**Comments on the Australian Law Reform Commission’s Interim Report on Traditional Rights and Freedoms – Encroachment by Commonwealth Laws**

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**The concept of property: a bundle of rights**

As the *Interim Report* recognises at a number of points, the concept of property does not refer to a “thing” but a bundle of rights, in particular the right to exclude others from enjoyment, the right to use and the right to alienate. At various points, however, the Interim Report fails to distinguish between these different rights in making extravagant and unsupportable claims, for example the statement at para 8.1 that the “the common law has long regarded a person’s property rights as fundamental”. This generalisation fails to acknowledge the crucial distinction which needs to be drawn between legislative provisions which interfere with the right to exclude others (in this case government) and legislative restrictions on the right to use.

**The common law does not recognise the concept of vested property rights**

The *Interim Report* does not identify any convincing basis for “vested property rights” at common law beyond the broad statements by Blackstone, discussed at paras 7.8-7.9. Moreover, the quotations from Blackstone at this point are clearly referring to interferences which involve government *taking possession* of land (“alienate”, “disseise”, “divested”), ie interferences with the right to exclude others from enjoyment. He is not referring to restrictions on land use.

The *Interim Report* offers no *judicial* authority for the concept of “vested property rights”. Moreover, the Report itself refers to a High Court decision which appears to completely undermine the concept. In *Durham Holdings v NSW*, discussed at paras 8.22-8.23, the High Court, in considering whether there was any requirement under a State Constitution for just compensation for acquisition of property rights in coal by a State specifically rejected the idea that there was an implicit constitutional limit on state power founded on ‘rights deeply rooted in our democratic system of government *and the common law’* (emphasis supplied). While the Court was concerned with the interpretation of the NSW Constitution, the argument that a just terms provision should be implied was based on the common law. The High Court rejected the suggestion that there was a doctrine of vested property rights under the common law. While this decision was primarily concerned with the right to exclude others (the government) from enjoyment, it necessarily has implications for any right to use: the effect of the acquisition was that this was completely removed.

In fact, the common law did recognise that there were limits on a landowner’s rights to use land via the tort of private nuisance. Where the *Interim Report* does mention private nuisance it views it in terms of *protecting* private property rather than *restricting its use* (see para 7.5). But protection for one landholder is necessarily achieved by limiting the use of a neighbour’s land.

In discussing the principle of legality/statutory interpretation at para 1.28 et seq, para 7.46 et seq and para 8.38 et seq, the Interim Report fails to mention a significant qualification placed on the presumption in relation to regulatory restrictions on land use. Citing a number of decisions including decisions of the House of Lords, the Canadian Supreme Court and the Privacy Council, Kevin Gray has stated:

Across the common law world the standard response is that mere regulatory interference with land use or land management does not constitute a deprivation of property for which compensation need be paid. The words which ring in the common lawyer’s ear are those of the English law lord, Viscount Simonds, who acidly observed almost 50 years ago that regulatory diminutions of an owner’s rights ‘can be effected without a cry being raised that Magna Carta is dethroned or a sacred principle of liberty infringed’ (K Gray, “Can environmental regulation constitute a taking of property at common law” (2007) 24 EPLJ 161-181, citing Viscount Simonds in *Belfast Corporation v O D Cars Ltd* [1960] AC 490 at 519).

**The Australian Constitution**

The ALRC’s inquiry is necessarily focused by its terms of reference. These require it to “[have] regard to the rights, freedoms and privileges recognised by the common law”. This wording, however, does not specifically exclude consideration of the Australian Constitution as a source of traditional rights. Moreover, insofar as the Constitution clarifies and refines any rights that existed at common law, it must necessarily be considered by the Commission. Indeed, the *Interim Report* refers to section 51(xxxi) on a number of occasions.

The Australian Constitution is the overriding source of “traditional” rights in Australia where it addresses the matter. It is ludicrous to suggest that common law principles developed in the very different UK context should be seen as impinging in any way on those formally recognised in the Australian Constitution. In addressing the question of property rights in the Constitution, any common law principles developed in a very different UK context were effectively overrode. This needs to be clearly stated in the Final Report, even if the Commission concludes that its consideration of the Australian Constitution is not clearly within its terms of reference.

The *Interim Report* recognises at para 1.16 that s 51(xxxi) effectively defines a right. This necessarily includes limitations on that right. This provision in the Constitution, as interpreted by the High Court, effectively provides that a landowner does not have any “vested property right” to exclude government from enjoying land at the landowner’s expense through “acquisition” (a fortiori, by restricting its use). Insofar as there is a right, it is simply a right to be provided with just compensation in certain circumstances. Beyond this, the proportionality test (see paras 1.65-1.67) is effectively applied by the Constitution as it has been interpreted by the High Court. In brief, the position is that acquisitions of recognised property rights are compensable where government effectively interferes with the right to exclude others (here the government itself) from enjoyment. Mere regulatory takings are not even compensable. What this means is that the Commonwealth only has to compensate where it interferes with *the right to exclude others* from enjoyment (in this case by acquiring a recognised property interest in the land: in particular ownership, but also including more limited rights such as restrictive covenants and profits á prendre). Restrictions on the *right to use* (so-called “regulatory takings) are not even compensable. The Constitution, as operationalized by the High Court, has effectively prioritised the right to exclude others by requiring compensation to be paid when legislation interferes with it..

It is simply wrong for the Interim Report to say, at para 8.36, that: “There is no clear boundary between a taking or acquisition of property by government and the regulation of use rights”. There is a well-developed High Court jurisprudence in this area which has recently been applied by the Federal Court in *Spencer v Commonwealth of Australia* [2015] FCA 754 to deny a claim under s 51(xxxi) for just terms compensation even where, as a result of restrictions imposed by native vegetation clearance legislation, land was no longer commercially viable.

**Environmental legislation implements obligations under international conventions**

The *Interim Report* pays significant attention to international instruments dealing with human rights, but is Australia a party to any human rights convention which acknowledges any right to property? So far as nature conservation is concerned, Australia has ratified a number of international conventions that commit the Australian government to pursue values which may require constraints to be placed on private land use. In addition, the *Environment Protection and Biodiversity Conservation Act* 1919 (EPBC Act) incorporates these into domestic law (this is recognised by the *Interim Report* at para 8.114). For examples of Australia’s international obligations which are reflected in provisions of the EPBC Act, see Article 8(c) of the UN Convention on Biological Diversity which requires Parties as far as possible and appropriate to: “*Regulate* or manage biological resources important for the conservation of biological diversity *whether within or outside protected areas* with a view to ensuring their conservation and sustainable use”. See also Article 8(l): “Where a significant adverse effect on biological diversity has been [identified] … *regulate* or manage the relevant processes and categories of activities” (emphasis supplied).

**The *Environment Protection and Biodiversity Conservation Act* 1999**

As the *Interim Report* points out, the EPBC Act does not absolutely prohibit development on a particular piece of land but simply requires approval to be obtained where there is *likely to be a significant impact* on a matter of national interest. An approval can still be given in these circumstances even if there is likely to be a significant impact, and in making a decision, the Minister must take into account not only matters of national interest but also “economic and social matters” (EPBC Act s 136(1)). In practice, approvals are rarely denied. Applications to carry out native vegetation clearance for agricultural purposes are rarely even considered. The recent decision in *Spencer v Commonwealth of Australia* [2015] FCA 754 concerned State land clearing legislation, not Commonwealth legislation.

A crucial factor to which the *Interim Report* does not draw attention is that environmental and land use planning legislation does not generally interfere with the historical and existing use of land, but rather development. See EPBC Act s 43B:

A person may take an action described in a provision of Part 3 without an approval under Part 9 for the purposes of the provision if the action is a lawful continuation of a use of land, sea or seabed that was occurring immediately before the commencement of this Act.

The continuation of the existing use right is conceded even where it is compromising nature conservation values. There are not even provisions in the legislation which allow existing uses to be terminated on payment of compensation, unless the land itself is compulsorily purchased.

It would be a massive departure from existing understandings to say that government cannot control the development of land without compensating the landowner: that there is some kind of right to development for which compensation should be paid if it is removed. This would have significant implications in an urban context. One response to this from rural landholders is that regulating agricultural development can be distinguished from urban development because it affects a person’s livelihood. Urban developers, however, could equally argue this, albeit commanding less public sympathy. It is also important to remember that a considerable amount of agricultural land is now farmed not by “Aussie battlers” but by large corporations.

**Takings law under the 5th Amendment to the US Constitution**

The Final Report should be wary of suggesting that the Australian government should tread the path taken under the 5th Amendment to the US Constitution. The US Supreme Court has held that a compensable taking occurs when regulation deprives a landowner of *all economically beneficial or productive use* of the land in question, unless the proposed use is already restricted by “background principles of nuisance or property law” (*Lucas v South Carolina Coastal Council* 112 S. Ct. 2886 (1992)). In practice, this will apply in very few cases because regulations designed to conserve biodiversity on privately owned land rarely involve “sterilization” of land, at the very least because they will usually allow any existing use to continue (eg pastoralism). It would appear not to apply on facts such as those recently considered in *Spencer v Commonwealth of Australia* [2015] FCA 754 where the property was simply found *not to be commercially viable* unless clearing was allowed.

Beyond the ostensible certainty of the *Lucas* criterion, whether a compensable taking occurs under the 5th Amendment will depend on a complex balancing exercise. This takes into account *economic impact*, particularly the extent to which the regulation has interfered with “distinct investment-backed expectations” and the *character of the government action*, for example whether it merely affects property interests through “some public program adjusting the benefits and burdens of economic life to promote the common good” (*Penn Central Transp Co v New York City* 438 US 104 (1978)). Relying on such a complex balancing exercise could potentially see landowners and government agencies locked up in litigation for significant periods of time. It might have a freezing effect on necessary land use regulation, with government reluctant to regulate because of the unknown compensation costs that might be incurred. A far more efficient use of available funding which balances conservation and intra-generational equity considerations is suggested in the following section.

**Payment for active management, not compensation for lost expectations**

It is important to bear in mind that even where legislation does not provide for just terms compensation to be paid, landowners significantly affected by conservation legislation can frequently take advantage of rural adjustment programmes which provide funding to allow them to exit their industry. This was in fact the position in *Spencer v Commonwealth of Australia* [2015] FCA 754, where an offer was made under an exit assistance programme to purchase land which was not commercially viable as a result of NSW native vegetation clearance legislation.

Apart from this, the focus of the current debate in Australia about conservation management on private land has changed radically in recent years and is still in the process of evolving. Funding transfers by government to rural landowners are now increasingly framed as payments for the provision of environmental services not as compensation for lost expectations. This usually involves payments for active management by landowners to advance biodiversity conservation objectives. Unlike compensation, these stewardship payments are forward looking. They are based on the extent of management activity carried out rather than the loss in market value of land. They are more equitable than compensation because they constitute payment for work performed, rather than being based on chance factors relating to the development value of land. Basing payments on active management to conserve biodiversity encourage landowners to see native vegetation as an asset rather than a liability. In essence, the community is paying for the production of an alternative commodity which in the past has been seen to have no commercial value:

Stewardship payments are also in line with justifications for private property which emphasise its role not only in respecting the individual’s sense of dignity, but also in developing a sense of personal responsibility to the community. Instead of telling landholders that they are being compensated to keep their destructive hands of the land, the message is that they have a vital role to play, a role which the community regards as being sufficiently important that it is prepared to pay for it (D Farrier, “Implementing the In-situ conservation provision of the United Nations Convention on Biological Diversity in Australia” (1996) 3 *AJNRLP* 1-24)).

The *Interim Report* appears to raise these developments obliquely in the statement at para 8.141:

In developing policies and laws, the Commonwealth could investigate whether consensual arrangements with the property holders could deliver the policy outcomes so as to address both s 51(xxxi) and broader concerns about the effect on property rights.

In the final report, the developments outlined above need to be canvassed in some detail to show that there is an alternative pathway to intra-generational equity to compensating landowners for restrictions imposed on land use in the interests of biodiversity conservation.

For an example of such a scheme at the Commonwealth level, see the Environmental Stewardship Programme at <http://www.nrm.gov.au/national/continuing-investment/environmental-stewardship> which provided long-term support for private landholders to maintain and improve the condition of matters of national environmental significance.

The final report should also note the development of *environmental offsets* programmes at a State and Commonwealth level, which require those carrying out development to replace environmental values (eg biological diversity) destroyed by development, or at least to provide compensation for the loss of these values. Offsets usually require active ongoing management of relatively degraded areas to replace biological diversity which has been lost. In this instance, rather than government having to find the funding, those carrying out development must pay.