

THE *TASMANIAN DAM* CASE AND SETTING ASIDE PRIVATE
LAND FOR ENVIRONMENTAL PROTECTION: WHO SHOULD
BEAR THE COST?

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ABSTRACT

*This article will examine some fundamental legal issues arising from setting aside private land for the protection of the natural environment, by the use of laws, policy measures and administrative practice (**environmental and planning measures**). In particular, what limits apply to the use of environmental and planning measures before compensation is payable by the State or its agency, where the objective of those measures is to protect the environment? At what point does the use of environmental and planning measures become so inconsistent with the nature of private property that they effectively constitute a taking of an interest in land for which the law can require the State to pay the owner just compensation? The starting point for finding an answer to these questions will be the High Court decision in *Commonwealth v State of Tasmania and others*¹ (**Tasmanian Dam Case**); not because it was the first time the issue had arisen in Australia, but because of its contextual significance in regard to the growth of environmental law in this Country. Our examination of these issues will primarily be concerned with the effects of environmental and planning outside of the established statutory means of claiming compensation.*

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¹ *Commonwealth v. State of Tasmania and others* (1983) 158 CLR 1.

I INTRODUCTION

Unlike the United States Constitution where its Fifth Amendment directly empowers citizens to protect their interest in property, citizens' property rights are only indirectly addressed in the Commonwealth Constitution.² The Commonwealth of Australia is empowered to make laws for the acquisition of property subject to the provision of just terms.³ The High Court of Australia has held, in a number of decisions, that the emphasis in the Constitution is not on taking or extinguishment of private property, but on its acquisition, for the purposes of the Commonwealth.⁴ This dichotomy occurs because an acquisition must confer a benefit⁵ on the acquiring authority, in addition to taking an interest. That effectively narrows the scope of the 'just terms' proviso by shifting the emphasis to what has been gained by the public authority and away from the dispossessed party. The intended beneficiary of the proviso was presumably not the public authority but that is the result of the meaning ascribed to the term 'acquisition' by the High Court.

The Constitutional requirement of 'just terms' in a Commonwealth acquisition law, can be characterised as a manifestation of a fundamental or core legal right of the kind sought to be protected in the *Universal Declaration on Human Rights*⁶ and the Constitution of the United States of America, with an ancestry that dating back at least to the Magna Carta

² *Commonwealth of Australia Constitution Act 1901* (Cth).

³ *Commonwealth of Australia Constitution Act* s 51(xxxi)

⁴ See, eg, *Tasmanian Dam case* 158 CLR 1, 144-5 (Mason J).

⁵ *Ibid.*

⁶ United Nations, General Assembly, *The Universal Declaration of Human Rights* (10 December 1948), Resolution 217 A (III).

of 1215.⁷ This year, in commemorating the 800th anniversary of the Magna Carta, we can ask: to what extent should the Magna Carta apply to contemporary Australia, in particular to the relationship between environmental and planning measures and citizens' property rights? This is not a simplistic dilemma about private property verses the environment. On the contrary, the protection of the environment is unarguably in the public interest. The pertinent questions are, when does the protection of that public interest impinge upon a private person's property rights and how far can that intrusion go before the owner or former owner of the interest is entitled to compensation from the State for any loss caused by the impingement?

The State and Commonwealth manifestations of these issues differ to some extent, but the same underlying principles apply in both jurisdictions. References to the Magna Carta persist in leading High Court Cases concerning the Commonwealth's power to appropriate land and in Western Australia, the Magna Carta, still forms part of the State's law, according to the State's Law Reform Commission.⁸ The part still in force contains a requirement that the State will not take the property except by 'due process of law'. The long tradition in English common law, which invests in the citizen some property rights, was received into

⁷ *Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another* (1997) 190 CLR 513, 657-9 (Kirby J).

⁸ The Law Reform Commission of Western Australia *United Kingdom Statutes in Force in Western Australia* Project No. 75 Report (1994) 6, 21, 27 (LRC UK Statutes Report) 1.9. In particular Chapter 29 of that Magna Carta applies, enacted in 1297 by Act 25 Edward I; and enhanced by 28 Edward III in 1354. The 1354 Statute added a requirement that land may only be taken by 'due process of law', which is a component of and possibly the progenitor of the 'just terms' guarantee in the Commonwealth Constitution. See also Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 140.

and forms part of the common law of Western Australia.⁹ Can the fundamental principles derived from these sources apply as a buffer between the citizen and environmental and planning law measures?

The whole area of compulsory takings and compensation in the context of environmental law was opened up by the *Tasmanian Dam* case, exposing for examination fundamental legal concepts in constitutional law, as well as deeper common law principles.

The growth in environmental law and policy at the Commonwealth and State levels, witnessed since the *Tasmanian Dam* case, may result in increased tension between environmental protection and property rights associated with land. Accordingly, there may be a concomitant increase in the application of the fundamental principles mentioned earlier in relation to the protection of property rights in land, in the context of environmental and planning measures.

II THE GROWTH OF ENVIRONMENTAL AND PLANNING MEASURES SINCE THE 1980S-WHO PAYS?

Until the early 1980s Australian land use regulation was the preserve of town planning law and policy. Land use planning and environmental law were primarily State matters.

⁹ *Batista Della-Vedova & Ors. v State Planning Commission; Batista Della-Vedova & Ors v State Energy Commission* (1988), unreported decision of the Compensation Court of Western Australia: 22 December 1988 BCC 8800828 and relevantly approved and quoted in *R v. Compensation Court of Western Australia; ex parte State Planning Commission & Anor; re Della-Vedova* (1990) 2 WAR 242, 253 (Wallace J) (unanimous judgment of Full Court of Supreme Court of Western Australia). See also Carney, above n 8, 138.

If land was required for a public purpose, it was either reserved or taken compulsorily under a 'Public Works Act'. Compensation was payable by the acquiring authority. On private land, there was little statutory regulation of the clearing of native vegetation, although clearing would have required planning approval.¹⁰

The regulation of land use today remains a planning matter, but it is now overlaid with environmental laws and policies. The boundaries between planning and environmental law are no longer distinct. This is without even considering more recent concepts such as sustainable development and the emerging use of that concept, with intergenerational equity and the precautionary principle, in climate change law.¹¹

The complexity of environmental and planning measures has muddied the simple concepts of reservation or taking for public use. Environmental and planning measures can sterilise the economic value of land, without any clear avenue to compensation for the landowner. Examples at the Federal level include the Commonwealth Department for the Environment's Environmental Offsets Policy.¹² In practice it is being administered to require large areas of land to be surrendered free of cost as the price for authorisations under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). Landowners are usually forced to agree or face delays or refusals from approval agencies. The areas demanded can bear little or no relation to the environmental

¹⁰ *Palos Verdes Estates v Carbon* (1991) 6 WAR 223, 241 (Malcolm CJ).

¹¹ See for example *Taralga Landscape Guardians v Minister for Planning* [2007] NSWLEC 59; David, Parry, 'Ecologically Sustainable Development in Western Australian Planning Cases' (2009) 26 *EPLJ* 375.

¹² Department of Sustainability, Environment, Water, Population and Communities, Environment, Australian Government, *Protection and Biodiversity Conservation Act 1999* (Cth) *Environmental Offsets Policy* (October 2012).

issues relevant under the EPBC Act. If the power exists under the EPBC Act to demand offsets then questions arise as to whether 'as a legal and practical matter' what is being done amounts to the taking of land otherwise than on just terms. The operation of this Act has the potential to sterilise much undeveloped urban land, without a clear¹³ mechanism through which landowners may claim compensation.¹⁴

In Western Australia, some examples of environmental and planning measures include:

1. Various wetland policies¹⁵ and conditions applied to clearing permits under the *Environmental Protection Act 1986* (WA) (**EP Act**), which can effectively sterilise substantial areas of land free of cost or at least to sterilise those areas by constraining their productive use.
2. The widest of these measures is the State Planning Policy 2.8¹⁶ which provides that conservation areas, in addition to land to be ceded free of cost for public open space, 'will be generally set aside free of cost', for

¹³ Section 519 of the EPBC Act provides for the payment of reasonable compensation where the operation of that Act would result in the '...acquisition of property that would be invalid because of paragraph 51(xxxi) of the Constitution...'. The compensation can be claimed by an application to the Federal Court. The scope of this provision is not clear. As it depends for its application on the meaning ascribed to the term 'acquisition' in section 51(xxxi), its application in practice may be problematic for the reasons examined later in respect of that word.

¹⁴ The effect will not only cost landowners but potentially, over a period of time, could lead to higher inner city land prices at a time when urban consolidation and denser development are regarded as important antidotes to the effects of car use and other activities on climate change.

¹⁵ Examples include the: Western Australian Government, *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, Gazette No 55, 8 April 2005; Western Australian Government, *Environmental Protection (South West Agricultural Zone Wetlands)*, Policy Approval Order No 215, 28 October 1998; Western Australian Government, *Environmental Protection (Swan Coastal Plain Lakes)*, Policy Approval Order 1992.

¹⁶ Prepared under section 26 of the *Planning and Development Act 2005* (WA), *Government Gazette*, WA, 22 June 2010, 2743 (SPP 2.8).

the purposes of urban bushland conservation¹⁷ and not be taken into account in the calculation of the developable area for the calculation of a public open space contribution.

3. Town planning schemes may contain reserves which are dressed up as zones.
4. Conservation areas may be created by the operation of the environmental assessment process under Part IV of the EP Act. Sometimes developers are simply forced to give up land for environmental protection purposes free of cost in the subdivision process, to avoid protracted arguments with approval authorities.

A *Significance of the Growth of Environmental and Planning Law Measures*

The environmental objectives and effectiveness of these measures is not in question in this article. The principal issues are legal and economic, in particular the extent to which the measures mentioned, are lawful, when no provision, or no adequate provision, is made to compensate affected landowners for the economic effects of the measures. These phenomena are not confined to Western Australia and the Commonwealth.¹⁸

Many, environmental and planning law measures are not legislative in nature. They rely on the exercise of broad discretions and implicit power. It is the practical operation of the law, through environmental and planning measures, more than its legal form, which is often significant in this context. This does not diminish the legal consequences of the measures impugned, as was seen earlier in this article. There is generally no reference to established legal processes for takings or reservations, and

¹⁷ Clause 5.1.2.2 (vii) of SPP2.8.

¹⁸ See for example Suri Ratnapala 'Constitutional Vandalism Under Green Cover' (2009) Speech published on website of Property Rights Australia.

in Western Australia the landowners have no independent merits-based appeal rights. Their only recourse is to apply for relief in the courts. It is no exaggeration to suggest that the circumstances are somewhat resonant with the excesses of King John, which were in part responsible for the Barons forcing him to agree to and seal the Magna Carta.¹⁹ By a 1354 amendment to and enactment of the Magna Carta, there was an added requirement that property can only be taken by 'due process of law'.²⁰

The growth in environmental and planning law measures and the related issue of compensation for landowners was referred to by the Hon. Ian Callinan AC QC in an article in *The Australian Newspaper* on 3 January 2008²¹. In speculating on what might be the major new legal issue of the coming years, and the capacity of our system to deal with it, he said:

I see the cost, and who should bear it, of environmental, town planning and heritage measures as the most likely candidate. 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.

Continuing, he said:

It has always been the common law that the owner of freehold land owns every tree on it. To combat the greenhouse effect, land clearing, the felling of trees for forest timber, grazing or cultivation will in places be forbidden, all of this again in the acknowledged and, it is said, necessary public interest.

¹⁹ In their book *1215 The Year of the Magna Carta* Danny Danziger and John Gillingham (Hodder and Stoughton 2004) 123 explain how the declarations by the King that large areas of England were 'forests' effectively sterilised productive land and led to unrest.

²⁰ See n 8 above and n 85 below.

²¹ The Hon. I. Callinan AC QC, 'For the Sake of Our Heritage, The Buck Must Stop Somewhere' *The Australian*, 3 January 2008, 10.

It is a legitimate question: will proper compensation be available for the consequential involuntary reduction in value to freehold owners?

A key issue referred to by The Hon. Ian Callinan AC QC was the ambiguity surrounding the means of 'acquisition'. In this regard he said:

'The High Court has tended to regard acquisition as an unduly narrow concept. The Tasmanian Dam case is, to adapt the hydrological theme, the high-water mark of that narrowness.

This is not an argument against the preservation of that pristine waterway, the Franklin River, but simply against the exoneration of the Australian public from paying to Tasmania the cost of its preservation.

This followed from the rejection by the High Court of an argument that compensation was due from the Commonwealth. The result, he said, is need for reform law, which he put as follows:

The reluctance of governments to provide for compensation, and of the High Court to acknowledge that an erosion of property rights for the benefit of others does constitute a taking in an era of increasingly intrusive legislation, is a matter that urgently needs addressing.

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. Yet under Australian law rarely does the former give rise to a right to compensation.²²

Despite this plea, there has been no substantive law reform in this area. As the Hon. Ian Callinan AC QC said, the issue is not about the desirability of conservation, but who should pay for the value which our society places on conservation.²³

III THE COMMONWEALTH: 'JUST TERMS'

B *The Tasmanian Dam Case*

The historical context of the Tasmanian Dam Case is significant because it heralded over subsequent decades the development of Australia's current environmental law system.

Tasmania and much of the rest of Australia were divided socially and politically in 1982 and 1983²⁴ by a proposal to dam the Gordon River in Tasmania's South West. The dam was called the Franklin Dam and the project, 'Gordon below Franklin'. The effect would be the destruction of a large area of wilderness forest.

In 1983, the newly elected Hawke Government sought to prohibit the construction of the dam and set aside for conservation 14,125 ha of the forest, which had previously been recognised as national park under the

²² Ibid. See also his dicta in *Commonwealth v Western Australia* (1999) 196 CLR 392, 488, [282] (Callinan J).

²³ See: *Commonwealth v Western Australia* (1999) 96 CLR 392, 458 [186].

²⁴ It was central in a battle for the leadership of the Australian Labor Party between Bob Hawke and Bill Hayden, and played a part in Bob Hawke leading the Australian Labor Party to victory in the 1983 Federal election.

National Parks and Wildlife Act 1970 (Tas). In August 1982 the area was excised from the national park and vested in the Hydro-Electric Commission of Tasmania under the *Gordon River Hydro-Electric Power Development Act 1982*. There was a landmark High Court challenge to the State of Tasmania's enabling legislation, brought by the Commonwealth, which came to be known as the *Tasmanian Dam Case*.

We will examine the relevance of the *Tasmanian Dam Case* to an aspect of contemporary environmental law, namely the use of environmental and planning measures to set aside land for conservation purposes, without the payment of compensation. Other strands of argument and findings of the Court will not be examined here, but have been the subject of extensive examination, particularly in connection with the external affairs power of the Commonwealth Constitution.²⁵

The battle lines were drawn in March 1983 when the *World Heritage (Western Tasmanian Wilderness) Regulations* (Cth) (Wilderness Regulations) came into effect. They prohibited, without ministerial consent, the construction of a dam or associated works, within that same 14,125 ha. The regulations were expressed to bind the Crown in right of the Commonwealth and State of Tasmania. Their primary purpose was to enforce the listing of the relevant land as a World Heritage Conservation Area.

In May 1983 the Commonwealth passed the *World Heritage Properties Conservation Act 1983* (Cth). Among other things, that Act contained

²⁵ *Commonwealth of Australia Constitution Act 1901* (Cth) s 51(xxix). See: GE Fisher 'External Affairs and Federalism in the Tasmanian Dam Case' (1985) 1 *Queensland University of Technology Law Review* 157.

provisions relating to the payment of compensation to a claimant from whom the property was acquired by the operation of a scheme of legislation which included that Act and the Wilderness Regulations.

In the action brought in the *Tasmanian Dam Case* the Commonwealth sought to restrain the State of Tasmania and others from acting contrary to the Wilderness Regulations. The defendants counterclaimed that the legislation was beyond power and accordingly invalid. Among other things, it was argued by the State of Tasmania that the legislation in reality acquired land without providing for the payment of compensation on just terms and thereby contravened section 51(xxxi) of the Constitution. Various questions were referred to the Full Court of the High Court for determination.

By a majority of four to three the High Court held that the Commonwealth legislation was valid partly on the basis of the Commonwealth's external affairs powers under section 51(xxix) of the Constitution. The Tasmanian legislation, to the extent that it was inconsistent with the Commonwealth legislation was invalid under section 109 of the Constitution of the Commonwealth. The minority of 3 held that the Commonwealth legislation was invalid.

For now, we will concentrate on an aspect of the majority's decision. Because they held the legislation to be valid under external affairs power, they had to decide, unlike the minority, whether the legislation offended section 51(xxxi) of the Constitution, which is an express grant of power to the Commonwealth 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 the power to make laws.

Of the majority who had to decide on the application of section 51(xxxi), three held that the legislation was within power under section 51(xxxi). They said it was not an acquisition, merely a taking. In their view no interest was actually 'acquired' because the legislation under attack was simply a restriction on the use of property. No benefit accrued to the Commonwealth. The legislation may have sterilised the land, but the Commonwealth did not acquire anything. Section 51(xxxi) accordingly did not apply. The majority, therefore, did not have to decide whether the terms of the alleged taking were 'just'.

Deane J said that provisions of the *World Heritage Properties Conservation Act 1983* (Cth) and Wilderness Regulations offended section 51(xxxi). The interest 'acquired' was the benefit of the prohibition on developing the land. Further, the acquisition was not on 'just terms' because section 17 of the World Heritage Properties Conservation Act delayed unfairly the payment of compensation.

Of the others in the majority, Murphy J did not consider the section 51(xxxi) point in any detail. Mason and Brennan JJ gave the question more consideration. These judges concluded there had been no acquisition, therefore the 'just terms' provisions did not apply. Their views are representative of one stream of reasoning in the High Court as to what constitutes 'acquisition'. Deane J represents a contrary line of thought, as will be seen.

Tasmania had submitted that although the legislation does not attempt to divest title from the State to the Commonwealth, it so restricts the rights of the State and confers such rights on the Federal Minister, that there was in effect an acquisition of property. The State argued that there is a distinction between 'taking' property and 'regulation', this having been

developed in the United States and discussed by Stephen J in the Australian High Court case of *Trade Practices Commission v Tooth & Co Limited*.²⁶

This was rejected by Mason J on the basis that just because Tasmania had rights which were extinguished or 'taken' it does not follow that there was an acquisition within the meaning of that term in the Constitution.

Like other Judges who have considered this question in the High Court, before and since the *Tasmanian Dam Case*, Mason J referred to the judgements of Holmes and Brandeis JJ in the United States case *Pennsylvania Coal Co v Mahon*.²⁷ In their oft-quoted judgements, Holmes and Brandeis JJ held that a restriction on the use of property deprives the owner of some right previously enjoyed, and is therefore an abridgement of rights in property without compensation. The consequence is that if the regulation of property goes too far, it constitutes a taking. There is no set formula to decide when regulation becomes a taking. It depends upon the 'facts and necessities' of each case.

Mason J²⁸ said, in the *Tasmanian Dam* case, that the American jurisprudence has no direct relevance to section 51(xxxi). In common with other judges who have considered this point in the High Court, he referred to *Penn Central Transportation Co v New York City*,²⁹ in which *The Pennsylvania Coal* case was explained on the footing that a State statute, that substantially furthers important public policies, may so frustrate distinct investment backed expectations as to amount to a

²⁶ *Trade Practices Commission v Tooth & Co Limited* (1979) 142 CLR 397, 413-5.

²⁷ *Pennsylvania Coal Co v Mahon* (1922) 260 US 393, 415, 417.

²⁸ *Commonwealth v. State of Tasmania and others* (1983) 158 CLR 1, 144-145.

²⁹ *Penn Central Transportation Co v New York City* (1978) 438 US 104.

'taking'. The relevant provision in the Fifth Amendment of the US Constitution is:

Nor shall private property be taken for public use without just compensation.

The emphasis in the Constitution, however, is not on taking or extinguishment of private property but on acquisition of private property for the purposes of the Commonwealth. It is a power giving provision with a proviso that acquisition must be on just terms. The emphasis is not on the right of the individual but the power of the State. There must, according to this Australian line of argument, be an acquisition whereby the Commonwealth or another gains an interest in property, however slight or insubstantial it may be. The majority of the judges who considered the section 51(xxxi) issue in the *Tasmanian Dam Case* said that there had been such an acquisition.

The interest need not be a recognised class of interest in property law and extends to 'innominate and anomalous interests' and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth.³⁰

Deane J devoted some 10 pages of his judgment in the *Tasmanian Dam* case to the question of whether section 51(xxxi) had been breached. He said that section 51(xxxi) has assumed the status of a Constitutional guarantee.³¹

³⁰ See the later discussion on *Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another* (1997) 190 CLR 1, 513; *Commonwealth of Australia v WMC Resources Limited* 194 CLR 1.

³¹ *Commonwealth v State of Tasmania and others* (1983) 158 CLR 1, 282. See *Commonwealth of Australia v WMC* (1998) 194 CLR 1, 20 (Kirby J); *Fazzolari v Parramatta City Council* (2009) 237 CLR 603, 619-20 (French CJ).

He agreed with the majority that there is a difference between restrictions on the use of property and the acquisition of property. He went on to say, however, that:

The benefit of land can, in certain circumstances, be enjoyed without any active right in relation to the land being acquired or exercised: see, e.g., *Council of City of Newcastle v Royal Newcastle Hospital*. Thus, if the Parliament were to make a law prohibiting any presence upon land within a radius of 1 kilometre of any point on the boundary of a particular defence establishment and thereby obtain the benefit of a buffer zone, there would, in my view, be an effective confiscation or acquisition of the benefit of use of the land... notwithstanding that neither the owner nor the Commonwealth possessed any right to go upon or actively to use the land affected.³²

He referred to the judgment of Stephen J in *Trade Practices Commission v Tooth & Co Limited*.³³ In particular, he quoted Stephen J as saying:

... far-reaching restrictions upon the use of property may in appropriate circumstances be seen to involve such an acquisition. That the American experience should provide guidance in this area is testimony to the universality of the problem sooner or later encountered whatever Constitutional regulation of compulsory acquisition is sought to be... imposed upon the free enjoyment of property rights. In each case the particular circumstances must be ascertained and weighed and, as in all questions of degree, it will be idle to seek to draw up precise lines in advance.³⁴

Deane J proceeded to adopt this approach in the *Tasmanian Dam Case*.

³² *Commonwealth v State of Tasmania and others* (1983) 158 CLR 1, 284

³³ Above, n 17.

³⁴ *Ibid* 414-5.

In referring to the legislation, in particular the Wilderness Regulations, he said:

They effectively preclude development and what would, in an ordinary context, be described as 'improvement' of the land without the Minister's consent: no building or other substantial structure can be erected; no tree can be cut down or removed; no vehicular track can be established; no works can be carried out. The regulations apply indefinitely. The land remains vested in the HEC. The HEC, however, is not only prohibited, in the absence of a consent which there is every reason to believe will not be forthcoming, from building the proposed dam; it is, without such consent, effectively excluded from putting the land to any active use at all.³⁵

Deane J's description from twenty-five years ago seems ahead of its time. As discussed earlier in this article, through delegated legislation and government policies of various kinds, there are now many people who have had conservation areas imposed on them to their detriment.

Deane J said that if restrictions of the kind, imposed in the Commonwealth legislation in this case, did not amount to an acquisition of property, 'the safeguard of section 51(xxxi) would be ineffective to preclude the Commonwealth from effectively dedicating the property of others to its purposes without compensation whenever such dedication could be achieved by the imposition of carefully worded restrictions upon the owner's use and enjoyment of his land.

He then went on to liken the environmental and planning measures in question to restrictive covenants:

³⁵

Commonwelth v State of Tasmania and others (1983) 158 CLR 1, 286.

The benefit of a restrictive covenant, which prohibits the doing of certain acts without consent and which ensures that the burdened land remains in a state which the person entitled to enforce the covenant desires to have preserved for the purposes of his own, can constitute a valuable asset. It is incorporeal but it is, nonetheless, property. There is no reason in principle why, if 'property' is used in a wide sense to include 'innominate and anomalous interests', a corresponding benefit under a legislative scheme cannot, in an appropriate case, be regarded as property.³⁶

This, of course, resonates with what the Hon. Ian Callinan AC QC was saying in his article, quoted earlier.

Deane J went on to say in the *Tasmanian Dam Case*:

The 'property' purportedly acquired consists of the benefit of the prohibition of the exercise of the rights of use and development of the land which would be involved in the doing of any of the specified acts. The purpose for which that property has been purportedly acquired is the 'application of the property in or towards carrying out' Australia's obligations under the Convention.³⁷

Having decided that there had been an acquisition, Deane J went on to consider whether the acquisition was on 'just terms'. What he said in this regard is interesting. Clearly, not every compensation provision will be 'just'. The formula in the *Tasmanian Dam Case* did not involve a judicial process for the ascertainment of the compensation. The assessment provisions would have been hard to apply and would take a long time to

³⁶ Ibid 286-7; See also *Commonwealth v Western Australia* (1999) 196 CLR 392, 488 [282], where Callinan J applied similar reasoning.

³⁷ *Commonwealth v State of Tasmania and others* (1983) 158 CLR 1, 286-7. The Convention to which Deane J is referring is the *World Cultural and Natural Heritage Convention for the Protection of the World Cultural and Natural Heritage*.

complete in practice. They would have provided a considerable barrier to obtaining compensation. Deane J said:

There is not, of course, anything intrinsically unfair in the Parliament providing a procedure for determining the quantum of compensation outside the ordinary judicial process. There is, however, something intrinsically unfair in a procedure which, in effect, ensures, unless a claimant agrees to accept the terms which the Commonwealth is prepared to offer, he will be forced to wait years before he is allowed even access to a court, tribunal or other body which can authoritatively determine the amount of the compensation which the Commonwealth must pay.

He held that the consequence of the failure to provide just terms rendered the regulations invalid.

In summary in regard to the Tasmanian Dam case, there is no doubt that the majority of the judges who considered section 51 (xxxi), took a conservative view of the scope of the provision when considered as a constitutional guarantee. The effect of that majority view would be to create a 'high bar' for anyone wishing to argue that particular regulation crosses the line between regulation and taking or 'acquisition'. However, such a view would lack nuance if it did not take into account other considerations, including:

- extinguishment or restrictions on rights in property may be analogous to a restrictive covenant;
- there is a difference between positive constitutional rights like the Fifth Amendment of the Constitution of the United States of America and legislative power dispensing provisions like section 51(xxxi) of the Australian Constitution;

- despite these differences, provisions such as the ‘just terms’ guarantee are derived from the same underlying principles from the Magna Carta and the common law.

Several other Commonwealth cases since the Tasmanian Dam case should be considered, before turning to the law and practice in Western Australia.

B *The Newcrest case*

Another wilderness, this time the Kakadu National Park, was the subject land in *Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another*.³⁸ The High Court in that case applied the *Tasmanian Dam Case* and considered a number of other authorities in which section 51(xxxi) was relevant. The Court found in favour of the plaintiff and struck down legislation under section 51(xxxi) of the Constitution.

The Commonwealth, by two proclamations made under the *National Parks and Wildlife Conservation Act (1975)* (Cth) (Commonwealth Act) included the plaintiff's mining leases within the area of the Kakadu National Park. The Commonwealth Act prohibited the carrying on of operations for the recovery of minerals. The same Act purported to exempt the Commonwealth from liability to pay compensation to any person by reason of that Act. Newcrest contended that the leases were still in force, and that therefore the Act was invalid.

Consistent with the *Tasmanian Dam Case*, the Court held by a majority of 4:3, that section 51(xxxi) operated as a fetter on the Commonwealth's ability to make laws for the purpose of discharging Australia's

³⁸ *Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another* (1996) 190 CLR 1, 513.

international treaty obligations, including the extension of the Kakadu National Park. A further and more substantial majority (6 to 1) held that the extension of the National Park over Newcrest's leases constituted 'sufficient derivation of an identifiable and measurable advantage [to the Commonwealth] to be an 'acquisition' for the purposes of section 51(xxxi). In doing that, they specifically referred to dicta of Brennan J's decision in the *Tasmanian Dam Case*.³⁹ This dictum is substantially the same as that of Mason J, which I have quoted above.

In the *Newcrest* case Brennan J also said, among other things:

The Commonwealth's interest in respect of the minerals was enhanced by the sterilisation of Newcrest's interests therein. In my opinion, by the force of the impugned proclamations, the Commonwealth acquired property from Newcrest . . . the property consisted not in a right to possession or occupation of the relevant area of land nor in the bare leasehold interest vested in Newcrest but in the benefit of relief from the burden of Newcrest's right to carry on 'operations' for the recovery of minerals.⁴⁰

Gummow J in *Newcrest* likewise, in quoting Dixon J in *Bank of New South Wales v Commonwealth*⁴¹ said that Newcrest had been deprived of the 'reality' of proprietorship.⁴² He went on to say that '*...here there was an effective sterilisation of the rights constituting the property in*

³⁹ *Commonwealth v State of Tasmania and others* (1983) 158 CLR 1, 246-7.

⁴⁰ *Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another* (1996) 190 CLR 1, 530.

⁴¹ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349.

⁴² *Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another* (1996) 190 CLR 1, 633.

question.⁴³ The constraints '*as a legal and practical matter*' denied *Newcrest of the exercise of its rights under the mining tenements.*'

Dawson and Toohey JJ came to similar conclusions. The dissenter on this point, McHugh J, took a restrictive view; that there was no gain to the Commonwealth and therefore no acquisition to trigger section 51(xxxi).

Finally, in regard to *Newcrest*, the judgment of Kirby J is significant because it resonates with statements of principle in a Western Australian case, considered later in this article.⁴⁴

Kirby J in the *Newcrest* case was in the majority. Early in his judgement he describes the effect of the Commonwealth legislation and the proclamation referred to above and then says:

Pause for a moment to reflect upon the result of the impugned legislation, if valid. It is one thing to expand a National Park for the benefit of everyone who will enjoy its facility. It is another to do so at an economic cost to the owners of valuable property interests in sections of the Park whose rights are effectively confiscated to achieve that end. Ordinarily, at least under Federal law, the expansion of areas for public use is carried out at the price of compensating justly those private individuals who lose their property interests in order to contribute to the greater public good. It is possible that the operation of the Constitution and the applicable Federal legislation might result in such an uncompensated acquisition. That, after all, could certainly occur, so far as the Constitution is concerned, in respect of the acquisitions of

⁴³ Ibid 635.

⁴⁴ *Batista Della-Vedova & Ors. v State Planning Commission; Batista Della-Vedova & Ors. v State Energy Commission* (1988), unreported decision of the Compensation Court of Western Australia: 22 December 1988, BCC8800828, 29.

property under State law which is not subject to the 'just terms' requirement of section 51 (xxxix) . . . if the correct interpretation of the Constitution requires such a result, this court must give effect to it. It must do so whatever opinions might be held concerning the justice or fairness of obliging selected property holders to suffer uncompensated losses for the benefit of the community as a whole.

Nevertheless, the result of such a course is so **manifestly unjust that the mind inclines against an interpretation** of the Constitution which has that consequence. At least it does so if another interpretation, which avoids it, is available.⁴⁵

Kirby J then went on to refer to an interpretive principle, namely, that where the *Constitution* is ambiguous:

'This court should adopt the meaning which conforms to the principles of fundamental rights rather than an interpretation which would involve a departure from such rights.

Australian law, including its Constitutional law, may sometimes fall short of giving effect to fundamental rights. The duty of the Court is to interpret what the Constitution says and not what individual judges may think it should have said. If the Constitution is clear, the Court must (as in the interpretation of any legislation) give effect to its terms . . . however, as has been recognised by this court and by other courts of high authority, the inter-relationship of national and international law, including in relation to fundamental rights, is 'undergoing evolution'. To adapt what Brennan J said in *Mabo v Queensland [No.2]* 491, the common law, and the Constitutional law do not necessarily conform with international law. However, international law is a legitimate and important influence on the development of the common law in

⁴⁵ *Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another* (1996) 190 CLR 1, 639 – emphasis added.

Constitutional law, especially when international law declares the existence of universal and fundamental rights. To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law, including in so far as that law expresses basic rights. The reason for this is that the Constitution not only speaks to the people of Australia who made it and accept it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community.

One highly influential international statement on the understanding of universal and fundamental rights is the Universal Declaration of Human Rights. That document is not a treaty to which Australia is a party. Indeed it is not a treaty at all. It is not part of Australia's domestic law, still less of its Constitution. Nevertheless, it may in this country, as it has in other countries, influence legal development and Constitutional interpretation. At least it may do so where its terms do not conflict with, but are consistent with, a provision of the Constitution. The use of international law in such a way has been specifically sanctioned by the Privy Council when giving meaning to express Constitutional provisions relating to 'fundamental rights and freedoms'. Such jurisprudence has its analogies in the courts of several other countries. The growing influence of the Universal Declaration upon the jurisprudence of the International Court of Justice may also be noted.

The Universal Declaration states in Art. 17:

'Everyone has the right to own property alone as well as in association with others.

No one should be arbitrarily deprived of his property.'

While this Article contains propositions which are unremarkable to those familiar with the Australian legal system, the prohibition on the arbitrary deprivation of property expresses an essential idea which is both basic and virtually uniform in civilised legal systems. Historically, its roots may be traced back as far as the Magna Carta 1215, Art.52 of which provided:

To any man whom we have deprived or dispossessed of lands, castles, liberties, or rights, without the lawful judgement of his equals, we will at once restore these.⁴⁶

He then referred to similar declarations in the French constitution, the United States constitution, the Indian constitution, the Malaysian constitution, the Japanese constitution and South African constitutions.

Kirby J went on to say:

In effect, the foregoing constitutional provisions do no more than reflect universal and fundamental rights by now recognised by customary international law. Ordinarily, in a civilised society, where private property rights are protected by law, the government, its agencies or those acting under authority of law must not deprive a person of such rights without a legal process which includes provision of just compensation . . . when the foregoing principles, of virtually universal application, are remembered, it becomes even more astonishing to suggest that the Australian Constitution, which in 1901 expressed the unexceptionally recognised and gave effect to the applicable universal principle, should be construed today in such a way we should limit the operation of that express requirement in respect of some laws made by

⁴⁶ *Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another* (1996) 190 CLR 1, 657-9. This provision was later extended by Statute: 28 Edward III in 1354. The 1354 Statute added a requirement that land may only be taken by 'due process of law'. See above, n 8.

its Federal Parliament but not others. Where there is an ambiguity in the meaning of the Constitution, as there is here, it should be resolved in favour of the upholding of such fundamental and universal rights.⁴⁷

This dicta is aligned with more recent High Court dicta, particularly that of French CJ in *Fazzolari Pty Ltd v Parramatta City Council*.⁴⁸

The legal conclusions which can be drawn from the *Newcrest Case* are similar to those which can be drawn from the *WMC Resources Case*, an exposition of which follows.

C *The WMC Resources Case*

Not long after the *Newcrest* case was decided, the High Court was given another opportunity to consider these issues. In the *Commonwealth of Australia v. WMC Resources Limited*⁴⁹ an exploration permit had excised from it, by the operation of the impugned Commonwealth legislation, an area in the Timor Strait, pursuant to a treaty between Australia and Indonesia. The case was decided by a 4-2 majority in favour of the Commonwealth. This was essentially the same High Court which decided the *Newcrest* case. This time Kirby J dissented with Toohey J. The majority held that the legislation was not a law for the acquisition of property. Essentially, the majority followed a line of cases which reflected the reasoning of the majority in the *Tasmanian Dam Case*.⁵⁰

⁴⁷ *Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another* (1996) 190 CLR 1, 661. See also below, n 59.

⁴⁸ *Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 610. See also above n 21, 22.

⁴⁹ *Commonwealth of Australia v. WMC Resources Limited* (1998) 194 CLR 1.

⁵⁰ *JT International SA v Commonwealth* (2012) 250 CLR 1; *ICM Agriculture v Commonwealth* (2009) 240 CLR 140; *Smith v ANL Ltd* (2000) 204 CLR 493; *Commonwealth of Australia v Mewett* (1997) 191 CLR 471; *Mutual Pools and Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155; *Georgiadis v Australia and Overseas Telecommunications Corporation* (1994) 179 CLR 297; *Health Insurance*

The decision they made in that case as to whether there had been the acquisition for a property right which benefited the Commonwealth right, which benefited the Commonwealth, differed from the call made in the Newcrest case. The majority held that the rights extinguished were not of a proprietary nature. The rights had no existence apart from the statute and were susceptible to modification or extinguishment. The rights extinguished did not create a reciprocal liability to the Commonwealth which would be converted into an advantage upon the rights being extinguished. Newcrest was distinguished on the basis that the rights under its mining lease were substantial rights, allowing the Company to use Commonwealth land for the extraction of minerals. Extinguishment of that right enhanced the property of the Commonwealth.⁵¹

Toohy J in dissent said that Commonwealth legislation granted immunity in favour of the plaintiff. It was a 'right'. It was identifiable, assignable, exclusive and valuable. Its extinguishment benefitted the Commonwealth.⁵²

Gummow J noted that for a claim to be truly a 'right' it must *not* depend for its existence on the sufferance of the party against whom it is asserted.

He said that the analysis of whether or not the provisions attracted the Constitutional guarantee '*must proceed from a consideration of the nature*

Commission v Peeverill (1994) 179 CLR 226; *Australian Tape Manufacturers Association Limited v Commonwealth of Australia* (1993) 176 CLR 480.

⁵¹ *Commonwealth of Australia v WMC Resources Limited* (1998) 194 CLR 1, 17 (Brennan CJ).

⁵² *Commonwealth of Australia v WMC Resources Limited* (1998) 194 CLR 194 CLR 1, 30.

*and function of such permits, the structure of the . . . Act and the immunity the permits conferred . . .*⁵³

Kirby J did not agree with the conclusion of Gummow J. He referred to the legislative scheme:

. . . conforming to what one would expect in national legislation of a country freshly claiming sovereign rights over its continental shelf and seeking to induce risk capital to explore for and exploit petroleum reserves as yet unknown. Introducing the Bill which became . . .the Act, the Attorney General . . . told the Parliament:

Today the exploration of Australia's offshore petroleum resources is a reality, or very soon it will be a substantial reality. For Government this has meant the devising of appropriate new legislative machinery.

He acknowledged expressly the need for assurances to investors if they were to be attracted to the nationally important task of petroleum exploration within the Australian continental shelf.⁵⁴

Kirby J noted that every judge in the Federal Court in this matter had determined against the Commonwealth. He said that the right in question was 'definable, identifiable by third parties, capable in its nature of assumption by third parties, and [had] some degree of permanence and stability'. It therefore had the attributes of property.

He went on to enunciate principles relevant to section 51(xxxi), which may be summarised as follows:

⁵³ *Commonwealth of Australia v WMC Resources Limited* (1998) 194 CLR 1,

73.

⁵⁴ *Commonwealth of Australia v WMC Resources Limited* (1998) 194 CLR 1,

83.

1. It is a Constitutional guarantee.
2. Rigid approaches to interpretation which would defeat the operation of the guarantee should be avoided.
3. The Commonwealth may not do indirectly what section 51(xxxi) would forbid if done directly.
4. The Court will look at the practical operation of the law as well as its legal form.
5. There is a danger in dissecting the words, that the achievement of the purposes of the paragraph as a guarantee, may be lost.
6. Interests which are inherently defeasible, 'however innominate and anomalous' can partake of the quality of 'property'.
7. A clear object of the Act which created the rights was to give the permittees a stable 'title' to the property rights.

He said that the existence of the permits is an impediment to the implementation of the treaty and removing the permit was an identifiable benefit or advantage to the Commonwealth. The sterilisation was imposed on the exercise of the respondent's rights in that area and was indistinguishable from the attempt to extinguish rights in the *Newcrest* case.

IV RETROSPECTIVE ON THE CASES - THE RESTRICTIVE VERSES THE LIBERAL

It can be seen that since the *Tasmanian Dam* case there has been effectively two lines of thought within the High Court, one restrictive and the other more liberal. In both the *Tasmanian Dam* case and the *Newcrest* cases, the High Court applied the principle that to come under section

51(xxxi) legislation must result in the acquisition of a positive benefit. Precisely what this means differs depending on who is applying the principle.

A factor affecting the divergence of views in particular cases is the approach the judges take to statutory interpretation. The passages quoted from the judgment of Kirby J in the *Newcrest* case show that he has a strong contextual approach. In *Shu-Ling Chang v Laidley Shire Council*⁵⁵ he described this approach as follows:

Traditionally, the English law and its derivatives (including in Australia) adopted a fairly strict, textual, literal, or 'grammatical' approach to interpretation. However, in more recent years, in part because of a growing understanding of how ideas and purposes are actually communicated by words this Court, English Courts and other courts of high authority throughout the common law world have embraced a broader contextual reading of statutory language and other texts having legal effects.

Specifically, this Court has accepted that it is an error of interpretive approach to take a word or phrase in legislation and to read the word or phrase divorced from its immediately surrounding provisions.⁵⁶

Although the High Court in its approach to section 51(xxxi) Court has generally leaned towards a restrictive approach, in particular in regard to the meaning of the term 'acquisition', there is a strong liberal stream favouring the landowner, which may conceivably prevail as an incident of the development of the purposive, contextual approach to legislative interpretation, championed by Kirby J and others.

⁵⁵ *Shu-Ling Chang v Laidley Shire Council* [2007] HCA 37.

⁵⁶ *Ibid* [43]-[44].

The liberal approach to statutory interpretation complements and reinforces the application of the liberal and traditional approach to property rights reinforced more recently by French CJ in the *Fazzolari v Parramatta City Council*.⁵⁷

On the same theme Kirby J in the *WMC Case* said:

One of the institutional strengths of the Australian economy is the Constitutional guarantee of just terms where the property interests of investors are required under Federal law. This Court should not undermine that strength by qualifying the guarantee. Neither the Court's past authority nor economic equity requires such a result. If it can happen here it can happen again and investors will draw their inferences.⁵⁸

Similarly in *Smith v ANL Ltd*, where he said:

The imposition of the imitation of power of the Parliament to enact laws with respect to the acquisition of property was a deliberate one. Generally speaking it has not been given a narrow construction. I judge the approach of the Court to the meaning of section 51(xxxi) not only to accord with the text of the Constitution but also with universal principles of human rights [Newcrest Mining 1997, 190 CLR 513 at 657-661] and, I believe, the expectations of citizens.⁵⁹

A similar sentiment was expressed by Gleeson CJ in *Smith v ANL Ltd*,⁶⁰ when he said:

⁵⁷ *Fazzolari v Parramatta City Council* (2009) 237 CLR 603, 610. See above n 19, 20 and 37.

⁵⁸ *Commonwealth of Australia v. WMC Resources Limited* (1998)194 CLR 1, 102.

⁵⁹ *Smith v ANL Ltd* (2000) 204 CLR 493, 530 [104].

⁶⁰ *Smith v ANL Ltd* (2000) 204 CLR 493.

The guarantee...is there to protect private property. It prevents expropriation of property of individual citizens, without adequate compensation, even where such expropriation may be intended to serve a wider public interest. A government may be satisfied that it can use the assets of some citizens better than they can; but if it wants to acquire those assets in reliance upon the power given by section 51(xxxi) it must pay for them, or in some other way provide just terms for compensation.⁶¹

Differences in the nature of the impugned legislation also plays a part. The *Tasmanian Dam Case* was relevantly concerned with the sterilisation of land. The *Newcrest* and *WMC Cases* concerned different types of mining tenement.

The High Court was not prepared in a majority decision to regard as acquisitions the replacement of groundwater ground water bore licences with an aquifer licence⁶² or the absence of space in packaging caused by the extinguishment of trademarks and other ‘get up’ in tobacco packaging.⁶³

Smith v ANL Ltd Global concerned the extinguishment of an entitlement to claim damages after six months from the commencement of a statute. The majority of four characterised the legislation, to paraphrase Kirby J as extinguishing the rights of some and commensurately advantaging others.⁶⁴ The dissenters, Hayne and McHugh JJ held that there had been no ‘legal or practical compulsion’ for there to have been an acquisition.

⁶¹ *Smith v ANL Ltd* (2000) 204 CLR 493, 501 [9].

⁶² *ICM Agriculture v Commonwealth* (2009) 240 CLR 140.

⁶³ *JT International SA v Commonwealth* (2012) 250 CLR 1.

⁶⁴ *Smith v ANL Ltd* (2000) 204 CLR 493, 530 [106].

The nature of the right in question, particularly if it has been created by statute can therefore be significant.⁶⁵

The explanation for the apparent inconsistency between the cases perhaps also lies in the oft-quoted passage from the US *Pennsylvania Central* case, which also appears in the judgment of Brennan J in the *Tasmanian Dam Case*:

This Court quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.⁶⁶

A similar view idea was expressed by Kirby J in *Smith v ANL Limited* when he said:

Finding a touchstone to distinguish legislation which falls within, and that which falls outside, the requirements of s 51(xxxi) is not easy. No verbal formula provides a universal criterion.⁶⁷

In conclusion, in the *WMC Case*, Kirby J distilled the application of section 51(xxxi) into seven principles. The factual differences between the cases only assists to some extent in explaining the different outcomes. There is no set formula of general application which could assist in explaining the outcomes of all cases. Nevertheless the deeper principles and that underlie section 51 (xxx) can be identified. It will be seen that they resonate with deeper principles applicable in State jurisdictions.

⁶⁵ *JT International SA v Commonwealth* (2012) 250 CLR 1, 102, 107; *Wurridjal v The Commonwealth* (2009) 237 CLR 309.

⁶⁶ See: (1983) 158 CLR 1 at 248; citing: (1979) 438 US 104, 124.

⁶⁷ *Smith v ANL Ltd* (2000) 204 CLR 493, 529 [100].

V STATE CONSTITUTIONS, JUST TERMS AND THE MAGNA CARTA

State Constitutions do not carry the same just terms guarantee as the Commonwealth Constitution.⁶⁸ However, fundamental rights do not necessarily stem solely from Statutes, constitutional or otherwise. As Kirby J said in the *Newcrest* and *Smith v ANL Ltd*⁶⁹ cases, the Constitutional guarantee in the Commonwealth Constitution is arguably the expression of fundamental rights of the kind reflected in the *Universal Declaration on Human Rights*, with an ancestry that dates back at least to the Magna Carta. The Magna Carta itself was a restatement of English law as it existed at that time and therefore the rights it expresses were more ancient than 1215.⁷⁰ Blackstone said in his *Commentaries*⁷¹ that the right to unmolested private ownership of property has been affirmed over the past millennium since the Magna Carta, including in the *Confirmatio Cartarum* 1297 (25 Edw 1); the *Bill of Rights* 1689 (W&M2, c2) and more recently the *Act of Settlement* 1701 (12 & 13 WIII c2). Winston Churchill in *The History of the English Speaking Peoples* said of the Magna Carta:

Throughout the document it is implied that here is a law which is above the King and which even he must not break. This affirmation of a supreme law and its expression in a general charter is the great work of

⁶⁸ Standing Committee on Public Administration and Finance, Western Australian Legislative Council, It is not entirely clear that at a State Level, fundamental rights cannot operate to deny the legislature power in extreme circumstances, however specific the legislation may be. See Gerard Carney above n 8, 108-13. See also Law Reform Commission *The impact of State Government Actions and processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia Report No 7* (May, 2004).

⁶⁹ *Smith v ANL Ltd* (2000) 204 CLR 493,529 See above n 46.

⁷⁰ See Winston S Churchill, *History of the English Speaking Peoples* (Cassell 11th Ed 2nd Impression 1967) 199-202.

⁷¹ William Blackstone (1765) *Commentaries on Laws of England* Book 1, 125.

Magna Carta; and this alone justifies the respect in which men have held it.⁷²

For the King, the contemporary reader should read 'the State': that is, the executive arm of Government.

These principles, as they apply to modern land ownership, have recently been affirmed by French CJ and Kirby J in the passages referred to earlier.

The Magna Carta still stands as a statement of the law in Western Australia, according to the Law Reform Commission.⁷³ English common law (and statutes) where relevant, were received into and forms part of the law of Western Australia.⁷⁴ In any event, as affirmed by Kirby J in *Newcrest*, the common law is arguably not static and may express fundamental rights from international measures such as the *Universal Declaration on Human Rights*.⁷⁵

Western Australia has a distinguished analysis of the common law in *Della-Vedova v State Planning Commission and the SEC*.⁷⁶ In that case,

⁷² See Churchill above n 70.

⁷³ The Law Reform Commission of Western Australian, *United Kingdom Statutes in Force in Western Australia*, Report, Project No 75 (October 1994) [1.9].

⁷⁴ Gerard Carney, Op Cit, 138-40.

⁷⁵ United Nations, General Assembly, *The Universal Declaration of Human Rights* (10 December 1948), Resolution 217 A (III). Also affirmed by Kirby J in *Commonwealth v. Western Australia* (1999) 96 CLR 392. An objective of the 'just terms' requirement is to reflect 'a basic principle of fundamental civil rights': 196 CLR 392, 461 [194].

⁷⁶ *Batista Della-Vedova & Ors. v State Planning Commission; Batista Della-Vedova & Ors. v State Energy Commission* (1998), unreported decision of the Compensation Court of Western Australia: 22 December 1988 BCC8800828 and relevantly approved and quoted in *R v Compensation Court of Western Australia; ex parte State Planning Commission & Anor; re Della-Vedova* (1990) 2 WAR 242, 253 (Wallace J) (unanimous judgment of Full Court of Supreme Court of Western Australia).

Pidgeon J (at first instance, which was upheld and approved on appeal) said that:

The Crown is not entitled by virtue of the Royal Prerogative to take possession of a subject's property for reasons of State without paying compensation (8 Halsbury's Laws of England 4th Edition, para 920). [note: this reference is now volume 8(2) para 379 of the 5th edition].

The common law principles are reflected in s 51(xxxi) of the Australian Constitution empowering the Commonwealth to make laws with respect to the acquisition of property on 'just terms'. While this does not bind the State to do the same it shows a consistency with the common law principles. The common law principles would apply in this State unless abrogated by statute, which gives rise to the canon of construction referred to by Lord Atkinson in *Central Control Board (Liquor Traffic) v. Cannon Brewery Co Ltd* [1919] AC 744, 752:

That canon is this: that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the legislature unless that intention is expressed in unequivocal terms.

The Public Works Act does not detract from these common law principles. On the contrary, it aims to give effect to them in their widest sense and I would interpret this as the policy and intention of the Act [referring to the Public Works Act 1902].⁷⁷

He proceeded to examine particular statutory provisions relating to the taking of land or interests in land relevant to that case, against the background of the above principles. He said that statutory provisions

⁷⁷ *Batista Della-Vedova & Ors. v State Planning Commission; Batista Della-Vedova & Ors v State Energy Commission* (1988), unreported decision of the Compensation Court of Western Australia: 22 December 1988 BCC8800828 at 29 – emphasis added.

cannot deprive a landowner 'of a right they have at common law when the legislature has not abrogated the common law'⁷⁸.

Pidgeon J went on to hold that the claimants could claim compensation under the relevant statutory scheme, and importantly:

If for any reason it could be considered that the Act [referring to the *Public Works Act 1902*] does not extend to incorporating this aspect of the claim in question then I consider it would exist at common law and has not been abrogated by statute. The common law is that if land is taken there is a right to compensation (*A-G v De Keyser's Royal Hotel [1920] AC 508*). The principles and method of compensation is determined by the Public Works Act which embraces the common law principles making it unnecessary in normal circumstances to consider them in compensation claims. The common law provides that where the statute authorising the taking does not provide a special tribunal to assess the amount of compensation it can be claimed in an action: (*Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd (supra)* at 752 and *Bentley v Manchester Sheffield and Lincolnshire Railway Co [1891] 3 Ch 222*).

Later in his judgment he applied the common law in coming to his decision.⁷⁹

The principle which can be derived from the analysis of Pidgeon J in the Compensation Court,⁸⁰ is that the State cannot take property without

⁷⁸ *Batista Della-Vedova & Ors v State Planning Commission; Batista Della-Vedova & Ors v State Energy Commission* (1988), unreported decision of the Compensation Court of Western Australia: 22 December 1988 BCC8800828 29 and approved and quoted in *R v Compensation Court of Western Australia; ex parte State Planning Commission & Anor; re Della-Vedova* (1990) 2 WAR 242, 253 (Wallace J) (unanimous judgment of Full Court of Supreme Court of Western Australia).

⁷⁹ *R v Compensation Court exp. State Planning Commission Re Della-Vedova (Supra)* (1990) 2 WAR 242, 253 (Wallace J).

compensating the owner of the property, on just terms, unless by statute Parliament specifically and clearly provides to the contrary. This is a fundamental right entrenched in the common law of the State and arguably forms part of its unwritten Constitution.

Why was such a fundamental right not expressly set out in the State Constitution? Although a full answer to that question could justify an examination beyond the scope of this article, there are two reasons which immediately present themselves. First, in comparison with the Commonwealth Constitution, the approach to drafting the State Constitution was understated. Some attribute the whole task to the then Governor Sir Frederick Napier Broome. A ‘more nuanced suggestion’ is that the work was done by the Governor and a number of eminent politicians, including the then Colonial Secretary in London.⁸¹ Whoever it was, the process was not well recorded and the drafters were apparently not celebrated constitutional scholars.⁸² It could be speculated that a drafting process dominated by leading members of the colonial executive may not by its nature be inclined to champion individual rights enforceable in the courts. Secondly, it is a feature of the state constitutions that generally, no attempt was made ‘to incorporate all of the fundamental institutions and principles of the Westminster system of government’. Such an attempt would have been viewed as ‘embarrassingly gauche’.⁸³ It was left to the Courts to apply the fundamental principles of the system.

⁸⁰ The Compensation Court’s jurisdiction was subsumed by the State Administrative Tribunal in 2005.

⁸¹ Lee Harvey ‘Western Australia’s Constitutional Documents: A Drafting History’ (2013) 36(2) *University of Western Australia Law Review* 49, 50.

⁸² Ibid.

⁸³ Gerard Carney, Op Cit 29.

An examination of relevant High Court and House of Lords cases shows that the themes adopted by Pidgeon J in the *Della-Vedova* case, which are reflected in the decisions of Kirby J in the *Newcrest* and the *Commonwealth v Western Australia*⁸⁴ cases have antecedents in a number of other High Court, Privy Council and House of Lords cases.⁸⁵ These cases strongly support, as we have said, the entrenched common law rights to property with a guarantee against acquisition, otherwise than on just terms.

The principle mentioned by Pidgeon J is that for the common law rights to be revoked or varied, the legislation must be quite specific. This has been confirmed a number of times by the High Court, classically in *Clissold v Perry (Minister for Public Prosecutions)*.⁸⁶ As we have seen, the same presumption in favour of entrenched rights, was affirmed by Kirby J in the *Newcrest* case and French CJ in the *Fazzolari* case.

In *Minister of State for the Army v Dalziel*, Starke J said that where there is a gap in a regulation in that it does not provide for the payment of compensation which is reasonable and just, the government would nevertheless be liable to pay compensation by application of the common

⁸⁴ *Commonwealth v Western Australia* (1999) 96 CLR 392. See also Callinan J in the same case.

⁸⁵ *Australian Apple & Pear Marketing Board & Anor v Tonking* (1942) 66 CLR 77, 104 (Rich J) with whom Latham CJ formed the majority and Latham CJ appeared to have agreed on these points (see 98, 99). Williams J appears to have endorsed this reason in *Johnston, Fear and Kingham and the Offset Printing Co Pty Ltd v the Commonwealth* (1944) 68 CLR 261, 291. The same principle was approved in *Minister of the State for the Army v Dalziel* (1944) 68 CLR 261, 291. The same principles were adopted by Starke and McTiernan JJ in the *Johnston Fear* case referred to above (at 327, 329). Similar principles have been expressed by English judges, in particular *A-G v De Keyser's Royal Hotel* [1920] AC 508; *Burmah Oil Co Limited & Ors v Lord Advocate* [1965] AC 75.

⁸⁶ *Clissold v Perry (Minister for Public Prosecutions)* (1904) 1 CLR 363, 373-4.

law principles.⁸⁷ Presumably, this dictum would have application where the relevant legislative provisions do not exclude the common law. Starke J repeated this principle in *Johnston Fear, Kingham and the Offset Printing Co v The Commonwealth*.⁸⁸ Whether the relevant statute does or does not exclude the common law will be a matter for the construction of the particular statutes. The cases cited stress that the exclusion must be clear and unequivocal.

There is, therefore, a significant body of authority which would support the contentions that the common law provides the rights I have mentioned⁸⁹. As can be seen from the passage quoted above by Pidgeon J in *Della Vedova*, the rights can be asserted by an action in the State Supreme Court.⁹⁰

Questions will always arise, of course, as to whether there has been a taking, and how compensation is to be calculated.⁹¹ There could be disputes over the facts as to whether or not the subject matter is property and whether or not there has been a taking. In the 2003 Western Australian case of *Cornell v Town of East Fremantle*⁹² it was held that restrictive heritage provisions in a town planning scheme, which effectively prohibited development except in unusual circumstances, constituted a prohibition on development for no purpose other than a public purpose and could therefore be the subject of a claim for injurious affection compensation under section 36 of the then *Metropolitan Region*

⁸⁷ *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 291.

⁸⁸ *Johnston Fear, Kingham and the Offset Printing Co v The Commonwealth* (1941) 36 CLR 128. The same principle was affirmed in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 111.

⁸⁹ Many of the cases are referred to in K Gray, 'Can Environmental Regulation constitute a taking at common law?' (2007) 24 *EPLJ* 161.

⁹⁰ See above n 78, 79.

⁹¹ See above n 50, 78 and text reproduced in respect of to that footnote.

⁹² *Cornell v Town of East Fremantle* [2003] WASC 163.

Town Planning Scheme Act 1959 (WA). When this decision, together with examples such as buffer areas and others (cited for example by Deane J in the *Tasmanian Dam Case* and other judges, who have held that sterilisation constitutes acquisition)⁹³ are examined together, it is arguable that many of the policy and legislation-based restrictions in Western Australia to which I have referred may constitute a taking.

The common law rights referred to above are more akin to the entrenched right entrenched in the Fifth Amendment to the USA Constitution rather than the constitutional guarantee in the Australian Constitution because the common law principles are not in the nature of a power-giving provision subject to a condition, as in the case of section 51(xxxi) of the Constitution, for the benefit of the State. Rather, they are entrenched legal rights in favour of the individual, usually in opposition to the State.⁹⁴ This law binds the State, unless Parliament very clearly enacts otherwise. We have not yet seen these principles argued recently in a major Court case, let alone in the High Court, in regard to the de facto taking of land by Government for conservation areas. But given the economic importance which can attach to these issues, it may be just a matter of time before we have more case law on this subject.

⁹³ For example Callinan J in *Commonwealth v Western Australia* (1999) 196 CLR 392, 480 [267]. See also his comments at 484 where he refers to diminution in value being an acquisition.

⁹⁴ It was suggested by Kirby J in the *Newcrest* case and Pidgeon J in the *Della Vedova* case that section 51(xxxi) is a particular expression more than a fundamental right.

VI CONCLUSION

The problem stated at the beginning of this article can be summarised by the following remarks of the Hon. Ian Callinan AC QC:

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.

Some of the issues relevant to this challenge have been referred to in this article. The limits applicable to the use of environmental and planning measures and determining when compensation is payable by the State, are unlikely to be straightforward and no set formula can provide guidance at the Commonwealth or State levels. There are, however, fundamental principles which are common to the Commonwealth and State jurisdictions which could be applied through their differing constitutional frameworks, to compensate landowners for loss in the value of land caused by environmental and planning measures

We can be reasonably certain that with the continuing importance and likely growth of environmental law and policy at the State and Federal levels, there will be a need to revisit some fundamental principles relating to the citizen and private property.

In a number of cases the High Court has grappled with the question of when do environmental and planning measures become an acquisition of property. The High Court cases deal with the questions of whether

legislation provides for an acquisition of property, and if so, was it on just terms. The application of concomitant principles under state law requires a resort to more fundamental common law principles which arguably underlie the operation of the Commonwealth and State law. The common foundation is the principle in the Magna Carta and the Universal Declaration on Human Rights, to quote Callinan J:

Acquisition on just terms is synonymous...with acquisition according to justice and that means justice as administered by a court or tribunal fully and properly equipped to adjudicate on all matters and not subject to a truncated review or appellate process.⁹⁵

This resonates with the 1354 statutory addition to the Magna Carta which required the taking of property to be in accordance with the due process of law.⁹⁶

⁹⁵ *Commonwealth v. Western Australia* (1999) 196 CLR 392, 491 [291], [292]

⁹⁶ 28 Edward III. The 1354 Statute added a requirement that land may only be taken by 'due process of law' See n 8 above.