Submission No 42

INQUIRY INTO REVIEW OF THE HERITAGE ACT 1977

Name: Mr Peter Ingall

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INQUIRY into the Heritage Act 1977:

SUBMISSION to the Standing Committee on Social Issues

PRESERVING HERITAGE & REAL PROPERTY RIGHTS

BY PETER INGALL

June 2021

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Ku-ring-gai council request a house at 6 Caithness Street, Killara, to receive an Interim Heritage Order to stop the current owner from making changes to it.

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[1.0] Introduction

This submission presumes the legitimacy and desirability of preserving heritage places and aboriginal heritage, and the legislative power of New South Wales to ensure same.

However, the *Heritage Act* 1977, by effectively purporting to impose uncompensated injurious affection on private landowners, has caused substantial injustice, and arbitrary deprivations of human rights, and continues to do so. It is a major defect in the Act which requires rectification.

The failure of the Heritage Council of NSW to acknowledge and recommend curing such injustices might be explained by the absence of any requirement for it to do so under the Act, but it nonetheless constitutes a major failure of judgment over many decades, which does not go positively to its credit. Under the Act, the Heritage Council has blithely allowed itself to be used as an instrument of oppression.

Examples of injustices imposed on landowners pursuant to the Act, and similar cases in other states, are supplied. The law of tenure in NSW and its relevance to the Act are outlined, as is the scope of injustice imposed. The so-far-neglected remedies potentially available to affected landowners against the Crown (in right of NSW) are explained. Possible remedial amendments to the Act are proposed.

Former High Court justice Ian Callinan AC[1] has observed:

> "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…"

The abovementioned defect in the *Heritage Act* is very much a social issue, and as such must be squarely within the scope of a Standing Committee on Social Issues.

This submission includes a copy of the Productivity Commission's wide-ranging report on Australia's historic heritage places, for the convenience of Committee members. Also included are four published news articles and a comment which illustrate community concerns.

[2.0] Productivity Commission Inquiry Report

The *Review of New South Wales Heritage Legislation Discussion Paper* notes (at 7) that the last major reforms to the *Heritage Act* took place in 1999.

The Productivity Commission after conducting a wide-ranging investigation, published: Productivity Commission 2006, *Conservation of Australia's Historic Heritage Places*, Report No. 37, Canberra ("PC Report").

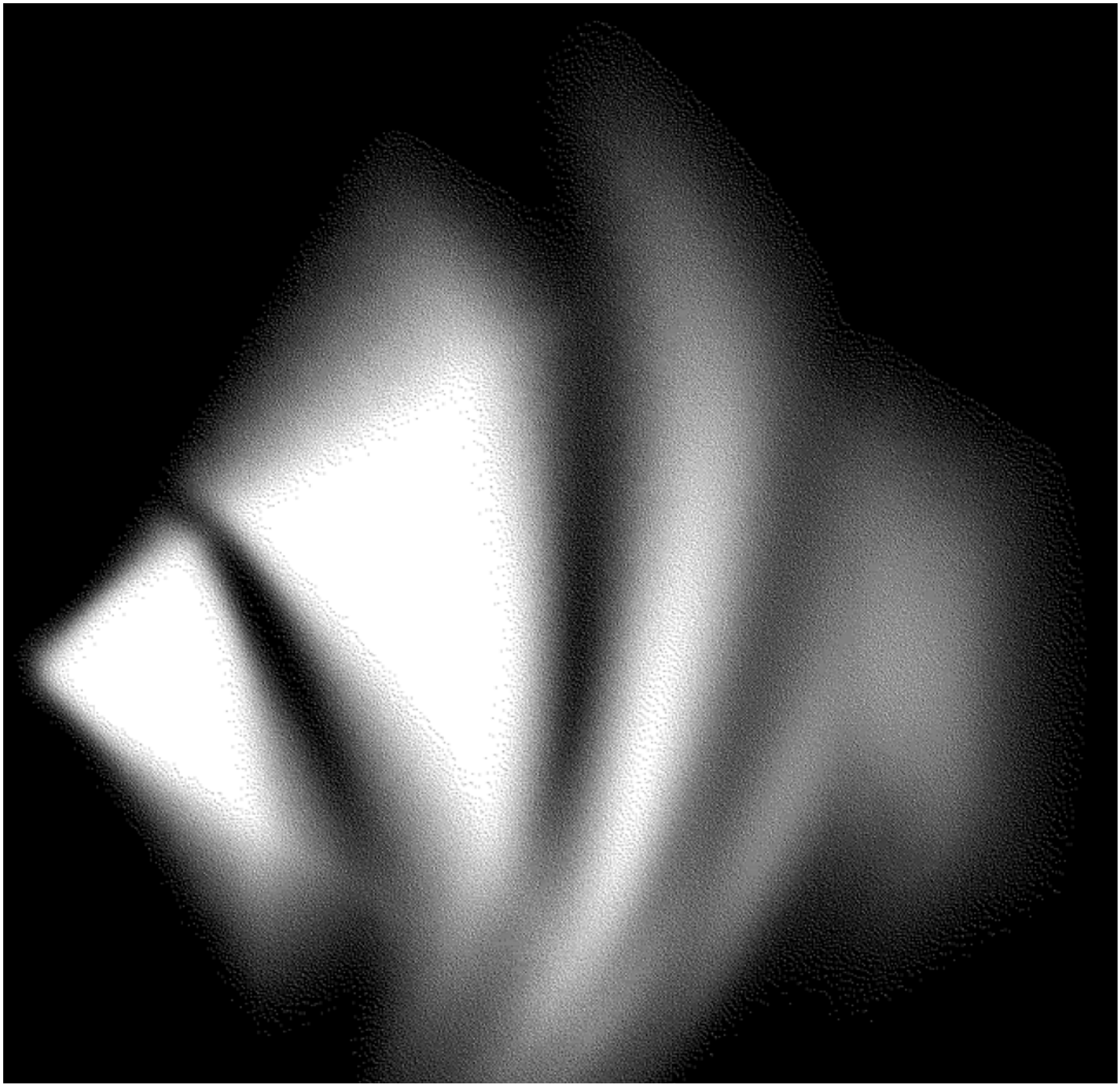
Although the PC Report is already 15 years old, the current Inquiry is the first opportunity to systematically review its observations and recommendations since the last "major reforms" to the Act. It might be the case that the Report is already well known to Committee members, but just in case, please find a copy of same below, for your convenience. (Just click on the image to open the 430*pp* document. If the technology fails, please contact the author or the Productivity Commission for a separate copy.)

This submission shall not attempt to analyse this report, which is perfectly self-explanatory, but some references shall be made to aspects of it below.

Australian Government
Productivity Commission

Conservation of Australia's Historic Heritage Places

Productivity Commission Inquiry Report



[3.0] Heritage Listings of Private Property: Uncompensated Injurious Affection

"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. heritage listing. 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.[2] Clearly, where a government fails to do so, the injurious affection is "uncompensated".

Given that the policy objective of a heritage listing is preservation, its characterisation as being potentially injurious might seem to be paradoxical, but any such paradox is resolved by understanding the distinction between the physical structure itself, and the legal rights of the owner which attach to such "real property".

[3.1] Brief Historical Background

Heritage protection of buildings is not new, having existed since the formation of the National Trust in NSW in 1945. Prior to the early 1970's, it seems to have been concerned with government buildings, and privately owned buildings occasionally bequeathed to the Trust.

By the early 1970's, there had been sufficient urban development, to cause the stock of old commercial and residential buildings to diminish, and the developing relative scarcity of architecturally significant examples began to attract attention. Should it all go?

It was in this general context that a group of middle class ladies resident in harbourside Hunters Hill decided that they wanted to save Kelly's Scrub from development. Having had no success going through the "normal channels", they turned to a working class communist union leader - the now (not until then) famous Mr Jack Mundey - to see if he could assist. The story is recounted as follows[3]:

> "In September 1970, James and 12 other neighbours gathered at All Saints parish hall and christened themselves the 'Battlers for Kelly's Bush'. The group, which the Hunters Hill Council would dismiss as "13 bloody housewives", elected [Betty] James as President,.... Most of the women were lifelong Liberal Party voters who had never been involved in politics.....
>
> .....The President of the Builders Labourers Federation (BLF) met with The Battlers and went to the BLF executive, who supported them in principle. The trade union support resulted in the first "Black Ban" called for by the BLF over an area of land (on June 16/1971)(Pitt, 2011). Black Bans would later become known

as "Green Bans" for their active pursuit of the maintenance of green space.

.....With the Union Green Ban in force, [the landowner] A,V. Jennings were eventually forced to sell the land to Hunter's Hill Council."

The key point of this story, for our purposes, was that the Crown, prior to preserving the land to remain undeveloped, (compulsorily) acquired the privately owned land for value - there was no legislation depriving the property owner of the use of the land with no compensation, by some form of heritage protection or "scenic protection" zoning.

According to the National Trust (NSW)[4]:

".....Jack Mundey and the BLF led the green bans movement in the 1970s.....The movement saved the following areas and their built heritage from destruction:
• The Rocks
• Woolloomooloo
• Darlinghurst
• Glebe
• Redfern
• Newcastle
• Various heritage buildings in Sydney's CBD
• Kellys Bush Park in Hunters Hill
• Centennial Park and the Botanical Gardens"

It seems that, far from actively seeking to develop a heritage protection movement, Mundey initially became involved in heritage preservation on the initiative of local residents at Hunters Hill, and then found himself, as leader of a union involved in construction (and demolition) projects, to have a *de facto* veto power over site demolitions. He was on the cusp of a wave of rapidly changing community thinking about the nature of developments and heritage protection, and surfed it.

Sentiment changed so quickly that government was left in his wake for quite some time. On one hand, the legality of maintaining green bans to maintain the *status quo ante* would have been highly questionable. On the other, was the possibility that developers could, by quickly demolishing particular sites, achieve a *fait accompli*, regardless of the merit of the particular circumstances.

With the subsequent validation by NSW governments of the use of heritage listings to inhibit development, without compensation, property owners suddenly found, often to their cost, that their ownership rights were truncated, or "sterilised".

Notwithstanding that Jack Mundey was a proud communist, there does not appear to be any indication at all that not compensating private property owners for losses was part of his agenda: his focus was simply to preserve properties for the time being until government took control of the process. To the extent that state governments

have opted to use heritage listings, without provision for compensation to adversely affected owners, in the decades since then, that has been the exclusive responsibility of those governments.

The PC Report[5] notes a key distinction between "planning" and "heritage" controls:

> "While there are many common elements, there are also fundamental differences between the ways planning controls and heritage regulatory controls are applied at the local level. Planning uses zonal controls applying *common* restrictions on all properties within a designated area. Heritage controls, by contrast, apply added restrictions selectively to individual properties, irrespective of zone."

[3.2] Costs to Affected Landowners

Four types of costs associated with heritage protection legislation identified in the PC Report[6] can apply to private property owners:

> "For many historic heritage places, contemporary use and enjoyment, and ongoing adaptation and development by the owners (government and non-government (private)) are compatible with and provide sufficient incentives for the continued conservation of their cultural values. However, for some places conservation of their heritage significance necessarily involves costs to individuals and the community. These costs include:
>
> • the costs of the heritage regulatory systems;
> • the added costs above normal repairs and maintenance for conservation of the heritage features;
> • costs of the compromises to contemporary use and enjoyment to retain them; and
> • the opportunity cost of forgone development opportunities otherwise permitted for the property.
>
> Where the places are government-owned, governments, as representatives of their communities, can directly consider such costs and weigh them against the cultural benefits conservation of the places provides to their communities. Where places are privately-owned, the owners have limited ability to capture the wider community benefits of conservation."

It is further bluntly concluded that:

> "For privately-owned places, the existing arrangements are often ineffective, inefficient and unfair." [7]

As former High Court judge, The Hon. Ian Callinan AC[8] has observed even more bluntly:

> "I have heard it said that if you wish to do your neighbours a bad turn, apply to have their property heritage-listed. This, I emphasise, is not an argument against heritage listing. It is just a plea for sharing its financial burden. A heritage listing can only be made in an actual or supposed public interest. As a listing comes at a cost, the public, as the beneficiary, should logically bear it.....
>
> 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. Yet under Australian law rarely does the former give rise to a right to compensation.
>
> If, as heritage and other authorities often contend, a listed property does have economic potential as such, and the owner thinks differently, why should not the owner have the right to require the authority to buy the property and then make good its contentions of valuable utility, either itself or by leasing it to someone who can?
>
> Laws to that effect have the further salutary result of discouraging excessive and indiscriminate listings."

Callinan's final point in that passage was in fact verified in the PC Report[9] which found that:

> "some in the community have an incentive continually to seek more listings as they do not bear the costs of conservation."

Some concrete examples of the types of losses alluded to by Callinan were provided in the PC Report[10] as follows:

> "**Box 7.3 Cost of heritage listing**
>
> Don Brew highlighted the additional maintenance costs of conserving a heritage property:
>
> > ... I just went through in replacing a slate roof and doing some joinery work, I think I spent something like $70,000 to $80,000. In a straightforward house that would have been maybe 30 or 40. So there is about a $40,000 differential. You could almost say twice the cost just to maintain the house faithful to its original structure. (DR trans., p. 130)
>
> The Property Owners Association of Victoria discussed the impact of listing in Stonnington:

> In Stonnington, these heritage orders have seriously devalued the properties compared to previous real valuations by over 25% on average. The foremost valuer Herron Todd – an international firm – has ... measured the devaluations specifically for 300 properties in Malvern, and in many cases, the losses exceeded $100,000 in 1998 dollars. After the mortgage, all their assets – gone. (sub. 134, p. 5)

A number of inquiry participants provided an independent valuation of the impact of listing on the value of their property. For example, Saman Rahmani:

> I purchased this house in good faith in October 1998 with no indication of any potential heritage listing. This house was and is the perfect candidate for demolishing and rebuilding. I would never have purchased this house if there was the slightest hint that it would have heritage significance ... I have since obtained an official valuation for my property. It clearly indicates that if it becomes listed as a heritage item its value will drop by $170,000. (sub. DR214, pp. 1,3)

Diana Anderson:

> My Mother and Father worked very hard to buy the land and build the property which was completed in the early 50's. Dad has since died and Mum lives there alone. ... We had some independent Real Estate Agents value the property with and without the Heritage listing on it, and they estimate that Mum will lose approximately $500,000 when she sells it, because of the heritage listing. (sub. DR202, p. 2)

David Miller, speaking about the Victor Harbour RSL Clubrooms:

> We have had appraisals by two separate land agents in the local town; they have said that the value of the property with the heritage listing in place, as you see it now, is in the vicinity of $500,000. If we didn't have the heritage listing on there, given that it's on the main boulevard right in front of the seashore, they start talking 1.2, 1.3, 1.4, 1.5 million dollars. (DR trans., p. 316)

John and Janet Boyd:

> ... we engaged the services of a fully qualified property surveyor at a cost of $700.
> His valuation put the value without heritage listing at $720,000, and with heritage listing at $600,000, a reduction of $120,000. (sub. DR373, p. 1)"

While these PC Report examples are mostly outside NSW, the principles are exactly the same. Here are some published NSW examples and comment. (Where only the first page is shown, click on it to open a multi-page Word document: click on the Pascoe article to see all five pages. Click on the Ku-ring-gai article to see all seven pages.)….

COMMENT Business Opinion

This was published 5 years ago

Heritage laws should be demolished

By **Michael Pascoe**

Updated November 4, 2015 — 5.54am, first published November 3, 2015 — 10.35am

The headline interest is in a reality TV couple in trouble with their local council, but the photographs tell the real story: an undistinguished, utterly forgettable little box of a house that nonetheless is subject to a heritage order.

It looks like another example of local government stealing property rights without compensation; "heritage" bureaucrats preserving dated, second-rate housing in aspic; or, in some instances, NIMBY councils circumventing rational medium density zoning by using a "heritage" excuse.

Be glad the heritage tsars are limited to the bureaucratic nightmare of local government and haven't seized control of Roads and Maritime Services or our streets would still belong to EH Holdens and Austin 7s. I enjoy classic cars but I wouldn't like local bureaucrats insisting that I keep and drive one.

There are of course good arguments for preserving that which is worth preserving, but the photographs of this East Kew "heritage" house owned by *The Block* winners Dea and Darren Jolly demonstrate how debased the tag has become.

Owner outrage at heritage listing of 'typical' homes

By Clare Masters, DailyTelegraph
October 23, 2007 12:00am

THESE anonymous red brick houses might seem like typical, suburban homes - and that is exactly why one Sydney Council wants to put them on the heritage list. Three brick houses built between 1969 and 1970 in Toongabbie have been listed as classic mid-20th century homes.

Up to 12 properties in Toongabbie and Epping were selected for prospective heritage listing in a draft Parramatta Local Environment Plan.

The perplexed owners of the three homes on Lennox St, Old Toongabbie, say they can't understand how their properties can be considered historic.

"It's council gone mad," said Ken Clunas, who has lived in his home for more than 30 years.

A letter from Parramatta Council sent to the three owners said the properties should be frozen in time as they showed "public recognition of the importance of an item in the life of the community".

But Mr Clunas said the heritage listing would devalue his property and make it very difficult to sell.

"If we wanted to sell the house we'd have a much more limited market because there are restrictions on what you can do to change it," he said.

"You can understand an older federation house being singled out for conservation but now, if we want to sell, we'll either have to wait or have a fire sale and lose tens of thousands of dollars - we can't afford that."

Disgusted local member and NSW Water Utilities Minister Nathan Rees received a number of complaints from perplexed residents and wrote to the Council in protest.

"Council should stick with core business rather than seek to preserve their officers' view of 'Ye Olde Worlde' Toongabbie," his letter read.

"It is suburban Australia and hardworking families should be left alone to go about their lives."

Mr Rees also suggests that if the Council intended to go ahead with its plan it should seek to compensate the residents through council rates.

Speaking with *The Daily Telegraph*, Mr Rees said it was crazy that "some heritage wizard" has swept in and listed the properties.

"If they want to modify their homes they are going to have to get special permission, it's just a joke."

A Parramatta City Council spokeswoman defended the decision saying the properties were "identified as being of historic and aesthetic value that clearly point to a time in Australia's 20th century".

"It is Council's view that if we fail to preserve our local heritage, our reference to the past will be lost for future generations," she said.

"Council acknowledges that, due to the age of properties, there may be some sensitivity about the proposed listings, so there will be continued public consultation on the draft Local Environmental Plan 2008."

Originally published as Outrage at heritage listing

THE AUSTRALIAN

Heritage homes a headache or a duty?

By RODNEY JENSEN
THEAUSTRALIAN
12:00AM MAY 5, 2012

COMMUNITIES are often outraged by plans to redevelop popular public heritage buildings, but shy away if a council decides to put private homes on the heritage list.

And that's because listed property owners are not only expected to maintain heritage status, but they must also forgo the development rights enjoyed by owners of ordinary buildings - obligations that can result in deliberate neglect or destruction, says heritage adviser Garry Stanley.

"I think if people are forced into being heritage-listed, they might do things deliberately to harm the property and there is some evidence of that occurring," he says.

Federal and state governments have failed to take a consistent national approach to conservation, contributing to losses of heritage stock, according to a 2006 Productivity Commission report, Conservation of Australia's Historic Places.

Another 15 per cent of listed heritage buildings and places - 90 per cent of which are privately owned - could be lost by 2030 if present trends continue, the report says.

Heritage places in rural areas and urban redevelopment zones are at the greatest risk, and when private owners are faced with heritage listing and the associated costs the reactions are frequently negative. It may explain mysterious building collapses, fires deliberately lit and brazen holiday-weekend building demolitions.

Under the present system, places and buildings can be identified as having heritage

significance at any time as the result of a formal heritage study or via an individual submission to government. The government decision as to whether to list takes no account of the financial status of the owner, but focuses on the merits of the case for heritage status according to accepted criteria.

Once the listing process has been formalised on the council plan, that decision remains final, applying to the building in perpetuity irrespective of who owns it.

The community is divided over heritage listings. Gregg & Kaufmann Real Estate director Zsuzsanna Kaufmann says the community fought "tooth and nail" to protect Nutcote, the former home of author May Gibbs on Sydney's lower north shore, from redevelopment in the early 1980s.

"People went on the streets with banners ... so it could not be redeveloped and it remains what it is.

"I'll bet my bottom dollar that at least two-thirds of the people who were carrying banners would have absolutely bombarded council with objections if their home was put on to a heritage list.

"In the 22 years that we've been involved in the north shore, including Cammeray, Mosman, Willoughby and Artarmon, I've only met less than a handful of people who have said, 'We are the proud owners of a heritage-listed building and we want to do our utmost to keep it that way and we wouldn't sell it for our life because we feel distinctive by being able to own it.' "

Heritage experts such as Mary-Lynne Taylor, a consultant lawyer at Bartier Perry in Sydney and former member of the NSW Heritage Council, argue listing processes should be subject to formal appeal.

Under NSW law, there is no process for appealing a heritage listing.

"The only thing to do is to apply for a development that would allow it to be

demolished," she says.

"And if it's your own house and you don't want to demolish it that's a pretty stupid procedure. But they probably wouldn't take it off the list unless you did."

Rappoport Heritage Consultants principal Paul Rappoport says under the present system of listing private owners are faced with the obligation and cost of maintaining their heritage properties, but it's the community that gets much of the benefit.

"A heritage listing immediately imposes limitations on development, and maintenance," Rappoport says.

"It can become quite problematic because the owner will be unhappy or disgruntled when they see that you have an obligation to maintain the property, the community gets the benefit of the listing, but doesn't pay any direct cost, so it all falls to you."

The case for greater flexibility in listing is supported by Stanley.

Some NSW and Victorian councils give the property owner an option whether their houses are listed, but this system does not apply in every case.

However, in some established conservation areas homeowners take the initiative to upgrade their properties without the need for council intervention.

"People are going to great expense to remove 1960s aluminium windows and replace them with traditional timber ones, because they see that their house is losing value," Stanley says.

On the flip side, Stanley points to one of the most problematic reasons for loss of heritage arising from unthinking neglect by owners in rural areas.

Hidden from view in larger properties are many significant heritage buildings. Because of various factors such as climate change, changing agricultural technology - who uses
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a stable these days? - or changing family circumstances properties with significant heritage value are rotting away with no effort to save them.

"For such hidden heritage there is little prospect of government fronting up the cash to save it," Stanley says.

"The costs would be enormous and there is so much out there.

"I think it's a matter of educating people to look at these things in a different light. It's something they've just looked at for decades and they have no regard for."

NSW and Victoria require approval for developments including demolition or alteration of a heritage item or place that is listed or is located within a heritage conservation zone.

In urban areas that have zoning to permit redevelopment this gives rise to the most contentious effects of owning heritage property.

The demolition of any part of a heritage-listed property is generally prohibited, although modifying one may be permitted.

The main problem with this is cost, since various specialist consultant reports are required to justify the development proposal, with fees amounting to many thousands of dollars in even the simplest cases.

A recent example concerns the house of Alex and Vesna Mastoris, who decided to make additions to their house in the inner-Sydney suburb of Annandale.

Their initial architect was replaced by Rappoport Heritage Consultants when their first set of plans required big modifications to satisfy the local council's heritage concerns. The resulting changes were estimated by the owners to account for between $50,000 and $60,000 of the final project cost of $450,000.
[Page 5 of 7]
Alex Mastoris says the 18 months the council took to process the final development

application could have been sped up, but he says: "I'd definitely tackle another heritage conservation project and I completely understand and sympathise with council.

"They don't want all this sort of ad hoc stuff in their neighbourhood. They want to retain the character of the neighbourhood. And I agree with that.

"I'd definitely recommend using a heritage architect for any person wishing to develop in a heritage conservation area."

Despite the problems besetting heritage in the private sector, experts say there is need for strong support for conservation.

Taylor says owners are not given the strong support that heritage deserves: "We don't celebrate you as an owner of private heritage. And we don't give you anything like enough recognition. We don't even give you a plaque or a certificate to hang on the wall."

In order to raise public understanding of the value of listed items, and not only from the outside, she suggests giving owners $5000 and requiring them to accept a plaque and put it on their building and to allow a public inspection once a year.

But Kaufmann says the responsibility of recognition extends equally to the real estate industry.

"If you are a good agent, your national pride and your pride in your town and your surrounds is just as important as being able to say 'I got a top price for a building'," she says.

* * *

EXPERTS' CONTRADICTIONS FUEL A COSTLY LEGAL BATTLE
PLANNING expert John Toon has experienced the frustration and cost of development
[Page 6 of 7]
linked to heritage concerns first-hand.

After retiring, the former professor prepared a redevelopment plan for his house, in Pymble in Sydney's north, proposing to demolish it to build six retirement houses.

The house was not heritage-listed at the time the application was lodged with Ku-Ring-Gai Council, but Toon says: "The major issue was that the council decided it could be a heritage item - there was a report from the council heritage officer and his words were 'it might be of heritage significance', and that set off a whole train of events.

"About six months after the application was lodged, the application was farmed out for assessment to a private consultant ... she didn't say much except that the development is more overlooked than overlooking.

"She made no mention of heritage. It is only the latter point" that council's heritage person mentioned in a report to council.

Toon appointed his own heritage consultant, Robert Staas, to report on the issue but since Staas and council's heritage officer disagreed, the council decided to appoint an independent expert. The resulting report found that the house was not of architectural heritage significance.

Nevertheless, council decided to engage yet another consultant, who suggested the house and garden might have been designed by an eminent local architect and an important pre-war landscape architect.

Toon appealed to the NSW Land and Environment Court, where evidence was heard from heritage experts both supporting the appeal and opposing it. The appeal was upheld.

Ku-Ring-Gai Council appealed to the NSW Supreme Court, but withdrew from full proceedings, leaving costs to be awarded to Toon (about $70,000).
[Page 7 of 7]
As Toon puts it: "By the time all the kerfuffle was over there was no interest of any kind for such a development ... the market had fallen out, it was just one of those troughs."

The house was sold and taking into account the costs of litigation and the differential in value as a house and multi-unit development, Toon estimates he lost about $700,000.

"I wasn't out to make a huge profit or anything like that.

"I had retirement housing developments all around my house and opposite and I said to myself, I'll do the same thing.

"I was very bitter about it at the time. It took some three to four years for me emotionally, I think, to get over it."

media_camera
David Armstrong was the only Ku-ring-gai councillor to vote against the council's recommendation to heritage list 75 potential items

NORTH SHORE

Residents angry after Ku-ring-gai Council identifies 75 items for potential heritage listing

[3.3] Aboriginal Heritage

The recognition, protection and preservation of Aboriginal heritage may be regarded by all as eminently desirable.

However, "the road to hell is paved with good intentions", and the good intentions with respect to Aboriginal heritage ought not be achieved by legislation purporting to impose significant uncompensated injurious affection on randomly affected landowners, casting them into a special form of bureaucratic hell.

This seems to be happening in Victoria and Western Australia, but potentially affected landowners will often have no idea what waits in store for them until a claim is made some time in the future, long after the passing of the relevant legislation.

The *Aboriginal Cultural Heritage Bill* (WA) 2020 ("Bill") proposed significant potential for the existing property rights of common law title holders to be adversely affected, with no compensation. The imposition of: protected area orders, and regulations; ACH management plans; stop activity orders; prohibition orders; remediation orders; and significant criminal liability, among other things which the reader on examination could no doubt identify, pose a significant potential interference with a landholder's ability to use land as thencetofore entitled. ("Landholder" is used in this Bill to refer to any common law title holder, by freehold or leasehold, which would ordinarily include an owner as defined in the *Heritage Act* (WA) 2016 s.6(f), but also an occupier of such land.)

Without attempting to compile an exhaustive list of possibilities here, it is clear that there is significant scope for injurious affection to be sustained on properties as a consequence of the operation of the Bill's terms. For example, compliance with the process of producing management plans might "sterilise" the use of the land for an extended period of time. The loss of value caused to the land as a consequence could be compounded by the making of a protected area order...and so it goes on. It may be that such legislative interference with private property ownership is necessary to achieve the objects of the Bill, but the failure to provide for compensation to affected landholders is completely unnecessary.

The Bill is structured so that the (aboriginal heritage related) public benefit is substantially paid for by randomly unlucky private landowners who happen to (possibly) have aboriginal heritage characteristics on their land, whereas it is a matter of common sense and justice - and human rights - that a public benefit be paid for by the public. This Bill, in attempting to restore or maintain the human rights of the aboriginal population of WA is, quite unnecessarily, structured to breach the human rights of common law title holders (some of whom, ironically, might be aboriginal).

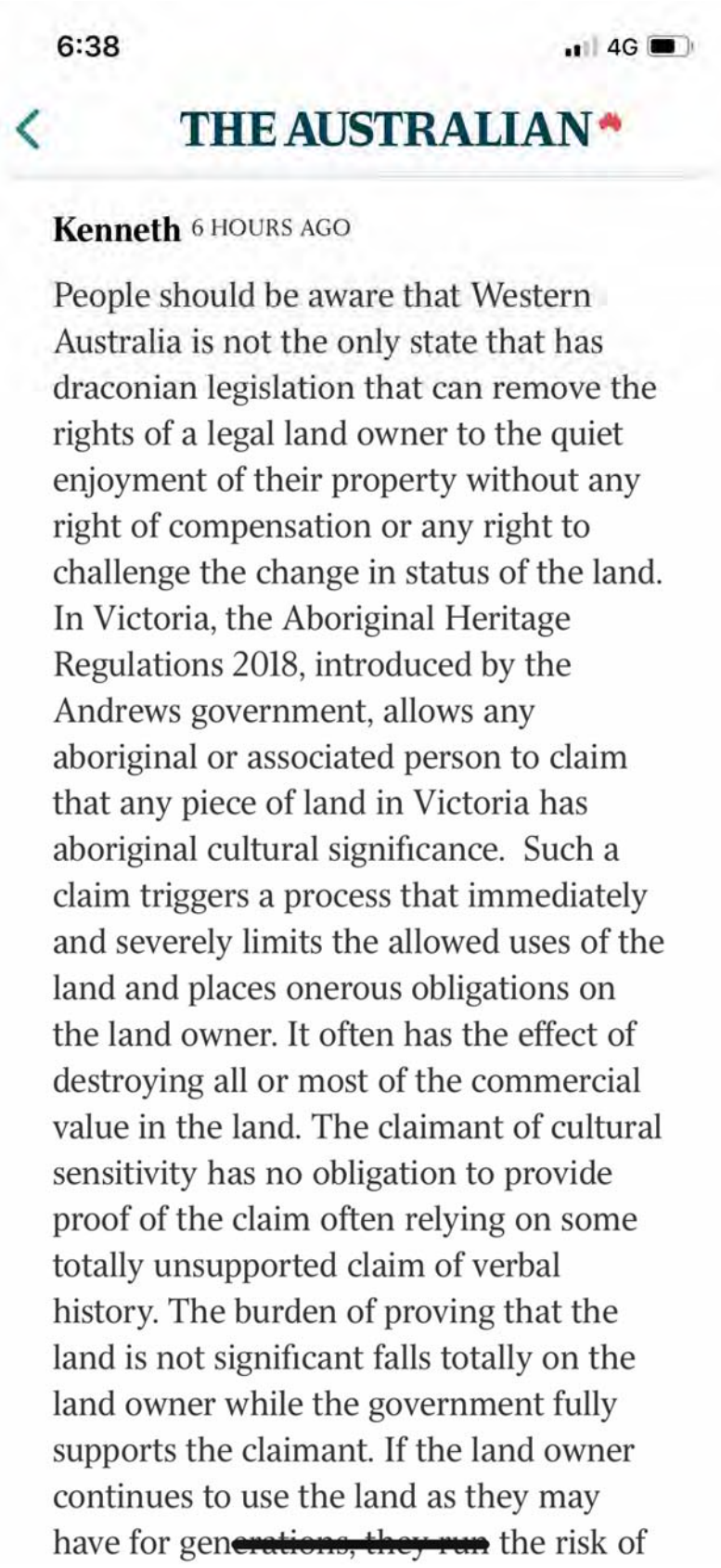
This injustice would be remedied by ensuring that one of the objects of the Bill is - expressed here in general terms - that any common law title holders adversely affected by the operation of the Bill should be compensated for their loss (of, say, peaceful enjoyment and land value) and compliance costs incurred, in a timely and equitable

manner. The absence of such a provision is a major human rights defect in the Bill. (See **[6.0]** for an explanation of this.)

Remedying this breach of human rights would, of course, potentially be at significant cost to the public purse. This would of itself encourage the government to achieve the desired objectives with a more streamlined system. (In this regard, comparison might be made with the *Treasure Act* (UK) 1996 which has resulted in a great increase in the reporting of finds. There are obviously major cultural differences between finds in the UK and aboriginal sites, but the comparison might nonetheless be informative.)

If on the other hand, injuriously affected landholders were properly compensated, the Crown could legitimately have the aboriginal heritage reservation noted on each title, perhaps in the form of a restrictive covenant, and the Act could be legitimately enforced against any subsequent breach by the landowner or a successor in title.

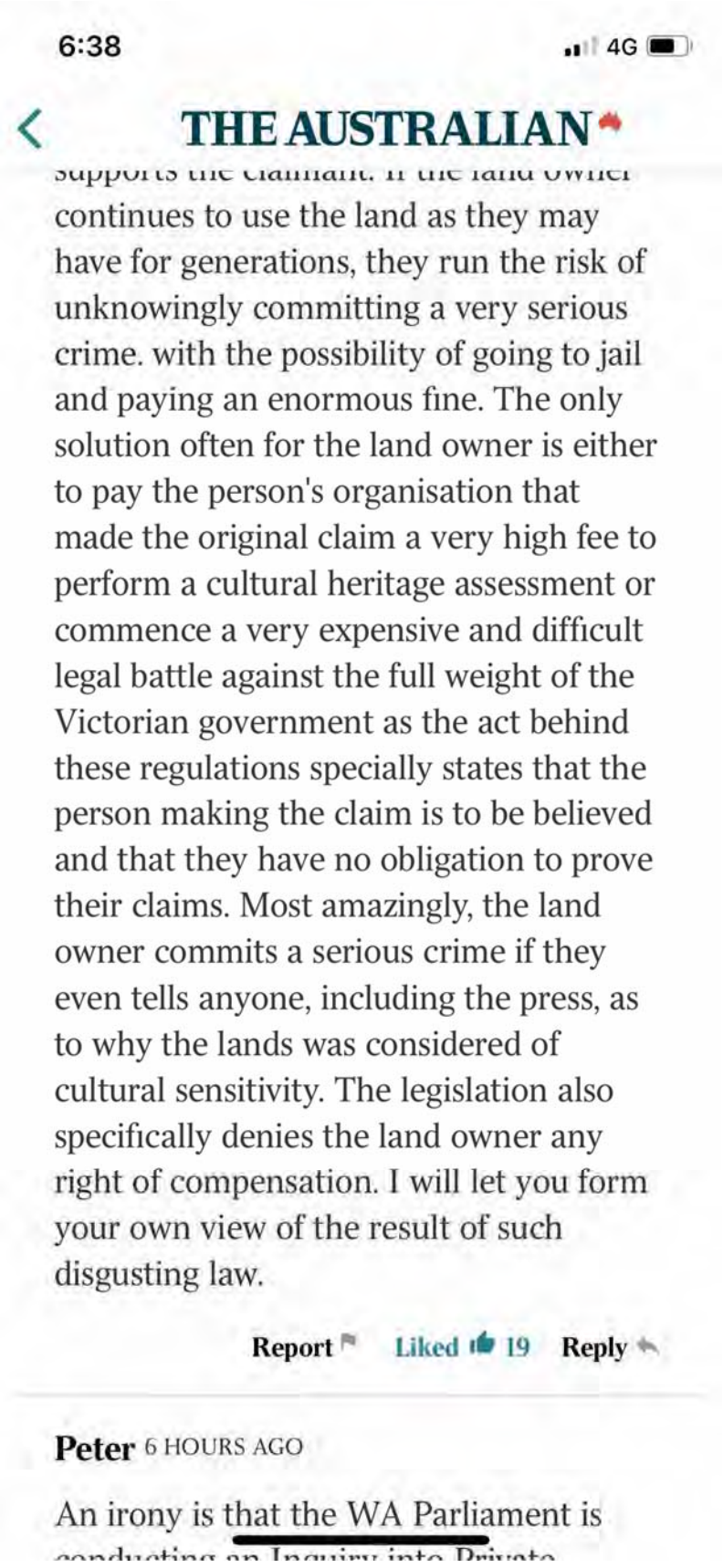
Victorian legislation, which bears many similarities to the WA Bill, is rather more advanced in execution, as it has been enacted and regulations promulgated. “Kenneth”, in the newspaper comment attached below, provides an example of what a common law title holder might feel when affected by comparable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


6:38 4G

THE AUSTRALIAN

Kenneth 6 HOURS AGO

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

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

Report Liked 19 Reply

Peter 6 HOURS AGO

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

Essentially, such schemes cause landowners to become, at their own cost, part of their very own public service bureaucracy, with their land "sterilised" for the foreseeable future. As shall become evident below, landowners should be able to contest this successfully as a derogation from the Crown grant of their estate.

Having said that, it is submitted to the Committee that any laws in NSW with respect to aboriginal heritage on privately owned land should provide for full compensation for any consequent interference with the right of free enjoyment which exists pursuant to the Crown grant. It follows logically that to minimise the cost to the state, assessments and the like should be governed by regulations in the simplest and most expeditious manner practicable.

[4.0] The Law of Tenure by Crown Grant of Freehold (or Leasehold) in NSW

This topic is examined in much greater detail in *Arguments for Property Rights in Australia*[11].

Referring to "common law" title (as opposed to native title, which is not created by grant), Dr Fry[12] 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.....".

Most privately owned land affected by heritage laws in NSW is held by freehold title, with some by leasehold. The Heritage Council should be in a position to quantify same. For purposes of exposition, the focus here shall be on freehold title.

In 1998, the High Court cited with approval Isaac J's 1923 observation[13]:

> "..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."

The High Court[14] has demonstrated no difficulty in characterising even 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."

Note also the High Court's characterisation of property rights as being a "bundle of rights", as for example Callinan J[15]:

> "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….."

With respect to the Crown's inability to derogate from a grant, Brennan J.'s *Mabo (No. 2) Case* judgment[16] is on point:

> "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."

This description of the fundamental common law rule that a grantor - including the Crown - cannot derogate from his own grant is nothing new. Nearly a half century before the High Court even existed, the Supreme Court of NSW stated, in *Cooper v Corporation of Sydney* (1853) 1 Legge 765 at 771-772:

> **"...**the Crown cannot derogate from its own 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* [1889] 14 App Cas 286 at 294, the Privy Council found that in 1823 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.

Consistently with this, the High Court[17] observed:

> "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."

The term "for ever" in a Crown grant of an estate in fee simple is not a mere poetic flourish, to be ignored at the whim of the Crown, whether such derogating whim be legislatively imposed or not.

Further, the High Court states that self-imposed inability of the Crown to derogate from

its own grant provides for security of ownership[18]:

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

The word "arbitrarily" has been interpreted by the High Court to mean not only "illegally" but also "unjustly"[19]:

> "....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, at least in relation to real property, 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.

The sovereign right of the Crown in right of a State to resume a Crown grant is not a right to derogate. Barton J. observed in the *Wheat Case* (1915) 20 CLR 54 at 98 "the power of the Parliament to assume or **resume**", not the power to "assume or derogate", and nor the power to "assume or repudiate". (Emphasis added.)

The existence of s. 51(xxxi) of the Australian Constitution, which provides for acquisition of property on just terms by the Commonwealth, is irrelevant and inapplicable to the above common law, as far as the Crown in right of a State, and landowners in a State are concerned. The absence of an identical provision in the NSW Constitution Act is equally irrelevant. The non-existence of a "deeply rooted right" which would operate as a restraint upon the legislative power of a State, causing it to lack the power to enact laws providing for the acquisition of property without compensation, as considered in *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 is also irrelevant. Whether or not there is a "taking" or alternatively a "regulation" as considered in the *Tasmanian Dam Case* (1983)158 CLR 1 is equally irrelevant.

Plenary powers of the State to acquire property without compensation relate to "assumption" of property, not "resumption" of granted title.

As Griffiths CJ stated in the *Wheat Case* (1915) 20 CLR 54 at 67:

> "The title to property is governed by State law…"

.... and a fundamental aspect of State law is the creation of tenure in land by Crown grant of freehold, or leasehold, with all of the extensive proprietary rights illustrated by the authorities noted above, which rights may be distinguished from those relating to other types of property not created by Crown grant, such as the chattel wheat.

From this very brief review of judicial authority, it is clear that any reliance by the Crown in right of NSW on the *Heritage Act* to injuriously affect a proprietor's right to use his/her land without compensation constitutes a derogation from the grant and must be unenforceable. The fact that there might be no "acquisition" as such by the State matters nought - a derogation does not require the existence of an acquisition.

Since the mid-twentieth century, legal practitioners have been letting landowners down comprehensively by failing to focus on the law of tenure in NSW. Instead, they have been completely distracted by the s. 51(xxxi) "acquisition on just terms" provision of the Australian Constitution and the absence of an equivalent section in the NSW Constitution, in which context they have ultimately sought to establish a mythical "deeply rooted right" to compensation for a widely defined "acquisition" of property.

With respect, the judiciary on the other hand, understand the law of tenure perfectly well, but cannot initiate relevantly useful cases, such as challenging the validity of the *Heritage Act* in particular circumstances by force of derogation from the Crown grant. That is the job of legal practitioners, and they have failed to do so.

To better understand the legal dynamics of Crown grants and the common law in relation to the relevant validity of State legislation, please see an analysis of a Crown grant of freehold title to 1,500 acres of land at Bringelly grant in the *Committee No. 6 Submission* [19].

In relation to tenure by the Crown grant of freehold, the analysis demonstrates:

- the principles of its operation;

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

- why it is indeed "common law title";

- its critical role in understanding the nature of "real property and interests in real property"; and

- provides a context for understanding how heritage listings which cause injurious affection may be understood in the context of the law of tenure in NSW.

As with any other privately owned land in NSW, the validity of any listing under the *Heritage Act* on any part of that 1,500 acres would be subject to those legal dynamics.

[4.1] The Nature of Resumption

The principal land acquisition statutes in Australia are listed by MS Jacobs[21]. 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" or "heritage listing" 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. This includes limitations of use, and obligations, imposed on landowners under the *Heritage Act*. Logically, this prohibition of derogation 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*[22]*)* 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 such as the *Heritage Act* 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. [23]

Now it might be said at this point, that, as a general proposition, legislation overrides the common law, so if heritage 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 (partial or complete) 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 repudiate the granted terms by resuming 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 the right to particular uses (in whole or part) 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 <u>not</u> 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 with respect to the use of double entrenchment and

adoption of s. 109 in the context of the Australian Constitution. (This is explained in the *Committee No. 6 Submission* at [2.2].)

The end result of unchallenged land use legislation, including the *Heritage Act*, might aptly be described as the "Rule of No-Law".[24] 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 heritage listing, 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[25] - 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. For example, 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. That power to make grants is inherently constitutional in character.

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 includes the *Heritage Act*.

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

The authorities and argument in support of these observations may be found in the *Committee No. 6 Submission* at [5.0]. The conclusion (addressed therein) of the Russell Review that State Parliaments "have no constitutional obligation to provide any compensation whatsoever for such compulsory acquisition" is 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*[26].

[6.0] Breaching of Human Rights

By restricting landowners' rights of use and imposing obligations, without full compensation, landowners' human rights are being breached by the *Heritage Act*.

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 which might be caused by imposition of heritage listing, 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 failure of NSW to provide full 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*[27]:

> "*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 affected by heritage listings? 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.[28]:

> "…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 under the *Heritage Act*, whether disabled or not.

It's a question that any Standing Committee on Social Issues might ask itself: does it believe that it is acceptable to arbitrarily deprive persons with disabilities of their property?...and persons without disabilities?

Pointing out human rights breaches to NSW bureaucrats or the Heritage Council might cause those officers with a conscience to cringe, but they act simply to follow the directions of the minister under the *Heritage 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 heritage protection 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.

Heritage protection is 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] The Principle of Legality

The principle of legality in the context of property law has been explained by French CJ[29]:

> "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 relevant validity of, for example, the *Heritage Act*, in its authorisation of subordinate regulations to derogate from the granted freehold rights of property owners, the minister of the day would firstly 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 the *Heritage 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, if raised in court, provides a hurdle which the minister would fail to clear, with the consequence that any court applying the principle would reject any argument 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 such judicial rejection by having the Act altered to expressly provide that, for example: “should the operation of the *Heritage Act* derogate from any Crown grant of freehold or leasehold title, then any such derogation 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 landowners over several decades, by the obscure *faits accomplis* of listing 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 outrageous.

[8.0] Possible State-Initiated Remedies for Landowners

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.

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 *Heritage 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 existing 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 *Heritage 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 the Heritage Council, for instance, to comply with such an objective. Indeed, heritage bureaucrats, in carrying out their functions under the Act, as directed by the minister of the day, might be put in the position of having to face genuinely affected and angry landowners 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 *Heritage Act*, many legislative consequences would follow. For example, in developing listing proposals: bureaucrats (including the Heritage Council) would be lawfully required to actively estimate and plan for any compensation required for injurious affection.

RECOMMENDATION
It is submitted that the *Heritage Act* be amended to 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 NSW 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 unilaterally 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 *Heritage Act* 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.

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 should 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 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 heritage listing ambitions. Consideration could also be given by the government to develop strategies to encourage genuinely voluntary landowner co-operation. In this regard, reference might be made to suggestions in the PC Report.

[8.1] Potential Relevance of the *Land Acquisition Act*

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 of imposing an injurious affection by heritage listing as a resumption than an acquisition, given that the proprietary estate 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 simply the landowner, because the landowner's rights are already encompassed in the proprietorship of the estate, 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 renovating a building in a manner inconsistent with permitted uses under a heritage listing, could not "acquire" that restrictive right as a third party and have it noted on the title in the form of, say, a restrictive covenant. Such "acquisition" would bring the listing within the scope of the *Land Acquisition 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 heritage-listed injuriously affected land within the compensation provisions of the Act.

The current difficulty of uncompensated injuriously affected landowners is where the NSW Government refuses 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 by a heritage listing.

As explained in the *Committee No. 6 Submission*[30], "acquisition" is different from mere "deprivation". The NSW Government may, as the *Heritage Act* now stands, simply choose whether or not to treat heritage-related usage restrictions as "acquisitions", which would entitle landholders to compensation under the Act, or as being merely incompensable "deprivations". Of course, it appears that NSW Government heritage policy has been, since 1977, 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 heritage 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 *Heritage 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 *Heritage Act*.

Such a course of action would allow - and indeed require – heritage listing restrictions causing injurious affection to be promptly brought under the *Land Acquisition Act* by being processed as "acquisitions" of any s.4(1) type of "interest", answering the Minister's objections on the point, if any were made.

[9.0] Commonwealth & Landholder Remedies

The reasons for Parliament taking action now, apart from the demonstrated need for justice (which should be enough by itself), are that lawful initiatives by the Commonwealth, or an aggrieved NSW landowner, might at any time force Parliament's hand.

The *Heritage 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.

In such circumstances, the following possibilities for landowner remedies, quite outside the control of any NSW Government may be considered.

[9.1] 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.[31] 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), 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*. This Committee's terms of reference do not extend to the *Heritage Act*, but an observed accumulation of landowner injustices in NSW and other States could build momentum for the adoption of Art. 17 and its application to common law title in NSW and the other States. Again, why should common law title holders be denied the human rights lawfully held by native title holders?

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

Generally, there is a very significant degree of co-operation between the Commonwealth and NSW. One facet of same is the making of grants by the Commonwealth to NSW under s. 96 of the Constitution in order to facilitate funding of various activities and project initiatives being carried out by NSW.

In these circumstances, the Commonwealth would be in a position to impose conditions to such grants requiring NSW 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 in the *Land Acquisition Act*); 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, that NSW *compensate* the freehold (or leasehold) title holders *for any loss, diminution, impairment or other effect* of the *Heritage Act* or other Act on their freehold (or leasehold) rights and interests.

As previously noted, 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. Again, why shouldn't NSW injuriously affected 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 to the Commonwealth. If NSW complied with the conditions by respecting the property rights of owners (and possibly, removing some less important heritage listings which would cost NSW nothing), no further action by the Commonwealth would be necessary.

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.

[9.3] Investor-State Dispute Settlement

Something like 30% of the Australian population was born overseas. It might be that of those, many may remain foreigners or have dual citizenship with respect to one of the many countries which has a free trade agreement ("FTA") with Australia. Land might also be owned by companies resident in FTA countries, such as ASEAN countries, for example.

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 heritage-listing-imposed 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[32].

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 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 Commonwealth would not only provide justice to NSW landholders, but also protect itself from the making of any ISDS claims.

[9.4] 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. The latter course is open to any injuriously affected landowner in NSW, even Australians!

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 heritage environment. 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 heritage listing 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 such litigation in the Supreme Court of NSW could simply rely on existing judicial authority – no new law!

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.

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*[33].

It is perfectly clear that real property rights include, as the High Court has repeatedly said: the right to perform "every act of ownership which can enter into the imagination".

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[34] and explained at **[2.0]**. Concerns about such injustices have been raised by the NSW Bar Association[35] and former High Court judge Ian Callinan AC[36], among others, but their concerns have been completely ignored.

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. However, it will take just one successful landowner applicant to succeed in such a case to remove any legal practitioner uncertainty about the correct law.

No political party in NSW has ever had the guts or honesty (or stupidity) to observe the principle of legality by campaigning to obtain from voters a clear electoral mandate to adopt a policy that real property rights should be diminished without compensation. In that context, the practical adoption of such policy under the *Heritage Act* (for example) is essentially subversive in nature.

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.

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.

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.

As stated by the NSW Bar Association[37], "property rights are human rights", and shouldn't human rights, like charity, begin at home?

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.

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Barrister

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

Citations

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3. Extracts from: New South Wales Office of Environment and Heritage, "Kelly's Bush Park - History"
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5. Productivity Commission 2006, *Conservation of Australia's Historic Heritage Places*, Report No. 37, Canberra at xxii.
6. *Ibid*., at xix-xx.
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10. PC Report *op. cit.*, n5, at 171.
11. See: *Arguments for Property Rights in Australia* at https://adverse-rezoning.info.
12. *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.
13. *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), at 218.
14. *Northern Territory v Griffiths* [2019] HCA 7 at 27.
15. Callinan J., *Chang v Laidley Shire Council* [2007] HCA 3.
16. *Mabo and others v. Queensland (No. 2)* [1992] HCA 23; (1992) 175 CLR 1 F.C. 92/014 (3 June 1992) per Brennan J. at §74.
17. *Fejo (on behalf of Larrakia People) v Northern Territory* [1998] HCA 58 at §11 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ. In a separate judgment, at §106, Kirby J. agreed, making the full court unanimous on the point.
18. 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)).
19. In *Western Australia v Commonwealth (Native Title Act Case)* [1995] HCA 47; 1995 185 CLR 373, the High Court affirmed that observation in the *Mabo (No. 1)* case.
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21. MS Jacobs, *Law of Compulsory Land Acquisition*, 2nd ed., (2015) at 26.
22. *Op. cit.*, n11

23. *Op. cit*., *Committee No. 6 Submission*, "[2.0] The Russell Review & the Fundamental Fallacy".
24. 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…"
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26. Explained *ibid.,* at [5.0].
27. 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....."
28. *Western Australia v Commonwealth (Native Title Act Case)* [1995] HCA 47 at 79.
29. French, Robert, C.J., A.C., "Property, Planning and Human Rights", *Planning Institute of Australia, National Congress* 2013: (NB: emphases in text are added.)
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31. See s.51(1) *Native Title Act* 1993 (Com.).
32. Australian Government – Department of Foreign Affairs and Trade "Investor-state dispute settlement (ISDS)" – Circular 2019.
33. *Op. cit*., n11.
34. *Op. cit*., *Committee No. 6 Submission* at [2.0].
35. Boulten, Phillip SC, *Submission of the New South Wales Bar Association to the Just Terms Compensation Legislation Review*, 2013.
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