INQUIRY into the planning, construction and management of the Western Sydney Airport project: SUBMISSION to the Finance and Public Administration References Committee

…and Justice for All

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[1.0] Terms of Reference

The scope of this Submission is within the Terms of Reference of the Inquiry, which include particular reference to "…probity planning…land acquisition….environment and heritage management…and any related matters". Thus, please note these observations…..

Ms STANLEY (Werriwa—Opposition Whip) has observed: "…small landowners in the Aerotropolis are left in limbo. This is causing unnecessary stress, anguish and mental illness. Landowners' demands are not unreasonable. They want certainty, transparency and confidence in the process and for their future". (*Hansard* House of Representatives, 20 October 2020 at 7531.)

A more detailed question on the subject was posed in the NSW Legislative Council in November 2020, which has not yet been answered at the time of making this submission:

> **"COMPULSORY LAND ACQUISITIONS**
>
> **The Hon. MARK BANASIAK (12:37**:36**):** My question without notice is directed to the Minister for Mental Health, Regional Youth and Women, representing the Minister for Planning and Public Spaces. Is the Minister aware that under proposed precinct plans for the aerotropolis, residents who live along Thompsons Creek have been given certainty that their land will be acquired, but residents who live along Wianamatta-South Creek on the same street have been given no such certainty despite the land already zoned RE1 Public Recreation and rendered unusable and unsaleable? Is the Minister also aware that that contradicts both a promise made by former planning Minister Anthony Roberts and Transport for NSW policies for handling compulsory acquisitions? Why is the Minister's department not treating all members of the area with fairness and respect, and why is her department acting in a contradictory matter?

> **"The Hon. BRONNIE TAYLOR (Minister for Mental Health, Regional Youth and Women) (12:38**:30**):** I thank the honourable member for his question, which is directed to the Hon. Rob Stokes, Minister for Planning and Public Spaces. As the question contained a large amount of detail I will take it on notice and provide an answer to him as soon as possible." (*Hansard* New South Wales Legislative Council, 24 November 2020.)

Mr Mark Latham MLC has reportedly, in extra-Parliamentary commentary, referred to the situation as "legalised theft". (Lachlan Leeming, 11 Feb 2021.)

I have been told that just in the Wiannamatta-South Creek area of the Western Sydney Aerotropolis and the Western Parkland City, approximately 200 landowners (almost all with 5 acre lots) have had some or all of their land rezoned by the New South Wales Government ("NSW") from "RU4 Rural Small Holdings", intended for land which is to be used for small scale rural and primary industry production, to a newly invented "Environment and Recreation" zone. The prior value of a typical 5 acre block approximated $5m, but since rezoning, no "sterilised" land has been sold because no buyer wants the uncertainty associated with the newly imposed restricted use. All land is held by freehold title, which is a form of common law title. The zoning and governing legislation does not purport to be a defeasement within the terms of any existing reservation to the granted title. There is no time limit to the rezonings, which could in principle last for a lifetime, at the exclusive discretion of NSW.

No doubt the Committee will receive submissions from aggrieved landowners verifying the nature and scope of these circumstances. It is not the purpose of this submission to detail or duplicate the particular claims of all the landholders in this regard, but rather to

proceed on the basis of the above general circumstances, in an attempt to clarify for the Committee what is materially happening at law, to facilitate your decision making.

[2.0] Property "Acquisition" v "Deprivation"

"Injurious affection" is an expression which is associated with the law of resumption: it is primarily concerned with depreciation to the value of retained land. It can be caused by a public authority in a variety of situations, one of which is, as in the subject instance, by the exercise of a law, rule or regulation, e.g. rezoning. Thus, a landowner's property can be said to be injuriously affected. Injurious affection is a form of deprivation of property, and a government may make provision for compensation for same. [1]

It is well known that s. 51(xxxi) of the Australian Constitution obliges the Commonwealth to make "acquisitions" of property on "just terms". It is also well established that this obligation does not extend to the States, and that the States have no identical constitutional provision binding them in the same way.

The High Court of Australia has pointed out that "deprivation of property" is wider in scope than "acquisition of property", because it is possible for a government to deprive an owner of property without actually acquiring anything for itself. The scope of the term 'acquisition' was explained as follows by Deane and Gaudron JJ in *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 119 ALR 577:

> 'Nonetheless, the fact remains that s 51(xxxi) is directed to 'acquisition' as distinct from deprivation. The extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property…"

The subject landowners who have had their land adversely rezoned are in the position of having been "deprived" of property rights (notwithstanding their continued ownership of title), while NSW has not "acquired" anything: thus for example, it has no new property right that it can trade with anyone. Contrast the example where a landowner grants an easement over a portion of his land: typically, there is a payment, for an agreed market value, made to the landowner and the new easement is noted on the title. Clearly, there has been an acquisition.

Note also that an essential aspect of "deprivation" in this context is the State's refusal to acquire the property right, either by resumption of the property *in toto*, or by acquiring the adverse restriction for fair (or indeed any) value.

It is of fundamental importance in appreciating the predicament of adversely affected landowners, to understand this distinction between acquisition and mere deprivation of property. By adversely rezoning properties, NSW sees itself to be freed from any obligation of compensation, which compulsory acquisition laws would mandate with regard to acquisition, because there is no acquisition.

The injustices perpetrated by this view have not gone unnoticed. Thus, the New South Wales Bar Association has rightly pointed out that "property rights are human rights" [2]. In its submission to a NSW Review in 2013, the Association noted that "...while there are many aspects of government conduct that may adversely affect the use and enjoyment of privately owned land, these activities do not form part of '*acquisition law*.'"

The High Court is also aware of this problem: "…If it were at all possible sensibly and properly to read the legislation as conferring a right to compensation upon the appellants I would be glad to do so. I cannot do that, but I can surely at least commend to the legislature the restoration to the appellants, and others similarly affected, of the right to compensation to which historically and morally they are entitled." [3]

Indeed, Mr Callinan AC has made extra-judicial commentary that, *inter alia*: "..restrictive covenants can be worth a great deal of money. There is a clear analogy between a legislatively imposed involuntary restriction on a land owner and one given for value and noted on the title. Each is equally a matter of public record and has all other relevant qualities in common. Yet under Australian law rarely does the former give rise to a right to compensation." [4]

[3.0] Breaching of Human Rights

The subject landowners' human rights are being breached by the NSW Government.

How so?

The *Universal Declaration of Human Rights* ("UDHR") provides:

> ***"Article 17.***
>
> *(1) Everyone has the right to own property alone as well as in association with others.*
>
> *(2) No one shall be arbitrarily deprived of his property."*

The injurious affection caused by imposition of recreation and environmental zoning, which impairs landowners' ability to use their land held under freehold title (or indeed leasehold title) is a deprivation of property rights in breach of Art. 17(2).

The refusal of NSW to provide compensation for such deprivation, or to acquire the land at pre-zoning market value, is by its very nature arbitrary, as well as a deprivation.

The UHDR, including Article 17, was adopted by the UN in 1948 when the President of the UN General Assembly was Australia's "Doc" Evatt, who had a hand in its drafting.
The UHDR has enjoyed bipartisan (i.e., by Labor and the Coalition) support at the Commonwealth level for the whole eight decades since 1948.

For example, Julie Bishop, a recent foreign minister, took this view in the 2017 *Human Rights Manual*:

> "*Australia considers all human rights to be universal. The UN Charter expressly recognises that human rights are universal in application and the UDHR is premised on this same view....*" [5]

So it seems that everyone in the world should enjoy the Article 17 right-not-to-be-arbitrarily deprived of their property, except for NSW landowners? What rot.

It gets even more ridiculous: given that native title holders, by the Commonwealth's adoption of Art. 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (the "Discrimination Convention") scheduled to the *Racial Discrimination Act* (Com.), have the protection of this human right in law, there is effectively a discrimination against common law title holders (of any race) as compared to native title holders. To use, for example, the words of Deane J. in *Western Australia v Commonwealth (Native Title Act Case)* [1995] HCA 47 at 79:

> "the moral entitlement to own property alone as well as in association with others and the moral entitlement to inherit which are referred to in Art 5 of the International Convention are "rights" for the purpose of the guarantee against racial discrimination contained in s 10 of the *Commonwealth Act*. Implicit in those moral entitlements is the "right" to enjoy immunity from being "arbitrarily dispossessed of [one's] property" which is expressly recognised by Art 17(2) of the Universal Declaration of Human Rights 1948."

The Commonwealth has also adopted the *Convention on the Rights of Persons with Disabilities* ("CPRD") into domestic law at a Commonwealth level by its inclusion in the *Human Rights (Parliamentary Scrutiny) Act 2011* s. 3(1)(g). Article 12(5) of the CPRD provides, in part: "…States Parties shall take all appropriate and effective measures to ensure…. that persons with disabilities are not arbitrarily deprived of their property".

Common law title holders in NSW do not have such protection, whether disabled or not.

Pointing out human rights breaches to NSW bureaucrats might cause those officers with a conscience to cringe, but they act simply to follow the directions of the minister under the *Environmental Planning and Assessment Act*, which itself, shockingly, contains absolutely no provision to have any regard for the human rights of landowners affected.
Uncompensated adverse rezoning is a human rights issue. NSW can make whatever environmental or other land use laws that it likes, but where it impairs the private property rights of landowners, it is their human right to receive compensation.

The rezonings are purportedly for the public benefit, so it is proper that the public should pay, rather than unlucky private landowners - and it must be asked: if the "public" doesn't want to pay for the planned public benefit, how much do they really want it?

[4.0] Brief History of the Development of Legislative Injustice in NSW

The County of Cumberland Planning Scheme Ordinance, which covered greater Sydney, including the area now occupied by the subject landowners, came into effect after World War II. Here are some pertinent observations…

Wilcox, M.R., *The Law of Land Development in New South Wales*, Law Book Co., (1967) at 206) observed:

> "The object of a planning scheme is to so regulate the use of land as to improve the area generally - aesthetically, socially, and economically. But, inevitably, some individuals must sacrifice for the common good. This they may do because their land has been reserved for a public purpose or zoned for a less profitable one, *It is proper and, in a democratic system almost essential, that the community as a whole compensate them for their individual loss*....."

At 277-278, Wilcox repeats and expands on this:

> "The essence of town-planning law is the subordination of the interests of the individual land-owner to those of the community as a whole. In a different way, this is true of most law. However, in contrast to most other fields of law, the restrictions imposed by [town planning] law do not fall impartially on all. On the contrary the very zoning which denies one owner the most economic use of his land, and thereby

> depresses its value, may substantially appreciate the value of his neighbours' land, differently zoned to permit that use. The law of supply and demand is most relevant to land values, especially in growing land metropoles.
>
> Fortune, therefore, dictates that some individuals shall incur substantial sacrifice in the common good while others will not only share the common gain but glean a substantial individual windfall as well."

Writing with respect to NSW legislation introduced in 1945, Wilcox notes that compensation is provided for "in certain cases" (...Part XIIA....included Div. 9, which provided for payment of compensation), but then notes (at 278):

> "In New South Wales the compensation funds have been so limited that compensation rights have almost disappeared. (The injustice to individuals is obvious....) *The elaborate structure remains but the fact is that, in the fifteen years since the first town-planning scheme was prescribed in new South Wales* (The first prescribed scheme was, of course, the County of Cumberland Planning Scheme Ordinance which came into force on 27th June, 1951.), *there is not one single reported case where compensation has been awarded by a court."* [Emphases added.]

Ashton & Freestone (Ashton P. & Freestone R., *Planning, Dictionary of Sydney*, 2008, http://dictionaryofsydney.org/entry/planning) write:

> "Released in 1948 but not legally gazetted until 1951, the County of Cumberland Planning Scheme was once described as 'the most definitive expression of a public policy on the form and content of an Australian metropolitan area ever attempted'. With some inspiration from the famous London plans by Patrick Abercrombie, the County Scheme introduced land use zoning, suburban employment zones, open space

> acquisitions, and the green belt to Sydney. The Main Roads Department supplied a ready-to-go expressway network.
>
> Yet, despite the best intentions, the Cumberland County Council was an overall failure. It met strenuous opposition from property owners and by the mid-1950s had 22,000 claims against it for 'injurious affection' arising from County zoning."

At this stage, there was an opportunity for legal practitioners to step in and pursue remedies for affected landowners. Notwithstanding Wilcox's observation (at 277-278) that "Common sense and justice demand" that the "sacrifices" imposed on individuals should be compensated, nothing happened. This professional failure might be attributed to two main causes:

1. Individual owners were generally unknown to each other, geographically dispersed, and had no television, internet, mobile telephones, fax machines or social media and nor, quite often, no landlines, to facilitate co-operation and mutual support; and
2. There had never been any jurisprudential reconciliation between the new "imported" planning laws and the underlying law of tenure, which is unique to NSW (and the other States). The resulting jurisprudential void blinded practitioners to the possibility of legal remedies arising from the State's legislative derogation from Crown grants of title, such derogation being in principle repugnant and so unenforceable.

Be that as it may, it seems that over the years, the protests faded in the face of bureaucratic inertia and political directionlessness, so that in the end, governments "got away with it". Subsequently, governance became more brazen.

Fricke QC (Fricke, G.L. QC, *Compulsory Acquisition of Land in Australia*, 2nd ed., Law Book Co. (1982) at 114-115) observed:

> "In the 1970's planning authorities attracted no doubt by the procedural simplicity of the making of an Interim Development Order, had consistently utilised them as a means of permanent planning control. In these circumstances many persons had been denied any right to compensation or the possibility of enforcing acquisition of land which they could not use for any effective private purpose. "

Mr Paul Landa MLA, a minister in the Wran government, was an avid user of Interim Development Orders. The term "Interim" suggests a fixed period, but was indeed a misleading euphemism, because such orders were in fact indefinite, as Fricke QC indicates. It is not surprising that the *Environmental Planning and Assessment Act* 1979 entrenched this same philosophy. It does not require compensation to be made to adversely affected landowners, it does not aspire to Wilcox's "common sense and justice", has no regard for their human rights, offers no remedy for injurious affection, has no pretence to equity and conscionability, and no natural justice type right to a genuine fair hearing. Indeed, the situation might be described as what the jurist John Wickham described as The *'Rule of No - Law'* [6].

Thus, while the original County of Cumberland planning legislation had the good intention of providing for the compensation of injuriously affected land, any such intentions are now legislatively absent, paving the way to a sort of hell for the subject landowners today.

It should not surprise the reader that in fact, the subject landowners are not the first to have their lands injuriously affected and human rights ignored. It's been happening for decades.

Indeed, according to Gadens:

> "The state government powers to downzone land are very broad. We suspect that there would be more outrage about the nature of these powers, but for the fact that, at any given point in time, only a small number of property owners are affected." [7]

For numerous published examples of such problems experienced by individuals in NSW and other States, please visit: https://adverse-rezoning.info. For a more detailed outline of many issues related to this submission, see also: *Arguments for Property Rights in Australia* (therewith).

[5.0] The Law of Tenure in NSW & Its Relevance

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

The law of tenure in NSW and the other Australian States differs fundamentally from that in the Australian Capital Territory, so the following observations do not relate to the latter jurisdiction. In NSW (and Australia), it commenced with the secret 1787 Letter of Instruction (now available on the internet) from King George III to Governor Phillip which, *inter alia*, granted Phillip the power to issue Crown grants of freehold and leasehold. The first Crown grant (of freehold title) was made to transported convict James Ruse, for a patch of 30 acres or so at Parramatta, not very far from the Aerotropolis.

Referring to "common law" title, as opposed to native title, which is not created by grant, Dr Fry observed:

> "No proprietary right in respect of any Australian land is now, or ever was, held, by any private individual except as the result of a Crown grant, lease, or licence and upon such conditions and for such periods as the Crown (either of its own motion or at the discretion of Parliament) is or was prepared to concede....." [8].

A Crown grant of title is an exercise of the sovereign Crown's power of alienation of its legal rights with respect to land. The Crown of course retains its sovereign power, and so if it chooses, can resume alienated property (i.e., proprietary) rights at any time.[9] This power is exercised by the Executive Government (typically the case, initially, in the form of the Governor by executive *fiat* – eg., Governor Phillip in New South Wales) and once established, the Legislature. These days, the planning minister, the Premier and other ministers, government authorities and planning bureaucrats, all represent "the Crown", together with the State Governor who acts on the advice of the government. It follows that where, for instance, the minister causes injurious affection to land by adverse rezoning, then that act has been done by the Crown.

Crown grants in NSW have all been made by the Crown in right of the State (formerly Colony), so the right of resumption rests exclusively with the State. The Crown in right of the Commonwealth has never had the constitutional power to issue Crown grants in NSW, and so has no right or power of resumption. Accordingly, only NSW has the power to compulsorily acquire granted estates in NSW.

Although the Crown is sovereign and can resume a grant at any time, it cannot derogate from (i.e., repudiate) the grant. It is a fundamental common law rule that a grantor cannot derogate from his own grant, and that includes the Crown as stated by the Supreme Court of NSW: **"...**the Crown cannot derogate from its own grant" [10] Cf. also this famous observation: "A grantor having given a thing with one hand is not to take away the means of enjoying it with the other".[11]

By using the mechanism of the grant as the basis for the law of tenure in NSW, the Crown has effectively denied itself the power to act arbitrarily to repudiate the terms of the grant. This is the essence of "alienation" of title which is fundamental to the Crown grant, and such alienation is virtually complete in the case of grants of freehold title. Thus, for example:

> The "most valuable incident" of an estate in fee simple (i.e. freehold) "is one that is now inseparable from it, *the unfettered right of alienation,* and along with this is the *right of free enjoyment."* [12]

The alienation of freehold title from the Crown is so complete, that it has been found by the High Court to extinguish native title.[13]

Thus also, according to the High Court:

> "..An estate in fee simple is, 'for almost all practical purposes, the equivalent of full ownership of the land' and confers 'the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination.' It simply does not permit of the enjoyment by anyone else of any right or interest in respect of the land unless conferred by statute, by the owner of the fee simple or by a predecessor in title." [14]

Note also Brennan J.'s *Mabo (No. 2)* case judgment [15]:

> "As the Crown is not competent to derogate from a grant once made(137), a statute which confers a power on the Crown will be presumed (so far as consistent with the purpose for which the power is conferred) to stop short of authorizing any impairment of an interest in land granted by the Crown or dependent on a Crown grant."

The unfettered right of alienation, which permits every act of ownership which can enter the imagination, does not simply fade away with time. In *Cooper v Stuart*[16], the Privy Council found that the common law rule against perpetuities was inapplicable to Crown grants of land in New South Wales, or to reservations or defeasances in such grants. That is, the legal force of a Crown grant does not come to an end at a particular point: it continues in perpetuity while the Crown exists, unless the Crown chooses to entirely resume the grant and subsequently cancel it.

Further, the High Court states that self-imposed inability of the Crown to derogate from its own grant provides for security of ownership:

> "Security in the right to own property carries immunity from arbitrary deprivation of the property....." [17]

The word "arbitrarily" has been interpreted by the High Court to mean not only "illegally" but also "unjustly" [18]

> "....In the development of the international law of human rights, rights of that kind have long been recognised. Thus, the Universal Declaration of Human Rights 1948, Art 17

included the following: "1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property." [19]

It might be observed in passing that the common law right of compensation for any resumption of uses inherent in Crown grants as noted here would be entirely consistent with Article 17 of the UDHR which was adopted by the General Assembly of the United Nations in 1948, by which time Crown grants had already been in use in New South Wales for over 150 years.

[5.1] Resumption

The principal land acquisition statutes in Australia are listed by MS Jacobs[20]. At 27, the author writes: "Most of these Acts provide for the right to acquire, the relevant acquisition procedure and for the payment of compensation". These Acts, initially enacted over a century ago when "zoning" was not even imagined, relate to the compulsory resumption of land *in toto*, so as a consequence "resumption" these days is ordinarily understood to be an acquisition of the freehold (or leasehold) title, whereas "resumption" is, by the nature of Crown grants, potentially infinitely variable.

A "resumption" in principle should relate to the reversion, or re-acquisition, of any particular entitlement associated with a grant to or by the Crown. It need not be a formal re-acquisition of the complete title, or be limited to the use of the term with regard to the compulsory acquisition of land for construction of public infrastructure. It could include any entitlement that "runs with the land". Grants of freehold and leasehold tenures carry with them a bundle of legal entitlements, and the mere fact that a resumption is made of some of these

entitlements, and not all, does not mean that there has been no resumption - only that there has been a partial resumption.

Indeed, it might be said that (putting the use of reservations aside), any legislative or regulatory instrument which has the effect, subsequent to the original grant of title, of limiting the proprietor's use and enjoyment of the subject land, is in the nature of a resumption of title, with its necessary consequences (in the absence of a reservation) of an entitlement of the title holder to compensation or rectification. Logically, this would also include any statute of limitations purporting to apply to claims relating to Crown grants of title.

[5.2] Common Law v Legislation

None of the cases relating to Crown grants of title (examined more extensively in *Arguments for Property Rights in Australia)* has ever been overruled by subsequent decisions. The common law is unchanged today. During the twentieth century, planning laws, initially modelled it seems on English laws, developed without reference to the fundamentally different law of Crown grant titles in the Australian States. There has never been any jurisprudential reconciliation between Crown grants of title and its related common law on one hand, and planning legislation on the other.

Now it might be said at this point, that, as a general proposition, legislation overrides the common law, so if planning legislation conflicts with property rights under common law, the legislation prevails. Such an argument is fallacious in this context: most fundamental is the fact that the Colony/State, by virtue of using Crown grants to alienate title, has, voluntarily, limited its own power, to in fact avoid sovereign risk for the proprietor.

The paradox here is that if the Crown can create a legal instrument which provides a grantee with an interest in land, which interest can exist in perpetuity, absent resumption, so that in the case of resumption, compensation must be paid, that instrument must by necessity eliminate the Crown's power to retrospectively legislate to be able to resume without compensation. If, on the other hand, the Crown does have that latter power, i.e., to effectively legislate *ex post facto* to be able to resume without compensation, thereby repudiating the grant, then the Crown does not, after all, have the power to create a legal instrument which provides a grantee with an interest in land, which interest can exist in perpetuity, absent resumption, so that in the case of resumption, compensation must be paid.

Consequently, if the latter case were to hold, namely where the Crown did have that power, to retrospectively legislate to be able to resume a Crown grant without compensation, then the security inherent in Crown grants and recognised by the courts since the early 19th century would really just be a colossal sham, as would be the role of reservations to grants, which are intended to permit resumption by defeasement without compensation. Indeed, such a conclusion would validate the legally baseless idea that all freehold and leasehold land is subject to an undocumented, inchoate reservation of indeterminate scope. Such a fundamental sovereign risk must be untenable. Dr Fry's "tenure by a Crown grant of freehold" would in effect be little more than a licence at the will of the Crown.

In short, the Crown's power to limit its own power - as exercised in the nature of Crown grants - is an aspect of its sovereignty. A decision by a court to deny that, would be to impose a new limitation on Crown (State) sovereignty. No court has done so.

The end result of unchallenged planning legislation might aptly be described as the already mentioned "Rule of No-Law".[6] It is in this context that, with no effective legal strategy apparently available to lawyers, their potential clients, namely unsuspecting and innocent landowners, whose land becomes injuriously affected by a planning instrument, discover gradually to their astonishment that the search for compensation will be swallowed up in a never-ending kafkaesque, progressively impoverishing, administrative tangle of "no-law" - a world away from "common sense and justice".

[6.0] Potential Remedies

Members of a Commonwealth Senate committee may be forgiven for being horrified at the egregious behaviour of the NSW State government with respect to these landowners.

The Western Sydney Airport Corporate Plan 2019-2020 was headlined:

> "**Purpose Statement**: To generate social and economic prosperity by working together to safely deliver a thriving airport precinct in Western Sydney".

This is a laudable purpose, consistent with Commonwealth policy, but injuriously affecting and arbitrarily impoverishing random local landowners can't be part of that. These problems have not been created by the Commonwealth, but exclusively by NSW. However, given such stated objectives, and the undeniable fact that these landowners' difficulties have been caused by decisions relating to this huge Commonwealth-led project, the Commonwealth should take steps to remedy these injustices. So, what might those remedies be?

NSW has the power to readily solve the subject injurious affectation injustices itself by simply offering to pay compensation for losses caused – and on that basis acquiring the right

to have its interest noted on title. Effectively, these would be partial resumptions, even if the land area of the title remained unchanged. If it were considered necessary to pass legislation to implement this, then NSW could readily do so.

NSW could also use its power to adversely rezone property more selectively, for the benefit of its budget.

NSW could also implement human rights legislation prohibiting its arbitrary deprivation of property. Consideration might also be given to incorporation of such legislation into the NSW Constitution by use of double entrenchment, so that the protection could only be overturned by referendum.

However, there is no sign that NSW has intentions of any such kind.

In such circumstances, the following possibilities remain.

[6.1] Potential Landowner Legal Action

At the outset, it might be asked why should perfectly innocent landowners be put into the position of having to fund and carry out litigation to remedy the uncompensated injurious affections imposed by NSW at all? This is especially the case when NSW is at all times in a position to remedy the position itself.

Having said that, two general avenues for court action present themselves:

1. Using the ISDS (not available to Australian owners); and
2. Initiating action at law or in equity in the Supreme Court of NSW.

[6.1.1] Investor-State Dispute Settlement

It might be that some of the estimated 200 or more affected landowners might be foreigners or have dual citizenship with respect to one of the many countries which has a free trade agreement ("FTA") with Australia. Any such landowners might well be entitled to make a sovereign risk claim for compensation with the support of their foreign native country against the Commonwealth for any loss or damage caused by NSW's injurious affection. Investor-state dispute settlement (ISDS) is a mechanism in an FTA or investment treaty that provides foreign investors (and reciprocally, Australian investors overseas) with the right to access an international tribunal to resolve investment disputes**.** A foreign investor in Australia, or an Australian investing overseas, can use ISDS to seek compensation for certain breaches of a country's investment obligations. For example:

- obligations setting parameters on expropriation of a foreign investor's property[21].

A double irony here is that:

- this avenue of compensation from the Commonwealth would not be available to any landowners who are Australian citizens; and
- in such a situation, the Commonwealth has no legal recourse available to it to secure reimbursement from NSW for monies paid out in such circumstances.

Thus, NSW behaviour poses a potential risk to Commonwealth coffers, particularly if such behaviour is not limited to the subject landowners near the Aerotropolis, but is more widely spread around the State. (Visit www.adverse-rezoning.info to see much more.)

A disincentive to making any such claim is the cost: approximately USD100,000 in advance. However, with the typical value of a five acre block reduced from an indicative $5,000,000 by say 80%, this potentially recoverable cost might not seem excessive.

[6.1.2] Litigation At Supreme Court of NSW

Someone else might suggest that the NSW Land & Environment Court would be the appropriate forum for any litigation, as the current facts do indeed relate to land and the environment (and it seems, recreation). The jurisdictional distinctions between it and the Supreme Court of NSW are acknowledged. However, any such potential action would not be an appeal against a rezoning under the relevant legislative scheme, but rather a challenge to the material validity of the legislation itself, relying on the law of tenure and the extensive and consistent existing authorities of the Supreme Court and High Court. Actions in the Supreme Court might be for damages, or in the Equity Division, for remedies including declarations, injunctions, or other orders pursuant to proprietary estoppel. The general details of such authorities and argument are provided in *Arguments for Property Rights in Australia*.

As observed already, all affected landowners would prefer to avoid such litigation, and it is indeed contrary to common sense and justice for government not to not find a non-litigious remedy in the circumstances.

So, let's consider options of initiative available to the Commonwealth.

[6.2] Ratification of Article 17 by the Commonwealth

The Commonwealth could at any time use its constitutional external affairs power to ratify Article 17 of the UDHR and bring it into domestic law. It would then be in a position to pass

legislation "covering the field" so that, by operation of s. 109 of the Constitution, the laws of NSW (or any other State) which conflicted with Article 17 would be rendered unenforceable to the extent of any such conflict.

Given the precedent that such a strategy has already been used by the Commonwealth to protect native title holders from having native title impaired or extinguished without compensation by any State, it must be achievable.

Having said that, such an initiative must apply to all States equally, and the political and legislative process would be extensive and no doubt take some years.

Thus for example, if the Commonwealth Government wished to ratify and bring into domestic law Article 17 of the UDHR, the *Human Rights (Parliamentary Scrutiny) Act 2011* could not apply as the law now stands, because the scope of "human rights" defined in s.3(1) of the Act excludes (by omission) Article 17. The result is that the Parliamentary Joint Committee on Human Rights would have no authority to enquire or otherwise act, and no Member would be required to provide a "Statement of Compatibility" with respect to any legislative instrument relevant to Art. 17. To remedy this, the Commonwealth might, if it wished, list Art. 17 as a source of "human rights" in the Act. It could at the same time ratify Article 17, ready to adopt it as domestic law within the process of the Act in due course.

Another consideration is that adoption of Art. 17 at the Commonwealth level would also serve to augment the protection provided by s. 51(xxxi) of the Constitution, which relates to "acquisition" only, not "deprivation".

That's just part of the story. Another inevitable aspect is the conduct of consultations with the States, not to mention the potential involvement of the Australian Law Reform Commission etc., so it could drag on……yet choosing not to adopt it would expose an hypocrisy in Australia's aforementioned bipartisan foreign affairs policy of support for the entire UDHR.

In the circumstances, it is submitted that your Committee recommend that the Commonwealth actively investigate the adoption of Art. 17 UDHR into domestic law.

In this context, another solution if available, which is more proportionate to the terms of reference of this inquiry, and capable of much faster implementation would be highly desirable…..and, it is submitted, here it is…

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

Given the scale and extent of the Aerotropolis project, there is a very significant degree of co-operation between the Commonwealth and NSW. Not being privy to the administrative details giving effect to such co-operation myself, it would nonetheless seem highly likely that one facet of same would be the making of grants by the Commonwealth to NSW under s. 96 of the Constitution in order to facilitate funding of various project initiatives being carried out by NSW. It might well be that substantial grants are not yet executed and so their terms are not yet final. This is information that the Committee should be in a better position to check.

In these circumstances, the Commonwealth would be in a position to include conditions to such grants requiring NSW, with regard to the general region of the Aerotropolis project and its land use planning, to, for example:

1. not arbitrarily deprive landowners of any of their pre-existing property rights without compensation;
2. provide a mechanism for prompt compensation to any affected landowners suffering hardship (akin to similar provisions for acquiring land in railway corridors etc.); and
3. provide to the Commonwealth on demand evidence of compliance with such conditions.

This sort of intervention is something that would require no legislative changes, and be achievable pretty quickly by the Commonwealth, requiring purely administrative actions, at minimal cost. If NSW complied with the conditions by respecting the property rights of owners (and possibly, removing some restrictive zonings which would cost NSW nothing), no further action by the Commonwealth would be necessary as far as the Aerotropolis region is concerned.

This initiative would also avoid the risk of the Commonwealth being exposed to any ISDS claims due to uncompensated injurious affections created by NSW in the Aerotropolis region.

Indeed, the Commonwealth could bask in the sunny fields of common sense and justice, equity and observance of human rights…….

As stated by the NSW Bar Association, “property rights are human rights”, and shouldn’t human rights, like charity, begin at home?

Thank you for reviewing this submission.

Peter Ingall *Peter Ingall*

Barrister 18 February 2021 See also: https://adverse-rezoning.info

Citations

1. For a general review of the nature of injurious affection, see Brown D., "The Differing Faces of Injurious Affection", [1972] 10,4 *WALR* 336.
2. Boulten, Phillip SC, *Submission of the New South Wales Bar Association to the Just Terms Compensation Legislation Review*, 2013.
3. Callinan J., *Chang v Laidley Shire Council* [2007] HCA 3. His judgment is a fine work of indignant *obiter dicta* on the topic.
4. Callinan, Ian QC, "For the sake of our heritage, the buck must stop somewhere", *The Australian*, 3 Jan 2008 at Summer Living p.10. Clipping of the whole article is viewable online at https://img1.wsimg.com/blobby/go/914d3b45-815f-4128-b43c-ec9d6e068b01/downloads/1c2ob78k1_730844.pdf
5. In her foreword to *Australia and Human Rights: An Overview* (4th ed. 2017) (the "*Human Rights Manual*"), the then Minister of Foreign Affairs, Julie Bishop wrote: "Australia will step up its efforts to promote and protect human rights around the world by serving as a member of the United Nations Human Rights Council, the world's peak human rights body, for the 2018-2020 term.

   It is in Australia's national interest to protect and promote human rights, uphold the international rules based order and shape the work of the United Nations. As a founding member of the United Nations, and one of only eight nations involved in the drafting of the Universal Declaration on Human Rights, Australia was, and is, of the view that human rights deliver peace, security and prosperity to Australia and the world....."
6. Wickham, John --- *Power Without Discipline The 'Rule of No - Law' in Western Australia: 1964* [1965] UWALawRw 4; (1965) 7(1) University of Western Australia Law Review 88 at 97: "Our statutes provide for the 'rule of no-law' varying from

rights without remedies, through no rights at all to inadequate rights or inadequate remedies…"

7. "Ask Gadens", *Planning Institute of Australia*, July 2013.
8. *Dr. T. P. FRY. B.O.L. (Oxon.). S.J.D. (Harv.). Senior Lecturer in Law in the University of Queensland,* LAND TENURES IN AUSTRALIAN LAW [1947] *ResJud* 158 – 167 at 159.
9. In the *Mabo No.2* case (*Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992)), the High Court observed at Brennan J. 45:

   "There is a distinction between the Crown's title to a colony and the Crown's ownership of land in the colony, as Roberts-Wray points out (74) ibid., p 625:

   'If a country is part of Her Majesty's dominions, the sovereignty vested in her is of two kinds. The first is the power of government. The second is title to the country ... This ownership of the country is radically different from ownership of the land: the former can belong only to a sovereign, the latter to anyone. Title to land is not, per se, relevant to the constitutional status of a country; land may have become vested in the Queen, equally in a Protectorate or in a Colony, by conveyance or under statute .....'"
10. *Cooper v Corporation of Sydney* (1853) 1 Legge 765 at 771-772.
11. *The Commonwealth v. Hazeldell Ltd.* [1918] HCA 75; (1918) 25 CLR 552, at p 563.
12. Kemp, Richard E. *Principles of the Law of Real Property in New South Wales*, 1903.
13. Neate G., *Indigenous land rights and native title in Queensland: A decade in review* (2001) at 18 observes: "In *Fejo v Northern Territory* (1998) 195 CLR the [High] Court decided that a valid grant of unqualified freehold title extinguished completely and for all time the native title rights and interests of indigenous Australians in respect of that land. [*Fejo v Northern Territory* (1998) 195 CLR 96 at paragraphs 43, 45, 55-

58 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ: paragraphs 95, 105-108, 112 per Kirby J.]"

14. In 1998, the High Court cited with approval Isaac J's 1923 observation in *Fejo v Northern Territory* [1998] HCA 58: see *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 42, per Isaacs J, quoting *Challis's Real Property*, 3rd ed (1911), p 218.
15. *Mabo and others v. Queensland* (No. 2) [1992] HCA 23; (1992) 175 CLR 1 F.C. 92/014 (3 June 1992) at para. 74.
16. *Cooper v Stuart* [1889] 14 App Cas 286 at 294.
17. Per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ. in *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 437, cited in the majority judgment of *Northern Territory v Griffiths* ([2019] HCA 7 at §71)).
18. In *Western Australia v Commonwealth (Native Title Act Case)* [1995] HCA 47; 1995 185 CLR 373, the High Court affirmed its observation to that effect in the *Mabo (No. 1)* case.
19. Ibid.
20. MS Jacobs, *Law of Compulsory Land Acquisition*, 2nd ed., (2015) at 26.
21. Australian Government – Department of Foreign Affairs and Trade "Investor-state dispute settlement (ISDS)" – Circular 2019.