



AUSTRALIAN PROPERTY INSTITUTE INC.

SUBMISSION TO THE

AUSTRALIAN LAW REFORM COMMISSION

ON

**INTERIM REPORT 127: TRADITIONAL RIGHTS AND FREEDOMS –
ENCROACHMENTS BY COMMONWEALTH LAWS (ESP. CHAPTERS
*7 PROPERTY RIGHTS AND 8 PROPERTY RIGHTS – REAL
PROPERTY*)**

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TABLE OF STATUTES CITED:

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Land Compensation Act 1973 [UK]
Local Government (Town and Country Planning) Amendment Act 1945 (NSW)
Public Works Act 1912 (NSW)
Water Act 2007 (Cth.)

TABLE OF CASES CITED:

Adelaide Clinic Holdings Pty Ltd v Minister for Water Resources (1988) 65 LGRA 410
Park v Allied Mortgage Corporation Ltd (unreported, FCA, 5 July 1995)
Poseidon Ltd & Sellars v Adelaide Petroleum NL [1994] 120ALR16
Spencer v Commonwealth (1907) 5 CLR 418
Tolsen v Roads and Maritime Services (2014) NSWCA 161
Trandos v Western Australian Planning Commission (2001) 117 LGERA 257
Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1,10

1. PREFACE

- 1.1. This submission to the Australian Law Reform Commission (ALRC) on Interim Report 127 *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* especially Chapters 7 *Property Rights* and 8 *Property Rights – Real Property*¹ has been prepared by the Australian Property Institute (API) as part of ongoing research efforts and dissemination of factual and dispassionate information about the worth of property rights in Australia, compensation assessments for such rights and the management of such rights.
- 1.2. In addition, API records its appreciation for the invaluable and numerous discussions that occurred during the preparation of the submission with members of the Submission Committee. This submission however does not necessarily represent the views of any of the individual members of the Submission Committee, sitting strictly extra-curially.

¹ Australian Law Reform Commission (ALRC) (2015) *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, ALRC Interim Report 127 (Sydney: July), 177 – 247.

2. INTRODUCTION

2.1. This submission responds to the ALRC's Interim Report 127 *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* especially Chapters 7 *Property Rights* and 8 *Property Rights – Real Property*² released in July 2015. The API welcomes the opportunity to respond to the Inquiry and in particular the provision of a late submission by the API to the ALRC.

2.2. The overall need for the Inquiry into those Commonwealth laws that may encroach upon traditional or common law rights, freedoms and privileges is supported by API. In particular it is noted with approval that the ALRC will also consider a broad range of matters pertaining to the impairment of the above mentioned rights, freedoms and privileges as set out in the *Terms of Reference*³. It is noted that in undertaking the reference from the Attorney-General, the ALRC has also been required to consider:

- *How laws are drafted, implemented and operate in practice; and*
- *Any safeguards provided in the laws, such as rights of review or other accountability mechanisms.*⁴

2.3. It is also noted that the focus of the Inquiry proposes to consider how such rights, freedoms and privileges are

*...“currently protected in law from statutory encroachment. Broadly speaking, some protection is provided by the Australian Constitution and, less directly, by rules of statutory construction...”*⁵

2.4. Of particular interest to the API, it is noted that the Interim Report refers to *s.51 (xxxi)* of the *Constitution* which requires that the Commonwealth must acquire property if compulsorily only on just terms (viz. para 1.16). It is further noted that this Constitutional provision is referred to conceptually as a right arguably protected by the *Constitution* and yet as Pillai and Williams state it is both a source of power and a limitation on that power to acquire property⁶. The qualification that the Commonwealth must acquire property on just terms raises the inevitable question as to the definition of “just terms”.⁷ API notes with approval that the Interim Report (viz. para 1.87) identifies certain laws that may merit further review, perhaps requiring a subsequent inquiry by the ALRC. The issue of the definition of “just terms” is, in the view of API, one such legal issue that is increasingly being canvassed as requiring clarification, and this aspect is dealt with more fully subsequently in this submission.

² ALRC (2015) 177 – 247.

³ ALRC, 9.

⁴ ALRC, 10.

⁵ ALRC, 17 (para 1.14).

⁶ Pillai, Sangeetha and Williams, George (2015), “Commonwealth power and environmental management: Constitutional questions revisited” *Environmental and Planning Law Journal* 32(5), September, 405.

⁷ Brennan, Sean (2004), “Native Title and the Acquisition of Property under the Australian Constitution” *Melbourne University Law Review* (28), 29 et al.

3. COMMENTS AND RECOMMENDATIONS (CHAPTER 7)

- 3.1. The following comments and recommendations focus on Chapter 7 Property Rights (The common law and private property) of the Interim Report.
- 3.2. It is noted that reference is made at paras 7.4 and 7.8 of the Interim Report to *Article 17 (2)* of the *Universal Declaration of Human Rights (UNDHR)* which provides that there should not be arbitrary deprivation of an individual's property. While para 7.35 of the Interim Report observes that the concept of property in the context of *s.51(xxxi)* of the *Constitution* is viewed broadly, and yet contrary to *Article 17 (2) UNDHR* the compensation accruing to a dispossessed owner in Commonwealth and State legislation focuses markedly on the unaffected market value of land. For example, *s.54(1) Land Acquisition (Just Terms Compensation) Act 1991 (NSW) (LAJTCA)* provides that compensation will not be less than the unaffected market value of the land. The differences between Commonwealth and State property compensation regimes is in practice insignificant, and yet all fail to recognise compensation driven primarily from a base of market value is unlikely to justly compensate a dispossessed owner.
- 3.3. As previously mentioned this submission, compensation in the Commonwealth regime is informed by *s.51 (xxxii)* of the *Constitution* which is given statutory impulse through the *Lands Acquisition Act 1989 (Cth.)*. This Commonwealth legislation and the various State property compensation regimes all incorporate phrases such as "just terms", "justly" and "just terms compensation" to evidence the common statutory intent that compensation to a dispossessed owner, simply speaking, is to be just⁸.
- 3.4. Also, it is noted the judgement in *Union Steamship Co of Australia Pty Ltd v King (1988)* 166 CLR 1,10 left open the prospect of a limit in state power such that compensation in any Australian jurisdiction should be just. However, confounding this view was the recent offset by betterment against market value compensation in *Tolsen v Roads and Maritime Services (2014) NSWCA 161*. Importantly, the Court of Appeal was prepared to accept matters beyond the market value of the land but still within the statutory concept of just terms compensation. The *Tolsen* decision arguably produced an aberrant result which is not in accord with *Article 17 (2) UNDHR*. Hence, there is now an increasingly urgent need to revisit how compensation for compulsory dispossession under Commonwealth and State laws should be constructed in order to evidence just compensation.
- 3.5. Under Commonwealth and State acquisition legislation, compensation does not accrue to holders of property rights whose holding is not directly impinged upon by a specific compulsory acquisition. As mentioned previously, the market driven approach as the primary basis for the assessment of compensation is increasingly viewed as outdated. API conducted a series of forums in 2013 throughout NSW on compensation reform, and a consistent view expressed in the forums was that the impact on property values arising from compulsory acquisition of land can extend well beyond the boundaries of

⁸ Hyam, Alan (2014) *The Law affecting Valuation of Land in Australia* 5th ed. (Sydney: The Federation Press), 334 – 336.

the land to be acquired for the public purpose.⁹ The API recognised there was a long standing reluctance by the State to extend compensation to land owners who are obviously adversely impacted by a public work, but whose land has not been acquired.

- 3.6. In the API submission to the 2013 NSW *Just Terms Compensation Legislation Review Consultation Paper*, it was stated:

...there has been a pervasive view since the first significant planning legislation in Australia, namely the 1951 County of Cumberland Planning Scheme Ordinance¹⁰, that compensation should be available for those owners injuriously affected by zoning:

... [I]legislation providing for planning must ensure that those injuriously affected by a scheme and those from whom land is compulsorily acquired will not be unjustly treated, but the legislation must also ensure so far as possible that the community will not be forced to pay unreasonably. In order to achieve these results, there must be carefully detailed clauses in the Act saying whether compensation is or is not payable in particular circumstances, and just how the assessment of compensation is to be determined.

Town and country planning legislation almost invariably provides that owners of property which is injuriously affected and loses value when the scheme comes into effect will be entitled to payment of compensation by the responsible planning authority, usually the local governing authority, or council.¹¹

- 3.7. In 1978, the Victorian Committee of Inquiry into Town Planning Compensation¹² chaired by (then) Mr. J. A. Gobbo QC considered the following Terms of Reference:

Whether there should be any and what extension or clarification of entitlement to compensation in respect of decisions or proposal of a planning nature; and

The measure which should be adopted to avoid or mitigate hardship and inequity consequent upon such decisions and proposals, and planning policies and procedures generally.

It should be noted, therefore, that the concern of the Committee was not intended to be the whole of the area of compensation including that for the taking of land, but only compensation in respect of town planning decisions.¹³

⁹ Australian Property Institute (2013) *Submission to Department of Finance and Services on Just Terms Compensation Legislation Review Consultation Paper* (Sydney: August), 6.

¹⁰ The *County of Cumberland Planning Scheme Ordinance* was prepared pursuant to the *Local Government (Town and Country Planning) Amendment Act 1945* (NSW).

¹¹ Brown A.J. & Sherrard H.M. (1969) *An Introduction to Town and Country Planning* 2nd ed. (Sydney: Angus & Robertson Ltd), 365-366; see also API (2013), 6 (para 1.5).

¹² Committee of Inquiry into Town Planning Compensation (1978) *Town Planning Compensation* (Melbourne: Government Printer), March.

¹³ *Town Planning Compensation*, 5.

- 3.8. The report of the 1978 Inquiry (known as the Gobbo Report) concluded that throughout Australia where no part of land affected adversely by the presence of public works is acquired by the constructing authority, compensation for injurious affection has never been a compensable item in such circumstances. The 1978 Inquiry Committee decided the reason was:

...because of the difficulty of drawing the line for entitlement or finding the edge of the ripple. Nevertheless this difficult issue was tackled in England and resulted in the Land Compensation Act 1973 [UK] that provided compensation outside the actual acquisition area.¹⁴

- 3.9. As a result, the Gobbo Report concluded due to these difficulties in delineation of the injurious affect:

...there should not be compensation for non-physical factors, such as personal inconvenience and detraction of view. These are notoriously difficult to evaluate and measure. If there is to be an innovation in this field of compensation it should be into an area where in the interests of both the claimant and the authority, some objective measurement and even calculation are possible.¹⁵

- 3.10. Further, the Gobbo Report concluded the “overwhelming percentage”¹⁶ of property value depreciation arose from physical factors due to the impact of traffic noise. In an attempt to define “the edge of the ripple,”¹⁷ the Inquiry Committee provided the following hypothetical example of how such an assessment of compensation for injurious affection could be conceived:

...a property alongside a freeway may sustain a claim for the difference in value between the market value of the property as at the date one year after the use has commenced and the market value of the property, assuming that there was none of the extra noise from the new freeway but assuming whatever noise would have existed had the previous road noise continued. Thus a property alongside the new freeway valued at \$30,000 on the relevant date might be valued at \$33,000 if at that date it is assumed that there had not been the extra noise emanating from the new works over and above the noise that would have existed had the works not been carried out. In essence it is therefore a question of compensation for increase in noise. The calculation should be based on a predicted noise level over a period of five or at most, 10 years. If this is not done, a low level of initial useage would debar an owner or tenant from compensation.

...The Committee considered closely the desirability of adopting a noise level reading which it would be necessary to prove as an initial step to entitlement. It would be desirable to provide that a claim would only lie if a reading taken at the face of the building exceeded a figure of the order of 68db (A) L10. This would avoid a multitude of claims for what may be little or no compensation for minor increases in noise. Again,

¹⁴ Town Planning Compensation, 32.

¹⁵ Town Planning Compensation, 33.

¹⁶ Town Planning Compensation, 33.

¹⁷ Town Planning Compensation, 32.

*such reading would be either an actual reading or one based on predicted levels of useage.*¹⁸

- 3.11. The Gobbo Report also concluded injurious affection arising from noise from other sources would need to be assessed in a manner different to that as set out above, and that:

*...Consideration will also have to be given to a different formula for noise evaluation where a rail line is concerned since there will not be the same continuity of noise in that case.*¹⁹

- 3.12. API considers there is a need for conceiving of a broader concept of compensation that justly compensates a dispossessed owner in accord with the intent of s.51 (xxxi) of the *Constitution* and the various State property compensation regimes. Such a need is being driven by an increasing perception that private property rights situated adjacent to, or above infrastructure such as motorways and tunnels, can be significantly diminished in worth, not only by noise as discussed in the Gobbo Report (referred to above). The recent example of the new high speed train route through central England, known as the HS2 from London to Midlands, provides evidence that the deleterious effect on properties adjacent to major infrastructure is now recognised and compensable:

*"The UK government was planning to buy out and compensate owners whose properties lay in the path of the new Midlands to London HS2 train – and also those up to within 120 metres of the tracks and whose homes might be "blighted" by noise.*²⁰

- 3.13. The broadening of compensation assessment to include such compensable impacts is not unknown in the area of contract and tort law, where the issue of futurity and hence possible future losses was addressed by the High Court in *Poseidon Ltd & Sellars v Adelaide Petroleum NL* [1994] 120ALR16 wherein it was stated:

"...the damages will then be ascertained by reference to the degree of the probabilities, or possibilities, inherent in the plaintiff's succeeding had the plaintiff been given the chance which the contract promised."

- 3.14. The broadening of the notion of compensable impact is supported by *Article 17(2) UNDHR* which provides that there should not be arbitrary deprivation of an individual's property which by definition provides also that there should not be arbitrary compensation. Further it is noted the International Federation of Surveyors (FIG) provides in its 2010 policy statement *Compulsory Purchase and Compensation: Recommendations for Good Practice* that compulsory land acquisition and

¹⁸ *Town Planning Compensation*, 34.

¹⁹ *Town Planning Compensation*, 36.

²⁰ *The Sydney Morning Herald* (2015), "Push to bring fairness to living next door" (11 August), 20.

compensation should strive for “new and better practices”.²¹

- 3.15. Also, for many years it has been recognised that injurious affection is found in the narrow circumstance of the placing of heritage restrictions on private properties, which arguably create a public benefit at a private cost. Subsequent to the 1978 Gobbo Report, Mr Justice Gobbo (then of the Victorian Supreme Court) speaking extra-curially also raised the question of heritage notifications stating:

*There are also questions in regard to historic buildings and planning restrictions, and as to whether or not you can get compensation where land is not taken,...but where there are restrictions placed on your use of land. In what circumstances can you then get compensation? Those are also challenging areas*²².

- 3.16. API recognises the drafting of a statutory right to compensation in such circumstances would require a different formula for compensation assessment. It is considered increasing evidence exists of inequity through the imposition of heritage restrictions on private properties, especially if the property is a principal place of residence.
- 3.17. Apart from the issue of potential compensation arising from injurious affection when land is adversely impacted by public works (but not acquired), there is also the vexed issue of enhancement and by extension betterment charges. It is noted by API the *County of Cumberland Planning Scheme Ordinance* provided for the collection of betterment charges for those owners gaining beneficially from zoning. However, the extraction of betterment from private landowners has never been greatly successful in Australia, except as an offset to compensation arising from expropriation of actual private rights. Specific provisions for betterment as an offset to compensation arising from public works have been provided for in the past for infrastructure as railways e.g. *s.18 City and Suburban Electric Railways Act 1915 – 1967* (NSW) as an amendment to *s.124 Public Works Act 1912* (NSW) contained in the *City and Suburban Electric Railways Act 1915 - 1967* providing:

...For the purpose of ascertaining the purchase money or compensation to be paid, regard shall in every case be had by valuers not only to the value of the land to be purchased or taken, but also to the damage (if any) caused by severing the land taken from other lands of the owner, or by the exercise of any statutory powers by the Constructing Authority otherwise injuriously affecting such other lands: and for the purposes of the work described in the Second Schedule of the City and Suburban Electric Railways Act, 1915 - 1967. (i.e. for the Eastern Suburbs Railway) they shall assess the same according to what they find to have been the value of such lands, estate or interest as at the twenty-seventh day of February one thousand nine hundred and sixty seven, and without being bound in any way by the amount of the valuation notified to such claimant, and without reference to any alteration in such value arising

²¹ International Federation of Surveyors (FIG) (2010) *Compulsory Purchase and Compensation: Recommendations for Good Practice*, FIG Policy Statement No. 54 (Denmark: November), 7.

²² Gobbo, Mr Justice (1981) “Introductory Remarks” in *Compulsory Acquisition of Land* (Melbourne: Leo Cussen Institute for Continuing Legal Education), 10.

from the establishment of railway or other public work upon or for which such land was resumed.

...Provided that the said valuers in ascertaining such purchase money or compensation shall take into consideration and give effect by way of set-off or abatement any enhancement in the value of the interests of any such owner in any land adjoining the land taken or severed there from by the construction of the authorised work.²³

- 3.18. API considers such provisions are inequitable and whilst uncommon, broad offsetting of compensation is still available to acquiring authorities. In a 1984 analysis of the operation of the *City and Suburban Electric Railways Act 1915 – 1967* it was concluded:

...that the enhancement in adjoining lands cannot be clearly determined given the broad beneficial effects of the construction of the Eastern Suburbs Railway. Secondly, the control over land use on designated property by means of substantially reduced liability for compensation, is an effective if inequitable method of enforcing planning control.²⁴

- 3.19. API considers issues of enhancement and blight remain inadequately addressed in LAJTCA and there is significant confusion in the interpretation of market value in NSW as defined in s.56. In particular, market value is to be assessed disregarding:

...(a) any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired, and

(b) any increase in the value of the land caused by the carrying out by the authority of the State, before the land is acquired, of improvements for the public purpose for which the land is to be acquired.²⁵

- 3.20. Further, s.61 is a special provision relating to market value where land has potential to be utilised for a purpose different to that for which it is currently used, and hence any compensation assessment ought not embody:

...(a) any financial advantage that would necessarily have been forgone in realising that potential, and

(b) any financial loss that would necessarily have been incurred in realising that potential.²⁶

- 3.21. API notes the assessment of compensation as defined in s.56(1)(a)-(b) and s.61 of the LAJTCA sits awkwardly with the classic definition of market value contained in *Spencer v Commonwealth* (1907) 5 CLR 418 where Griffith CJ stated:

²³ s.124 *Public Works Act 1912* as amended by the *City and Suburban Electric Railways Act 1915 - 1967*.

²⁴ Sheehan, J. (1984) "Towards a New Theory of Planning Compensation", *The Valuer*, 28 (2) April, 111.

²⁵ s.56,1 (a)-(b), LAJTCA.

²⁶ s.61,(a)-(b), LAJTCA.

...In my judgment the test of value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, that is, whether there was in fact on that day a willing buyer, but by inquiring 'What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?' It is, no doubt, very difficult to answer such a question, and any answer must be to some extent conjectural. The necessary mental process is to put yourself as far as possible in the position of persons conversant with the subject at the relevant time, and from that point of view to ascertain what, according to the then current opinion of land values, a purchaser would have had to offer for the land to induce such a willing vendor to sell it, or, in other words, to inquire at what point a desirous purchaser and a not unwilling vendor would come together.²⁷

- 3.22. The *Spencer* rule (as it has come to be known) has been interpreted in subsequent case law as incorporating the notion of highest and best use. As Hyam points out, the principle of highest and best use “has received judicial approval on a number of occasions.”²⁸ The assessment of compensation based upon the highest and best use of land was canvassed in *Adelaide Clinic Holdings Pty Ltd v Minister for Water Resources* (1988) 65 LGRA 410, where Jacobs J stated:

...In the first place, it is in my view wrong in principle to determine the highest and best use by comparison of the notional market value for commercial development on the one hand, and residential development on the other. Common experience shows that land ideally suited for commercial development will fetch a higher price per unit of area than residential land, but it does not follow that the highest and best use of all land is a commercial use, for the highest and best use means exactly what it says – the most advantageous use of the subject land having regard to planning and all other relevant factors affecting its present and future potential. The first task of the valuer is to determine what that use is and then to value the land on that basis. It is not appropriate to determine the highest and best use by reference only to value.²⁹

- 3.23. Subsequently, the *Spencer* rule and the concept of highest and best use was clearly linked in *Park v Allied Mortgage Corporation Ltd* (unreported, FCA, 5 July 1995) where Hill J stated:

...As Spencer's case (1907) 5 CLR 418 itself makes clear the valuation must proceed by reference to the best use of the property.

For this purpose the valuer will take into account not only the present use to which the land is applied, but any more beneficial use to which it may reasonably be applied. This is the process which a purchaser negotiating to purchase the property would undertake. Thus it is not inappropriate in valuing property to take into account a potential development of the property, for among the range of hypothetical purchasers

²⁷ *Spencer v Commonwealth* (1907) 5 CLR 418 per Griffith CJ at 432.

²⁸ Hyam, A. (2004) *The Law Affecting Valuation of Land in Australia*, 3rd ed. (Sydney: The Federation Press), 122.

²⁹ *Adelaide Clinic Holdings Pty Ltd v Minister for Water Resources* (1988) 65 LGRA 410 per Jacobs J at 415.

*can be assumed to be a person who would undertake such a development as would maximize the usage of the land...*³⁰

- 3.24. Finally, in *Trandos v Western Australian Planning Commission* (2001) 117 LGERA 257, Anderson J stated:

...It seems to me that an evaluation of the highest and best use does not necessarily depend on an assessment of the subjective intention and personal views of the particular Minister of the day.

...The potentiality of the land is to be judged by reference to planning considerations viewed objectively, the question being: what is the most advantageous use to which the land can be put, having regards to the dictates of orderly and proper planning?...³¹

- 3.25. Given the foregoing case law, API considers the definition of market value in s.56 of *LAJTCA* is fundamentally flawed. The previously mentioned API forums highlighted this crucial aspect of compensation assessment. It was a consistent and coherent view that the definition of market value in the *LAJTCA* does not reflect the case law which has developed since 1991, given the Department had clearly stated in the *Consultation Paper*:

*...It is therefore appropriate that the Government review the current regime to ensure that it is clear and equitable.*³²

4. COMMENTS AND RECOMMENDATIONS (CHAPTER 8)

- 4.1 The following comments and recommendations focus on Chapter 8 Property Rights – Real Property of the Interim Report.
- 4.2 It is noted reference is made at para 8.11 of the Interim Report that a distinction is often made between an acquisition of property rights as opposed to a regulation of land use. Where an acquisition does occur the arguments pertaining to just compensation have been dealt with more fully in Section 3 of this submission.
- 4.3 API notes the discussion at paras 8.21 – 8.22 of the Interim Report in respect of the compulsory acquisition of coal reserves by the NSW Government in 1981. It is noted a grant to Claimants for Crown lands under the *Aboriginal Land Rights Act 1983* (NSW) (ALRA) constitutes not only a transfer of property to the Claimants but also mineral property rights such as coal ordinarily retained by the Crown. This issue is not mentioned in this section of the Interim Report, and it is the view of API that this legislation represents a significant departure from widely understood private property rights. Arguably a transfer from a successful Claimant under the ALRA to a third party could also involve the transfer of subsurface mineral reserves such as coal.

³⁰ *Park v Allied Mortgage Corporation Ltd* (unreported, FCA, 5 July 1995) per Hill J.

³¹ *Trandos v Western Australian Planning Commission* (2001) 117 LGERA 257 per Anderson J at 277.

³² *Consultation Paper*, "Introduction", Purpose of Review, 8, para.1.

- 4.4 API considers that the *Water Act 2007* (Cth.) contains two areas of questionable constitutionality. It is noted that s.100 of the *Constitution* states:

The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

- 4.5 Arguably, the *Water Act 2007* (Cth.) extends into areas described at s.100 of the *Constitution* and also attempts to compromise the Commonwealth power at s.51(xxxi) to undertake compulsory acquisition of property albeit on just terms. At s.255 of the *Water Act 2007* (Cth.), the Commonwealth or its agencies are denied the ability to compulsorily acquire water access rights, notwithstanding that such a right or interest in such a right may be property for the purposes of s.51(xxxi). While it is recognised at para 8.93 of the Interim Report that consensual arrangements have been encouraged to overcome the need for compulsory acquisition compensation, nevertheless s.255 (and other matters within the *Water Act 2007* (Cth.)) may merit further review, perhaps requiring a subsequent inquiry by the ALRC.
- 4.6 It is noted that reference is made at para 8.98 of the Interim Report to native title as perhaps hindering economic development opportunities. A number of innovative solutions to customary and traditional land tenures have been proposed over recent years suggesting that an accommodation can be reached between Western property rights concepts whilst retaining the crucial values of customary and traditional tenures.³³
- 4.7 API notes that para 8.113 of the Interim Report canvasses the general justification for laws that interfere with property rights on the grounds of necessity and/or the public interest. The distinction between compensation for the taking of property rights and the absence of compensation for regulatory activity such as land use zoning (except for a public purpose zoning) is an established feature of Australian real property. Whilst increasing restrictions on land usage appear to be firmly justified for the “broad public good” this perceived public benefit has received only minor public debate.³⁴
- 4.8 API notes in the concluding section of Chapter 8 at para 8.137 of the Interim Report that the mention of legality at common law and in international law is canvassed. It is considered useful if this protection from statutory encroachments through the principle of legality could be expanded significantly to aid the reader. As stated earlier in this submission, the question of compensation for property rights compulsorily acquired is increasingly a work in progress. Greater clarity is required as society anticipates compensable rights arising from impacts generated from public works and other endeavours.

³³ Boydell, S, Small, G and Sheehan, J (2007) *Review of Financial Management of Customary and other Land in the Pacific*, sub project 3.1 report of the Pacific Islands Forum Secretariat Land Management and Conflict Minimisation Initiative (Sydney: accessUTS Pty Ltd, December), 60 – 64.

³⁴ Sheehan, J (2010) “Australia” in Alterman, R (ed.) *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (Chicago: American Bar Association), 116.

4.9 Finally it is noted at para 8.141 of the Interim Report that while the Commonwealth is under no constitutional obligation to compensate for actions that do not constitute acquisition of property, nevertheless arguably some actions could be viewed as warranting compensation. API notes current arrangements in both Commonwealth and State property compensation regimes fail to recognise this increasing expectation of the community. Such laws may merit further review, perhaps requiring a subsequent focused inquiry by the ALRC into compensation for the commutation of private property rights in broader circumstances.

5. APPENDIX 1

AUSTRALIAN PROPERTY INSTITUTE INC.

The Australian Property Institute, (formerly known as the Australian Institute of Valuers and Land Economists), has enjoyed a proud and long history. Originally formed in South Australia over 87 years ago in 1926, the Institute today represents the interests of nearly 8,000 property experts throughout Australia.

The API, the nation's peak professional property organisation and learned society, has been pivotal in providing factual, independent and dispassionate advice on a broad range of property issues addressed by the Commonwealth and State/Territory governments and their agencies since the Institute was formed.

In addition, the Institute's advice has increasingly been sought by international bodies such as the United Nations, the Food and Agriculture Organisation (FAO), the European Commission (EU) and the World Bank, evidencing a level of expertise within the API and its membership, which is recognised regionally and globally.

As a professional organisation the primary role of the Australian Property Institute is to set and maintain the highest standards of professional practice, education, ethics and discipline for its members.

API members are engaged in all facets of the property industry including valuation, property development and management, property financing and trusts, property investment analysis, professional property consultancy, plant and machinery valuation, town planning consultancy, property law, research and education.

Membership of the Australian Property Institute has become synonymous with traits and qualities such as professional integrity and client service, industry experience, specialist expertise, together with tertiary level education and lifelong continuing professional development.

6. APPENDIX 2

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