever” are not mere poetic licence, but of real legal force, is further underlined by reference to the Privy Council, (as already noted above, in *Cooper v Stuart*[49]), and its holding a that the rule against perpetuities did not apply to such a Crown grant in New South Wales.

The grant document proceeds to identify the area and location of the land:

> “…One thousand five hundred Acres of Land, lying and situate in the District of Bringelly…”

with a reference to all of the neighbouring properties and their respective boundary distances surrounding Piper’s land. At least some of the references, such as to “Ludenham (*sic*) farm”, would no doubt be familiar to people in the area today. It would appear likely (and this could be checked at NSW Land Registry Services) that the bordering properties had already been alienated by the Crown by grant of freehold to other proprietors.

The Bringelly Crown grant is “Conditioned”, as the Governor expressed it, which is to say it contained what might be described as conditions precedent, which Piper had to satisfy:

> “…Not to sell or alienate the same for the space of Five Years from the date hereof, and to cultivate twenty-five Acres within the said Period,…..”

The requirement to cultivate 25 acres can be seen to reflect: a continuing concern with the agricultural development of the colony; and with complying with the details in the Letter of Instruction supplied to Macquarie’s predecessor, Governor Phillip. On satisfaction of the conditions (or at least, in the absence of any dissatisfaction by the Governor as to the farming practices undertaken during that initial five year period), Piper had complete freedom to exercise his full ownership rights flowing from the grant of freehold title.

As the Privy Council observed[50], freehold title cannot be made subject to conditions. Conditions may be freely imposed on grants of leasehold, but the alienation of freehold title is so complete as to exclude the possibility of conditions.

However, Crown grants of freehold can, and very often do, contain reservations, as is the case with the subject Bringelly grant:

> "…and reserving to Government the right of making a Public road through the same; and also reserving for the Use of the Crown such timber as may be deemed fit for Naval Purposes…."

Former High Court judge Ian Callinan AC[51] has observed that:

> "It has always been the common law that the owner of freehold land owns every tree on it…".

This common law would apply to the Bringelly grant also, subject only to the limited reservation with respect to certain timber.

Once again, it is the common law of the courts which gives meaning to the word "reserving". We need look no further than the Privy Council [52]:

> "…The whole and every part of the lands granted vested, …have ….. 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*….." (Emphases added.)

This is a description of how a reservation to a Crown grant works. The point of a reservation is that the Crown is not required, if choosing to exercise its right of defeasement of the reservation at some time in the future, to pay compensation to the owner. Conversely of course, if a defeasement was not within the scope of a reservation, it would require the payment of compensation to avoid invalidity.

The Privy Council judgment, delivered by Lord Watson[53], continued:

> "....assuming the Crown to be affected by the rule against perpetuities in England, it was nevertheless inapplicable, in the year 1823 [the date of the grant made in that particular case], 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."

Thus the reservations imposed by Governor Macquarie in the Bringelly grant last forever, unless or until the Crown validly acted to defease them. (The term "defease" is simply derived from the Norman French term "defaire" - to undo.) In practice, many reservations become obsolete. For example, the navy has little use for timber for masts and hulls these days.

The use of reservations imposes no injustice, because any prospective purchaser of the Crown grant is on notice from the outset. Reservations cannot be added to a grant at some later time, as that would be a derogation from the grant. Further, the courts interpret reservations conservatively as against the Crown, as evidenced by numerous common law authorities cited in *Arguments for Property Rights in Australia*[54]. Thus, for example, the right to the timber does not carry with it free access to the land: the Crown has to pay the landowner reasonable compensation for access. Further, the reserved right to the timber has no application at all to timbers unsuitable for use by the navy – eucalyptus trees are the most common, but least attractive timber to shipbuilders, so to that extent they would not be within the scope of the reservation.

Also, until the Crown chooses to exercise its right, the landowner is free to use the timber as desired, including cutting the trees down and selling the timber to, say, merchant mariners. If there happens to be no such tree on the land when the Crown defeases the reservation and comes-a-calling to harvest some timber, the Crown has simply missed out.

The reservation in the Bringelly grant with respect to the use of timber is illustrative, because it is reserving a property right (that is, the use of particular types of timber), without purporting to reserve the land on which the timber might be found.

Essentially, the Governor is reserving a usufructuary right for the Crown. A "usufruct" is a legal right accorded to a person or party that confers the temporary right to use and derive income or benefit from someone else's property. Clearly, if the Crown were to harvest timber from Piper's land pursuant to the reservation, that right is usufructuary. A usufruct with respect to land is a proprietary right, and thus a "real property" right. Yet it carries with it no right to the land itself, and such a reservation cannot be relied upon by the Crown to authorise the deprivation of title to the suitable-tree-bearing patch of land from the owner.

The High Court has demonstrated no difficulty in characterising mere usufructuary uses as interests in land – that is to say, as interests in "real property":

> "rights and interests were essentially usufructuary, ceremonial and non-exclusive.....perpetual and objectively valuable in that they entitled the [native inhabitants] to live upon the land and exploit it for non-commercial purposes." [55]

Note also the High Court's acceptance that property rights include a "bundle of rights", as for example Callinan J.[56]:

> "A necessary first step …..is for Australian courts firmly to grasp the principle that the various separate rights of user of property are in themselves property. The Court in Dalziel's case (1944) 68 CLR 261 recognized that by taking away some rights of user, in particular the right to possession, the Commonwealth could make property practically worthless. …What needs to be recognized is that property is a bundle of rights, and each right in that bundle is itself property….."

The most fundamental lesson to learn from this example, the reservation of timber use, is that every instance of tenure by Crown grant of freehold constitutes real property rights which relate to *uses* of land: freehold title is not simply of the physical land itself.

Indeed, this distinction can be made with reference to the *Wheat Case*, cited in the Russell Review. As noted above, the *Wheat Case* concerned a chattel, wheat. This may be distinguished from the proprietary *right to grow wheat*, which exists pursuant to the grant of freehold (and leasehold) title and is not a chattel, but a real property right. The "real property" right to grow wheat and the power of New South Wales to deprive a landowner of that right, was simply not at issue in the *Wheat Case*.

Another point not at issue in the *Wheat Case*, but relevant to the interpretation of the grant document, is that of native title. In 1816, neither Governor Macquarie, nor any of his contemporaries, had heard of "native title", yet the effect of the Bringelly Crown grant is that it permanently extinguished any and all pre-existing native title to the 1,500 acres of land as described. This is so because the High Court has ruled that where native title exists, the grant of freehold title by the Crown permanently extinguishes it. [57] This is yet another way in which the common law informs us about the meaning of the document.

The final detail of the Bringelly grant document to explain is the imposition of an annual "quit rent". This was simply a vestige of English law which was abolished in NSW during the 19th century and has no contemporary relevance to real property, or interests in real property.

[8.1] Dead Horse Flogging

For purposes of illustration, we might turn now to the speech made in March 2021 by landowner Maria Zucco (video above at **[1.0]**) where, *inter alia*, she observes that one prohibition purportedly imposed by the Environment and Recreation zoning is that: "…if your horse dies, you can't replace it.." The reader might consider analysing the legal implications of this prohibition, based on the framework of law associated with the Bringelly Crown grant of freehold tenure as explored above….

The first point is that the owner's right to run a horse on the land is a real property right, pursuant to the grant. As noted above, the High Court has repeatedly upheld: "the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination." The owner is not limited to running a horse. The owner is entitled to run a farmyard of all sorts of animals, provided only that no nuisance or hazard is caused to the neighbours. Indeed, as has been done from time to time in the past, the landowner can run a private zoo! It follows that if the Crown, by legislation or regulation, purports to deprive the owner of such rights without compensation, it is a derogation from the grant and capable of being declared invalid in a court.

The second point is that while the right to run horses is a real property right, horses themselves are mere chattels, and the *Wheat Case* is good authority for the proposition that the State can compulsorily acquire any such horses for any or no value. The State can do the same with cars, boats or any other chattels, although one can imagine that any government wantonly and widely exercising such power would have a short electoral life.

Having said that, strictly speaking, the right to access the property belongs to the owner - it is a real property right pursuant to the grant - and includes the right to exclude trespassers, including the Crown: that is the essence of *alienation* of freehold title. Accordingly, (except in relation to criminal matters which are irrelevant here) even if the State were to

compulsorily acquire horses, it could not gain access without either: the permission of the owner; or offering reasonable compensation for the right of access, because the right of access is a real property right, and without compensation, such enforced access would be a trespass and a derogation from the grant. In such an example, the value of compensation for access would probably be small, but it would include for example, providing repairs for any damage caused in the course of the removal of the horses. (The same principle applies where a Crown grant reserves mineral rights – the Crown can be owner of the minerals, but has to ensure that the landowner is paid for a right of access, which access has not been reserved under the grant.)

So, a State policy which dictates to a private landowner that "…if your horse dies, you can't replace it.." is repugnant to the Crown grant, unjust, and indeed a breach of human rights (per Article 17(2) of the *Universal Declaration of Human Rights*). Correctly understood, the State policy is, to use the metaphor, "flogging a dead horse".

If the State were to expropriate the horse, the *Wheat Case* is good authority for the proposition that the State would thenceforth possess all the rights of ownership of the horse as a chattel, and thus if the horse died, as a matter of property law, the State's representatives, including the Minister, or the Independent Community Commissioner, could indeed flog it.

Let's hope that all the horses and their offspring in Bringelly and district have a long and happily life without any such interruptions.

[8.2] Questions Raised by the Bringelly Crown Grant Example

Hopefully, this exposition of the Bringelly grant has demonstrated to the reader, in relation to tenure by the Crown grant of freehold:

- the principles of its operation;

- how it is given meaning and force by the common law;

- why it is indeed "common law title"; and

- its critical role in understanding the nature of "real property and interests in real property", which were entirely overlooked in the Russell Review.

Moving on, Wilcox[58] noted that:

> "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."

It is clear that during the period of two centuries since the granting of unconditional freehold title to John Piper, there has been extensive subdivision of the 1,500 acres: with many evidently being five acre blocks, there would currently and concurrently be hundreds of successors in title to John Piper in Bringelly. Precise details of each could be obtained by conducting searches at NSW Land Registry Services.

The “real property rights and interests in real property” of these landowners are still derived from that Crown grant.

So, an adversely affected landowner situated in Bringelly, or any other area in the vicinity of the Aerotropolis where freehold title has similarly been granted, might at this point ask:

1. if my rights as registered proprietor to freehold land are so extensive and fundamental, how is it that the NSW Government can effectively sterilise my land, and repudiate the Crown grant with impunity by imposing restrictions on use such as “Environment and Recreation” zoning without compensation?

2. What’s the point of all this common law if it can’t protect me from such derogation, and arbitrary deprivation of my property rights?

Fair questions!

The short answer is that:

1. the Government can do it because it thinks it can, and no one challenges its legal view. Thus, for example, the Russell Review – not uniquely, as noted above - completely failed to examine and understand the legal dynamics of “real property and interests in real property” and consequently, adopted fundamental legal fallacies, and so readily ignored the legitimate concerns of property owners. If the Government is receiving legal advice that the uncompensated adverse use of zonings is lawful, it can choose to proceed on that basis, disregarding the protests of land users as mere anomalies.

2. Further, the Government’s failure to understand (or to be thoughtful enough to inquire) that it is actually depriving people of property rights blinds it to the absence of justice.

3. Given that, as noted above, these injustices have existed pursuant to legislation in force since the 1970’s, there has also been a succession of ministers in both the Coalition and Labor parties who have considered the situation “normal”, or who have been possibly “captured” by the planning bureaucracy, which itself has never been legislatively required to avoid, for example, arbitrarily depriving people of their property rights.

Before turning to proposing possible legal remedies for landowners, it is timely to consider two legal hurdles that the minister of the day would have to jump if any landowner made a legal challenge.

[9.0] Minister's Hurdles #1 & #2: The Principle of Legality, & Legislative Validity

The principle of legality in the context of property law has been explained by French CJ[59]:

> "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'. (*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'.* (*R v Secretary of State for the Home Department Ex parte Sims* [2000] 2 AC 115, 131 (Lord Hoffman). *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". (*Ibid.*)'"

In attempting to justify the validity of, for example, the *EP&A Act*, in its authorisation of subordinate regulations or zoning to derogate from the granted freehold rights of property owners, the minister of the day would have to demonstrate that the principle of legality has been observed. The minister could only do this by pointing to a provision in the Act expressly providing that, for example, should the operation of the Act derogate from any Crown grants, then any such act of repudiation would be nonetheless valid, and no liability for compensation would be incurred by the Crown under any circumstances.

Perusal of such legislation shall reveal that neither this Act, nor any other NSW Act, operating to restrict proprietary rights of land use without compensation contains such a provision. Thus the principle of legality provides a hurdle which the minister would fail to clear, with the consequence that any court applying the principle would reject the minister's argument – namely, that the intention to arbitrarily deprive the property rights of some owners can be merely inferred from the Act and so be valid.

It is true that the minister could then seek to overcome the court's rejection by having the Act altered to expressly provide that, for example: "should the operation of the Act derogate from any Crown grant of freehold or leasehold title, then any such act of repudiation would be nonetheless valid, and no liability for compensation would be incurred by the Crown. For the

avoidance of any doubt, the human right of any proprietor not to be arbitrarily deprived of his property is expressly excluded under this Act".

At this juncture, the abovementioned observation of the House of Lords that Parliament must "squarely confront what it is doing and accept the political cost" is most pertinent: it's one thing to sneak through injustices against relatively isolated groups of landowners over several decades, by the obscure *faits accomplis* of planning decisions, but quite another to have Parliament openly and clearly legislate in favour of such obvious injustice. In practice, any such amendment to overcome the principle of legality is most likely to be impossible to achieve, and viewed by any reasonable person as being scandalous. The minister would have to retire hurt at this first hurdle.

Having said that, suppose for the sake of argument that the minister did manage to have the Act so amended. In this case, the principle of legality would be satisfied: any court could understand the legislature's nefarious intention as being expressly put.

This would bring the minister to another hurdle however. The court, having satisfied itself of the clear intention of the legislation, would then turn to the question of the validity of operation of the legislation. If the operation of the Act is materially invalid, notwithstanding its clear intention, then the court will find that it is relevantly unenforceable. This is a second hurdle for the minister. The possible reasons for such invalidity are as already explained in this submission, and we turn at **[10.0]** to a general outline of possible remedies for the landowner.

Before doing so, attention might briefly be paid to the operation of the *Land Acquisition Act*. Perusal of the Act reveals that its Objects relate to the "acquisition of land or any interest in land" (- see s. 4(1) for example). As explained earlier, it would be more correct to describe the process as a resumption than an acquisition, given that the proprietary interest in the land was created in the first place by Crown grant: the Crown is simply taking back what it had granted previously.

S. 4(1) also provides this definition:

> *"**interest*** in land means—
> (a) a legal or equitable estate or interest in the land, or
> (b) an easement, right, charge, power or privilege over, or in connection with, the land."

Now, it might be said that any landowner has, by virtue of freehold or leasehold tenure, an interest in the land and also (as expressed in (b)) a "right…power or privilege over, or in connection with the land". However, it seems clear that (b) should be interpreted to be with respect to identifiable "rights" etc. of third parties, rather than the landowner, simply because the landowner's rights are already encompassed in the proprietorship of the land, i.e., in the "interest in the land".

It follows from this reasoning that the Act contemplates the existence of separately identifiable third party rights capable of acquisition (i.e., resumption). There would seem to be no reason in principle under the Act why the NSW Government, in exercising its power to, for example, prevent a landowner from using land in a manner inconsistent with

"environmental and recreation" uses, could not "acquire" that right as a third party and have it noted on the title. Such "acquisition" would bring the zoning within the scope of the Act, including all of its provisions with respect to the payment of compensation to the landowner. In short, it would seem that NSW could, under the *Land Acquisition Act* as it now stands, bring all injuriously affected land within the compensation provisions of the Act.

The current difficulty of uncompensated injuriously affected landowners is that the NSW Government is refusing not only to "acquire" their land title, but also is refusing to "acquire" the lesser "right…power or privilege over, or in connection with the land" which it purports to impose.

As explained previously, "acquisition" is different from mere "deprivation". The NSW Government may, as the Act now stands, simply choose whether or not to treat zoning usage restrictions as "acquisitions", which would entitle landholders to compensation under the Act, or as being merely incompensable "deprivations". Of course, the facts as revealed in many hundreds or more *EP&A Act* submissions demonstrate that NSW Government policy is to adopt the latter policy of deprivation.

In contrast, under the law of tenure by Crown grant of freehold or leasehold title, there is no such distinction, and no such discretion. The failure of the NSW Government to "acquire" the zoning restrictions is a derogation from the Crown grant, which does not provide NSW the opportunity to choose a policy of uncompensated deprivation.

A further note on the point relates to s. 7(1) of the *Land Acquisition Act*:

> "**7 Act not to empower authority to acquire land**
> (1) This Act does not empower an authority of the State to acquire land if it does not have the power (apart from this Act) to acquire the land."

If the Minister were to aver that the *EP&A Act* does not empower him to "acquire" a right or privilege in connection with the land, then this could easily be addressed by making appropriate amendments to the *EP&A Act*, which could form part of the *Land Decisions Bill*. Indeed, perhaps the Independent Community Commissioner could assist both the Minister and landholders on the issue by proposing amendments to serve that purpose, to your Committee.

Such a course of action would allow - and indeed require - zoning restrictions causing injurious affection to be promptly brought under the *Land Acquisition Act* by being processed as "acquisitions", answering the Minister's objections on the point, if any were made.

[10.0] Commonwealth & Landholder Remedies & the Sword of Damocles

NSW has the power to readily solve the subject injurious affectation injustices itself by simply offering to pay compensation for losses caused – and on that basis acquiring the right to have its interest noted on title. Effectively, these would be partial resumptions, even if the land area of the title remained unchanged. If it were considered necessary to pass legislation to implement this, then NSW could readily do so.

NSW could also use its power to adversely rezone property more selectively, for the benefit of its budget.

NSW could also implement human rights legislation prohibiting its arbitrary deprivation of property.

However, except only for the existence of the *Land Decisions Bill*, there is no sign that NSW has intentions of any such kind.

The *EP&A Act* has been law for over four decades, without having been effectively challenged, and such a longevity status may taken to suggest impregnability. However, the undoubtedly egregious behaviour of the NSW State government with respect to at least some landowners and their real property rights belies an internal rot at the heart of the Act, which begs challenge. This challenge might emanate from the Commonwealth, or affected landowners, or both. The lack of past action cannot be taken as a reliable indicator of future inaction.

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

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

This is a laudable purpose, consistent with Commonwealth policy, but injuriously affecting and arbitrarily impoverishing random local landowners can't be part of that. The problems addressed in this submission have not been created by the Commonwealth, but exclusively by NSW. However, given such stated objectives, and the undeniable fact that these landowners' difficulties have been caused by decisions relating to this huge Commonwealth-led project, the Commonwealth should take steps to remedy these injustices. So, what might those remedies be?

In such circumstances, the following possibilities remain.

[10.1] Ratification of Article 17 by the Commonwealth

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 NSW (or any other State) which conflicted with Article 17 would be rendered unenforceable to the extent of any such conflict.

Given that such a strategy has already been used by the Commonwealth to protect native title holders from having native title impaired or extinguished without compensation by any State, it is precedented.[60] The Commonwealth has already legislated to ensure that NSW (and other States) cannot arbitrarily deprive native title holders of their property (including usufructuary rights). The Commonwealth could easily do that with respect to common law title holders in NSW, having access to the power to do so (after ratifying Art. 17 UDHR, as discussed subsequently), and the anomalous failure to do so will become increasingly obvious as affected landholders make their position better known.

The Senate Finance and Public Administration References Committee currently has the adoption of Art. 17 UDHR into domestic law before it as a subject for its *Inquiry into the planning, construction and management of the Western Sydney Airport*.

[10.2] Addition of Conditions by the Commonwealth to s. 96 Grants

Given the scale and extent of the Aerotropolis project, there is a very significant degree of co-operation between the Commonwealth and NSW. Not being privy to the administrative details giving effect to such co-operation, it would nonetheless seem highly likely that one facet of same would be the making of grants by the Commonwealth to NSW under s. 96 of the Constitution in order to facilitate funding of various project initiatives being carried out by NSW. It might well be that substantial grants are not yet executed and so their terms are not yet final.

In these circumstances, the Commonwealth would be in a position to include conditions to such grants requiring NSW, with regard to the general region of the Aerotropolis project and its land use planning, to, for example:

1. not arbitrarily deprive landowners of any of their pre-existing property rights without compensation;

2. provide a mechanism for prompt compensation to any affected landowners suffering hardship (akin to similar provisions for acquiring land in railway corridors etc.); and

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

One option for the imposition of such conditions would be for the Commonwealth to require in each and every s. 96 grant made to NSW relating to general region of the Aerotropolis project that NSW *compensate* the freehold (or leasehold) title holders *for any loss, diminution, impairment or other effect* of the *EP&A Act* or other Act on their freehold (or leasehold) rights and interests.

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

This sort of intervention is something that would require no legislative changes, and be achievable pretty quickly by the Commonwealth, requiring purely administrative actions, at minimal cost. If NSW complied with the conditions by respecting the property rights of owners (and possibly, removing some restrictive zonings which would cost NSW nothing), no further action by the Commonwealth would be necessary as far as the Aerotropolis region is concerned.

The Senate Finance and Public Administration References Committee currently has the addition of conditions to s.96 grants to NSW before it as a subject for its *Inquiry into the planning, construction and management of the Western Sydney Airport*.

Commonwealth action to adopt either or both of the above strategies (i.e., Art. 17 or s. 96) to prevent wrongdoing by NSW would offer it the additional benefit of avoiding the risk of it being exposed to any Investor State Dispute Settlement claims due to uncompensated injurious affections created by NSW in the Aerotropolis region. This is explained next.

[10.3] Investor-State Dispute Settlement

It might be that some of the estimated 200 or more affected landowners in the Wiannamatta-South Creek area alone might be foreigners or have dual citizenship with respect to one of the many countries which has a free trade agreement ("FTA") with Australia.

Any such landowners might well be entitled to make a sovereign risk claim for compensation with the support of their foreign native country against the Commonwealth for any loss or damage caused by NSW's injurious affection. Investor-State Dispute Settlement (ISDS) is a mechanism in an FTA or investment treaty that provides foreign investors (and reciprocally, Australian investors overseas) with the right to access an international tribunal to resolve investment disputes**.** A foreign investor in Australia, 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[61].

In such a situation, the Commonwealth has no legal recourse available to it to secure reimbursement from NSW for monies paid out in such circumstances. Thus, NSW behaviour poses a potential risk to Commonwealth coffers, particularly if such behaviour is not limited to the subject landowners near the Aerotropolis, but is more widely spread around the State. (Visit www.adverse-rezoning.info to see much more.)

Accordingly, by adopting the Art. 17 and/or the s. 96 strategy, the Senate Finance and Public Administration References Committee might well conclude that the Commonwealth would not only provide justice to NSW landholders and preserve the integrity of the Western Sydney Airport Corporate Plan "Purpose Statement", but also protect itself from the making of any ISDS claims.

[10.4] Potential Landowner Legal Action

At the outset, it might be asked why should perfectly innocent landowners be put into the position of having to fund and carry out litigation to remedy the uncompensated injurious affections imposed by NSW at all? This is especially the case when NSW is at all times in a position to remedy the position itself.

Having said that, two general avenues for court action present themselves:

1. Using the ISDS (not available to Australian owners); and

2. Initiating action at law or in equity in the Supreme Court of NSW.

The former possibility has been briefly outlined above.

Someone else might suggest that the NSW Land & Environment Court would be the appropriate forum for any litigation, as the current facts do indeed relate to land and the environment (and it seems, recreation). The jurisdictional distinctions between it and the Supreme Court of NSW are acknowledged. However, any such potential action would not be an appeal against a rezoning under the relevant legislative scheme, but rather a challenge to the material validity of the legislation itself, relying on the law of tenure and the extensive and consistent existing authorities of the Supreme Court, High Court and Privy Council. Unlike the finding of native title by the High Court, which essentially involved the formulation of new common law, any litigation in the Supreme Court of NSW based on common law could simply rely on existing judicial authority – no new law!

Actions in the Supreme Court might be for damages, or in the Equity Division, for remedies including declarations, injunctions, or other orders pursuant to proprietary estoppel. The general details of such authorities and argument are provided in *Arguments for Property Rights in Australia*[62].

Undoubtedly, all affected landowners would prefer to avoid such litigation, and it is indeed contrary to common sense and justice for government not to not find a non-litigious remedy in the circumstances.

Whether it be a litigant landowner, or a Commonwealth initiative, change can eventually come suddenly. Like the sword of Damocles, the State's purported power to injuriously affect landowners without compensation is actually hanging by a thread, and might fall without warning at any time.

[11.0] Implications for the *EP&A Act* & the *Land Decisions Bill*

On 20 October 2020, the Hon Mark Banasiak MP introduced the *Environmental Planning and Assessment Amendment (Review of Land Decisions) Bill 2020* ("*Land Decisions Bill*") as a private member's bill. In his second reading speech, Mr Banasiak told Parliament that he was introducing the *Land Decisions Bill* in response to what he termed recent impingements on private property rights without parliamentary scrutiny, and by a mere "wave of the

environment Minister's pen", including the controversial Koala Habitat Protection SEPP which commenced on 17 March 2021.

The proponent of the *Land Decisions Bill*, simply by proposing it, deserves recognition for it as being a milestone in the protection of the human right not to be arbitrarily deprived of property in NSW.

A city law firm has identified three significant changes to the NSW planning framework which the *Land Decisions Bill* would introduce, if passed:

1. **"… allow a single House of Parliament to disallow environmental planning instruments (EPIs)** made under Part 3 of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**), which include both SEPPs and Local Environmental Plans, or LEPs…….

2. **…create a new pathway for the mediation of certain disputes arising under the EP&A Act….**

3. **…..expand the administrative review jurisdiction of the Civil and Administrative Tribunal to include decisions by persons and bodies 'relating to the use or value of private land'……."** [64]

The *EP&A Act* 1979 relevantly succeeded, and institutionalised, the unjust use of Interim Development Orders as permanent planning instruments (as described by Fricke QC[65]) by allowing planning instruments to injuriously affect landowners' property without compensation. Notwithstanding the abundant evidence of injustices to unlucky landowners since then, it should be noted that the *Land Decisions Bill* is the first occasion in over four decades that an attempt has been made in Parliament to restore justice to such landowners.

Put most briefly, in attempting to remedy the problem, the *Land Decisions Bill* seeks to open new avenues for: mediation; administrative review; and (temporary) Parliamentary veto of an EPI.

The proposed Parliamentary veto would indeed seem to implement the common law principle of legality, as characterised in Lord Hoffman's observation that "*Parliament 'squarely confront what it is doing and accept the political cost'".* The injustice being imposed on particular landowners would by this method be exposed and attributed to the particular members seeking to perpetrate it, rather than by the "mere 'wave of the environment Minister's pen'", as Mr Banasiak has put it, or by the substantially anonymous publication of planning changes by the massive administrative behemoth implementing such matters.

With the Parliament potentially examining hundreds, and perhaps thousands of applications for veto at any one time, such an experience would certainly validate the extent of grievance for all to see. Yet it might be asked whether this would, over time, be a manageable process

for Parliament. If more protections were instead built into the administrative system, then ideally the landowner demand for applications for veto would be substantially reduced or become highly exceptional.

The proposed expansion of the jurisdiction of the Civil and Administrative Tribunal is also moving in the right direction, but in the absence of any clear intention in the amended legislation authorising the Tribunal to apply the principles of natural justice, one might wonder about the potential value of such appeals: the Tribunal is tasked by the Act, with respect to uncompensated injurious affection in particular, to enforce purportedly lawful injustices. A similar concern exists with respect to the proposed mediation, which would be conducted within the terms of the inherently unjust (in these matters) *EP&A Act*.

Everyone knows that the most remarkable building is only as good as its foundations. Building a grand house on poor foundations will lead to interminable problems and repairs. In this sense, the *EP&A Act* has a defective foundation: its Objects. Examination of the Objects of the Act reveals that there is no provision to respect the real property of landowners, no commitment to avoid arbitrarily depriving them of their property rights, no requirement to avoid derogation from Crown grants of title, no right of natural justice – no nothing really. The Objects are reproduced here:

> **"1.3 Objects of Act**
> (cf previous s 5)
> The objects of this Act are as follows—
>
> (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,
>
> (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,
>
> (c) to promote the orderly and economic use and development of land,
>
> (d) to promote the delivery and maintenance of affordable housing,
>
> (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,
>
> (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),
>
> (g) to promote good design and amenity of the built environment,

(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,

(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,

(j) to provide increased opportunity for community participation in environmental planning and assessment."

These ten Objects are all very worthy, but respecting the real property rights of private landowners is not an Object. Given that the single group of people most likely to be significantly affected by the operation of the EP&A *Act* is that of private landowners, the omission of such an Object is remarkable, and fundamental.

It is from this omission that all of the injustices inflicted onto landowners flow: there is simply no mandate for planners to observe such an objective. Indeed, planning staff, in carrying out their functions under the Act, as directed by the minister of the day, are often being put in the position of having to face genuinely affected and angry landowners, or receive hundreds of desperately composed submissions, with an attitude of sympathy, or empty placatory assurances, but with no ability to genuinely address landowner concerns. Such enforced institutionalised hypocrisy is ethically corrupting: this is also unfair for the bureaucrats who have to comply with the minister's policy under the Act, or resign!

If an Object to respect private property rights were included in the *EP&A Act*, many legislative consequences would follow. For example, in developing plans:

- bureaucrats (including the Independent Community Commissioner as announced in May 2021) would be lawfully required to actively estimate and plan for any compensation required for injurious affection;

- the Tribunal would have to be empowered to uphold the real property rights of landholders in administrative appeals; and

- in mediation, all sides would know that ultimately, the landholder would have to be reasonably compensated.

RECOMMENDATION

It is submitted that the *EP&A Act*, by adoption of the *Land Decisions Bill* (as might otherwise be amended), include an Object to ensure, in the making of decisions under the Act, that real property rights be respected.

Two possible alternative formulations to achieve this might be either:

Option 1.

To ensure that, with respect to any owner of common law title to land by Crown grant of freehold or leasehold – and more generally, of real property or interests in real property:

- **there be caused no derogation to any grant of title; and**

- **no person shall be arbitrarily deprived of his property.**

OR

Option 2.

To ensure that, with respect to any owner of common law title to land by Crown grant of freehold or leasehold – and more generally, of real property or interests in real property:

- **the Crown provides compensation *for any loss, diminution, impairment or other effect* of the Act on real property rights and interests.**

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

The second Object option is also open to the Commonwealth to enact at any time, provided it relies on its external affairs power after adopting into law Article 17 of the *Universal Declaration of Human Rights* (which incidentally, would augment its current power with respect to native title, which relies on the more narrow power pursuant to Article 5 of the Discrimination Convention).

NSW could adopt either Object option. The first Option might be preferable in that with regard to interpretation, it would more obviously direct judicial attention back to the common law relating to Crown grants of title.

Adoption of such an Object into the *Land Decisions Bill* would naturally give rise to a review of other legislative provisions or regulations made under the Act, not to mention bureaucratic procedures, which might conflict with that objective. The *Bill's* proposals with regard to the Parliamentary veto, mediation and administrative appeals might also be simplified or integrated more effectively with other processes under the *Act* to avoid unnecessary regulatory complications for landowners in general. Thus, a better foundation may lead to a better and simpler regulatory structure.

To the extent that advice from the viewpoint of a practitioner with landowning clients might be valuable in developing the most practical adjustments to legislative provisions or regulations necessarily consequent to the adoption of any such Object, **the Committee might consider consulting Mr Aaron Gadiel of Mills Oakley**. (Disclosure: Mr Gadiel has no professional or personal relationship with your humble correspondent.)

A proponent of the existing law (without the inclusion of the proposed Object) might argue that the no doubt significant adjustments required under the new Object, to: seriously avoid the unnecessary injurious affection to landowners; and to provide compensation where injurious affection is deemed to be necessary in the public interest, would be inconvenient and costly.

No doubt, the transition to: compliance with the common law; the observance of a human right; equity; and natural justice for landowners, in NSW might be "inconvenient" for the minister of the day. Yet any minister worth his salt would embrace such inconvenience as an opportunity to right wrongs in real property regulation.

As to cost, if the public cannot or does not wish to pay for a public benefit, how much does the "public" really want it? Any such ministerial objection would be akin to the chagrin of a reformed thief who comes to realise that he has to buy things with his own money instead of other people's.

Costs can be greatly reduced by reducing adverse zoning ambitions: it is astute, as it were, to avoid champagne when on a beer budget. Consideration could also be given by the government (or indeed its Independent Community Commissioner) to develop strategies to encourage genuinely voluntary landowner co-operation, such as financial incentives including rates reductions, philanthropic donations, or perhaps Commonwealth co-contributions to funding. At the moment, NSW explores none of these options.

An example of a possible alternative model which respects the state-based landowner's property rights, but which can also assist the NSW Government to achieve its environment and recreation land policies might be a version of the Commonwealth plan to achieve its environmental objectives by the Emission Reduction Fund, pursuant to the *Carbon Credits (Carbon Farming Initiative) Act* (Com.) 2011. Landowner participation is entirely voluntary, and it seems that some farmers love it. [66] Whether or not such a scheme would be suitable for NSW to achieve its environment and recreation land use goals might be an open question, but the point is that such possibilities, which avoid breaching anyone's human rights, are currently given no consideration at all.

The *Land Decisions Bill* (as might be amended), in fact provides a timely opportunity for Parliament to get on the front foot and abolish the *EP&A Act's* current scheme of injustice.

The reasons for Parliament taking action now, apart from the demonstrated need for justice (which should be enough by itself), are that:

1. Lawful initiatives by the Commonwealth, or an aggrieved NSW landowner, might at any time force Parliament's hand; and

2. As demonstrated by the Aerotropolis group, the passive and relatively silent surrender of isolated landowners similarly affected in the past cannot be assumed to continue. With the advent of social media and greater landholder awareness, political pressure for justice will continue to grow. See below for examples.

ABC Western Sydney / By data journalist Catherine Hanrahan

Posted Sat 3 Apr 2021 at 6:10am

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

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

The submissions made by the Spagnols with respect to their land should, with respect, be read by every member of the Committee.

See also this video story:

Nat Wallace reporting,
"Properties 'virtually worthless' after government rezones them",
A Current Affair - Channel 9 Sydney,
27 April 2021
https://www.youtube.com/watch?v=ddHUDcY2OEU

So, some conclusions as to implications for the *EP&A Act* and the *Land Decisions Bill* might be drawn as follows. (Conclusions are explained more comprehensively at **[13.0]**.)

Legal practitioners, as exemplified by the Russell Review and the property law textbook relied upon therein, have been fixated with: the s. 51(xxxi) "just terms" provision of the Australian Constitution; and the constitutional ability of the State to acquire chattels without compensation, as outlined in the *Wheat case* and other cases. However, both s. 51 (xxxi) and the law of chattels in NSW are substantially irrelevant to the law of real property and interests in real property as far as NSW landowners are concerned.

Unlike legal practitioners in this particular field, judges overwhelmingly rely on the previous judgments of their own court and other superior courts to glean the common law, not on textbooks. (It seems that there has not been a property law textbook published in the last 50 years or more that has examined the judicial authorities of the sort relied upon in this submission, the latest one we can find being not so limited having been published in 1903. [67])

The reader may appreciate that the examination of the law of real property in this submission has likewise relied on judicial authorities, that is, the judgments of superior courts. Now, it is a constitutional limitation of the courts that they cannot go out to seek, or tout for, cases that they would like to hear: they are entirely passive in this respect. The most judges can do generally is express a topical opinion in a judgment[68], or publish more detailed views in retirement[69], as indeed Callinan AC did on these issues.

The point of these observations is that because of the aforementioned fixation, lawyers have not brought to any court the type of argument made out in this submission, and consequently, judges have had no opportunity to rule directly on such argument. It would, it is submitted, require only one such successful case to be put to a court to cause the invalidity of the operation of the *EP&A Act* with respect to uncompensated injurious affection to be affirmed.

PART II

The Rights & Wrongs of "Value Capture"

[12.0] "Capture the Uplift in Land/Property Value"

The Inquiry's Term of Reference 1(b)(xii) reads:

> "whether, and what legislative or other measures should be taken by the government to capture the uplift in land/property value created as a result of such transport projects".

"Capturing the uplift" by government is not defined precisely in the Terms of Reference, but three distinct techniques can be identified:

1. Betterment tax;
2. Government proprietorship rights; and
3. Imposition of injurious affection without compensation.

Each shall be explored in turn below.

[12.1] "Value Capture", Betterment Tax & Sir Humphrey Appleby

"Capturing the uplift" in private property values has previously been referred to in NSW as "value capture", which itself is an oily euphemism for a betterment tax.

Previous experience in NSW over a period of three decades or so has demonstrated betterment tax to have been administratively unmanageable and a fiscal failure. Economists view betterment taxes as being not only administratively inefficient, but inefficient in the allocation of economic resources, to be avoided in favour of other more efficient types of tax, such as the GST, to take one example.

Betterment tax first appeared as part of the County of Cumberland scheme in the 1940's, after World War II. As shall become evident below, unlike the use of "value capture" in recent times, the original intentions behind its introduction were quite honourable: the intention being to use any such taxes raised to compensate landowners injuriously affected by the new use of zoning.

Wilcox[69] provides some more detail on the subject:

> "...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 been 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."

Importantly, it must be acknowledged is that in 1945, the legislators:

- Foresaw the possibility of injurious affection being inflicted on some landowners;

- Recognised the justice of providing compensation in such circumstances; and

- Made specific legislative provision for compensation to injuriously affected landowners.

Although the legislation failed in these respects, at least the intention was good. This cannot be said of the successor legislation, the current *EP&A Act*, which completely ignored these concerns.

Note also the failure of the County of Cumberland legislation to attempt to reconcile the new planning laws with the pre-existing law of tenure in NSW. This jurisprudential void allowed later legislators who were not so concerned with "common sense and justice" to consider compensation for injurious affection to be an unnecessary "optional extra", which was duly dropped over time.

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:

1. 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 repayments possibly being borne by a non-cash income producing asset), or securing funds from other sources unrelated to the land; and

2. 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 precisely 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

3. 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, astute 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 GST, council rates, capital gains tax and even stamp duty, which was supposed to have been abolished (along with wholesale sales tax etc.) when the GST was adopted.

Indeed, the vertical fiscal imbalance that has existed between NSW (and the other states) and the Commonwealth since the latter assumed sole effective control of income tax revenue during World War II, which has resulted in a perennial shortage of tax revenue for NSW - and the associated reliance on Commonwealth support via s. 96 grants - really demands an ongoing review of individual proposed taxes in the context of overall tax structure to find the most efficient overall tax policy solutions. Efficiency in this context means:

1. lower administration costs; and

2. lower market efficiency disruption costs,

so as to help grow the economic pie, to achieve sufficient net revenue for the State, but also to maximise market efficiency, both of which are to the ultimate benefit of residents by raising real incomes.

In short, betterment tax should not be considered in isolation, but in the context of overall tax strategy. **In this regard, the advice of someone like economist Professor Judith Sloan would be valuable.**

At this point, notice might be taken of the "Budget overview: Planning the future of Western Sydney" *NSW Budget Half-Yearly Review 2020-2021* which states, in part:

> "The Commonwealth Government's $5.3 billion investment in the Western Sydney Airport at Badgerys Creek is at the heart of plans to create a bustling airport region within Western Sydney, known as Aerotropolis, attracting jobs in aerospace and defence, manufacturing, healthcare, freight and logistics, agribusiness, education and research.
>
> Employment created by the Aerotropolis development will add to the 28,000 direct and indirect jobs expected to be generated by the airport by 2031."

The point to be noticed is that NSW is itself receiving a direct "uplift" of $5.3 billion of Commonwealth Government spending, and the consequent increases in employment and business activities will themselves generate significant tax revenue for NSW into the future. If NSW felt that its tax structure will be inadequate to capture enough tax revenue from these developments, the solution would have to be to conduct a macro-economic review of its tax structure, rather than simply plump for an inefficient and ad-hoc betterment tax.

In the case of the Aerotropolis and vicinity, it might be asked: which properties would be targeted for a betterment levy? The headline cases? Cases over a certain dollar value, or land size? To be "fair", should it be all such affected properties regardless of size? Over what time period would values be assessed? What would be the government's budget allocation to fund the additional bureaucracy required to implement all this? If property values subsequently subside, will the property owners receive pro-rata refunds? If not, why not? A betterment tax or "value capture" can readily seen as turning into a labyrinthine maze, of little ultimate benefit to government.

Notwithstanding all this, and the repeal of the provisions in respect of injurious affection and betterment in NSW in 1979, 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.

Legal practitioners Aaron Gadiel & Anthony Whealy[71] have 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 Gadiel and Whealy, refer to their article. Some of their most relevant observations are as follows:

> "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 epitomised 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. "Placation" is the policy.

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, Fricke QC, and even the Hon. J.J. Cahill - 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 might say, the *de facto* defeasement, or derogation). 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 (unlike in 1945), the introduction of the more economically efficient capital gains tax and GST have provided NSW with significant revenue flows from betterment and other causes of increase in land value and investment, so that NSW has in fact had new revenue available to assist with compensating for injurious affection, quite apart from so-called "value capture".

Having been heavily critical of betterment tax (a.k.a. "value capture" or "uplift capture"), credit must be given where due. In this regard, the NSW Government gives the "thumbs-down" to "value capture" in planning agreements. Aaron Gadiel[72] explains:

> "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. New planning agreement policy blows away poor practice money - for example a 50 per cent share in any perceived increase in land value - and will threaten to otherwise stall or oppose the planning proposal entirely.
>
> A planning agreement that is motivated by a desire to capture developer or landowner profits is informally called a 'value capture' deal. Not all planning agreements have to be about 'value capture'. In fact, when they were first introduced almost all planning agreements were not about 'value capture'. Planning agreements were (originally) mostly about ensuring that adverse impacts from proposed development were appropriately controlled and mitigated.
>
> The best succinct analysis of the problems with 'value capture' arrangements were set out in the Federal Government's independent Henry Tax Review in 2010. Some of the review's findings were as follows:
>
> - In general, infrastructure charges will operate more effectively if they are set to reflect the cost of infrastructure, not to tax the profit of development.
>
> - Applying infrastructure charges through simple flat levies can sometimes reduce housing supply. Where the charge exceeds the cost of providing infrastructure, it acts like a tax and can discourage development. This is more likely to occur where the size of the charge is set relative to the developer's capacity to pay (rather than the cost of infrastructure).
>
> - To operate effectively, value capture taxes need to isolate the increase in value attributable to the zoning decision or the new infrastructure (as opposed to

general land price increases at the local level). This is often difficult since the value of land will move in anticipation of a change in rezoning. Sometimes this can occur many years before the rezoning.

- A value capture scheme may encourage the public sector to generate revenue through additional zoning restrictions or delays in land release.

- Where rezoning is linked to 'value capture', it is likely to stop land being developed to its most productive use — at least in the short run.

Value capture now officially given the thumbs-down

The new practice note includes the following fundamental principles:

- 'Planning authorities should always consider a development proposal on its merits, not on the basis of a planning agreement'.

- 'Planning agreements should not be used as a means of general revenue raising or to overcome revenue shortfalls'.

- 'Planning agreements must not include public benefits wholly unrelated to the particular development'.

- 'Value capture should not be the primary purpose of a planning agreement.'

The practice note explains what can happen if 'probity and public interest are not considered'. It says that 'undesirable outcomes' include the following:

- 'A planning authority seeks inappropriate benefits through a planning agreement because of opportunism or to overcome revenue-raising or spending limitations that exist elsewhere.'

- 'A planning authority takes advantage of an imbalance of bargaining power between the planning authority and developer, for example by improperly relying on its statutory position in order to extract unreasonable public benefits under a planning agreement.'

The new practice note explains that: 'the use of planning agreements for the primary purpose of value capture is not supported as it leads to the perception that planning decisions can be bought and sold and that planning authorities may leverage their bargaining position based on their statutory powers'

The practice note offers an **example** that a planning agreement 'should not be used to capture land value uplift resulting from rezoning or variations to planning controls'.

Agreements [which] propose contributions as either:

- a monetary contribution per square metre of **increased** floor area; or
- as a percentage of the increased value of the land,

are now officially frowned-upon."

We note further a green shoot of hope for landowners, that "the practice note sets down an 'acceptability test' for new planning agreements. The new test requires that planning agreements: "….Protect the community against adverse planning decisions." [73]

Alleluia.

The question might be posed to the Minister: why should the community be protected against adverse planning decisions only with respect to planning agreements? Minister, please explain!

[12.2] Legitimate Uplift by Government

Having outlined the very significant shortcomings of betterment tax and its euphemism of "value capture", the second question remains as to what legitimate and effective measures are nonetheless open to the government to capture the uplift in land/property value created as a result of such transport projects.

In regard to legitimate uplift, the law of tenure suggests two starting points:

1. unalienated Crown land
2. alienated Crown land held by Crown grant of freehold or leasehold.

It might be that any major transport project will cause, *ceteris paribus*, land values in the vicinity to rise because of an increase in market demand for such land arising from its proximity to a new transport hub.

If NSW possesses unalienated Crown land in the project's vicinity, then, after considering whether or not any of it needs to remain so for public purposes (whether that be a nature reserve, community hall, law court or football stadium etc. etc.), it may determine that the remaining Crown land would be available for alienation and sale in the market.

In this case, the government could grant: freehold title, with or without reservations; or leasehold title, with or without reservations or conditions. Of course, according to the type of tenure and the extent of reservations and conditions attached, the value of the land will vary.

Thus for example, a perpetual lease would be more valuable than a 99 year lease and freehold tenure would be greater than that of the leases. Also, the greater the prospective potential restrictions on permitted uses, lower the market value of the land.

In this situation, NSW may time the sale to suit its needs. The sale can take place in an open sale process, such as an auction, and the government receive the revenue from the sale. By creating and selling the private title, the government is also creating a revenue stream into the future from taxes and charges ordinarily payable as a consequence of the private economic use of the land - i.e., GST, capital gains tax, land tax etc. Indeed, the fundamental purpose of granting land title right from the beginning, even to ex-convicts, was to encourage productive effort which would sustain the economy.

So, this is a perfectly acceptable method of revenue raising by NSW, which has been in use since the early 19th century.

As to alienated Crown land, whether held by freehold or leasehold title, title might be held by private owners, or indeed by NSW itself. In the latter case, the title has been alienated, but could have been acquired by purchase by the government, just like any other private purchaser can do. In this case, the government is the registered proprietor of the land, just as a private entity owning land would be. In this context, the government is in the same proprietary position as private landowners, and undertakes comparable risks of ownership, both positive and negative. Where the value of land appreciates due to market demand (for example, as a result of a major transport project), the government is just as entitled to realise that gain, at a time of its choosing, as any private landowner is.

For the purposes of Term of Reference 1(b)(xii), in such cases, the government would naturally "capture the uplift in land/property value" by its proprietary interest. In this context "value capture" has a completely positive meaning.

[12.3] Government Unjust Uplift & Conflict of Interest

So, now to consider, in contrast, the nature and extent of unjust "value capture" arbitrarily imposed by the government at the expense of unlucky landholders.

The NSW Government (Crown) remains sovereign, and this sovereign power, coupled with the right of proprietorship, gives rise to a potential conflict of interest. Where the government complies with the law of tenure, this potential conflict of interest is substantially avoided, because it cannot derogate from Crown grants of title: for example, it could not successfully impose usage limitations on existing Crown grants without compensation, in order to gain an advantage for itself. Should it attempt to do so, the courts, if presented with a claim by a landowner properly asserting same, would invalidate the derogation. (The basis for this view and the supporting body of authority of superior courts was explained in Part I above.)

However, where the government takes the view, as NSW has done at least since 1979 under the *EP&A Act*, that it can lawfully restrict uses on private land (i.e., injuriously affect such

land) without compensation (thus being in derogation from the Crown grant), an actual conflict of interest arises. Where affected landowners fail to challenge this, as so far they always have, the government of the day is left free to exploit the conflict of interest for its own benefit – that is, to unjustly "value capture".

As noted at **[1.2]**, some Members of Parliament have referred to this unjust value capture as "legalised theft". While this oxymoronic concept has no standing in law - "theft" by definition cannot be lawful - as a rhetorical epithet, it is perfectly apt to express the injustice as experienced by uncompensated injuriously affected landowners.

In principle, the conflict of interest can arise in three ways:

1. The imposition of restrictive land use zoning which will ordinarily reduce the market value of the land.

2. The removal or relaxation of restrictive land use zoning will ordinarily increase the market value of the land.

3. The combined use of 1. and 2., i.e., the uncompensated imposition and subsequent relaxation of restrictive land use zoning.

In the case of point 1., by not being paid compensation, the landowner is forced by the government to bear the loss in value of the land. To use the example of "environment and recreation" rezoning, the government causes the market value of the land to plummet. This is effectively an "off budget" item for the government, which is to say that it has gained a benefit at no financial cost to itself.

The government can then take all the time it wants with respect to future decisions regarding the land, which has been "sterilised". Broadly speaking, it has four avenues to effect unjust value capture. Let's call them the "**Four Strategies of Injustice**". The government can adopt-

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

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

C. the **Mandated Developer Compliance Strategy:** at some later time of its choosing, require developers to contribute green space to projects at their own cost, by purchasing the sterilised land at the post-zoning depreciated value, prospectively from

owners distressed by the zoning and consequently under pressure to sell at any price; and

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

In this example as given, no personal corruption by the members of the government or the developer is asserted. The developer is simply paying the price (in cash and kind) required by the government for the development of land. The profit, or budget saving, or "value capture" (however expressed), from these zoning and resale activities goes to the State, not any government minister or official.

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

At the same time, it is perfectly evident that the government would have succumbed to the conflict of interest presented to it by its willingness to impose uncompensated losses on injuriously affected landowners, and subsequently to profit in one way or another from rezonings over which it has exclusive control. By yielding to, or indeed enthusiastically embracing, the conflict of interest, the government of the day (at least since 1979) is creating a corrupted process. The affected landowners have in fact been victims of an unjust "value capture" by government, having been treated unjustly, inequitably (i.e., unconscionably), in breach of their human right not to be arbitrarily deprived of property, and, as submitted in Part I, unlawfully.

The conflict of interest caused by the view that government can restrict uses on private land without compensation, also gives rise in practice to an opportunity for government personnel to make subsequent favourable zoning decisions for reasons other than public policy, i.e. for undisclosed private benefit. No suggestion of actual personal corruption in these matters is made in this submission: there may well be none at all. The point is merely that a potential for personal corruption to arise is created from the conflict of interest arising from the government's purported unfettered discretion to arbitrarily injuriously affect landholders without compensation. The systematic creation of such temptation indefinitely into the future is imprudent.

With respect to the possibility that the government might adversely rezone land as a strategy to lower its value, and subsequently benefit from that in some way, examples might be hard to identify due to the complexity of planning processes, and the sometimes very long periods

over which such events develop. However, **there are landowners who have some familiarity with these issues, and contact details could be provided to the Committee on request. It would be a study in itself.**

Having said that, a couple of possible examples might be outlined here.

First, landowner has observed that a property at Light Horse Interchange Eastern Creek had been zoned as environmental land and acquired from the owners, presumably at the low market price associated with such zonings, for the benefit of the Western Sydney Parkland Trust. In keeping with government practice, imposition of the environmental zoning would not ordinarily have been accompanied by any compensation to the original owners. The land, 35ha in area – which estimates would support 350 quarter acre house blocks – is now being advertised for sale by the Trust as a "substantial opportunity for a world class industrial estate with a potential end asset value in excess of $400 million". An advertisement for same is at https://www.commercialrealestate.com.au/property/light-horse-interchange-eastern-creek-nsw-2766-2016487018

What happened to the environmental zoning? This example is submitted subject to verification of the precise circumstances by the Committee, if it wishes to do so. Clearly, the circumstances developed over many years. The original owners might well have died. The government ministers responsible would have changed. If there was any injustice to the original landowners, it can be easily forgotten.

Another example is with regard to landowners on the coast of NSW. Correspondence from Minister Stokes and the Coastal Panel congratulating the Eurobodalla Shire Council for a management plan is part of a pattern of rezonings pursuant to the *Coastal Management Act* 2016 (NSW) which landowners complain impairs property rights.

A pattern of behaviour reported by landowners, and partly corroborated by Ministerial correspondence, involves:

- adversely rezoning properties, which has the effect of reducing property values (and by inference, their subsequent resumption valuation);

- preventing landowners from performing defensive works on waterfront properties;

- the adoption of faux legal advice that any such undefended and inundated land shall necessarily revert to the Crown, consequently avoiding any need to adopt a process of resumption or compensation;

- no right of a fair hearing being granted to affected landowners; and

- an transparent intention by the government to acquire some injuriously affected land in the future at injuriously affected prices.

Like the *EP&A Act*, the Act of Parliament governing coastal management makes no provision for recognition of injurious affection, much less for compensation. Consequently, it is no surprise that neither the Minister, nor his advisory Coastal Panel, nor the local Council, and nor the climate change activist on whose advice they relied (the activist funded by the Commonwealth Government) evinced any concern whatsoever for any injurious affection caused to landowners. To the contrary, the Minister and the advisory panel consider the exercise to be worthy of commendation.

There has never been an elected government in NSW (or any other Australian jurisdiction) which has campaigned for office on the basis that it would legislate to restrict land uses, while leaving the associated costs to be borne by uncompensated private landowners - yet that is what is being done. There is an element of subversion which is undeniable.

The Coastal Panel, in adopting the *Saunders Case*[74] as a basis for avoiding compensation to property owners, gives no appearance of having sought the advice of an "independent legal advisor" as contemplated by the Act: the advisory document relied on for policy was created by a non-lawyer climate change activist, and a review by a legal practitioner would have quickly revealed some of its legal fallacies. There is also no evidence that the Minister sought the advice of the Crown Solicitor, which avenue must have been available to him. In this way, the competence of the Coastal Panel and the Minister with respect to the seeking of sound, independent legal advice with respect to an important legal issue must be questioned.

For a copy of the ministerial correspondence, and detailed analysis of these circumstances, see: "**[3.3.1]** - Seaside Swindling & the Coastal Management Act (NSW)", *Arguments for Property Rights in Australia*.

As to land in the vicinity of the Aerotropolis, it might be that the rise in values, particularly in some larger and well-positioned properties might be significant and attract some headlines, causing some members to expect a quick and identifiable return directly to the government by such landowners - in other words, to pay a betterment tax.

The disadvantages of betterment tax, and the relevant existence of other taxes already operating, have already been pointed out above.

The operation of the law of tenure provides a more fundamental understanding on this topic. The reader might recall from **[4.0]** the High Court's observation that the Crown grant of an estate in fee simple (i.e., freehold title) confers "…the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination".

It follows that where the government has imposed a zoning restriction on privately owned land, limiting various acts of ownership, and resulting in a loss of value and amenity to the owner, without compensation, the zoning restriction – being, by the way, a Private Land Sterilisation Strategy, is repugnant to the grant.

Suppose that at a later time – with another owner, being a successor in title - the government relaxes the zoning from "environment and recreation" to allow a wider range of uses, including say, commercial or industrial uses, and the value of the land rises substantially. All the government has done has been to reverse the repugnancy and restore to the landowner permitted uses to which he was entitled from the time of the original grant: i.e., it's the De-sterilisation Uplift Strategy in action. Although the government, as it currently operates, might say that it has created this new opportunity for the landowner, in reality, all it has done is, having deprived the predecessor owner's rights, to have restored those landowner rights to another landowner.

In this sense, the government has not created increased market value for the owner by discretionarily providing a benefit as such, but has simply removed a bar improperly imposed, thereby increasing the value of land to a point which it would otherwise have reached without the imposition of restrictive zoning. Also, speaking generally, because the previous zoning restriction had artificially lowered the value of the land, the introduction of new, relaxed zoning would have an instant and significant upward effect on the land value, whereas without zoning interventions, *ceteris paribus*, the value would have risen more gradually and evenly over a longer period of time.

Thus the significant price rises resulting from rezoning favourable to landowners may be more properly seen as rapid market adjustments to the twofold (in this example) removal or relaxation of unjust restrictions on land use, rather than simply a lucky break from a beneficent government.

If, during the above scenario, ownership of the land had changed:

- the original owner would have borne the loss in value caused by the adverse rezoning to "environment and recreation" - the Landowner Loss Realisation Strategy;

- the original owner would also have been denied the benefit of "commercial and industrial" rezoning – the Private Land Sterilisation Strategy;

- the purchaser would have acquired the land at the deflated doubly zoning-affected price – the Mandated Developer Compliance Strategy or the De-Sterilisation Uplift Strategy;

- the purchaser would receive the benefit of the later, favourable rezoning, i.e., the removal of the "environment and recreation" and the new flexibility of the "commercial and industrial" zoning (subject to NSW possibly imposing a "value capture" impost which might deprive the purchaser of some or all of that benefit).

Because the original owner had not been compensated by the government, the government had no claim to any proprietary financial share of the increased market value of the favourably rezoned land. Further, in this circumstance, the government is offering the second owner doubly favourable rezoning, which opportunity it had denied the previous owner, who

ought to have had that freehold right, so as to be able to offer it for sale to the second owner at the higher price. Thus the government is again in a potential conflict of interest situation, because by its failure to compensate for the imposition of restrictions, it can offer betterment by rezoning at its undeserved discretion and favour - which will naturally attract private pressure to obtain such favourable rezoning. Hence some headlines…..

Commentary[75] on such outcomes might be noted:

> "Peter Tulip is the co-author of Reserve Bank research paper, The Effect on Zoning on House Prices. He blames the current structure of the zoning system for the dramas, and said it needs to be overhauled.
>
> 'The corruption we often see is a production of the zoning system. Rezoning is incredibly lucrative because there is an administratively-determined shortage of residential land,' Tulip, who is chief economist at the Centre for Independent Studies, said.
>
> 'The shortage drives up the price of rezoned land and creates a big temptation for corruption. The lack of logic underpinning rezoning makes the corruption easy.
>
> 'Defenders of zoning say that planning has not changed, so that is not responsible. This is seriously misleading.
>
> 'The rigidity of the planning system is the problem. It means higher demand results in higher prices.
>
> 'A responsible planning system would have resulted in more construction and lower prices.
>
> 'Economists agree that greater supply would make housing more affordable.' "

Another professional cited[76] opines:

> "Another expert labelled the NSW planning system the slowest in the world.
>
> Dr Shane Geha is the managing director of NSW rezoning company EG Advisory and adjunct professor of Engineering at UNSW.
>
> 'You can't build on unzoned land without a development application and a myriad of other approvals, both at a council and state level,' he said.
>
> 'As such, we have a highly inelastic product that immensely slows down supply, which, if done for long enough, increases the value of the stock dramatically, particularly if there is high demand.' "

In such ways are the effects of adopting the *Fundamental Fallacy* as good law (as exemplified in the Russell Review) ultimately manifested: injustice, significant market inefficiency, unrestrained regulatory complexity, and scope for corruption.

It might be further noted that, on the views of these observers, Government "value capture" in whatever form, of rising land values, would be based on rising prices caused by Government-imposed market inefficiencies: how could such a policy be sensible?

[12.3.1] Avoiding Unjust Uplift and Conflict of Interest

As former High Court judge Ian Callinan AC[77] has observed:

> "…Not just adjacent people but also the public generally always do acquire something of value when another person's right to use their property in a way that would not cause a legal nuisance is reduced. English law has long recognised restrictive covenants, agreements by which an owner agrees not to exercise a lawful proprietary right in order that a neighbour may have an enhanced enjoyment of their own property.
>
> Not surprisingly, 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…"

A restrictive covenant is a negative covenant respecting the use (or non-use) of land. In comparison, an easement is an interest in land which allows entry to the land for some permitted act. [78]

If, at the time of adversely rezoning land, the government provided fair compensation to the landowner for loss of market value, then the government could have the restriction noted on the title. Perhaps it might be called an "environment and recreation" easement or restrictive covenant.

The landowner would still be in a position to decide (absent a decision by the government to compulsorily acquire the balance of the landowner's interest) the timing of sale of the property, if ever.

Such an arrangement, as well as being just for the landowner, would avoid the creation of a conflict of interest for the government. It would not be able to manipulate (intentionally or not) market values so as to profit from committing injustices to landholders, and would stand to legitimately benefit financially from increased land values over time. Thus, for example, if after several decades the government decided to abolish the restrictive rezoning, causing the value of the property to rise significantly, both it and the landowner would stand to share directly in the capital gain.

[12.4] An Island of Unjust "Value Capture": The Landowner Perspective

It is easy to find injuriously affected landowners who believe that there is one rule for major landholders who seem to get favourable treatment, and another for smaller ones like themselves. That, and the palpable sense of injustice often give rise, rightly or wrongly, to a general suspicion of corruption and favouritism in high places. In fact, it's as if they were marooned on an island of unjust "Value Capture" and the rule of "no-law".

To clear the air, and to focus more precisely on what is happening around them, attention might be paid to the following points of context. Collectively, they would appear demonstrate that the landowners' undeserved disadvantage relative to all around them can be attributed not to corruption or favouritism as such, but rather explained by the failure of the NSW Government and the Russell Review in particular to understand the rights of the freehold title holders with respect to impairment of real property at common law, using the flawed *EP&A Act* as the instrument of oppression. The points of context include:

- limitations of Commonwealth powers in relation to land acquisition;

- the arbitrariness of NSW's zoning and handling of land resumptions;

- the role of developers;

- elder abuse;

- the NSW Valuer General;

- native title;

- fair trading compliance;

- NSW's placatory strategies (including the Independent Community Commissioner); and

- land acquisition principles as endorsed by Mr Pratt, the Customer Services Commissioner.

These are now considered in turn.

Commonwealth's Limited Powers Re: Land Acquisition in NSW

As members of the Committee might be aware, the Senate Finance and Public Administration References Committee is conducting an *Inquiry into the planning, construction and*

management of the Western Sydney Airport project (the "Senate Inquiry"). It appears that a key impetus for the Inquiry was media and other reports with respect to payments being made by the Commonwealth to acquire land well above market value.

The relevance of the Senate Inquiry to this submission is the constitutional context of such acquisitions by the Commonwealth and the perceptions of injuriously affected NSW landowners in the area.

Crown grants in NSW have all been made by the Crown in right of the State (formerly Colony), so the right of resumption of title rests exclusively with the State. The Crown in right of the Commonwealth has never had the constitutional power to issue Crown grants in NSW, and so has no right or power of resumption. Accordingly, only NSW has the power to compulsorily acquire (or, more correctly, the "sovereign power to resume") granted estates in NSW.

As is also acknowledged at **[2.0]**, the Commonwealth is required by s. 51(xxxi) of the Australian Constitution to acquire property only on "just terms".

So, in the context of the development of the Western Sydney Airport, the Commonwealth is required to acquire certain land. As detailed plans are developed, such land parcels are identified and progressively acquired by negotiation with the landowners in the normal way. Given that the location of the runways and particular infrastructure are in a fixed position, certain land in particular locations must be acquired to carry out those plans.

The difficulty that arises for the Commonwealth, as a willing buyer of a required parcel of land, is that it might come up against an unwilling seller. Given that the Crown in right of the Commonwealth has no power to compulsorily acquire, or resume, such land, the unwilling seller has effectively cornered the market for this particular piece of land. The Commonwealth could not solve the problem by, for example, putting a bend in the runway to avoid the land. In this context, the seller is in a position to command what we might call a "monopoly premium" and to wait until the Commonwealth comes up with a financial offer just too good to refuse.

At this point, it might be considered that an option for the Commonwealth would be to approach NSW with a proposal that NSW compulsorily resume the land at market price, which it undoubtedly has the power to do, and then on-sell it to the Commonwealth. A problem with making such an agreement is that it would transfer ownership of the monopoly premium from the private landholder to the NSW Government, and on the premise of the maxim that "there is no such thing as a free lunch", NSW might demand as the price of its co-operation, say, an untied s. 96 grant equal to the value of the monopoly premium. At least, NSW might say, the Commonwealth would definitely end up owning the land parcel when required, which was otherwise not guaranteed. So, in this situation, the Commonwealth would also be faced with the prospect of the by now unhappy landowner commencing legal action against what it would undoubtedly call the "conspiracy" between the Commonwealth and NSW.

The point of all this is that in the area of land acquisition, the Commonwealth's powers in NSW are very limited, so it could be cornered into paying very high prices in particular circumstances. Even a referendum proposal to allow the Commonwealth power to compulsorily acquire state land at fair prices would be doomed to complete failure, if only because all states would fiercely oppose it.

It might be that notwithstanding being stuck due to its limited powers, the Commonwealth could have explored other land options, or perhaps it did not explore co-operation with NSW as it might have. Be that as it may, no doubt the Senate Inquiry will find that out.

The bottom line is that while the Commonwealth might be able to explain paying what appear to be excessive prices for land in the vicinity of the Aerotropolis as being due to the constitutional limits of its acquisition powers in NSW, from the point of view of injuriously affected landholders, whose land is not required by the Commonwealth, it just looks like one set of rules for major property owners and another for them.

The Role of Developers

The general role of developers can be explained quite simply. NSW needs to negotiate with them to organise various land developments in the vicinity of the Aerotropolis. Typically, as discussed earlier, developers need to meet requirements set by NSW. Where, as part of a project, NSW allows a developer to benefit from a favourable rezoning of formerly adversely rezoned land, or requires a developer to acquire some such land as a contribution to the project, the developer is simply complying with the rules set by NSW. It is NSW which is controlling and potentially manipulating zoning restrictions for its own budgetary benefit. However, it may nonetheless seem to some adversely affected landholders, quite reasonably, that developers are by comparison unfairly receiving favourable treatment.

The Arbitrariness of NSW's Zoning & Handling of Land Resumptions

Another element influencing landholder perceptions is the handling of land resumptions. Although injuriously affected landholders would generally view those having their land resumed for real money as being comparatively lucky in the circumstances, there seem to be many reported cases where the purchase amount is inadequate, which of itself would reinforce landowner scepticism of the Government's *bona fides*.

Of course, it might be that in 99% of such resumption cases, an owner will complain that the price was too low, whether it was really, or not. However, to the extent that some claims do have arguable merit, we might note in passing that the sum payable to the vendor by NSW for compulsory resumption of land must be sufficient to avoid derogation from the Crown grant: if the legislation under which the resumption sum was determined authorised a lower amount, then the landowner can sue for the difference. An early case where this happened

was *Lord v Commissioners for City of Sydney*[77]. The City Commissioners, pursuant to statutory powers, paid compensation to the plaintiffs for land resumed, but the plaintiffs were not satisfied with respect to sums paid for the resumed land. On appeal to the Privy Council, higher compensation awards were affirmed.

The underlying point though is that while others who are having land resumed and are being compensated, injuriously affected landowners are not. The arbitrariness of zonings (as already noted above by some commentators) and the provision of compensation to some (for example where land is to be resumed for a railway), but not to others, defies any logic, as far as landholders are concerned. See also the Pratt Review's guiding principles, discussed below.

Elder Abuse

The NSW Ageing and Disability Commission (ADC) exists to prevent and better protect older people and adults with disability from abuse, neglect and exploitation. It has been reported by landowners that some of the people on injuriously affected land are elderly. Consequently, the NSW Government's failure to provide compensation, or desist from the environment and recreation rezoning, has destroyed their financial capacity to make provision for their personal well being, for example, by now being unable to fund the installation of a downstairs bathroom, or to fund a security deposit for a place in an aged care facility. In this context, the NSW Government is effectively committing elder abuse. These elderly are being exploited. They are being exploited by the NSW Government to provide a public benefit at their own, very considerable, personal cost. Consideration might be given by such residents to reporting these instances to the ADC, but no doubt the Minister responsible would use the *EP&A Act* as cover.

The appointment of the Independent Community Commissioner (discussed below) is reportedly designed to address "those who need support on compassionate grounds". Whether this includes the elderly only, and if so, whether they will be properly compensated for their loss, and if so, why not all other distressed owners as well, remains to be seen.

The NSW Valuer General

It has been reported (in April 2021) that the NSW Valuer General is not altering land valuations in the vicinity of the Aerotropolis. With respect to injuriously affected landholders, the market has already made its judgment in the form of plummeting land values and the sudden illiquidity (unsaleability) of land assets. The opinion of the Valuer General is substantially irrelevant to achievable market values in this context. However, the Valuer General's valuations are used as a basis for calculating land tax and council rates. Consequently, it would seem that landowners will be obliged to pay the same amounts of taxes and rates into the future, notwithstanding their diminished ability to use their land and its lower market value. This is really just adding insult to injury by the NSW Government.

Native Title

Native title does not appear to be at issue in any way in the subject circumstances. Yet, an uncompensated injuriously affected landowner might wonder why it is that the Commonwealth has enacted legislation to protect native title holders in NSW (and other states) from native title impairment without compensation, but not to similarly protect common law title holders.

The Commonwealth might be excused for not realising that common law title holders in NSW or other states needed such protection, but nonetheless, the discrimination against them is there. S. 51(1) of the *Native Title Act* 1993 (Com.) provides for an:

> "entitlement [to compensation] on just terms to compensate the native title holders for *any loss, diminution, impairment or other effect* of the [compensable] act on their native title rights and interests." (Emphasis added.)

In *Northern Territory v Griffiths*[80], the High Court found no difficulty with the use of the words "loss, diminution, impairment or other effect" as describing property rights which attract a right to compensation.

Fair Trading Compliance

The ease and disregard with which the NSW Government has injuriously affected landowners, to the latter's very significant cost, might be contrasted with state fair trading laws.

To illustrate, in a recent Queensland case, a Brisbane real estate agent failed to return a $24,500 deposit to a buyer following the termination of a sales contract. The state Office of Fair Trading issued an infringement notice. The agent, being amazingly stubborn, continued to refuse to refund the money, and appealed to the Magistrate's Court, the District Court, the Supreme Court, and then the High Court, which refused to hear a further appeal.[81] If the case had been in NSW (which has its own legislation to similar effect), undoubtedly the result would have been the same.

The point of this is simply to note the seriousness with which the injustice to the landowner would be treated by government in a fair trading context, whereas landowners affected by environment and recreation rezoning, causing losses amounting to very many multiples of $24,000 in each case, face complete disregard by the NSW Government.

NSW's Placatory Strategies (including the Independent Community Commissioner)

A fundamental source of frustration for landowners is the placatory strategies adopted by the NSW government. These include widely publicised instances, for example:

- assurances that all properties resumed will receive compensation (when the precise issue is actually that the government is *refusing* to acquire);

- assurances that open space will be resumed, which conveniently avoids addressing landowners affected by environmental and recreation zoning;

- the process of accepting submissions, which provides a façade of potential redress, but which in fact just serves to avoid the fundamental objections of landowners;

- providing planners for meetings, where the planners are placed in the unenviable position of facing frustrated landowners, without having any power to deal with the big objections; and

- ministers engaging in publicity events for the project, such as riding a skateboard through parkland, but utterly failing to address landowner concerns.

The creation of an Independent Community Commissioner by the Minister in May 2021, is to "address the concerns of landowners in the Western Sydney Aerotropolis". This looks on its face to be a step forward by the Minister, as it is no doubt intended to be, but it bears the hallmarks of just another placatory strategy.

One of the announced roles of the Commissioner is to advise "on actions to assist people on environmentally constrained land and those who need support on compassionate grounds". Thus straight away, affected landowners are cast in the role of supplicants, as if waiting for the exercise of mercy, used by a tyrant to demonstrate his power. Such condescension is patronising in the extreme. Landowners are not interested in the tyrant's titbits of "support" and "compassion", but in justice, and respect of their human rights. They want a FAIR GO!

Affected landowners want, and deserve, fair compensation for any imposed injurious affection, or to have any such rezoning rescinded. Promptly.

It should be borne in mind that the Commissioner has evidently been appointed not under any new legislation, which might restore legitimate landowner rights, such as Mr Banasiak's the *Land Decisions Bill*, but under the existing *EP&A Act*, which contains no provision for the protection of injuriously affected landowners. In this context, subject to clarification from the Minister, it would seem that the position of Independent Community Commissioner is simply an administrative appointment which can be terminated by the Minister at his discretion, making the "Independent" label "aspirational" rather than legally substantial.

The appointed Commissioner has, according to the Minister, "a wealth of experience in planning, property and complex public policy matters". Given that the *EP&A Act* has been in force for over four decades, at least as long as the Commissioner's career, the question might be asked: has she ever, even once, stood up for the property rights of adversely affected landowners, uncompensated under the Act? With respect, extensive planning experience of the Commissioner fixes her at the outset as just another cog (of whatever size) in the landowner-oppressing bureaucratic planning juggernaut.

If the Commissioner's appointment by the Minister is anything more than another placating strategy, then within four weeks or so of her appointment, landowners would expect to see her recommending to the Minister that the *EP&A Act* be amended to protect the rights of injuriously affected landowners, for example as per *Land Decisions Bill*. It's about justice and human rights, so it should be an easy decision….and the Commissioner is after all, "Independent".

Fundamentally, such placatory techniques should be seen for what they are: a means of avoiding the real and substantial concerns raised by injuriously affected landowners.

Land Acquisition Principles as Endorsed by Mr Pratt, the Customer Services Commissioner

The Terms of Reference of this Inquiry refer at 1(a) to "…the Russell and Pratt Reviews into the *Land Acquisition (Just Terms Compensation) Act* 1991". This submission is focused primarily on injurious affection, and secondarily on the notion of "value capture", rather than on "land acquisition" itself. However, the Pratt Review "guiding principles" serve to provide a stark contrast to the treatment of injuriously affected landowners.

As Mr Pratt[82] says in the government video:

> "As the Commissioner for service in New South Wales my role is primarily about advocating for citizens and for businesses in terms of improving how government interacts with citizens and businesses everyday throughout this state….."

Ten guiding principles were developed during my review that articulate the aspirations for the acquisition process which the reviews recommendations are intended to deliver.

1. The resident has a primary point of contact throughout the process.

2. The resident is treated with respect and sensitivity at all times.

3. Their needs and those of their family are listened to and given consideration.

4. The resident is informed personally and promptly early in the process and there is a regular, timely engagement throughout the process.

5. The resident is provided with all relevant information in a timely, easy to understand transparent manner at all steps in the process.

6. The process allows the resident adequate time for consideration negotiation, decision making and relocation without unduly delaying the project.

7. The timeline and any deadlines are clearly explained.

8. The valuation and acquisition process is fair, consistent and transparent based on market value not reinstatement.

9. Clear reasons and explanations are given for financial calculations, offers and terms of settlement.

10. A full suite of support options and entitlements are un-ambiguous, easy to understand, simple to access and straightforward to administer."

How successful the state bureaucracy might be at implementing these principles is not a topic of this submission. The main point for our purposes is that injuriously affected landowners are totally excluded from the adoption of these policies. This is not Mr Pratt's fault, because he is naturally relying on the Russell Review's exceedingly narrow understanding of what real property rights actually are, and legislation relating thereto.

Pratt's ten guiding principles should apply equally to injuriously affected landowners who are being deprived of real property rights. Once again, in this way, the landowners are seemingly marooned on an isle of "no-law", in an sea of rights-for-others-only.

From this brief analysis, it can be seen that injuriously affected landowners have been treated unfairly compared with other title holders, developers, and landholders selling to the Commonwealth, but the only entity clearly behaving improperly and unjustly is the NSW Government. It is the party responsible.

[13.0] Conclusions

To draw conclusions together, it is convenient to summarise and revisit some key points already made in this submission.

To take the point made at **[12.4]** first, the apparent absence of rights of injuriously affected landowners in NSW can be seen from the above examples to be anomalous. These anomalies may be recited as follows.

1. The Commonwealth, in acquiring other people's land in NSW, has to pay just terms and cannot compulsorily acquire for market value: this does not apply to NSW landowners injuriously affected by NSW who receive no value at all.

2. Even if entirely innocent on their own part, developers can seemingly benefit from the State's strategies of injustice, such as the Mandated Developer Compliance Strategy and the De-sterilisation Uplift Strategy, the existence of which relies on unjust value capture to the cost of injuriously affected landowners.

3. The ten guiding principles enounced by the Customer Services Commissioner purportedly apply with respect to land resumptions for transport corridors and the like, but not at all to injuriously affected landowners.

4. A portion of affected landowners are older people and people with a disability. The NSW ADC exists to protect such people from abuse, neglect or exploitation, but by gratuitously injuriously affecting their land without compensation, the NSW Government is abusing, neglecting and exploiting them more than pretty well any one else can.

5. The NSW Valuer General maintains land values, which while to the benefit of those favourably zoned landowners, punish injuriously affected landholders by causing land tax and council rates to be assessed at levels way above injuriously affected market prices.

6. The Commonwealth protects native title holders from uncompensated "loss, diminution or other effect" caused by NSW legislation, but not common law title holders.

7. State fair trading laws consider the right of landowners (and others) to be refunded in full for services not rendered to be taken seriously - but in contrast, NSW, for a purported public benefit, eagerly and directly causes the values of injuriously affected land to fall by vastly greater amounts with utter disregard for the possibility of making just compensation.

If the injuriously affected landholders were enemies of the state, not deserving of human rights (but even enemies of the state do have human rights, they being universal), then maybe

this insidious pattern of denial of rights and of justice might be explainable. It certainly begins to resemble the victimisation of certain minorities in some dictatorial states. Does it really need to be said that all of the injuriously affected landowners are not enemies of the state?

As noted previously, no political party in NSW has ever sought a clear electoral mandate with a policy that real property rights should be diminished without compensation. Yet these landowners are caught in a vortex of real property wrongs.

Clearly, the anomalous position of injuriously affected landholders who are denied compensation stems from a misunderstanding of the law: the *Fundamental Fallacy*, as exemplified in the Russell Review and explained at **[2.0]**. Concerns about such injustices have been raised by the NSW Bar Association and former High Court judge Ian Callinan AC, among others, but their concerns have been completely ignored.

It is perfectly clear that real property rights include: the right to grow wheat; the right to run horses, or other livestock; the right to cut down trees, or not cut them down; the right to grant easements including for example, of rights of way, of light, of air and of fences; the right to expel trespassers; the right to subdivide; the right to build a house or add a granny flat; in fact, as the High Court has repeatedly said: the right to perform "every act of ownership which can enter into the imagination".

The Crown (in general, but in this context, the Crown in right of NSW) remains sovereign, so consequently retains the power "to…resume" as Barton J. put it in the *Wheat Case*.

Nonetheless: "the Crown is not competent to derogate from a grant once made" as Brennan J. observed in the *Mabo (No. 2) Case*.

Given that the Crown created a system of land tenure based on the grant of title, which at common law prohibits it from derogating from any such grant in the future, any legislation must be unenforceable at least to the extent of the derogation. To continue with Brennan J. in *Mabo (No. 2)*:

> "a statute which confers a power on the Crown will be presumed (so far as consistent with the purpose for which the power is conferred) to stop short of authorizing any impairment of an interest in land granted by the Crown or dependent on a Crown grant".

Further, this law does not just "fade away". The words including "for ever" as found in Macquarie's Crown grant in Bringelly are, according to the High Court in the 1998 *Fejo Case*, "recognised as conveying an estate in fee simple". This judgment that "for ever" means forever is entirely consistent with the Privy Council's 1889 ruling in *Cooper v Stuart* that Crown grants in NSW were not subject to the rule against perpetuity.

The reader might appreciate from analysis above that, unlike in so many other areas of law relating to real property, there is no requirement under the *EP&A Act* to take account of landholders injuriously affected under the Act. Accordingly, there being no requirement in the Act for compensation to be made, the Minister, possibly bolstered by the Russell Review's inadequate exposition of what real property rights actually are, sees the zoning decisions as being lawful, and making an opportunity for a big budget saving. Justice is not the Minister's concern.

In this context, the whole juggernaut of authority would find affected landowners to be a mere irritant, to be placated for the time being, until the momentum of the whole project, and time, wears them down.

Once the *Fundamental Fallacy* is acknowledged and as such rejected, it follows that State Parliaments do have an obligation to provide compensation for any resumption of uses which amounts to a derogation from a Crown grant. It so happens that this obligation is essentially constitutional in nature, notwithstanding that it does not, in so many words, resemble s. 51(xxxi) of the Australian Constitution. Extensive judicial authority – of the Supreme Court of NSW, the Privy Council and the High Court of Australia – is consistent with this obligation of the State.

As noted briefly at **[10.4]**, if the failure to compensate landowners injuriously affected by legislation constitutes a derogation from the grant of title, then it would be open to landowners to seek a variety of remedies in law or in the Equity Division of the Supreme Court of NSW, where the Court would be essentially be asked to simply follow its own authority, supplemented by consistent judgments of the Privy Council and the High Court.

Courts have not been able to make any orders or judgments on this particular issue because no lawyer has presented the argument. However, once the trance-like state induced in lawyers by their pre-emptively conclusive interpretation of the irrelevant s. 51(xxxi) is broken, this should change.

In the musical *My Fair Lady* – based on George Bernard Shaw's *Pygmalion* – Rex Harrison's Professor 'iggins took his elocution student and former "guttersnipe", Audrey Hepburn's Eliza Doolittle, to the races to demonstrate her progress in diction and deportment. In the midst of polite society and a race, Eliza briefly relapsed, urging a horse to "move yer bloomin' arse". Landowners might also take the view that it is time for legal practitioners to move their "bloomin' arses" as well.

For landowners with foreign nationality (not Australians), ISDS might provide an avenue of redress as outlined at **[10.3]**.

While judicial remedies should be available to uncompensated injuriously affected landowners, another avenue of potential redress is direct action by the Commonwealth, whether by legislation, or adding conditions to s. 96 grants made to NSW, as respectively outlined at **[10.1]** and **[10.2]**. As noted there, s. 51(1) of the *Native Title Act* 1993 (Com.) provides with respect to native title rights in NSW, compensation "…. *for any loss, diminution, impairment or other effect"*. It is simply logical, and in the interests of justice, for the Commonwealth, where NSW has failed, to ensure that common law title holders have the same human right to compensation as it has provided for native title holders.

The Senate Finance and Public Administration References Committee currently has these options before it as a subject for its *Inquiry into the planning, construction and management of the Western Sydney Airport*. At the Commonwealth level, landholders should encourage Senators and MHRs to adopt this justice equalisation.

The above legal strategies, once initiated, could develop quite quickly, and completely outside the control of the NSW government, other than as a defendant in court. The sword of Damocles is hanging precariously…

However, NSW has the opportunity to take the initiative and rectify the situation, restoring justice to injuriously affected landowners, by adopting legislative adjustments to the *EP&A Act*. In this regard the *Land Decisions Bill* tabled by Mr Banasiak MLC would seem to present an excellent opportunity for justice. Whatever details or amendments might be adopted therein, this submission makes the **Recommendation** (at **[11.0]**) to include a new Object in the Act providing for the protection of real property rights. Other sections of the Act or its subordinate regulations would then be interpreted in the context of this new Object. If any section or regulation no longer made sense in the context of the new Object, it would require amendment to suit the new context.

With regard to government "capturing the uplift" in land/property value, three distinct techniques can be identified:

1. Betterment tax;

2. Government proprietorship rights; and

3. Imposition of injurious affection without compensation.

As a euphemism for a betterment tax, so-called "value capture" is an inefficient tax, both administratively, and economically, and has been thoroughly discredited over three decades of failure in NSW. With respect, proponents of same must be ignorant of this history. If NSW requires greater tax revenue, proposals should be approached from a macro-economic tax management perspective, rather than the opportunistic ad-hoc manner that this sort of "value capture" notion represents.

If "value capture" is taken to refer to the rising value of alienated property in which NSW has a proprietary interest, then, absent any of the "Four Strategies of Injustice", NSW is perfectly entitled to such "value capture", which might be realised by selling the land or by other commercial means.

In the third interpretation, "value capture" is the result of one of the "Four Strategies of Injustice", each of which relies in one way or another on the of uncompensated injurious affection being imposed on a landowner. Accordingly, "value capture" in this context is based on the shameful imposition by NSW onto the landowner of injustice and repudiation of their human right not to be arbitrarily deprived of property.

The views put in this submission with regard to NSW real property law in general, and the nature of Crown grants of freehold and leasehold title, are founded on the judicial authority of the superior courts mentioned. Consequently, any disagreement with the thrust of the arguments put must have to address, not so much the opinions of your humble correspondent, but the judicial authority of the cases cited.

Whatever the outcomes of the Inquiry, the Committee must be congratulated for its willingness to explore these issues. If clarification is required on any aspect of this submission, you would be most welcome to make contact.

Thank you for the opportunity to make a submission to your Inquiry.

Peter Ingall
Barrister

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

Citations

1. *Wheat Case* (1915) 20 CLR 54 at 98, the cases being referred to being: *Canadian Liquor Case* (1895) (quoted in *Lefroy's Canada's Federal System,* p. 213) and *Union Colliery Co. of British Columbia* v. *Bryden* (1899) A.C., 580, at p. 587.

2. *Cooper v Stuart* [1889] 14 App Cas 286 at 294.

3. See: *Arguments for Property Rights in Australia* at https://adverse-rezoning.info.

4. *Wheat Case, op.cit, n.* 1 at 98.

5. *Durham Holdings v New South Wales* (2000) 205 CLR 399

6. The abolition bill was passed by the Assembly on a 51–15 vote on 24 October 1921 and two days later, the Council voted itself out of existence: the (Labor) members who voted for the abolition were known as the "suicide squad": "Queensland Legislative Council", *Wikipedia*.

7. Carney, Gerard, "An Overview of Manner and Form in Australia" (1989) 5 *QUTLJ* 69 at 80.

8. *Wheat Case, op.cit, n.* 1 at 78.

9. Boulten, Phillip SC, *Submission of the New South Wales Bar Association to the Just Terms Compensation Legislation Review*, 2013 – Submission 12 – at 4.

10. Callinan, Ian AC, "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

11. Ibid.

12. For a general review of the nature of injurious affection, see Brown D., "The Differing Faces of Injurious Affection", [1972] 10,4 *WALR* 336.

13. *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 119 ALR 577

14. *Op. cit., n.* 3.

15. *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.

16. 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 .....'"

17. *Cooper v Corporation of Sydney* (1853) 1 Legge 765 at 771-772.

18. *The Commonwealth v. Hazeldell Ltd.* [1918] HCA 75; (1918) 25 CLR 552, at p 563.

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

20. 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.]"

21. In 1998, the High Court cited with approval Isaac J's 1923 observation in *Fejo v Northern Territory* [1998] HCA 58: see *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 42, per Isaacs J, quoting *Challis's Real Property*, 3rd ed (1911), p 218.

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

23. *Cooper v Stuart, op.cit., n.* 2.

24. Per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ. in *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 437, cited in the majority judgment of *Northern Territory v Griffiths* ([2019] HCA 7 at §71)).

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

26. MS Jacobs, *Law of Compulsory Land Acquisition*, 2nd ed., (2015) at 26-27.

27. *Op. cit. n.* 3, particularly at **[2.0]**.

28. 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…"

29. Twomey, Anne, Professor, *The Constitution of New South Wales* (2004) at 1.

30. *McGinty v Western Australia* (1996) 186 CLR 140 at 172-173.

31. Twomey, *op. cit.* at 25.

32. Professor Stuart Kaye, "The offshore jurisdiction of the Australian states", *Australian Journal of Maritime and Ocean Affairs* (2009) Vol 1(2) at 38-39.

33. *Wheat Case, op.cit., n.*1 at 67.

34. 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....."

35. *Western Australia v Commonwealth (Native Title Act Case)* [1995] HCA 47 at 79.

36. Wilcox, M.R., *The Law of Land Development in New South Wales*, Law Book Co., (1967) at 206.

37. *Ibid.*, at 277-278.

38. *Ibid.*, at 278.

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

40. Wilcox, *op. cit.*, at 277-278.

41. Fricke, G.L. QC, *Compulsory Acquisition of Land in Australia*, 2nd ed., Law Book Co. (1982) at 114-115.

42. Wickham, *op. cit.*, at 28.

43. "Ask Gadens", *Planning Institute of Australia*, July 2013.

44. For a more detailed outline of many issues related to this submission, see also: *Arguments for Property Rights in Australia* (therewith).

45. Kemp, *op.cit., n.19* at 5.

46. Sykes, Trevor, *Two Centuries of Panic: A history of corporate collapses in Australia*, Allen & Unwin (1988) at 10.

47. For a biography of this prominent and colourful chap, see: Eldershaw, M. Barnard, *The Life and Times of Captain John Piper*, Australian Limited Editions Society (1939). Curiously, the author's name was the pseudonym of joint authors Marjorie Barnard and Flora Eldershaw.

48. *Fejo (on behalf of Larrakia People) v Northern Territory* [1998] HCA 58 at para. 11 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ. In a separate judgment, at para. 106, Kirby J. agreed, making the full court unanimous on the point.

49. *Cooper v Stuart, op.cit., n.* 2.

50. *Cooper v Stuart, op.cit., n.* 2.

51. Callinan, *op.cit., n.* 10.

52. *Cooper v Stuart, op.cit., n.* 2 at 289-290.

53. *Cooper v Stuart, op.cit., n.* 2 at 294.

54. *Op. cit., n.* 3.

55. *Northern Territory v Griffiths* [2019] HCA 7 at 27.

56. Callinan J., *Chang v Laidley Shire Council* [2007] HCA 3. His judgment is a fine work of indignant *obiter dicta* on the topic.

57. Neate, *op.cit*., n. 10.

58. Wilcox, *op. cit.*, *n. 36* at Chapter 1.

59. French, Robert, C.J., A.C., "Property, Planning and Human Rights", *Planning Institute of Australia, National Congress* 2013: (NB: emphases in text are added.)

60. See s.51(1) *Native Title Act* 1993 (Com.).

61. Australian Government – Department of Foreign Affairs and Trade "Investor-state dispute settlement (ISDS)" – Circular 2019.

62. Visit https://adverse-rezoning.info to see many more instances.

63. *Op. cit. n.* 3, particularly potential remedies in equity at **[6.0]**.

64. Daly, Samantha & Hannam, Angus, "Should creating environmental planning instruments be subject to greater Parliamentary oversight?" *Johnson, Winter & Slattery* April 1 2021. (Emphases in original, which provides additional analysis.)

65. Fricke QC, *op. cit.*, *n.* 41.

66. The operation of the Emission Reduction Fund is described in *Arguments for Property Rights in Australia*, *op. cit. n.* 3, at **[8.6]**.

67. Kemp, *op.cit., n.19.*

68. As Callinan J. did in *Chang v Laidley Shire Council, op.cit., n.56* for example.

69. Callinan *op.cit., n.9*

70. Wilcox, *op. cit.*, at 278.

71. Gadiel, Aaron & Whealy, Anthony, "Green light for value capture in planning agreements – taking the 'voluntary' out of VPAs", *Mills Oakley* (2016)

72. Gadiel, Aaron, "Planning Agreements: Practice Note", *Mills Oakley* (February 2021) at 3-5. (Emphases in original.)

73. Ibid., at 5-6.

74. *Environment Protection Authority (EPA) v Saunders and Leaghur Holdings PL* (1994) 6 BPR 13,655.

75. Hendy, Nina, "Behind the Western Sydney Aerotropolis Rezoning Saga", *The Urban Developer*, 17 May 2021.

76. Ibid.

77. Callinan, *op.cit., n.* 10.

78. Examination of a great variety of examples, including rights of way, rights to support, easement of light, easement of air, fencing easements, equitable easements etc. is provided in Bradbrook A. & MacCallum S., *Easements and Restrictive Covenants in Australia*, 3rd ed., (2010). The great variety of types of easement and restrictive covenant is itself evidence of common law title being, to use High Court terminology, a "bundle" of usage rights, which are "limited only by the imagination".

79. *Lord v Commissioners for City of Sydney* (1859) 12 Moo PC 473, 14 ER 991.

80. *Northern Territory v Griffiths* [2019] HCA 7

81. "High Court throws out Sunnybank real estate agent's appeal", *Attorney-General Qld Media Statement* 12 March 2021.

82. "The Pratt Review", *NSW Centre for Property Acquisition – Land Acquisition*, video (August 2017) https://www.propertyacquisition.nsw.gov.au/pratt-review