8. Property Rights—Real Property

Contents

The common law protection of real property

8.1 This chapter is about the common law protection of vested property rights in land (real property). The chapter builds on the discussion in Chapter 7 and discusses how vested property rights in land are protected from statutory encroachment; laws that interfere with rights in land; and how such laws might be justified. As noted in Chapter 7, the common law has long regarded a person's property rights as fundamental, and 'property rights' was one of the four areas identified of concern in the national consultation on 'Rights and Responsibilities', conducted by the Australian Human Rights Commission in 2014.[1]

8.2 In Chapter 7, reference was made to the case of *Entick v Carrington* which concerned trespass in order to undertake a search—an interference with real property in the possession of another. Rights such as those protected by the tort of trespass to land have long been exercisable even against the Crown or government officers acting outside their lawful authority. In *Plenty v Dillon*, Mason CJ, Brennan and Toohey JJ

1 Australian Human Rights Commission, *Rights and Responsibilities* (Consultation Report, 2015) 8.

said that the principle in *Entick v Carrington* 'applies to entry by persons purporting to act with the authority of the Crown as well as to entry by other persons'.[2]

8.3 Similarly, in *Halliday v Nevill*, Brennan J said:

> The principle applies alike to officers of government and to private persons. A police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duty unless his entering or remaining on the premises is authorized or excused by law.[3]

8.4 Implicit in this statement of the law is the recognition that the law—common law or statute—may authorise entry onto private property. Examples of such statutes are discussed in Chapter 17, which deals with laws authorising what would otherwise be a tort.

8.5 The protection of the landowner was so strong that protection of uninvited entrants from intentional or negligent physical injury by occupiers was slow to develop. It was only in 1828, in *Bird v Holbrook*, that the courts declared unlawful the deliberate maiming of a trespasser, albeit only if it was without prior warning.[4]

Protections from statutory encroachments

8.6 As outlined in Chapter 7, property rights find protection in the *Australian Constitution*, through the principle of legality at common law, and in international law.

Australian Constitution

8.7 Section 51(xxxi) of the *Constitution* concerns acquisition of property on just terms.[5] Section 100 of the *Constitution* is also relevant to the issues considered in this chapter.[6] It provides that:

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2 *Plenty v Dillon* (1991) 171 CLR 635, 639 (Mason CJ, Brennan and Toohey JJ). Their honours then quoted Lord Denning adopting a quotation from the Earl of Chatham. '"The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement." So be it—unless he has justification by law': *Southam v Smout* (Unreported, [1964] 1 QB) 308, 320.

3 *Halliday v Neville* (1984) 155 CLR 1, 10 (Brennan J). Brennan J was quoted in *Plenty v Dillon* (1991) 171 CLR 635, 639 (Mason CJ, Brennan and Toohey JJ). In *Plenty v Dillon*, Gaudron and McHugh JJ said 'If the courts of common law do not uphold the rights of individuals by granting effective remedies, they invite anarchy, for nothing breeds social disorder as quickly as the sense of injustice which is apt to be generated by the unlawful invasion of a person's rights, particularly when the invader is a government official': Ibid 655.

4 *Bird v Holbrook* (1828) 4 Bing 628; *Southern Portland Cement v Cooper* [1974] AC 623 (PC); *Hackshaw v Shaw* (1984) 155 CLR 614. For negligent injury, trespassers were at first owed no duty of care; then, after *Southern Portland Cement v Cooper*, only a duty of common humanity. The High Court of Australia in *Hackshaw v Shaw* recognised a limited duty of reasonable care when there was a real risk that a trespasser might be present and injured: *Southern Portland Cement v Cooper* [1974] AC 623 (PC); *Hackshaw v Shaw* (1984) 155 CLR 614.

5 Chapter 7 considered the application of this provision to Commonwealth laws concerning personal property. This chapter focuses upon real property.

> 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.

8.8 Lorraine Finlay has argued that 'the "just terms" guarantee in s 51(xxxi) in fact offers only limited protection to property rights in Australia, with there being two main limitations to its efficacy—one structural, and the other interpretive'.[7] The structural limitation is that it does not extend to state governments.[8] As Latham CJ observed in *PJ Magennis Pty Ltd v Commonwealth*, state parliaments do not have a constitutional limitation equivalent to s 51(xxxi) of the *Australian Constitution*: '[t]hey, if they judge it proper to do so for some reason, may acquire property on any terms which they may choose to provide in a statute, even though the terms are unjust'.[9] However, states are able to, and often do, provide compensation even though there is no constitutional requirement for them to do so. On some occasions the Commonwealth has used its influence to encourage states to do so.[10]

8.9 The Commonwealth has imposed a requirement for just terms for any acquisition of property on both the Northern Territory and the Australian Capital Territory in their respective self-government statutes.[11] The High Court in *Wurridjal v Commonwealth* overruled *Tau v Commonwealth*,[12] which was long standing authority for the proposition that s 122 of the *Constitution* (the so-called 'territories power' which confers power on the Commonwealth Parliament to make laws for the government of the territories) confers power to acquire property which is unconstrained by the requirement for just terms.[13]

8.10 Finlay sees the other limitation to the efficacy of s 51(xxxi) as stemming from the way that the provision requires an 'acquisition', 'with the result that the just terms guarantee can effectively be side-stepped by the Commonwealth Government if it limits or restricts property rights in a manner that does not amount to an actual acquisition'.[14]

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6 For example, in the *Lee* litigation which is discussed later in the chapter, Mr Lee and Mr Gropler sought, among other things, damages from the alleged abridgment of their reasonable use of waters of rivers. See *Lee v Commonwealth* (2014) 220 FCR 300.

7 Lorraine Finlay, 'The Attack on Property Rights' (The Samuel Griffith Society, 2010) 23 <http://samuelgriffith.org.au/>.

8 Ibid.

9 *PJ Magennis Pty Ltd v Commonwealth* 80 CLR 382, 397–8.

10 See, eg, *Native Title Act 1993* (Cth) s 20(1). The states and territories are liable to pay compensation when their acts extinguish native title.

11 *Northern Territory (Self-Government) Act 1978* (Cth) s 50; *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 23(1)(a).

12 *Tau v Commonwealth* (1969) 119 CLR 564.

13 *Wurridjal v Commonwealth* (2009) 237 CLR 309, [46]–[86] (French CJ); [175]–[189] (Gummow and Hayne JJ); [287] (Kirby J). French CJ explained the result of applying s 51(xxxi) to s 122: 'The result of its application to s 122 is that no person anywhere within the Commonwealth of Australia can be subjected to a law of the Commonwealth acquiring the property of that person other than on just terms. It will also protect States where laws made under s 122 effect or authorise the acquisition of State property': Ibid [79].

14 Finlay, above n 7, 23.

Takings v regulation

8.11 In the context of arguments about s 51(xxxi), a distinction is often made between a 'taking' (that is, an 'acquisition') and a 'regulation'. The regulation of land use for a number of purposes, particularly related to the environment and biodiversity, has 'produced a strong backlash' from landowners, arguing that such measures are effectively 'takings',[15] and therefore amenable to compensation.

8.12 What amounts to the acquisition of property is a subject of lively academic debate. O'Connor, for example, identifies three propositions underpinning property rights arguments, influenced to a great extent by analysis of the US takings clause:

> The first is that the property rights of a landowner are not just a unitary estate or interest in land, but a bundle of rights which include the rights to use and enjoy the land, to dispose of or alienate it, and to exclude others from it. ... Gray calls this an 'atomic' conception of property, ...
>
> The second proposition is premised on the idea of property as 'an ad hoc collection of rights in resources'. It holds that any regulation which curtails one or more of the rights in the owner's bundle is a prima face 'taking' ['conceptual severance']. ...
>
> The third proposition is that compensation must be paid whenever a disproportionate burden has been unfairly imposed on some citizens for the benefit of the public as a whole ['distributional fairness']. ...[16]

8.13 A further issue concerns substances that sit within the Crown prerogative. This has arisen particularly in the context of states. If a landowner does not own minerals in that land, for example, then a taking of them is not compensable.

8.14 An illustration of the width of the power of states is the acquisition of coal. At common law the Crown had the right to 'royal' minerals—gold and silver—with the power to enter, dig and remove them.[17] This common law position also became the law in the Australian colonies.[18] In *Wade v New South Wales Rutile Mining Co Pty Ltd* (*Wade*), Windeyer J commented that

> Gold, the 'royal metal', has always had a special position in law: a position which silver is perhaps entitled to share. Gold in the Australian colonies belonged always to the Crown, whether it was in Crown land or in lands alienated by the Crown. No express reservation was necessary to preserve the Crown's rights. They depended upon prerogative rights recognized by the common law. Thus gold did not pass by a Crown grant of the land in which it lies. If this were once debatable, all doubts were dispelled, for Victoria, by the decision of the Privy Council in *Woolley v Attorney-General (Vict)* (1877) 2 App Cas 163. And in New South Wales the position was expressly recognized by the legislature when in the Preamble to the Mining on Private Lands Act of 1894 it was recited that

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15 See Pamela O'Connor, 'The Changing Paradigm of Property and the Framing of Regulation as a Taking' (2011) 36 *Monash University Law Review* 50. O'Connor describes the development of the property rights movement in the US from the 1990s and the theoretical arguments supporting it, particularly Locke's writings and the proposition that 'the social contract from which civil government derives its power does not authorise it to take away any part of property rights of citizens without compensation': 51.

16 Ibid 53–4.

17 *The Case of Mines* (1568) 1 Plowd 310, 336.

18 *Woolley v A-G (Vic)* (1877) 2 App Cas 163.

> ... certain other lands have from time to time been alienated without express reservation of any minerals which might afterwards be found therein, but having regard to the well established laws of England whereby it has been held from time immemorial that the royal metal gold does not pass from the Crown unless by express conveyance in the grant of such lands ...[19]

8.15 *Cadia Holdings Pty Ltd v New South Wales* concerned a mine in which gold and copper were intermingled and could not be mined separately.[20] The High Court held that by the time the common law was received in New South Wales the prerogative rights described in *Wade* had been abridged by s 3 of the *Royal Mines Act* 1688 (Imp), so that where copper and gold were intermingled in the ore there was no 'mine of gold' for the purposes of the prerogative.

8.16 *Wade* concerned mining leases under the *Mining Act 1906* (NSW). Under that Act a mining warden could grant an authority to enter private lands and search for minerals not reserved to the Crown. Rent and compensation were required to be paid to the landowner; and royalties for minerals taken had to be paid. As Windeyer J remarked, 'the obvious policy of this is to encourage mining', but

> [t]he means adopted involve a further, and quite radical, interference with the common law rights of a landowner. Even when he owns the minerals in his land he must suffer them to be mined unless he be active in mining them himself.[21]

8.17 Windeyer J referred to

> the elementary principle of the common law that a freeholder for an estate of inheritance is entitled to take from his land anything that is his. Except for those minerals which belong to the Crown, the soil and everything naturally contained therein is his.[22]

8.18 In the Australian colonies minerals were 'reserved' in Crown grants of land, reflecting the Crown right to minerals. The general pattern in each jurisdiction was 'to progressively reserve various minerals from Crown grants by legislation'.[23] What amounts to 'minerals' is a matter of construction. Professor Peter Butt explains:

> A reservation of 'minerals' is widely construed. It includes whatever substances are encompassed by the vernacular meaning of that word as used in the mining world, the commercial world, and by landowners, at the time of the Crown grant. Within that meaning, it includes even minerals of a kind which, at the time of the Crown grant, were thought unworthy of extraction or were technologically incapable of extraction.
>
> More recent Crown lands legislation attempts to obviate arguments over the meaning of 'minerals' by defining the term. These statutory definitions are very wide—so wide

19 *Wade v NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177, 186 (Windeyer J).
20 *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195.
21 *Wade v NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177, 195.
22 Ibid 184 (Windeyer J). This case concerned the right to mine for zircon, rutile and ilmenite on lands in NSW.
23 Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Real Property Law* (Lawbook Co, 2002) [15.18]. See also JRS Forbes and Andrew Lang, *Australian Mining and Petroleum Laws* (Butterworths, 1987).

> that one writer has commented that modern landowners may not even own the soil on their land.[24]

8.19 However the practice was not consistent until 1861, with the enactment of the *Crowns Land Alienation Act*. As Professor Butt explains:

> Until 1824, Crown grants in New South Wales did not reserve minerals to the Crown. From 1828 until 1844 Crown grants variously reserved gold, silver and coal. From 1844 until 1850 only coal was reserved. In 1850 the Crown rescinded all former reservations of coal, except in land within a city, township or village; reservations of coal continued to be made, however, in relation to urban land. From 1850 until 1861 Crown grants generally did not reserve minerals (although there were some exceptional cases).[25]

8.20 This has meant that the dates of the original Crown grants and the particular legislation in each jurisdiction 'assume great significance in determining in each instance whether a landowner owns a particular mineral beneath her or his land'.[26]

8.21 On 1 January 1982, the *Coal Acquisition Act 1981* (NSW) vested all coal in the Crown, with provision made for payments of compensation. At the time the legislation was passed there were substantial coal reserves in the Hunter Valley that were still in private ownership and there were major coal mining developments planned.[27] Moreover, the rate of compensation was capped under the legislation.[28] As explained by Tony Wassaf:

> This meant that owners of those [privately owned] reserves were set to receive substantial royalties from those developments. The Government decided that it would be better for the State if the Crown received those royalties rather than the private owners.[29]

8.22 The validity of this legislation was tested in *Durham Holdings Pty Ltd v New South Wales*.[30] It was argued that the capping of compensation amounted to the denial of 'just' or 'adequate' compensation and as such was invalid. As Blackshield and Williams point out, '[i]f the acquisition had arisen under a Commonwealth statute, it would have breached the requirement in s 51(xxxi) of the Constitution that such

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24 Peter Butt, *Land Law* (Lawbook Co, 5th ed, 2006) [218].

25 Ibid [217].

26 Bradbrook, MacCallum and Moore, above n 23, [15.18]. See also Adrian J Bradbrook, 'Relevance of the Cujus Est Solum Doctrine to the Surface Landowner's Claims to Natural Resources Located Above and Beneath the Land' (1987) 11 *Adelaide Law Review* 462.

27 Tony Wassaf, 'Implications of *Durham Holdings Case* and Coal Compensation Discrimation' (2001) 20 *Australian Mining and Property Law Journal* 10, 10.

28 Wassaf explains that '[t]his meant that owners of those [privately owned] reserves were set to receive substantial royalties from those developments. The Government decided that it would be better for the State if the Crown received those royalties rather than the private owners': Ibid. Wassaf explains that the specific cap of the compensation payable to BHP, CRA and RGC (Durham Holdings was the RGC subsidiary) was made on the basis that budgetary restraint was required and these companies could afford it: Ibid 11.

29 Tony Wassaf, 'Implications of *Durham Holdings Case* and Coal Compensation Discrimation' (2001) 20 *Australian Mining and Property Law Journal* 10, 10.

30 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.

acquisitions be made on "just terms"'.[31] The argument drew upon the judgment of the court in *Union Steamship Co of Australia Pty Ltd v King*, in leaving open the possibility that there was a constitutional limit in state power founded on 'rights deeply rooted in our democratic system of government and the common law'.[32]

8.23 The Court of Appeal rejected this argument and the High Court refused special leave to appeal. Gaudron, McHugh, Gummow and Hayne JJ held that:

> What the Court of Appeal said is true of the application to this Court, namely:
>
> The [applicant] was unable to point to any judicial pronouncements, let alone a decided case, which indicated, at any time, that any such principle existed in the common law of England, or of the colonies of Australasia, or of Australia. It advocated the development of the common law, by the recognition of such a principle for the first time in this case.
>
> The applicant sought to rely upon statements respecting the common law in decisions respecting the powers of several of the states of the United States before the inclusion in those written state constitutions of guarantees respecting the taking of property. However, what would be involved if the applicant's submission were accepted would not be the development of the common law of Australia. Rather, it would involve modification of the arrangements which comprise the constitutions of the states within the meaning of s 106 of the Constitution, and by which the state legislatures are erected and maintained, and exercise their powers.
>
> ... Further, whatever may be the scope of the inhibitions on legislative power involved in the question identified but not explored in *Union Steamship*, the requirement of compensation which answers the description 'just' or 'properly adequate' falls outside that field of discourse.[33]

8.24 The legal result was that the states could acquire property without having to pay just compensation.

8.25 The 1988 referendum included a proposed law to alter the Constitution, amongst other things, 'to ensure fair terms for persons whose property is acquired by any government'. The vote in favour of the resolution was 30%.[34] As one commentator remarked, the 'true level of public support for the idea was, however, impossible to gauge due to the way in which the question was presented as part of a larger package'.[35]

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31 George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory* (Federation Press, 6th ed, 2014) [16.24].

32 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10 (The Court).

33 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 409–10. Kirby J, while agreeing with the outcome, suggested that there may be a constitutional limit with respect to 'extreme' laws: 431. He referred to this, speaking extra-curially: Michael Kirby, 'Deep Lying Rights—A Constitutional Conversation Continues' (The Robin Cooke Lecture, 2004) 19–23.

34 Tony Wassaf, 'Implications of *Durham Holdings Case* and Coal Compensation Discrimation' (2001) 20 *Australian Mining and Property Law Journal* 10, 12.

35 Sean Brennan, 'Section 51(xxxi) and the Acquisition of Property under Commonwealth-State Arrangements: The Relevance to Native Title Extinguishment on Just Terms' (2011) 15 *Australian Indigenous Law Review* 74, 74.

8.26 The Law Council of Australia submitted that 'the lack of any constitutional or general protection from acquisition other than on just terms under State constitutions or statutes' amounted to 'a significant gap in property rights protection'.

> In some cases, this has resulted in States compulsorily or inadvertently acquiring or interfering with property rights, without any corresponding compensation for the right-holder.[36]

8.27 The Law Council stated that an area of concern was a utilisation by the Commonwealth of this limit in constitutional compensatory provisions in the states:

> Of particular concern to this Inquiry is where this may have occurred due to intergovernmental arrangements or agreements between the Commonwealth and States, which require or encourage States to interfere with property rights but with no corresponding duty to compensate on just terms.
>
> In such cases, there has been no remedy available to the land-owner because the scheme might have been established informally, through mutual agreement, rather than through a federal statute.[37]

8.28 The Law Council drew attention to *Spencer v Commonwealth*,[38] as appearing to demonstrate a possible inconsistency in relation to protection of property rights under Australian law.[39] The plaintiff, Peter Spencer, owned a farm in New South Wales. He claimed that the restrictions on the clearing of vegetation imposed on his farm by the *Native Vegetation Conservation Act 1997* (NSW) and the *Native Vegetation Act 2003* (NSW)—in furtherance of agreements between New South Wales and the Commonwealth—constituted an acquisition of property other than on just terms pursuant to s 51(xxxi) of the *Constitution*.[40]

8.29 Under the *Natural Resources Management (Financial Assistance) Act 1992* (Cth), the Commonwealth may enter into an agreement with a state to provide financial assistance in respect of projects jointly approved by the relevant Commonwealth and State Ministers or specified in the agreement.[41] The *Natural Heritage Trust of Australia Act 1997* (Cth) established the Natural Heritage Trust of Australia Account, one purpose of which is to conserve remnant native vegetation.[42] Pursuant to an agreement with the Commonwealth in 1997, the state of New South Wales undertook to enact native vegetation conservation legislation. In 1997 the *Native Vegetation Conservation Act 1997* (NSW) was introduced, restricting the clearing of native vegetation on land. Further agreements provided for compensation to assist where property rights were lost, which were to be addressed in developing catchment or regional plans.

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36 Law Council of Australia, *Submission 75*.
37 Ibid.
38 *Spencer v Commonwealth* (2010) 241 CLR 118.
39 Law Council of Australia, *Submission 75*.
40 The relationship between the various Acts and agreements is set out in the judgment of French CJ and Gummow J: *Spencer v Commonwealth* (2010) 241 CLR 118 [5].
41 *Natural Resources Management (Financial Assistance) Act 1992* (Cth) s 5(1).
42 *Natural Heritage Trust of Australia Act 1997* (Cth) s 10(a).

8.30 Mr Spencer argued that his property acquired pursuant to this scheme included carbon sequestration rights. Such a right is defined in New South Wales legislation as a right to the 'legal, commercial or other benefit ... of carbon sequestration by any existing or future tree or forest on the land after 1990'.[43] It is also deemed to be a profit à prendre, a defined interest in land.[44] Mr Spencer alleged that, by reason of the state legislation, he had been prevented from clearing native vegetation on his land, which amounted to an acquisition of his property. His inability to clear his land rendered it commercially unviable. He argued that the scheme between the Commonwealth and New South Wales was designed to avoid the 'just terms' constraint on the exercise of legislative power under s 51(xxxi) of the *Constitution*.

8.31 The Federal Court rejected Mr Spencer's claim. The High Court granted special leave to appeal. French CJ and Gummow J stated:

> The case which Mr Spencer seeks to raise potentially involves important questions of constitutional law. It also involves questions of fact about the existence of an arrangement between the Commonwealth and the State of New South Wales which may justify the invocation of pre-trial processes such as discovery and interrogatories. The possible significance of those questions of fact has become apparent in the light of this Court's judgment in *ICM Agriculture Pty Ltd v The Commonwealth ...* , which had not been delivered when the primary judge and the Full Court delivered their judgments.[45]

8.32 The decision in *ICM Agriculture Pty Ltd v Commonwealth* is discussed in detail below in relation to water rights. For present purposes it is relevant to note that the challenge was to a funding agreement (and related legislation) under which the Commonwealth had paid financial assistance to New South Wales. While the claim failed, the High Court held that a grant under s 96 of the *Constitution*—which relevantly provides that 'the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'—cannot be made on terms and conditions that may require a state to acquire property on other than just terms.[46] Hayne, Kiefel and Bell JJ noted that a law may contravene s 51(xxxi) 'directly or indirectly, explicitly or implicitly'.[47] Further, French CJ, Gummow and Crennan JJ indicated that the limitation in s 51(xxxi) may extend to executive action.[48] These comments suggest awareness by the High Court of the need to consider the indirect and implicit effect of legislation, and grants and executive actions in relation to s 51(xxxi).

8.33 The Law Council stated:

> While, the [*Spencer*] case was struck out by the Federal Court and Full Federal Court as not having reasonable prospects of success, the High Court ruled that the Federal Court had erred in finding that the case did not have reasonable prospects of success

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43 *Conveyancing Act 1919* (NSW) s 87A.
44 Ibid s 88AB.
45 *Spencer v Commonwealth* (2010) 241 CLR 118 [4].
46 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [46] (French CJ, Gummow and Crennan JJ), [174] (Hayne, Kiefel and Bell JJ). See also [138]–[141] (Hayne, Kiefel and Bell JJ).
47 Ibid [139].
48 Ibid [29].

> and referred it back for reconsideration. The case appears to demonstrate a possible inconsistency in relation to protection of property rights under Australian law.[49]

8.34 In June 2010, the Hon Bob Katter MP introduced a private member's Bill, entitled the Constitution Alteration (Just Terms) Bill 2010, into the Commonwealth Parliament. The Bill sought to do two things. First, it sought to alter the *Constitution* so as to extend the constitutional requirement for just terms to 'any restrictions on the exercise of property rights'. Secondly, it sought to alter the *Constitution* so as to 'prohibit state laws acquiring property or restricting the exercise of property rights of any person, except on just terms'.[50] The first reading speech referred to Mr Spencer's legal action.[51]

8.35 As at the time of writing, Mr Spencer's case is before the Federal Court, with Mortimer J scheduled to deliver judgment on 24 July 2015.

8.36 There is no clear boundary between a taking or acquisition of property by government and the regulation of use rights. The way that property rights are envisaged conceptually and politically also drives arguments about which side of the boundary a particular government initiative should fall. O'Connor refers to a 'shifting paradigm of property rights' that is 'increasingly evident in public debates about regulatory changes':

> It used to be assumed that laymen implicitly accepted the molecular conception of property as a 'discrete asset', or the whole package of rights in a thing. We are now seeing evidence, in submissions to government inquiries and even in government documents, that the atomic or bundle of rights paradigm and conceptual severance are gaining wide acceptance among landowners affected by regulation. ... [T]his changing public perception of property can be expected to make a significant difference to the willingness of citizens to tolerate regulatory interference with their property.[52]

8.37 This chapter considers particular areas of concern in Commonwealth laws affecting real property and the rights of landowners.

Principle of legality

8.38 As discussed in Chapter 7, the principle of statutory interpretation now known as the 'principle of legality' provides some protection to vested property rights. Blackstone commented:

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land ... Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In

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49 Law Council of Australia, *Submission 75*.

50 Diane Spooner, '*Property' and Acquisition on Just Terms* <www.aph.gov.au> 1.

51 For further information about the Bill see Diane Spooner, '*Property' and Acquisition on Just Terms* <www.aph.gov.au>.

52 O'Connor, above n 15, 78.

> this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained ... All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.[53]

8.39 In *R & R Fazzolari Ltd v Parramatta City Council*, a case which concerned the Parramatta City Council's attempt to acquire land by compulsory process, French CJ stated:

> Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretive approaches where statutes are said to affect such rights. ... The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights.[54]

International law

8.40 Article 17(2) of the *Universal Declaration of Human Rights* provides that '[n]o one shall be arbitrarily deprived of his property'.[55] This protection is, however, a limited one.

8.41 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[56] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[57]

Bills of rights

8.42 As noted in Chapter 7, in other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. The *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention on Human Rights*) expressly added a recognition of property rights in Protocol 1, art 1—'for the peaceful enjoyment of one's possessions'.[58]

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53 William Blackstone, *Commentaries on the Laws of England* (Clarendon Press reprinted by Legal Classics Library, 1765) vol I, bk I, ch 2, 135.

54 *R & R Fazzolari Ltd v Parramatta City Council* (2009) 237 CLR 603, [43] (French CJ).

55 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948).

56 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J).

57 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

58 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

Laws that interfere with property rights

8.43 A range of statutory provisions may be characterised as interfering with vested property rights—whether or not this interference may be considered justified.

8.44 The *Lands Acquisition Act 1989* (Cth) is the key piece of legislation concerning Commonwealth acquisition of land. With some exceptions, the Commonwealth cannot acquire an interest in land[59] other than in accordance with the procedures outlined in that Act.[60] The Act provides a detailed process for Commonwealth acquisitions of land[61] and protections—including compensatory mechanisms—for people whose interests in land are adversely affected by a compulsory acquisition.[62] The *Lands Acquisition Act* was largely based on recommendations in the ALRC's report *Lands Acquisition and Compensation*.[63] The Act was designed to modernise Australia's system of compulsory land acquisition. Previously, the law lacked procedures to ensure fairness in decision-making, including 'a mechanism for an individual adversely affected by a decision to compulsorily acquire property to require the acquiring authority to justify publicly the need for, and choice of, their property'.[64]

8.45 A number of Commonwealth laws may be seen as encroaching on real property rights. These include:

- environmental laws;
- native title laws; and
- criminal laws.

8.46 These laws are summarised below. Some of the justifications that have been advanced for environmental laws that encroach on property rights, and public criticisms of laws on that basis, are also discussed.

Environmental laws

8.47 Environmental legislation may be understood as any statute that includes provisions intended 'to protect the environment [including national heritage] and conserve natural resources in the public interest'.[65] There are approximately 60 Commonwealth environment-related statutes in force.[66]

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59 'Interest in land' is broadly defined as 'any legal or equitable estate or interest in land', a restriction on the use of land, whether or not annexed to other land', or 'any other right (including a right under an option and a right of redemption), charge, power or privilege in connection with the land or an interest in the land': *Lands Acquisition Act 1989* (Cth) s 6(a), (b), (c).

60 Ibid s 21(1).

61 See for example, Ibid pts IV, V, VI. These parts provide procedures for the acquisition of interests in land, as well as pre-acquisition procedures and the right to seek review of a decision to acquire land.

62 See, for example, the compensation scheme in pt VII of the Act.

63 Australian Law Reform Commission, *Lands Acquisition and Compensation*, ALRC Report 14 (1977).

64 Department of the Parliamentary Library (Cth), *Bills Digest*, No 114 of 1988, 24 October 1988, 1.

65 Australian Network of Environmental Defender's Offices, *Submission 60*.

66 See Australian Government, Department of the Environment, 'Legislation' <http://www.environment.gov.au/about-us/legislation>.

8.48 Commonwealth environmental laws may be seen as interfering with real property rights by authorising, for example:

- the compulsory acquisition of property;
- the regulation of land use, development and activities;[67]
- restrictions on the sale or lease of real property;[68]
- actions which adversely affect the 'enjoyment' (for example, search and enter powers), or value of real property;[69] and
- restrictions on the assignment/sale of tradeable resource-use property rights.[70]

8.49 Many environmental planning statutes that may be considered to interfere with property rights are state—not Commonwealth—Acts.[71] While particular concerns have been expressed about the actions of state governments,[72] state legislation is not the concern of this Inquiry.

8.50 The Australian Network of Environmental Defender's Offices (ANEDO) submitted that 'there are currently no Commonwealth environmental laws that unjustifiably interfere with vested property rights'.[73] While some Commonwealth environment-related statutes which may interfere with property rights may be widely accepted in the community as justified, this Inquiry heard particular concerns about the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) and the *Water Act 2007* (Cth) (*Water Act*).

Compulsory acquisition of property

8.51 Most Commonwealth environmental statutes include an express provision precluding the Commonwealth from compulsorily acquiring property without providing compensation on just terms.[74] While both the EPBC Act and the *Water Act* contain such provisions,[75] concerns have been expressed that these two statutes may unjustifiably interfere with property rights in a way that falls short of triggering invalidity pursuant to s 51(xxxi) of the *Australian Constitution*, as it has been interpreted.

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67 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12, 15A, 15B, 15C, 16, 17B, 18, 18A, 20, 20A; *Comprehensive Nuclear-Test-Ban Treaty Act 1988* (Cth); *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) div 1; *Great Barrier Reef Marine Park Act 1975* (Cth) s 38DD.

68 *Building Energy Efficiency Disclosure Act 2010* (Cth) s 11.

69 *Environment Protection and Biodiversity Conservation Act 1999* (Cth); *National Radioactive Waste Management Act 2012* (Cth) s 11.

70 *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth); *Water Act 2007* (Cth); *Renewable Energy (Electricity) Act 2000* (Cth).

71 See eg, *Environmental Planning and Assessment Act 1979* (NSW).

72 National Farmers' Federation, *Submission 54*. See also Finlay, above n 7.

73 Australian Network of Environmental Defender's Offices, *Submission 60*.

74 See, eg, *Greenhouse and Energy Minimum Standards Act 2012* (Cth) s 174. See the discussion of s 51(xxxi) in Ch 7.

75 *Water Act 2007* (Cth) s 254; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 519.

EPBC Act

8.52 The EPBC Act is the Australian Government's main piece of environmental legislation. The Act affects a landowner's real property rights by imposing environmental land use restrictions. For example, a person is prohibited from taking an 'action'[76] that

- has or will have, or is likely to have a significant impact on the world heritage values of a declared 'World Heritage property'—s 12(1) (civil penalty);
- results or will result in, or is likely to have a significant impact on the world heritage values of a declared 'World Heritage property'—s 15A(1), (2) (offence);
- has or will have, or is likely to have a significant impact on the ecological character of a 'declared Ramsar wetland'—s 16(1) (civil penalty);
- results or will result in, or is likely to have a significant impact on the ecological character of a 'declared Ramsar wetland'—s 17B(1), (2) (offence);
- has or will have, or is likely to have a significant impact on a 'listed threatened species' that are included in the extinct in the wild, critically endangered, endangered or vulnerable categories—s 18(1)–(4) (civil penalty);
- has or will have, or is likely to have a significant impact on a 'listed threatened ecological community' included in the critically endangered or endangered categories—s 18(5), (6) (civil penalty);
- results or will result in, or is likely to have a significant impact on a 'listed threatened species or a listed threatened ecological community'—s 18A(1), (2) (offence);
- has or will have, or is likely to have a significant impact on a 'listed migratory species'—s 20(1) (civil penalty); and
- results or will result in, or is likely to have a significant impact on a 'listed migratory species'—s 20A(1), (2) (offence).

8.53 The provisions with respect to a World Heritage property, a declared Ramsar wetland and a listed migratory species do not apply if the person has been approved to take the action under pt 9 of the Act; is exempted from needing such approval by pt 4 of the Act; or in certain other circumstances.[77] The Act gives certain, different, circumstances when the offence provisions with respect to a listed threatened species or a listed threatened ecological community (s 18A(1) and (2)) will not apply.[78] The civil penalty provisions with respect to a listed threatened species (s 18(1)–(4)) and a listed threatened ecological community (s 18(5) and (6)) do not have exclusions.

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76 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 523.

77 See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2), 15A(4), 16(2), 17B(4), 20(2) and 20A(4).

78 Ibid s 18A(4).

8.54 Justification for the prohibition of these actions and interference with vested property rights draws primarily on the requirement for an action to have, or be likely to have, a 'significant' impact. The Explanatory Memorandum implicitly suggests that this requirement strikes a balance between an owner's rights and the public interest. For example, in relation to s 12, the Explanatory Memorandum states that

> Not all actions impacting on a world heritage property will have, or are likely to have, a *significant impact* on the *world heritage values* of that property. This clause therefore does not regulate all actions affecting a world heritage property.[79]

8.55 Dr Gerry Bates has commented that the question of significance is 'for subjective determination by the minister'.[80]

8.56 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) considered the provisions of the Environment Protection and Biodiversity Conservation Bill 1998 (Cth) but it did not express concerns about any impact on vested property rights.[81] Nor did it express concerns in this regard about a subsequent Bill that, among other things, sought to amend the EPBC Act by imposing strict liability on certain elements of the offences in ss 15A, 17B, 18A and 20A of the *EPBC* Act (outlined above).[82]

8.57 Since the commencement of the EPBC Act in 2000, there have been a number of reviews of the Act and natural resource management more broadly,[83] including an independent review of the Act[84] undertaken pursuant to s 522A.[85] Two of them are of particular relevance to the matters considered in this Inquiry.[86]

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79 Explanatory Memorandum, Environment Protection and Biodiversity Conservation Bill (Cth) 23 [23] (emphasis in original). See other examples at [49] ('Not all actions affecting a nationally threatened species or community will have, or are likely to have, a *significant impact* on that species or community'); [59] ('Not all actions affecting a migratory species will have, or are likely to have, a *significant impact* on that species').

80 Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 2013) 174 [5.71].

81 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Seventh Report of 1999* (1999).

82 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Eleventh Report of 2006* (2006). The Committee did express concerns about the imposition of strict liability.

83 Some of these reviews are outlined in National Farmers' Federation, Submission No 136 to 'Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999' (2009) 4, 7–12; 'The Australian Environment Act—Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999' (Final Report, October 2009) 4, 8. Further, in its submission to this ALRC Inquiry, ANEDO outlined a number of inquiries and consultations that it had been involved in that were concerned with 'cutting green tape', see Australian Network of Environmental Defender's Offices, *Submission 60*.

84 'The Australian Environment Act—Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999', above n 83.

85 This section provides that the Minister must cause an independent review, of the operation of the Act and the extent to which the Act's objects have been achieved, to be undertaken within 10 years of commencement and thereafter in intervals of not more than 10 years.

86 Senate Finance and Public Administration References Committee, Parliament of Australia, *Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures* (2010); 'Impacts of Native Vegetation and Biodiversity Regulations' (Inquiry Report 29, Productivity Commission, 2004).

8.58 The potential for the EPBC Act to encroach on vested property interests is illustrated in *Greentree v Minister for the Environment and Heritage*.[87] The Full Court of the Federal Court upheld the Federal Court's decision that Mr Greentree had taken an action which had a 'significant impact on the ecological character of a declared Ramsar wetland', contrary to s 16(1) of the EPBC Act.[88] The property had been farmed by Greentree Farming (a partnership),[89] which cleared, ploughed and sowed the land.[90] Consequently, the farmer and his company had to pay $150,000 and $300,000 respectively to the Commonwealth, conflicting with Mr Greentree's asserted right to use and enjoy his own property.

8.59 In March 2010, the National Farmers' Federation (NFF) submitted to the Senate Finance and Public Administration References Committee's Inquiry into Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures, that where the operation of the EPBC Act results in landholders' property rights being reduced, the Act should require landholders to be compensated.[91] The Committee reported that

> While the committee does not believe that it is always inappropriate for government to regulate the use or utilisation of private landholdings, there comes a point at which regulation of land may be so comprehensive as to render it of a substantially lower economic value to the landowner. In such circumstances consideration should be given to compensation being provided to the landowner in recognition of this.[92]

8.60 However, the Committee did not make a specific recommendation in this regard.

8.61 In this ALRC Inquiry, the NFF again expressed the view that the degree of interference by the EPBC Act with property rights may be unjustified. The NFF's main argument was that the Act 'is having a significant financial impact on farmers as a consequence of the limitations it places on property development and land use change'.[93] It suggested that the land use restrictions were resulting in adverse economic and environmental outcomes by preventing the effective introduction of modern agricultural technology. For example, it suggested that prohibitions on cutting down isolated paddock trees frustrates precision cropping practices, which may: reduce chemical and fertiliser use, prevent run-off into waterways, lower fuel consumption and mitigate soil loss. In its view, such restrictions—where referral is required—'substantially limit the continued profitability and viability of farms'.[94] It submitted

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87 *Greentree v Minister for Environment and Heritage* (2005) 144 FCR 388.
88 Ibid [45]–[50].
89 Ibid [4].
90 Ibid [45].
91 National Farmers' Federation, Submission No 265 to Senate Finance and Public Administration References Committee, *Inquiry into Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures*, 2010 4.
92 Senate Finance and Public Administration References Committee, Parliament of Australia, *Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures* (2010) [5.13].
93 The NFF also claimed that the 'complexity' of the Act's operation frustrates farmers from achieving 'optimum value from their land assets': National Farmers' Federation, *Submission 54*.
94 Ibid.

that the fact that 'there is no compensation directly available under the EPBC Act' should be of interest to this Inquiry.[95]

8.62 By contrast, ANEDO submitted that the common law has 'long accepted that government regulation of activities that can occur on private property (for example, restricting water use, land-clearing or requiring development consents) is not an acquisition of property, and therefore does not trigger a right to compensation'.[96] ANEDO cited two cases to support this statement: *Commonwealth v Tasmania*[97] and *ICM Agriculture Pty Ltd v Commonwealth*.[98] Both cases concerned s 51(xxxi) of the *Constitution*, among other provisions.

8.63 In *Commonwealth v Tasmania*, Tasmania argued that the relevant Commonwealth statute and regulations—which prohibited the construction of a hydro-electric dam in an area in south-western Tasmania—were invalid because they constituted an acquisition of property on other than just terms. The state argued that an 'acquisition can occur through the operation of legislation which so restricts the use of land that it assumes the owner's rights for an indefinite period'.[99] An analogous argument could potentially be made by a landowner prevented from carrying out certain activities by the EPBC Act. The High Court, however, did not accept this contention by Tasmania.

8.64 Three of the four Justices who considered the issue rejected Tasmania's argument about s 51(xxxi) of the *Constitution* as they did not consider that there had been an 'acquisition' of property by the Commonwealth. While Mason J observed that the property is 'sterilized' in terms of its potential for use—as the provisions prevented any development of the property without the Minister's consent—he did not consider that the Commonwealth or anyone else had acquired a proprietary interest in the property.[100] Similar views were expressed by Murphy J[101] and Brennan J.[102] Dr Bates has explained this judicial reasoning: 'sterilising this particular form of land use did not ... prohibit other uses to which the property might be put and the Commonwealth had not effectively acquired the property'.[103]

8.65 By contrast, Deane J concluded that there had been an acquisition of property on other than just terms as the 'Commonwealth has, by the Wilderness Regulations, brought about a position where the HEC land is effectively frozen unless the Minister consents to development of it'.[104] His Honour continued:

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95 Ibid.
96 Australian Network of Environmental Defender's Offices, *Submission 60* citing *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; *Commonwealth v Tasmania* (1983) 158 CLR 1, 145–6.
97 *Commonwealth v Tasmania* (1983) 158 CLR 1, 145–6.
98 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140.
99 *Commonwealth v Tasmania* (1983) 158 CLR 1, 24.
100 Ibid 145–6.
101 Ibid 181.
102 Ibid 248.
103 Bates, above n 80, 151.
104 *Commonwealth v Tasmania* (1983) 158 CLR 1, 286.

> ... the Commonwealth has, under Commonwealth Act and Regulations, obtained the benefit of a prohibition, which the Commonwealth alone can lift, of the doing of the specified acts upon the HEC land. The range of the prohibited acts is such that the practical effect of the benefit obtained by the Commonwealth is that the Commonwealth can ensure, by proceedings for penalties and injunctive relief if necessary, that the land remains in the condition which the Commonwealth, for its own purposes, desires to have conserved. In these circumstances, the obtaining by the Commonwealth of the benefit acquired under the Regulations is properly to be seen as a purported acquisition of property...[105]

8.66 Andrew Macintosh and Deb Wilkinson have argued that '[s]everal High Court decisions in the 1990s and early 2000s have cast doubt over the weight of Mason, Brennan and Murphy JJ's findings in the *Tasmanian Dam case*'.[106] It is a matter of ongoing debate about 'exactly where the dividing line for constitutional acquisition lies in relation to laws that regulate natural resources'.[107] They concluded that 'when the EPBC Act goes beyond minor interferences so as to significantly reduce the commercial uses to which property can be applied, or if it deprives property of any commercial use, questions may arise about acquisition'.[108]

8.67 Even if not a compulsory acquisition of property, the interference of the EPBC Act with property rights may still be considered to be unjustified if compensation is not provided. Indeed, the NFF claims that farmers should receive compensation for 'shouldering the burden of providing a public benefit' provided by the EPBC Act.[109]

Water Act 2007

8.68 The Scrutiny of Bills Committee did express some concerns about vested property rights when considering the provisions of the *Water Act*. Specifically, it expressed concern about provisions relating to entry to premises, without warrant, as it considered that they may trespass unduly on personal rights and liberties.[110]

8.69 In this Inquiry, the NFF had a different complaint. It submitted that the *Water Act* has the potential to cause unjustified interferences with property rights. Its two particular concerns were first, that the Act, particularly the Murray-Darling Basin Plan, has the potential to 'erode' farmers' water rights and entitlements without full

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105 Ibid 287.

106 Andrew Macintosh and Deb Wilkinson, 'Evaluating the Success or Failure of the EPBC Act; A Response to McGrath' (2007) 24 *Environmental and Planning Law Journal* 81, 82. The article they were responding to was Chris McGrath, 'Swirls in the Stream of Australian Environmental Law: Debate on the EPBC Act' (2006) 23 *Environmental and Planning Law Journal* 165.

107 Macintosh and Wilkinson, above n 106, 83. See also McGrath, above n 106.

108 Macintosh and Wilkinson, above n 106, 83. O'Connor makes a similar point. 'Landowner lobby groups argue that the effect of Australia's land clearing laws is to make some private land effectively conservation estate, depriving the owners of all economically viable uses. In Australia, as in the US, it is generally accepted that compensation should be paid when regulation crosses that threshold': O'Connor, above n 15, 78. She argues that '[i]n many if not most cases, land affected by clearing restrictions may be suitable for other viable uses'.

109 National Farmers' Federation, *Submission 54*.

110 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *First Report of 2008* (2008) 43–4.

compensation and secondly, that the Murray-Darling Basin Plan's Constraints Management Strategy could potentially result in the flooding of private land.[111]

8.70 With respect to the first issue, the NFF expressed concern that Commonwealth laws 'fail to fully ensure that full compensation provisions are in place for any diminution in water access'. It submitted that '[w]here such action undertaken by government results in diminution of entitlement reliability, water access entitlement holders should be fully compensable at the market rate'. It called for the Commonwealth to provide just compensation 'where States fail to do so'.[112] An access entitlement is 'the long term right to receive annual allocations'.[113]

8.71 The National Water Initiative is an intergovernmental agreement between the Commonwealth and all state and territory governments.

> The States and Territories are to make plans to address any existing overallocation for all river systems and groundwater resources. The use of water for private consumption (such as for irrigation, industry and domestic use) is to require a water access entitlement (such as a water licence), as determined by a State or Territory water plan.
>
> Water access entitlements are to be described as a share of the water available for consumption (the consumptive pool) from a specified water resource. They must be separate from land and will, among other things, be mortgageable, capable of being traded ...
>
> Water plans are to be prepared by States and Territories for surface water and groundwater management units in which water entitlements are issued. They are to provide for secure ecological outcomes by defining appropriate water management arrangements to achieve environmental and other public benefit outcomes ...They are also to ... determin[e] the shares in the consumptive pool, and the rules to allocate water during the life of the plan.[114]

8.72 The *Water Act*, the Murray-Darling Basin Plan and other intergovernmental agreements have developed the approach in the National Water Initiative.

8.73 Water entitlements may constitute a form of personal property. For example, Michael McKenzie has analysed rights under the *Water Management Act 2000* (NSW) and observed that the NSW Government had 'stopped short of explicitly defining water rights under a water access licence as personal property'.[115] He explained that the case law, however, has made it clear that 'whether the water rights amount to property rights depends on the terms of the legislation'.[116] While water entitlements may constitute a form of personal property, they are discussed in this chapter, rather than Chapter 7, because many conceive of rights to water in a non-technical way, as intrinsically related to real property.

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111 National Farmers' Federation, *Submission 54*.
112 Ibid.
113 Henning Bjornland and Geoff Kuehne, 'Water Soft Path Thinking in Other Developed Economies—Part C: Australia' in David B Brooks, Oliver M Brandes and Stephen Gurman (eds), *Making the Most of the Water We Have: The Soft Path Approach to Water Management* (Earthscan) 220, 223.
114 Westlaw AU, *The Laws of Australia* (at 1 March 2015) 14 Environment and Natural Resources, '14.9 Water' [14.9.570].
115 Michael McKenzie, 'Water Rights in NSW: Properly Property?' (2009) 31 *Sydney Law Review* 443, 462.
116 Ibid.

8.74 With respect to the *Water Act*, as noted earlier, s 254 provides for just terms compensation for any acquisition of property. Further, pt 2 div 4 of the Act, which concerns management of Basin water resources and specifically allocates risks in relation to reductions in water availability, is in effect a compensation regime for losses suffered by the holders of water rights.

8.75 The Murray-Darling Basin Plan is a legislative instrument authorised under the *Water Act*[117] for the purpose of facilitating the integrated management of the Murray-Darling Basin water resources in a way that promotes the objects of the Act.[118] The objects of the Act include the promotion of 'the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes'.[119] For present purposes, key aspects of the *Water Act* include the following:

> The central concept of the *Water Act* is the development of the Basin Plan (Pt 2 div 1).
>
> The Basin Plan must identify water resource plan areas and they must align as far as possible with the areas provided under State legislation for the management of water resources (s 2(1) item 2).
>
> The Basin Plan must establish the maximum long-term annual average quantities of water that can be taken in a sustainable basis from the Basin water resources as a whole and from the water resources of each of the water resource plan areas (s 22(1) item 6). These averages are called SDLs [sustainable diversion limits].[120]

8.76 The Full Court of the Federal Court gave this overview of the *Water Act* in the case of *Lee v Commonwealth*, which involved, among other things, an appeal by two landowners from the Federal Court's rejection of their claim for compensation under s 254 of the *Water Act*—the statutory just terms provision in that Act. Each landowner operated an irrigated horticultural farm that draws water from the Murray River. Before the Federal Court, the landowners had argued that

> by reducing the amount of water they could carry over from one year to the next pursuant to State legislation, and by detrimentally affecting the cost of access to irrigation delivery infrastructure, the value of their farms, and the price at which they were able to sell their water entitlements to the Commonwealth, the Act had effected an acquisition of property otherwise than on just terms, which entitled them to compensation under s 254 of the Act.[121]

8.77 That is, there were essentially four claims in respect of s 254.[122] The Federal Court concluded that the two landowners—Mr Lee and Mr Gropler—had 'no

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117 *Water Act 2007* (Cth) s 33.

118 Ibid s 20.

119 Ibid s 3(c).

120 *Lee v Commonwealth* [2014] FCAFC 174 (18 December 2014) [31]–[34].

121 *Lee v Commonwealth* (2014) 220 FCR 300, 301. The Federal Court commented that the allegations in the amended statement of claim in respect of the s 254 claims 'lack clarity': Ibid [192]. The Court sought to detail the claims at Ibid [193]–[200].

122 Claims in respect to: (1) carryover water; (2) an increase in the cost of access to the irrigation delivery system; (3) a decline in the value of the properties; and (4) a reduction in the price at which the landowners were able to sell their water entitlements to the Commonwealth.

reasonable prospect of prosecuting the s 254 claim successfully'.[123] The focus of discussion in this chapter is the claim concerning carryover water.[124] In respect of this claim, the Federal Court stated that '[i]t is alleged that as a result of the Commonwealth Environmental Water Holder conserving water for environmental use, Mr Lee's entitlement to carryover water will be reduced and the value of his water entitlements has, as a result, been reduced'.[125] The Court continued:

> It seems that these [carryover] entitlements arise under State laws. For the purpose of argument, let it be assumed that those rights were taken from Mr Lee. He still faces the obstacle that there was no acquisition of property from him by any other person. Sections such as s 254 are directed to acquisition, not deprivation.[126]

8.78 The Federal Court found that 'there was no acquisition of property from the appellants and no measurable advantage conferred on the Commonwealth'.[127] The trial judge ordered summary judgment in favour of the Commonwealth and the Murray-Darling Basin Authority in respect of all the claims made in the proceeding.[128]

8.79 On appeal, the Full Court explained that the Federal Court had found the case in respect of s 254 to be analogous to that in *ICM Agriculture Pty Ltd v Commonwealth*, rather than that in *Newcrest Mining (WA) Limited v Commonwealth*, as the appellants had contended.[129]

> His Honour explained ... that the appellants' case was governed by *ICM* and not *Newcrest* 'in that there was no measurable or identifiable advantage conferred on the Commonwealth in consequence of Mr Lee and Mr Groper's alleged loss of carryover entitlements'.
>
> We respectfully agree with his Honour's legal analysis and conclusion, which disclose no appealable error.[130]

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123 *Lee v Commonwealth* (2014) 220 FCR 300, [221].

124 With respect to the claim that there had been an increase in the cost of access to the irrigation delivery system, the Federal Court explained that the applicants 'seek to claim that the Commonwealth Environmental Water Holder has acquired water entitlements for use for environmental purposes from farmers who previously used the rights to operate irrigation farms' with a consequence that '[t]he costs of maintenance of the infrastructure must be borne by fewer users and as a result the cost for the remaining users is increased': [212]. The Court concluded that this economic consequence did not result in the Commonwealth having acquired any property: [215]. With respect to the claim that there had been a decline in the value of the two properties 'because irrigators in their localities sold out to the Commonwealth and their farms are no longer used as irrigation properties', resulting in the 'Swiss cheese effect' where 'the remaining irrigation farms are left isolated and surrounded by empty blocks which were previously irrigation properties', the Federal Court concluded that such economic consequences 'have not resulted in any acquisition of property by the Commonwealth': [214]–[215]. With respect to the claim that there had been a reduction in the price at which the landowners were able to sell their water entitlements to the Commonwealth, the Federal Court observed that the rights had been sold on the market for the market price—a price which fluctuates—and concluded that '[t]he complaint that Mr Lee and Mr Gropler did not achieve a better price in the market when they sold to the Commonwealth is not a suitable claim under s 254': [220].

125 *Lee v Commonwealth* (2014) 220 FCR 300, [197].

126 Ibid [200].

127 *Lee v Commonwealth* [2014] FCAFC 174 (18 December 2014) [15].

128 *Lee v Commonwealth* (2014) 220 FCR 300, [234].

129 *Lee v Commonwealth* [2014] FCAFC 174 (18 December 2014) [174]–[175].

130 Ibid [176]–[177].

8.80 The Federal Court had also observed some 'misconceptions'[131] about the landowners' concern that the 'fixing' of the sustainable diversion limits (SDLs) has the effect of reducing their water entitlements 'by around 25% and thereby denying them water to such a degree that their farms are no longer viable'.[132] The SDLs were to come into operation in 2019.[133]

8.81 The Court outlined the Commonwealth Government's policy in relation to the operation of the *Water Act*.[134] It referred to the Sustainable Water Use and Infrastructure Program[135] and the Restoring the Balance in the Murray-Darling Basin program.[136] The first program provided for Commonwealth funding to be used to invest in projects which would improve and modernise irrigation infrastructure so as to address significant water losses caused by leakage and evaporation. The second program provided for the Commonwealth to purchase water entitlements in the Murray-Darling Basin from those who volunteered to sell and then to use that water for environmental purposes. The Court also referred to a Government commitment to '"bridge the gap" between the current diversion levels, being the baseline diversion limits, and the proposed level of diversion reflected in the Basin SDL'.[137] The Court stated of the latter that 'the Commonwealth's intention was to reduce the current diversion level without reducing irrigators' water entitlements'.[138]

8.82 The Court explained that under the policy,[139] the Commonwealth committed to purchase a certain amount of water entitlements from willing sellers in the market and then to use that water for environmental purposes.[140] The remaining irrigators who did not sell their entitlements would retain their same entitlements.[141]

> The reduction in water entitlements for use in irrigation is achieved by devoting the water purchased by the Commonwealth to environmental uses.
>
> ... Whilst government policy may change, the evidence in this case is that the policy means irrigators who retain their entitlements will suffer no loss of entitlement to water as a result of the fixing of the SDLs.[142]

8.83 The Full Federal Court included this extract in the Court's reasons[143] and also recounted the Federal Court's explanation of the Government's policy.[144] The Court granted leave to appeal but dismissed the appeal.[145]

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131 *Lee v Commonwealth* (2014) 220 FCR 300, [228].
132 Ibid [227].
133 Ibid [225].
134 Ibid [71]–[78].
135 Ibid [73].
136 Ibid [74].
137 Ibid [75].
138 Ibid.
139 Presumably the Restoring the Balance in the Murray-Darling Basin program.
140 *Lee v Commonwealth* (2014) 220 FCR 300, [229].
141 Ibid.
142 Ibid [229]–[230].
143 *Lee v Commonwealth* [2014] FCAFC 174 (18 December 2014) [20].
144 Ibid [56]–[61].
145 Ibid [187].

8.84 The application for special leave to the High Court in this case was refused. Keane J remarked:

> Given the findings of the courts below as to the likely and actual operation of the *Water Act* upon the applicants' rights, any adverse effect upon their legal rights is so remote that their standing to challenge the validity of the Act is doubtful ... [146]

8.85 It is useful now to refer to *ICM Agriculture Pty Ltd v Commonwealth* and *Newcrest Mining (WA) Limited v Commonwealth* as the distinction between the two cases was key to the outcome in *Lee* in respect of the s 254 claim.

8.86 In *ICM Agriculture Pty Ltd v Commonwealth*, three landowners commenced proceedings in the High Court claiming that a reduction in their water entitlements amounted to an acquisition of property other than on just terms, contrary to s 51(xxxi). The case did not concern the *Water Act*. Each landowner conducted farming enterprises near the Lachlan River in New South Wales.[147] The land was within the area known as the Lower Lachlan Groundwater System (LLGS).[148] Agricultural enterprises in this area were reliant upon both groundwater and surface water.[149] The case concerned the replacement of bore licences with aquifer access licences under New South Wales legislation. The aquifer access licences reduced the amount of groundwater to which the plaintiffs were entitled—for two plaintiffs by about 70%.[150] The state of New South Wales offered the plaintiffs 'structural adjustment payments' which the landowners considered to be inadequate.[151] The Commonwealth, as represented by the National Water Commission, and the state of New South Wales had earlier entered into a funding agreement which provided that each was to provide equal funds to be used for structural adjustment payments.[152]

8.87 The majority of the High Court decided that the replacement of the bore licences did not constitute an 'acquisition' of property within the meaning of s 51(xxxi). It is important to note that the case concerned groundwater. Since 1966 the right to the use, flow and control of sub-surface water has been vested by statute in the state 'for the benefit of the Crown'[153] and New South Wales legislation imposed a prohibition on access to, and use of, groundwater without a licence.[154] So, while the cancelled bore licences were a species of property,[155] there was no 'acquisition' by New South Wales.[156]

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146 Transcript of Proceedings, *Lee v Commonwealth* [2015] HCATrans 123 (15 May 2015) 16.
147 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [91].
148 Ibid.
149 Ibid [1].
150 Ibid [6].
151 Ibid [7].
152 Ibid [10]–[11].
153 Ibid [72]–[73] (French CJ, Gummow and Crennan JJ); [108], [124], [144] and [146] (Hayne, Kiefel and Bell JJ).
154 Ibid [58]–[59], [84] (French CJ, Gummow and Crennan JJ); [122]–[123], [144] (Hayne, Kiefel and Bell JJ).
155 Ibid [147] (Hayne, Kiefel and Bell JJ).
156 Ibid [84] (French CJ, Gummow and Crennan JJ), [148]–[154] (Hayne, Kiefel and Bell JJ).

8.88 French CJ, Gummow and Crennan JJ concluded that

> ... in the present case, and contrary to the plaintiff's submissions, the groundwater in the LLGS was not the subject of private rights enjoyed by them. Rather ... it was a natural resource, and the State always had the power to limit the volume of water to be taken from that resource. ... The changes of which the plaintiffs complain implemented the policy of the State respecting the use of a limited natural resource, but that did not constitute an 'acquisition' by the State in the sense of s 51(xxxi).[157]

8.89 Hayne, Kiefel and Bell JJ concluded that

> Neither the existence, nor the replacement or cancellation, of particular licences altered what was under the control of the State or could be made the subject of a licence to extract. If, as was hoped or expected, the amount of water in the aquifer would thereafter increase (or be reduced more slowly) the State would continue to control that resource. But any increase in the water in the ground would give the State no new, larger, or enhanced 'interest in property, however slight or insubstantial', whether as a result of the cancellation of the plaintiff's bore licences or otherwise.[158]

8.90 By contrast, in his dissent, Heydon J determined that the increase in water in the ground 'will be a benefit or advantage which New South Wales has acquired within the meaning of s 51(xxxi)'.[159]

8.91 In *Newcrest Mining*, the termination of the right to mine was found to constitute an 'acquisition' of property partly because 'there was no other form of land use open to the plaintiff following the sterilisation of that particular form of land use'.[160] The benefit that passed to the Commonwealth was the unexpired term of the mining leases.[161]

8.92 In *ICM Agriculture Pty Ltd v Commonwealth*, French CJ, Gummow and Crennan JJ distinguished the case before them from *Newcrest Mining*:

> To acquire the substance of proprietary interests in the mining tenements considered in that case is one thing, to cancel licences to extract groundwater is another. The mining tenements were interests carved out of the radical title of the Commonwealth to the land in question, and the radical title was augmented by acquisition of the minerals released from the rights of another party to mine them. As Brennan CJ later explained [in *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1, [17]], the property of the Commonwealth had been enhanced because it was no longer liable to suffer the extraction of minerals from its land in exercise of the rights conferred by the mining tenements held by Newcrest.[162]

8.93 As noted earlier, the NFF views a 'diminution' of water access entitlements (caused by the Commonwealth's administration of the *Water Act*), unaccompanied by compensation 'at market rates', as an unjustifiable interference with property rights. However, the judgments in the *Lee* litigation suggest that any diminution of the consumptive pool caused by the Commonwealth under the *Water Act* will be by

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157 Ibid [84].
158 Ibid [153].
159 Ibid [235]. See [232]–[235].
160 Bates, above n 80, 151 [5.34].
161 Ibid.
162 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [85].

consensual purchase of water entitlements and from water savings associated with investments in more efficient infrastructure. In such circumstances, the argument could be advanced that the Commonwealth was sufficiently concerned about property issues that it implemented a policy that required consensual arrangements which overcame the need for compulsory acquisition and compensation. That is, that it introduced measures to address any unjustifiable interference with property rights. Accordingly, some might say that the operation of the *Water Act* does not amount to an unjustifiable interference with property rights.

Native title laws

8.94 Native title laws were also raised in a submission to this Inquiry.[163] Two reports have been released in 2015 which have outlined consultations about the *Native Title Act 1993* (Cth) (*Native Title Act*) and raise issues of relevance to this Inquiry.

8.95 In 2014, the Australian Human Rights Commission consulted nationally on the protection of human rights and freedoms in Australia. In the subsequent report, the 'freedom to exercise native title' was identified as an issue emerging from the consultation on property rights.

> Consultations with native title holders revealed that they face complex legislative and bureaucratic regulations that impede their capacity to use their native title to achieve economic development. These barriers obstruct the potential for Aboriginal and Torres Strait Islander peoples to build and own houses on their native title lands, and use their native title as a foundation to create and participate in businesses.[164]

8.96 The ALRC conducted an Inquiry into aspects of the *Native Title Act* from August 2013 to April 2015, including national consultations. The final report was released in June 2015.[165] The Terms of Reference asked the ALRC to examine, among other things, whether the *Native Title Act* should be clarified to provide that native title rights and interests 'can include rights and interests of a commercial nature'.

8.97 Section 223(2) of the *Native Title Act* states that native title rights and interests include, but are not limited to, hunting, gathering, or fishing, rights and interests. That is, the provision provides a non-exhaustive list of some native title rights and interests. The ALRC drew upon the approach to native title rights taken in *Akiba v Commonwealth*[166] and recommended that s 223(2) be amended to confirm that native title rights and interests may comprise a broadly-framed right that may be exercised for any purpose, including commercial or non-commercial purposes where the evidence supports such a finding.[167] The ALRC recommended that the *Native Title Act* should further provide a non-exhaustive list of kinds of native title rights and interests,

163 D Wy Kanak, *Submission 38*.
164 Australian Human Rights Commission, *Rights and Responsibilities* (Consultation Report, 2015) 42.
165 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015).
166 *Akiba v Commonwealth* (2013) 250 CLR 209.
167 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) Rec 8–1, see recommended text for s 223(2)(a).

including trading rights and interests that might be established on the evidence.[168] This part of the recommendation reflects case law where a right to trade has been recognised in principle.[169] The ALRC recommended that the terms 'commercial purposes' and 'trading' should not be defined in the Act.[170]

8.98 The ALRC's recommendations will contribute to the ongoing discussions about how native title holders may be empowered to use their native title to create economic development opportunities.

Criminal laws

8.99 A number of Commonwealth criminal law provisions may interfere with property rights. A number of these are considered in Chapter 7, dealing with personal property.

8.100 There are few criminal offences that may be characterised as interfering with a person's interests in real property.

8.101 In the *Crimes Act 1914* (Cth), s 3ZB empowers a police constable to enter premises to arrest an offender if the constable has a warrant for that person's arrest and has a reasonable belief that the person is on the premises.

8.102 In the *Criminal Code* (Cth), s 105.22 allows the police to enter premises if a preventative detention order is in force against a person and the police have a reasonable belief that the person is in the premises.

8.103 Other Commonwealth statutes also contain offence provisions for preventing entry to land where an officer or other specified person is empowered to enter.[171]

Search warrants to enter premises

8.104 While entry powers for law enforcement authorise what would otherwise be a trespass, they may be considered, broadly conceived, as an interference with real property.

8.105 At common law, whenever a police officer has the right to arrest, with a warrant, they may enter private premises without the occupier's permission in order to execute the warrant.[172] Police powers to enter and search private premises through the issue of search warrants are, however, a relatively modern phenomenon. Historically, courts were not empowered to issue search warrants on private property, unless in relation to the search and seizure of stolen goods.[173]

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168 Ibid Rec 8–1, see recommended text for s 223(2)(b).

169 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [153], [155].

170 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) Rec 8–2.

171 See, eg, *Taxation Administration Act 1953* (Cth) s 353–10.

172 Australian Law Reform Commission, *Criminal Investigation*, Interim Report No 2 (1975) [60]. See also, *Handock v Baker* (1800) 2 Bos & P 260.

173 See, eg, *Entick v Carrington* (1765) 19 St Tr 1029. See discussion in Ch 7.

8.106 Where legislation has been passed to derogate from the principle of a person's right to undisturbed enjoyment of their premises, the legislation is to be construed so as not to derogate from the common law right without express words or necessary implication.[174] This is underscored by the principle that there is no common law right for law enforcement to enter private property without a warrant.[175]

8.107 By way of example, s 3ZB of the *Crimes Act* was introduced through the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994* (Cth) which amended the *Crimes Act 1914* (Cth). When introducing the Crimes (Search Warrants and Powers of Arrest) Amendment Bill 1994 (Cth) to the House of Representatives, the then Minister for Justice explained the purpose of the Bill was to implement the recommendations of the Review of Commonwealth Criminal Law, in order

> to make much needed reforms of the law relating to search, arrest and related matters for the investigation of most Commonwealth offences. These areas of the law have been the subject of careful examination by the Australian Law Reform Commission in its report entitled Criminal Investigation, and more recently by the Review of Commonwealth Criminal Law established by Mr Bowen as Attorney-General and chaired by the Rt. Hon. Sir Harry Gibbs. The bill closely follows the recommendations made by the Review of Commonwealth Criminal Law in its fourth and fifth interim reports.[176]

8.108 In the ALRC's 1975 *Criminal Investigation* report, the ALRC wrote that

> A power to enter should be available, first, in order to arrest a person named in a warrant of arrest and reasonably believed to be on the premises, and, secondly, where no warrant exists, to accomplish the lawful arrest of a person reasonably believed to have committed a serious offence and reasonably believed to be on the premises.[177]

8.109 In light of this commentary, s 3ZB appears to be fairly uncontroversial.[178]

Justifications for encroachment

8.110 Arguably there are a number of laws that interfere with real property rights. This section focuses on justifications which have been used with respect to environmental laws, as these laws generated the most debate among stakeholders in this Inquiry.

8.111 This Inquiry heard from two groups of stakeholders: those who emphasised an environmental perspective and those who emphasised a private property perspective. The NFF represented the views of those who emphasised a private property

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174 *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206 (The Court).

175 *Entick v Carrington* (1765) 19 St Tr 1029.

176 Commonwealth, *Parliamentary Debates*, House of Representatives, Crimes (Search Warrants and Powers of Arrest) Amendment Bill 1994 (Cth) 3 May 1994 (Minister Keen). These aims are also reflected in the Explanatory Memorandum, Crimes (Search Warrants and Powers of Arrest) Amendment Bill 1994 (Cth). There was a significant Review of Commonwealth Criminal Law established in 1987 and chaired by Sir Harry Gibbs. The Review published five interim reports and a final report (1988–1991).

177 Australian Law Reform Commission, *Criminal Investigation*, Interim Report No 2 (1975) [60].

178 The ALRC did not receive any submissions on this provision or other entry pursuant to arrest or search warrants under Commonwealth or state and territory law.

perspective. In the wider public debate, others have also defended private property.[179] Lorraine Finlay has argued that '[t]he link between property rights and individual liberty remains relevant in the modern context'[180] and, in her view, 'the existing protections are insufficient and largely symbolic'.[181]

8.112 Environmental Justice Australia and ANEDO represented the view of those who emphasise an environmental perspective. Generally, environmental defenders put forward the justifications for interferences with real property rights. Environmental Justice Australia noted '[t]he recognition, both internationally and domestically, of the right to property is tempered with the recognition that it will be subject to lawful limitations imposed by the state'.[182] Laws limit land and water use to balance competing private interests, to protect the environment[183] or for the public interest. ANEDO explained that planning and environmental laws 'evolved in part to address land use conflict arising from incompatible uses of private property (for example, industrial and urban uses), and competing use of natural resources'.[184]

Necessary and in the public interest

8.113 The most general justification for laws that interfere with vested property interests is that the interference is necessary and in the public interest. This is also an often used justification in respect of laws which may be seen to interfere with rights in real property.

8.114 Those who emphasise an environmental perspective argued that environmental regulation—which may interfere with real property rights—is both necessary and in the public interest. There are a range of environmental treaties which require Australia to take actions which may affect property rights.[185] For example, a number of relevant provisions in the EPBC Act were enacted so as to comply with Australia's international obligations.[186]

8.115 ANEDO and Environmental Justice Australia referred to the rationale for environmental laws as being in the public interest. As ANEDO put it, '[e]nvironmental laws exist to protect the environment and conserve natural resources in the public interest, for the benefit of all Australians, including property owners'. ANEDO cited Dr Nicole Graham, who has argued that '[e]nvironmental laws indicate the

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179 See, eg, Australian Human Rights Commission, *Rights and Responsibilities* (Consultation Report, 2015) 41.

180 Finlay, above n 7, 21.

181 Ibid 19.

182 Environmental Justice Australia, *Submission 65*.

183 See Lee Godden and Jacqueline Peel, *Environmental Law* (Oxford University Press, 2010) ch 4.

184 Australian Network of Environmental Defender's Offices, *Submission 60*.

185 See, eg, *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 June 1993); *Convention on the Conservation of Migratory Species of Wild Animals*, opened for signature 23 June 1979, 1651 UNTS 333 (entered into force 1 November 1983); *Convention on Wetlands of International Importance Especially Waterfowl Habitat*, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975).

186 See Explanatory Memorandum, Environment Protection and Biodiversity Conservation Bill (Cth); Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No 1) 2006 (Cth). See also Department of Parliamentary Services (Cth), *Bills Digest*, No 135 of 1998-99, 23 March 1999, 3–4.

government's prerogative, indeed responsibility, to balance private rights against the public's interest in health and environmental protection'.[187] Environmental Justice Australia cited Professor Kevin Gray, who stated that

> ... privileges of ownership have always been intrinsically curtailed by community-oriented obligation. ... The community is already entitled—has *always* been entitled—to the benefit of a public-interest forbearance on the part of the landowner.[188]

8.116 ANEDO called for recognition that rights and freedoms operate in an ecological context, and stated that the need for ecological sustainability meant that the public interest is more prominent today than in Blackstone's 18th century England.[189] It referred to Preston CJ of the NSW Land and Environment Court who has argued that the increasing strain on ecological systems will mean that 'the *public benefit demands* from these resources will increasingly have to be met first, before the resources are available for *private benefits*'.[190] ANEDO submitted that there is 'evidence that the wider community values the environment and feels that regulation across a wide range of sectors is "about right"'.[191]

8.117 Another argument pertaining to the public interest is that a requirement to pay compensation to landholders would discourage regulators from implementing environmental protections.[192] ANEDO referred to 'takings' legislation in the US which, it argued, has had a 'chilling effect' on government regulatory activity.[193] Some consider that s 51(xxxi) of the *Constitution* can have a similar effect.

8.118 ANEDO also submitted that the ALRC should consider 'the right of all Australians to a healthy environment' which is 'emerging' in human rights law.[194] However, as noted in Chapter 1, in this Inquiry the ALRC is focusing on existing common law rights rather than any parallel human right that may be understood, or developing, in international law.

Adequacy of existing protection

8.119 Both ANEDO and Environmental Justice Australia submitted that existing protections are adequate to safeguard against any encroachments.[195] Both stakeholders

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187 Australian Network of Environmental Defender's Offices, *Submission 60*.

188 Environmental Justice Australia, *Submission 65*.

189 ANEDO submitted that, for the purposes of this ALRC Inquiry, the principles of ecologically sustainable development should be 'an integral part of any public interest test': Australian Network of Environmental Defender's Offices, *Submission 60*.

190 Ibid.

191 Ibid. They cited a 2013 publication.

192 O'Connor, above n 15, 73.

193 Australian Network of Environmental Defender's Offices, *Submission 60*. See the submission for a list of other concerns about the implications of any changes to compensation laws.

194 Ibid. ANEDO acknowledged that 'the human right to a healthy environment currently has an uncertain status in international law, and has not been formally recognised in any binding global international agreement'. It argued that '[d]espite lacking formal recognition, there are existing civil and political rights which could provide a basis for an individual to argue that they have a right to a healthy or sound environment' and that 'there is an increasing push for its formal recognition'.

195 Environmental Justice Australia, *Submission 65*; Australian Network of Environmental Defender's Offices, *Submission 60*. See also Andrew Macintosh and Richard Denniss, 'Property Rights and the

referred to s 51(xxxi) of the *Constitution*. Environmental Justice Australia saw this protection as adequate: '[t]he protection against the acquisition of property by Parliament without compensation operates to protect individuals and ensure that they do not bear a disproportionate burden for the benefit of the community'.[196]

8.120 Both also referred to other measures which they considered to be important to ensure that private and public interests are balanced fairly. Environmental Justice Australia referred to the requirement that laws not be arbitrary or without foundation but rather for a proper purpose.[197] ANEDO referred to 'public participation and transparency in decision-making, court review mechanisms and other procedural fairness'.[198]

8.121 With respect to the EPBC Act, ANEDO submitted that the embedded objective of 'promot[ing] ecologically sustainable development'[199] guides decision-makers to effectively balance and integrate economic, environmental and social considerations before making a decision that affects property rights.[200]

Economic arguments

8.122 ANEDO also referred briefly to some economic arguments. It referred to a 2012 Senate Inquiry that 'called into question' the suggestion that environmental laws are causing private developers to shoulder an unreasonable burden.[201] It also referred to a number of economic arguments that have been raised to criticise US-style 'takings' legislation.[202]

8.123 Others have also assessed the economic arguments which have been used to justify encroachments on real property rights. For example, in 2004 the Productivity Commission considered such arguments in one of its reports.[203] Andrew Macintosh and Richard Denniss analysed both equity and economic arguments in their paper assessing whether farmers should have 'additional statutory rights to compensation when restrictions are placed on their ability to use or clear land and when water allocations are reduced for environmental purposes'.[204] In part, Macintosh and Denniss' study responded to the claim that 'the provision of more secure property rights will stimulate greater investment and improve the allocation of scarce agricultural resources'.[205]

Environment: Should Farmers Have a Right to Compensation?' (Discussion Paper 74, The Australia Institute, 2004).

196 Environmental Justice Australia, *Submission 65*.

197 Ibid.

198 Australian Network of Environmental Defender's Offices, *Submission 60*.

199 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(b).

200 Australian Network of Environmental Defender's Offices, *Submission 60*.

201 The reference was to Senate Environment and Communications Legislation Committee, Parliament of Australia, *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012* (2013).

202 Australian Network of Environmental Defender's Offices, *Submission 60*.

203 'Impacts of Native Vegetation and Biodiversity Regulations', above n 86.

204 Macintosh and Denniss, above n 195, v.

205 Ibid. A counter argument is that farmers and irrigators obtain a significant economic benefit from having healthy land and a healthy functioning river system.

8.124 With respect to the economic arguments, Macintosh and Denniss explained that, because market failure causes many environmental problems, policy makers can choose between polluter-pays policies and beneficiary-pays policies.[206] The NFF advocated the implementation of a beneficiary-pays model. Under such a model, the person who obtains a benefit should pay the cost of undertaking it. So if a land owner is prohibited from clearing land for the benefit of the wider community, then the community should pay that land owner compensation. Under the polluter-pays model, a person taking an action should be required to pay the full costs associated with taking that action. So if a land owner does clear the land, that land owner will have to pay the community for any environmental damage caused.

8.125 Macintosh and Denniss explain that while polluter-pays policies are generally considered to be more economically efficient than beneficiary-pays policies, they typically have higher political costs.[207] They concluded that farmers should not be provided with additional statutory rights to compensation in respect of interferences with land use, in part because such an approach would be unlikely to result in a significant increase in agricultural investment or output.[208] While they acknowledged that there was a more convincing economic argument with respect to the claim for compensation with respect to interferences with water use, they similarly opposed the creation of additional statutory rights here, explaining that a number of studies had concluded that the economic gains could be limited.[209]

8.126 In its report, the Productivity Commission stated that a 'major aim' of its recommendations was 'to make the cost-benefit trade-offs involved in achieving various environmental objectives more transparent, so that optimal policy choices are made'.[210] It stated that the cost-benefit is 'obscured' in cases concerning native vegetation and biodiversity regulation of private land 'because the costs of regulation are largely borne by landholders'.[211] It observed that

> Regulation of native vegetation clearing on private property effectively asserts public ownership of remnant native vegetation while leaving its ongoing day-to-day management in the hands of the (uncompensated) landholder. From the landholder's perspective, native vegetation loses much of its private value and becomes a liability. ... When regulation reduces the private value to landholders of native vegetation, incentives to care for it are reduced. The prospective private loss also creates an incentive to circumvent the regulations ... or to bring forward clearing as insurance against possible strengthening of regulations in future.[212]

8.127 It continued:

> Poor incentives for landholders to comply with current regulatory arrangements could be addressed to some extent by compensating landholders for their losses. Payment of compensation would also make the costs of regulation more transparent to the

206 Ibid vi.
207 Ibid.
208 Ibid.
209 Ibid vi–vii.
210 'Impacts of Native Vegetation and Biodiversity Regulations', above n 86, 221.
211 Ibid 224.
212 Ibid 225.

> community, facilitating comparison with environmental benefits. However, the Commission does not recommend simply compensating landholders for the impacts of *existing* compulsory regulatory regimes. This is not only because of the numerous difficulties in assessing appropriate farm-level compensation ... but because continued reliance on regulation to achieve a range of broadly-defined environmental goals appears unlikely to be the most effective, least-cost option from a whole-of-community perspective. In this case, compensation would merely shift an unnecessary large cost burden from landholders to taxpayers.[213]

8.128 Relevantly, it recommended:

> Landholders individually, or as a group, should bear the cost of actions that directly contribute to sustainable resource use (including, for example, land and water quality) and, hence, the long-term viability of agriculture and other land-based operations.[214]

8.129 Another relevant recommendation was that

> Over and above landholder responsibilities, additional conservation apparently demanded by society (for example, to achieve biodiversity, threatened species and greenhouse objectives), should be purchased from landholders where intervention is deemed cost-effective.[215]

8.130 Macintosh and Denniss explained that farm lobby groups welcomed the Productivity Commission's report, considering it to support their claims for a statutory right to compensation.

> Despite the enthusiastic response by farm lobby groups, the Commission's position on the creation of a statutory right to compensation is unclear. The report does, however, support the notion that public good environmental benefits associated with the retention of native vegetation should be purchased from landholders. It is likely that a statutory right to compensation for the impacts of some native vegetation and biodiversity laws that are designed to achieve 'public good environmental benefits' could fit within the framework envisaged by the Productivity Commission.[216]

Distinguishing between rights

8.131 Some stakeholders conceived of an individual's rights pertaining to a particular property as being of a different order from human rights. In ANEDO's view, '[t]he identification by the Inquiry terms of reference of environmental law as an area that potentially unreasonably impinges upon personal freedoms evidences a misunderstanding of human rights principles as they relate to property rights'.[217] Environmental Justice Australia submitted that clearing land of native vegetation is not an innate human right.[218] It submitted that

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213 Ibid.
214 Ibid 238 (rec 10.7).
215 Ibid 239 (rec 10.9).
216 Macintosh and Denniss, above n 195, 2.
217 Australian Network of Environmental Defender's Offices, *Submission 60*.
218 Environmental Justice Australia, *Submission 65*. Similarly, ANEDO argued that 'there is no general proprietary right to clear vegetation or to undertake development'. Rather, activities such as clearing vegetation and farming are 'privileges' afforded to land holders on terms subject to change. See Australian Network of Environmental Defender's Offices, *Submission 60*.

> The principle of a right to own property and not to be arbitrarily deprived of that property should not be confused with the substantive rights that an individual may have to any particular property and does not and should not be seen as a limitation on the ability of governments to enact laws to protect the environment.[219]

8.132 In its view, the rights to ownership of property and against arbitrary deprivation of that property that are protected in international law enjoy 'a fundamental foundation in the integrity and dignity inherent in every person' whereas 'particular rights to certain property as they exist at a particular point in time' do not have such a foundation.[220]

8.133 Environmental Justice Australia also pointed to the universality of human rights. In its view it would be problematic to protect the content of a particular interest in particular property as it would 'not be universal', but rather would 'be concentrated in the hands of the very few'.[221] Both it and ANEDO were critical of any attempt to use a human rights argument to challenge environmental law and regulation. ANEDO saw it as 'nonsensical'.[222] Environmental Justice Australia submitted that '[t]he protection of the content of particular property rights is simply not suitable to a human rights style evaluation framework', such as using a proportionality test.[223]

8.134 It is important to note that this Inquiry is concerned with a review of Commonwealth laws for consistency with traditional rights, freedoms and privileges. That is, the Inquiry is focused on the recognition of rights, freedoms and privileges by the common law rather than the recognition of human rights in international law.[224]

Proportionality

8.135 In the European context, a proportionality test has been used to determine whether interferences with real property rights caused by environmental laws are justified. Article 1 of Protocol 1 to the *European Convention on Human Rights* protects the right of Europeans to 'the peaceful enjoyment' of their 'possessions'. Further, it stipulates that 'no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'.

8.136 The European Court of Human Rights has heard a significant number of cases where a citizen has alleged that a State has violated—unjustifiably interfered with—their right to property by taking measures (authorised by environment-related legislation) to protect the environment.[225] There are a number of steps in the test for determining whether environmental legislation has unjustifiably interfered with

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219 Environmental Justice Australia, *Submission 65*.
220 Ibid.
221 Ibid.
222 Australian Network of Environmental Defender's Offices, *Submission 60*.
223 Environmental Justice Australia, *Submission 65*.
224 See Ch 1.
225 See, eg, *Hamer v Belgium* [2007] V Eur Court HR 73; *Papastavrou v Greece* [2003] IV Eur Court HR 257; *Pine Valley Developments Ltd v Ireland* (1991) 222 Eur Court HR (ser A); *Oerlemans v The Netherlands* (1991) 219 Eur Court HR (ser A); *Fredin v Sweden (No 1)* (1991) 192 Eur Court HR (ser A); *James v United Kingdom* (1986) 98 Eur Court HR (ser A).

property rights. With respect to the proportionality part of the test, which asks whether there was a 'reasonable relationship of proportionality between the means employed and the aim pursued', the Court in *Fredin v Sweden (No 1)* stated that States enjoy 'a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question'.[226]

Conclusions

8.137 The common law has long regarded a person's property rights as fundamental. Property rights find some protection from statutory encroachments in s 51(xxxi) of the *Australian Constitution*, through the principle of legality at common law, and in international law. Section 51(xxxi) provides that any 'acquisition' of property must be on 'just terms'.

8.138 Some Commonwealth laws may be seen as interfering with real property rights. These laws impose upon property owners in different contexts and in different ways. The laws that raised the most controversy and debate among stakeholders in this Inquiry—and in a series of cases, some of which have gone to the High Court—were provisions in environmental laws imposing restrictions on the use of land and water. For example, the prohibition of 'action' such as clearing, ploughing and sowing land which has or will have a significant impact on the ecological character of a declared Ramsar wetland.[227] Concerns have been expressed that such laws may actually significantly reduce the commercial uses to which property can be applied.

8.139 Sometimes the complaints have been about state laws. This reflects the fact that state and territory governments are primarily responsible for the management of native vegetation and biodiversity, and that state governments have legislative power in relation to internal waters.[228] Most states do not have an equivalent provision to s 51(xxxi) of the *Australian Constitution*.[229] State legislation is not the concern of this Inquiry. However, concerns have been expressed about potential Commonwealth involvement through partnerships. The Commonwealth has sought to become involved in the management of water resources within Australia, sometimes by the provision of financial assistance.[230] Notably, the Commonwealth now has primary responsibility for

226 *Fredin v Sweden (No 1)* (1991) 192 Eur Court HR (ser A) [51].

227 See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 16(1); *Greentree v Minister for Environment and Heritage* (2005) 144 FCR 388.

228 Westlaw AU, *The Laws of Australia* (at 1 March 2015) 14 Environment and Natural Resources, '14.9 Water' [14.9.420].

229 For a discussion of moves to change the position in Western Australia see Lorraine Finlay, *Strengthening Property Rights in Western Australia* (13 March 2015) <www.freedomwatch.ipa.org.au>.

230 'In practice, the provision of financial assistance has been one of the principal mechanisms used by the Commonwealth to become involved in the management of the water resources of Australia': Westlaw AU, *The Laws of Australia* (at 1 March 2015) 14 Environment and Natural Resources, '14.9 Water' [14.9.430].

water management in the Murray-Darling Basin.[231] The Commonwealth may also financially assist states with respect to natural resources management.[232]

8.140 This Inquiry heard particular concerns about the EPBC Act and the *Water Act*. While the restrictions on the use of land and water brought about by these statutes do not necessarily amount to 'acquisitions' attracting s 51(xxxi) of the *Constitution*, there is evident concern about the impact of legislative interventions that are considered as interfering with a landowner's enjoyment of land—beyond minor interferences. For example, the Productivity Commission was concerned that regulation of native vegetation clearing on private property can result in a loss of value for the landholder.[233] It recommended that conservation aimed at achieving biodiversity and threatened species, which is over and above landholder responsibilities, should be purchased from landholders where it is cost-effective to do so.[234]

8.141 Although the Commonwealth is under no constitutional obligation to compensate for interferences that fall short of constituting 'acquisitions' of property, this does not mean that such interferences never warrant compensation or are always justified. 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) issues and broader concerns about the effect on property rights.[235] Further, the EPBC Act and the *Water Act* could be reviewed to ensure that these laws do not unjustifiably interfere with rights pertaining to real property. The ALRC is interested in comments on these suggestions and on other approaches to assessing whether Commonwealth laws unjustifiably encroach on rights pertaining to real property.

231 *Water Act 2007* (Cth).
232 *Natural Resources Management (Financial Assistance) Act 1992* (Cth).
233 'Impacts of Native Vegetation and Biodiversity Regulations', above n 86, 225.
234 Ibid 239 (Recommendation 10.9).
235 This is the approach that the Commonwealth took with respect to water in the Murray-Darling Basin as noted in the discussion in the judgments in *Lee v Commonwealth* (2014) 220 FCR 300; *Lee v Commonwealth* [2014] FCAFC 174 (18 December 2014).