

Chronic Housing Market Disequilibrium: Causes & Cure

Submission to Productivity Commission 2026, Housing supply regulation

By Peter Ingall

The Chair of the Productivity Commission has taken this view:¹

“I am a subscriber to the housing theory of everything which is that unaffordable housing sits at the heart of a lot of our economic, social and broader, environmental challenges we have let it slide for a very long time and unless we can make serious inroads into housing supply, I fear that our bright young people will be pushed out away from our most productive cities and our most productive jobs and that is a really bad thing for the nation.”

The Chair also makes adverse reference to excessive planning rules and approvals.

In the terms of reference, the Treasurer observes:²

“Australia has a housing shortage. We do not have enough homes, where people need them, at prices they can afford. Regulation serves an important purpose, but over the past several decades, the volume and complexity of regulations affecting the housing sector have increased significantly.”

In simple economic terms, there is a long-run housing inelasticity of supply: that is to say, the supply level of housing hardly adjusts to rising price levels, even in the long term. So, supply does not match demand, causing an imbalance. An efficient market would react to this imbalance with an increase of supply, to move towards equilibrium with demand. The general thrust of the Interim Report’s proposals are to reduce the current structural market rigidity of supply by reducing regulation.

Accepting all of the above, the question may be asked: how did we arrive at this position, where there is a chronic housing shortage? As the Chair has observed above, it has been sliding in that direction for “a very long time”. So, why has it been “sliding” for so long? How has regulation been allowed to develop to such an extent? Can the Productivity Commission enforce its recommendations? What is to stop the regulatory forces reasserting themselves (“sliding back”) after the Commission’s final report is published and gradually forgotten?

To answer such questions, it is necessary to understand the fundamental causes of the trends that have led to today’s situation. Housing is not personal property, like cars or handbags. It is an example of real property, with the proprietors having, to use the conventional phrase, an interest in land. The laws relating to real property can be very complex. I venture to say that the complexities of real property law are generally beyond the comprehension of economists. This is no shame, because the complexities of economics are self-evidently beyond the ken of lawyers generally, and as we shall see, many lawyers are additionally inadequately familiar with aspects of real property law. This “blind spot” at the intersection of economics and the

¹ Transcript: “Danielle Wood [Chair of Productivity Commission] on why housing matters for economic growth” in “Why fixing Australia’s productivity problem is a ‘game of inches’”, *Business Think*, UNSW Business School, 1 Sep 2026.

² Productivity Commission 2026, *Interim report - Housing supply regulation*, Interim report, Canberra, July at iv.

law has facilitated the gradual and extensive development of regulatory complexity, substantially unobserved until a crisis has been reached.

So, to understand the fundamental causes of what has been going on, and from that, what the ultimate cure is, it is necessary to explore some Australian history in relation to the private use of land. In this regard, attention might be drawn in passing to the *Productivity Commission Act 1998* (Com.) s 8(3) which provides in part that:

“The Commission, in all reports on matters referred to it, must provide a variety of viewpoints and options representing alternative means of addressing the issues in the report.”

This submission might be one such “alternative”. Also in passing, it may be noted that in fields of science such as economics, argument by authority is a *fallacy*, whereas in the field of law, argument by authority is *fundamental*. So, footnoting is used extensively in the legal parts of the submission.

THE THREE GREAT PRODUCTIVITY INNOVATIONS OF AUSTRALIAN REAL PROPERTY LAW

The “Big Three” productivity innovations in Australian real property law, which have helped drive the trending rise in living standards over a very long time are the:

1. law of tenure by Crown grant of estates in fee simple, since 1792 in New South Wales;
2. invention of Torrens title, since 1858 in South Australia; and
3. invention of strata title, since 1961 in New South Wales.

Each of these innovations:

- was rapidly copied by all the other States (or Colonies as they were prior to Federation in 1901), and have spread around the world since then;
- has relied for its integrity on the existence of an independent judiciary, which each Crown jurisdiction³ has had the good fortune to possess as part of the separation of sovereign powers evolved by the British; and
- is explained sequentially below, with the main focus being on the most fundamental innovation, the Crown grant of estates in fee simple.

The Crown grant of estates in fee simple and the invention of Torrens title created ideal conditions for the development of efficient markets in the development and trading of land in the Colonies/States, with almost zero sovereign risk.

³ That is to say, the jurisdiction of each of the six Colonies/States and since 1901, the Commonwealth.

In describing the details of the new New South Wales State Arms in 1906, with the Latin motto, translated: “Newly risen how brightly you shine”, the inclusion of wheatsheafs is explained thus:⁴

“The wheatsheaf, or garb,...contains several layers of allusion: to the agricultural wealth of New South Wales, especially wheat growing; and to the convicts, many of whom, through their toil in producing food for the early colony, were rewarded with grants of land upon which they established the farms and rural landscapes of eastern New South Wales. These allusions were clear to educated men and women at the time, and those with an interest in the political economy of New South Wales at the turn of the 20th century.”

It seems to also to have been clear to Commonwealth Members of Parliament in the first decade of federation, as evidenced by the different types of land tenure used in the Commonwealth territorial jurisdiction of the Australian Capital Territory on one hand, and in the States on the other.

Thus, s 9 of the *Seat of Government (Administration) Act* 1910 (Com.) states that:

“no Crown lands in the territory shall be sold or disposed of for any estate of freehold”.

The land tenure in the Australian Capital Territory was to be essentially different from what it would have become as part of New South Wales, that is, leasehold instead of predominantly freehold.

Leasehold tenure as adopted in the Australian Capital Territory allowed a high degree of planning control without violating these rights of real property owners, because of the flexibility of tenure and the relatively limited property rights of owners as tenants/lessees compared to fee simple tenure.

The Minister of Home Affairs, Mr King O’Malley, stated:⁵

“After many years of waiting, the Commonwealth is able now to come into its own kingdom, and to provide provisionally for the government of the Federal Territory.....

...this is merely a short machinery Bill, which we wish to get through to-night, if possible...The New South Wales Government have ceded to us an area of land for which we shall not have to pay anything, but we propose to resume that portion of the Territory which is now in private hands. The intention is that the Territory shall be governed entirely by the Commonwealth...”

The Commonwealth possesses the sovereign power to at any time repeal s 9 of the above Act, but has never seen the need to do so.

In the same debate, Dr Carty Salmon made the following observations about the expected scale of the new capital city:⁶

⁴ “Coat of Arms of New South Wales”, *Wikipedia*, citing Gullick, William Applegate, *The New South Wales Coat of Arms with notes on the earlier seals*, Government Printer, Sydney, 1907.

⁵ *Commonwealth Parliamentary Debates House of Representatives SEAT OF GOVERNMENT (ADMINISTRATION) BILL Second Reading* 10 Nov. 1910 at 5872ff.

⁶ *Ibid.* A century later, in 2010, Canberra’s population turned out to be slightly under 359,000.

“... Washington is, however, a city which, notwithstanding great natural advantages, still lags behind as compared with other great cities in the United States of America. The city is remarkable for the fact that it has progressed very little indeed during the long years during which the great Republic of which it is the capital has been advancing by leaps and bounds. The Minister has told us with a certain amount of pride that the population of Washington is 400,000. If the population of Yass-Canberra is to increase at the same rate that that of Washington has increased relatively to the enormous advance of the population of the United States, we may expect within the next two or three hundred years to have 100,000, or perhaps twice that number, of inhabitants there.”

While ambitions for the new capital as a political seat of power were great, expectations with respect to commercial development were appropriately modest.

Perhaps inspired by the Canberra planning experience, state governments and planners have in more recent decades aspired to greater use of central planning themselves, but without realising the fundamental relevance of the existence of freehold estates to the legality of state planning activities, and its fundamental difference from leasehold tenure in the Australian Capital Territory. This fundamental difference has been overlooked by State planning legislation. Freehold was understood to be an engine of economic growth, while leasehold, a lesser proprietary right, facilitated central land planning flexibility for the new capital city, to be funded by the States.

As to the topic of multiple titles on a lot, it was always possible at common law for a proprietor to subdivide an estate horizontally or vertically.⁷ However, the legislative invention of strata title in 1961 allowed for the first time the construction of separately titled units, each with its own share of the estate. This provided banks and other financial institutions such as building societies the ability to use each separate title as security for a mortgage. Thus the adoption of strata title not only made higher density development more practical, it simultaneously lowered the cost of capital and increased the availability of capital for mortgagors. Accordingly, it increased the supply and variety of housing options at a time of significant postwar immigration, when the slogan “populate or perish” had been championed by Australia’s first Minister for Immigration, Arthur Calwell.

So, what’s happened now? If these innovations in the law of tenure served to maximise the opportunity for an efficient market in land - not just for housing, but also for industrial, commercial, rural and other such uses – why is there in more recent times a chronic shortage of housing supply? To answer this, it is first necessary to understand the law of tenure’s “big three” productivity innovations, and secondly the legislative schemes which have developed without constraint since the mid-twentieth century.

It may be noted in passing that there are other important productivity innovations, such as Crown leasehold and Crown perpetual leasehold tenures. By the middle of the 20th century, there was a “bewildering multiplicity of tenures”, with over seventy (70) different kinds in Queensland alone.⁸ However, as these largely relate to rural lands rather than housing, analysis of same is excluded from this submission.

⁷ *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* [1971] HCA9; 124 CLR 73 per Windeyer J at [15].

⁸ Fry, Dr TP, “Land Tenures in Australian Law” [1947] *ResJud* 158 at 265-266.

Great Productivity Innovation #1: The Estate in Fee Simple (Freehold) (1792)

As taught in high schools (or at least used to be), the first Crown grant of a fee simple estate was issued in 1792 by Governor Phillip to Cornish farmer James Ruse, who as a convict, had his sentence of death commuted to transportation to New South Wales. Having arrived on the First Fleet, Ruse subsequently found his farming skills to be in demand in the new Colony. This initial grant set the model for the law of tenure which subsequently spread round the continent, and was a major factor in the development of Australia's economic wealth.

According to the Productivity Commission:⁹

“A freehold (or fee simple) estate is the most complete form of land interest that can be held by a person.”

This is a textbook-type statement. Thus for example, it is acknowledged in *Sackville & Neave 11th ed.*¹⁰:

“The term ‘estate’ means, for present purposes, the fullest set of rights of enjoyment of land: namely, the right of possession. In the case of the ‘estate in fee’ this was (3.12) ‘the maximum interest which a subject could have in the land’: *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 at 80 per Deane and Gaudron JJ....The common law developed the notion that there was a thing called the ‘estate’, quite separate from the land.”

These statements are true, but what does “the most complete form of land interest” mean exactly? That question is answered by reference to the common law as pronounced by the judges of our superior courts.¹¹

An estate in fee simple confers “the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination”¹² Thus: “An estate in fee simple is, “for almost all practical purposes, the equivalent of full ownership of the land”.¹³

This scope was exemplified in *Spencer v Commonwealth*¹⁴ where for the purpose of valuation, the High Court considered possible uses as a “freezing house”¹⁵; to enjoy the “view and the breezes of the ocean”¹⁶; for “factory or storage purposes”¹⁷; for “villa residences”¹⁸; “workingmen’s dwellings”¹⁹; “being held merely as a speculation”²⁰; “a

⁹ Productivity Commission 2016, *Regulation of Australian Agriculture*, Report no. 79, Canberra at 68, Box 2.2.

¹⁰ Brendan Edgeworth, Christopher Rossiter, Pamela O'Connor, Andrew Godwin & Leon Terrill, *Sackville & Neave Australian Property Law*, 11th ed., 2021, LexisNexis Butterworths. (“Sackville & Neave 11th ed.”.) at [3.8] and [3.12].

¹¹ NB: “Freehold” may take three possible forms : the estate in fee simple; the life estate; and an estate *pur autre vie*. The latter two types of tenure are relatively uncommon, so for general purposes freehold is treated synonymously with the fee simple estate.

¹² *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. Cited with approval in *Fejo (on behalf of Larrakia People) v Northern Territory* (1998) 195 CLR 96; [1998] HCA 58 at [43] and [93].

¹³ *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635 at 656, per Deane, Dawson and Gaudron JJ. See also *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 80, per Deane and Gaudron JJ.

¹⁴ 5 CLR 418. (“*The Spencer Case*”) (Not to be confused with *Spencer v Commonwealth of Australia* [2010] HCA 28.)

¹⁵ *Ibid.*, per Barton J at 436.

¹⁶ *Ibid.*, per Higgins J, exercising the original jurisdiction of the High Court, at 419.

¹⁷ *Ibid.*, per Higgins J at 420.

¹⁸ *Ibid.*, per Higgins J at 420.

¹⁹ *Ibid.*, per Higgins J at 420.

²⁰ *Ibid.*, per Higgins J at 422.

factory or some other enterprise requiring a considerable space”²¹; “subdivision into small allotments for workingmen’s dwellings”²²; and for a “factory site” and “workmen’s residences”²³.

Note also that today, professional valuers rely on a principal value as defined by their Asset Standards Valuations Committee, which expresses the essence of the common law authorities including in particular *The Spencer Case*.²⁴ The legal durability of *The Spencer Case* (1907) was recently re-affirmed by the High Court in *Northern Territory v Griffiths*:²⁵

In effect, in coming to a ruling on a just valuation, the High Court considered all the possible acts of ownership of a fee simple estate which could be imagined, including various types of residential or industrial use, or just for speculation.

Accordingly: “At common law, freehold ownership or, more precisely, an estate in fee simple is the most ample estate which can exist in land. As such, it confers the greatest rights in relation to land and the greatest degree of power that can be exercised over the land; and, for that reason, it ordinarily has the greatest economic value of any estate in land.”²⁶

The “most valuable incident” of an estate in fee simple:²⁷ “is one that is now inseparable from it, *the unfettered right of alienation*, and along with this is the *right of free enjoyment*”.

Put another way:²⁸ “the house of every one is to him as his castle ... as for his repose”.

The proprietary right to exercise free enjoyment of the estate extends to the exclusion of the Crown. The 1st Earl of Chatham, William Pitt, characterised the point memorably in Parliament in 1763, as adopted by Lord Denning MR in 1964 with the “justification by law” qualification:²⁹

“‘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.”

This rhetorical piece captures the idea that the Crown, having alienated the proprietary interest in the land to the “poorest man”, cannot violate his proprietary interest by entering the cottage without his consent. That is to say, the Crown may not trespass.

²¹ *Ibid.*, per Griffith CJ at 430.

²² *Ibid.*, per Griffith CJ at 430.

²³ *Ibid.*, per Isaacs J at 444.

²⁴ Per Administrative Appeals Tribunal (“AAT”): “Benefits assets test: valuation and equitable interests *Secretary to DSS and Langton*”, AAT Decisions No. 77 February 1994 at 1115.

²⁵ [2019] HCA 7 at [66]. Per the majority judgment: per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ; Gageler and Keane JJ separately agreeing.

²⁶ *Northern Territory v Griffiths* [2019] HCA 7 at 26-27 [67] per Kiefel CJ Bell J Keane J Nettle J Gordon J.

²⁷ Kemp, Richard Edgar, *Principles of the Law of Real Property in New South Wales: Intended for the Use of Students in Conveyancing*, Law Book Co., 1903 at 67 & 85. (“*Kemp’s Real Property*”.)

²⁸ *Semayne’s Case* (1604) 5 Co Rep 91a at 91b [77 ER 194 at 195] approved per Bell and Gageler JJ, *Roy v O’Neill* [2020] HCA 45, 272 CLR 291 at [31].

²⁹ *Southam v Smout* [1964] 1 QB 308 at 320.

In addition to terms used to describe the scope of the fee simple estate, including “full ownership”³⁰, “most ample estate”³¹, “free enjoyment”³² and limited only by the “imagination”³³, is the characterisation of a “bundle of rights”:³⁴ “Property, in relation to land, is a bundle of rights exercisable with respect to the land. The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle.” Further:³⁵ “What needs to be recognized is that property is a bundle of rights, and each right in that bundle is itself property the subject of acquisition”.

In this context, it is a fallacy to understand an estate in fee simple as merely being land as an object. In the words of the High Court:³⁶

“...property” does not refer to a thing; it is a description of a legal relationship with a thing^[26]. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing.”

Thus, the law of tenure by Crown grant governs the power of the proprietor with respect to land, being the “estate”.

In relation to housing, any householder assumes the right to lock the front door at night, or anytime, or to build a perimeter fence with or without a locked gate. The householder also presumes the right to not have anyone, such as a landlord or government official, barge in any time of the day or night when they feel like it. This is the right of peaceful enjoyment. The proprietor possesses this right as part of the fee simple estate. If the proprietor grants a lease, an essential part of that lease is always that the tenant is entitled to peaceful enjoyment of the tenancy for the duration of the lease contract. The proprietor can grant (or indeed, alienate) this right to the tenant because of his own entitlement of same as part of the estate.

The word “home” is used in the Interim Report forty (40) times, so it’s clearly very important to the Productivity Commission, in the context of its terms of reference. The right to peaceful enjoyment is probably the single most important legal entitlement which makes a house a home. This right is not created by some local government regulation or State legislation, both of which may, in law, be abolished at any time. It is a secure right which exists due to the law of tenure by Crown grant of the freehold estate, and runs with the land.

This right to peaceful enjoyment is protected by the common law tort (civil wrong) of trespass to land and may be illustrated by reference to a real life example where an outraged [redacted] mum, self-represented, successfully sued New South Wales in the Supreme Court for trespass by police on her property.³⁷

³⁰ *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 per Gummow and Hayne JJ at [127], French CJ specifically concurring on the point, at [100], as did Kirby J at [224] and Crennan J at [439]; *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 at [50] (“The Blue Mud Bay Case”).

³¹ *Northern Territory v Griffiths* [2019] HCA 7 at 26-27 [67] per Kiefel CJ Bell J Keane J Nettle J Gordon J.

³² *Kemp’s Real Property* at 67 & 85.

³³ *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. See also: *Fejo (on behalf of Larrakia People) v Northern Territory* (1998) 195 CLR 96 at [21]; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 176, per Gummow J.

³⁴ Per Rich J, *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 284. See also:

Yanner v Eaton (1999) 201 CLR 351, 365–366; *Commonwealth v Western Australia* [1999] HCA 5 at [284] per Callinan J; *Smith v ANL Limited* [2000] HCA 58 at [23] per Gaudron and Gummow JJ; *Northern Territory v Griffiths* [2019] HCA 7 at 27.

³⁵ *Commonwealth v Western Australia* [1999] HCA 5 at [284] per Callinan J

³⁶ *Yanner v Eaton* (1999) 201 CLR 351 at [17] citing: [26] Bentham, *An Introduction to the Principles of Morals and Legislation*, ed by W Harrison (1948) at 337, n 1; K Gray and S F Gray, “The Idea of Property in Land”, in Bright and Dewar (eds), *Land Law: Themes and Perspectives*, (1998) 15 at 15.

³⁷ Full details are in *Romani v State of New South Wales* [2023] NSWSC 49 per Wright J.

Box 1

On 20 August 2021, during the COVID-19 pandemic, information was received at Lismore Police Station which suggested that a local resident, Sanchia, might be seeking to have pamphlets printed in relation to organising a public gathering or protest on 31 August 2021. The NSW Police decided to pay a visit at her home to get further information about her possible intentions in this regard.

Sanchia was the registered proprietor of the house and land where she resided with her children, aged 19 and 14 years. At the time two policemen attended, Sanchia was not at home, but her two children were. The policemen ignored “No Trespassing” signs and jumped over the locked gate to enter. They had no warrant which entitled them to enter the property: “No trespassing” signs in such circumstances apply to policemen (officers of the Crown) as much as to anyone else.

The police officers spoke to the 19 year old who “felt very uneasy, uncomfortable and distressed because she perceived it to be intimidating.” After a short conversation the officers left. They “did not at any point draw or point their service revolvers or any other weapons nor did they give any indication that they considered using them”. The judgment continues: “[The 19 year old] returned to her younger brother who had been watching what occurred from the veranda. She understood that he felt anxious and worried by the events and she herself felt mentally and physically shaken, especially when the officers initially ignored her request to leave the property, as well as intimidated and disrespected in what should have been the safety of her family’s home and property.” Further: the 19 year old “gave evidence that, as she understood it, the police officers’ actions caused her to react as she did, in part at least, because of the past experiences which she and her family had suffered as a result of a violent home invasion in 2016 when Sanchia, and the 19 year old’s elder sister and younger brother were chased by an intruder who came into their house and tried to kill them and shot one of their animals.”

[The mother] “Sanchia understood that the police officers’ actions had caused her children what she described as ‘great anxiety, distress, worry and trauma’ and she herself felt that her and her family’s privacy had been ‘grossly invaded’ and ‘their liberties to abide peacefully within [their] own property and home was grossly infringed’. In addition, Sanchia felt that the conduct of the officers was ‘intrusive’, that they acted in ‘a disturbing manner’ and that ‘they used their powers to intimidate’. She was perplexed as to why police officers would jump her padlocked gate when ‘no trespass’ signs were clearly displayed or would see this as acceptable or lawful.”

The judge assessed from the evidence that the trespass lasted for only three to five minutes and that the police thought (mistakenly) that they were entitled to enter the property. The full factual details may be found in the judgment, along with a very good analysis of the law of trespass.

The point is that the Court ordered New South Wales to pay Sanchia: general damages of \$7,500; plus aggravated damages of \$5,000; plus exemplary damages of \$5,000, totalling \$17,500 plus interest. Go girl!

The judiciary takes the interference with the proprietor's peaceful enjoyment of the estate by trespass by the Crown or others very seriously.

Limitations to Acts of Ownership

While, as noted above, the Productivity Commission states that “fee simple estate is the most complete form of land interest that can be held by a person”, there are limitations to the permitted acts of ownership. Here are some key limitations.

1. The physical boundaries as described in the grant may be fixed or flexible, but are always there.³⁸
2. The prohibition on private nuisance acts to stop neighbours from imposing nuisances on each other. Dixon J observed:³⁹

“It may be conceded that interferences of a physical nature, as by fumes, smell and noise, are not the only means of committing a private nuisance. But the **essence of the wrong** is the detraction from the occupier's enjoyment of the natural rights belonging to, or in the case of easements, of the acquired rights annexed to, the occupation of land. The law fixes those rights.”

In the same case, Latham CJ stated:⁴⁰

“I agree that the category of nuisance is not closed and that if some new method of interfering with the comfort of persons in the use of land emerges the law may provide a remedy.”

Councils may impose regulations managing or prohibiting nuisances public and private, but they exist within the scope of the common law.⁴¹

3. Resumptions. The Crown in right of a State may resume any or all of an estate at any time, although only without derogation from the Crown grant. (“Derogation” is explained below.)

Doctrine of Derogation from Grant

Having considered the unrivalled scope of proprietary rights which flow from the fee simple estate, it has been noted that every fee simple estate exists by a grant from the Crown. The next key point is to understand the existence and fundamental importance of the **common law doctrine of derogation from grant**, which doctrine is pretty straightforward:⁴²

³⁸ *Verrall v Nott* (1939) 39 SRNSW 89; *Southern Centre of Theosophy Incorporated v The State of South Australia* [1982] 1 All ER 283; [1982] AC 706.

³⁹ *Victoria Park Racing and Recreation Grounds Co. Ltd v Taylor* (1937) 58 CLR 479 at 506-507. (The “Victoria Park Racing Case”).

⁴⁰ *Victoria Park Racing Case* at 493.

⁴¹ See *Slattery v Naylor* LR 13 App Cas 446 (The “Slattery Case”).

⁴² *The Commonwealth v. Hazeldell Ltd.* [1918] HCA 75; (1918) 25 CLR 552, at p 563. See also: Per Lord Denning MR, *Molton Builders Ltd v Westminster City Council* (1975) 30 P & CR 182 at 186, cited in *Rees v Earl of Plymouth & Ors* [2020] EWCA Civ 816 at [19], which

“A grantor having given a thing with one hand is not to take away the means of enjoying it with the other”.

This principle applies to the Crown. It has been so declared by the Supreme Court of New South Wales, the Privy Council and the High Court of Australia. According to the Supreme Court: “The Crown cannot derogate from its own grant”.⁴³ The Privy Council, in considering Crown grants of estates in fee simple issued in 1810 and 1823 in the “district of Sydney” described it as “a well known and admitted principle of law”.⁴⁴ According to the High Court: “As Chitty says [A Treatise on the Law of the Prerogatives of the Crown (1820), p125]: ‘the King cannot take away, abridge, or alter any liberties or privileges granted by him or his predecessors, without the consent of the individuals holding them’”.⁴⁵ Note also the observation of Brennan J in the *Mabo (No. 2) Case*:⁴⁶

“As the Crown is not competent to derogate from a grant once made, 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.”

“It is evident that the acquisition of property is of little benefit, unless accompanied with a prospect of retaining it without interruption.”⁴⁷ Put another way: ⁴⁸ “Security in the right to own property carries immunity from arbitrary deprivation of the property”.

The principle has been described as one of ‘common honesty’.⁴⁹

Clearly, the alienation of an estate in fee simple by the Crown is designed to provide security of tenure to the grantee proprietor, his heirs and successors forever. Being sovereign, the Crown in right of the State may resume all or any part of any grant at any time, but it must do so without derogating from its grant. It cannot plead ignorance of this limitation, which it has imposed on itself. Over three hundred years ago, the Full Court of Star-chamber found that:⁵⁰ “*ignorantia juris non excusat* (especially in sheriffs and other ministers of law and justice)”.

A unique feature of any Crown grant of fee simple estate is that the rule against perpetuities is not applicable.⁵¹ The estate does not simply wear out or diminish or expire over generations: it lasts for ever. The estate may be subdivided, but the grant continues to apply with respect to each subdivided portion. The Crown remains sovereign, so may resume all or

further cites: *Johnston & Sons Ltd v Holland* [1988] 1 EGLR 264, 267; *Platt v London Underground Ltd* [2001] 2 EGLR 121, 122. See also: *British Leyland Motor Corporation v Armstrong Patents Ltd* [1986] AC 477 per Lord Templeman; *Aussie Traveller Pty Ltd v Marklea Pty Ltd* [1998] 1 Qd R 1 at 8 per McPherson JA citing in turn *O’Keefe v. Williams* (1910) 11 C.L.R. 171 at 191 and 192; and *Bankstown Trotting Recreational Club Ltd v Chisholm* [2016] NSWCA 274 at [82]-[88] per Beazley P, Bathurst CJ and Sackville AJA; *Project Blue Moon Pty Ltd v Fairway Trading Pty Ltd* [2000] FCA 127 at [11].

⁴³ *Cooper v Corporation of Sydney* (1853) 1 Legge 765 at 771-772.

⁴⁴ *Lord v The City Commissioners* (1856) 2 Legge 912; (1859) 12 Moo PC 473, 14 ER 991. See also *Ex Parte Smart* [1867] 6 SCR 188 (NSW).

⁴⁵ *The Native Title Act Case*, (1995) 183 CLR 373 at [45].

⁴⁶ *Mabo and others v. Queensland (No. 2)* [1992] HCA 23; (1992) 175 CLR 1 F.C. 92/014 (3 June 1992) at [74] per Brennan J. (The “*Mabo (No. 2) Case*”).

⁴⁷ *Kemp’s Real Property* at 501.

⁴⁸ 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].

⁴⁹ *Commonwealth of Australia v Yunupingu* [2025] HCA 6 per Edelman J at [321], citing *Harmer v Jumbil (Nigeria) Tin Areas Ltd* [1921] 1 Ch 200 at 225.

⁵⁰ *Countess of Rutland’s Case* (6 Coke 52b).

⁵¹ *Cooper v Stuart* 1889] UKPC 1, (1889) LR 14 App Cas 286, 14 App Cas 286, [1889] UKPC 16.

part of the estate at any time, but only on terms that avoid derogation from its grant – that is to say on payment of the full market value of the resumed property interest. State legislation governing the process of resumption and compensation necessarily exist to honour these obligations, although this point is typically forgotten these days.

In relation to the Crown's exercise of statutory powers to resume estates in land, it has long been established that proprietors justifiably dissatisfied with sums paid by the Crown may appeal for a higher award of compensation.⁵²

Great Productivity Innovation #2: Torrens Title (1858)

The grant of fee simple estates provides proprietors with great freedom to use the land as they wish and to deal with it as they wish. Over the years and decades, any particular estate (or subdivided portion of it) might be sold or inherited many times over. This posed a potentially significant problem in relation to the ever-extending “chain of title”.

The opportunity and need to address this gradually developing market inefficiency arose because of the tradeability of the fee simple estate and the expanding number of proprietors, which deepened the real estate market. Thus, in New South Wales Proper (i.e., excluding Van Diemen's Land, Victoria and Queensland) 6,846,773 acres (over 10,000 square miles) had been alienated by the Crown (as freehold or leasehold estates) by 1859.⁵³

South Australia's formation was indeed unique in a variety of ways. Unlike the other five Australian Colonies, it was established as a free settlement, not a convict settlement. Amongst its special features was a requirement and expectation that the new settlement would be developed at no cost to the “Mother Country”.

Administrative power was divided between a Governor who represented the Crown, and a Resident Commissioner, reporting to Colonisation Commissioners. The Resident Commissioner was responsible for the survey and sale of land and for the migration arrangements and funding. Funds raised were to be put towards an Emigration Fund for poor people.

These arrangements were made in response to lobbying of supporters for the creation of the colony, and were initially set out in the *South Australia Act* (UK) 1834.

Clearly in these circumstances, the settlers were keen to ensure the commercial viability of the new Colony and the tradeable liquidity of real estate, the ownership of which was widely dispersed as a matter of policy. Given these circumstances, it is really no surprise that the world first invention of Torrens title was in South Australia.

The Torrens system makes the conveyance of land simpler, cheaper and much more reliable than the “old system” where on every conveyance, a chain of proprietors back to the original grantee had to be correctly identified and evidenced.

⁵² Bennett, JM, *Sir Alfred Stephen: Third Chief Justice of New South Wales 1844-1873*, (2009) at 177-178.

⁵³ “Land Tenure and Settlement”, *Year Book Australia 1911* (Australian Bureau of Statistics 1301.0, s.1 at [9]).

Yet, the estate itself which is the object of title, whether it be an estate in fee simple or leasehold, is always as characterised by the Crown grant:⁵⁴

“The Real Property Act, *while not altering the law as to the estates or interests which may be acquired in land*, yet made a vast difference....in the manner in which those interests may be dealt with in the case of all land subject to its provisions.”

This observation is consistent with the long title of the *Real Property Act* 1900 (NSW):

“An Act to consolidate the Acts relating to the declaration of titles to land and the facilitation of its transfer”.

Torrens title was quickly adopted by all the other colonies, and later overseas. First adopted in New South Wales by the *Real Property Act* 1862, it adopted “not a system of registration of title, but of title by registration”.⁵⁵ Provided a purchaser is registered, his ownership is conclusive and indefeasible, regardless of the existence of any defect in the chain of title, which is no longer required to be substantiated.

As a system to efficiently and reliably manage the recording and conveyance of titles, the Torrens system in no way derogates from the Crown grants of freehold or leasehold estates. However, given that the typical purchaser has only two things in mind, namely that he acquires valid title, and to the correct site, the habitual focus is naturally on the registration of title, rather than on the Crown grant itself.

With respect to conveyancing and land ownership in the States, the undoubted success of the Torrens system has resulted in Crown grants tending to be “out of sight, out of mind” as far as practitioners and proprietors are concerned. This passive myopia might be a factor contributing to the relative invisibility of the Crown grant to many proprietors. Have you seen the Crown grant for your property or your family’s property, which describes your estate?

Having said all that, the efficiency of Torrens title, as the Great Productivity Innovation #2 is also being eroded, reducing the market efficiency of conveyancing. This shall be explained subsequently.

Great Productivity Innovation #3: Strata Title (1961)

Before the introduction of strata title legislation, individual ownership of multi-dwelling properties (typically apartments) was managed by the techniques of a Tenants in Common agreement, or by Company Title. Cordato⁵⁶ notes that not only were these arrangements complicated, but banks and non-banking financial institutions were reluctant to finance buyers because common ownership or share ownership was not satisfactory security for advances. Cordato explains further:

⁵⁴ *Kemp’s Real Property* at 5. Emphasis added.

⁵⁵ *Breskvar v Wall* (1971) 126 CLR 376 at 385 per Barwick CJ; *Castle Constructions Pty Limited v Sahab Holdings Pty Limited* [2013] HCA 11 at [20] per Hayne, Crennan, Keifel and Bell JJ.

⁵⁶ Cordato, Anthony J., “How strata title solved the housing crisis”, Cordato Partners 28 Jan. 2025. See also: *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* [1971] HCA9; 124 CLR 73 per Windeyer J at [15].

“Property developers and the Law Society of NSW worked with the NSW State Government to solve the problem. They came up with the Conveyancing (Strata Titles) Bill....The Conveyancing (Strata Titles) Act 1961 commenced on 1 July 1961. It was a great success. A building boom followed....

Strata title has proved to be an excellent solution to the problem of providing security of title in multi-dwelling buildings.

Strata title has spread across the world. The 1961 *Strata Titles Act* has been the template in most places.

By the 1970s, it was the law throughout Australia, and in New Zealand. There are currently over 340,000 active strata schemes in Australia.”

The strata title statutory rights of subdivision are complementary to the alienated rights of the proprietor under each grant, and so constitute no derogation therefrom. By enhancing the marketability, financeability and potential variety of uses of land, strata title expanded the possible range of “acts of ownership”.

Indeed, it might be concluded that strata title was, in terms of its innovation and wide adoption around Australia and internationally, comparable to that of Torrens title approximately a century earlier.

The price elasticity of supply for housing measures how responsive the quantity of housing supplied is to a change in price. The percentage change in housing quantity is divided by the percentage change in price. Inelastic supply (<1) is where demand drives prices faster than the numbers of new dwellings built. Elastic supply (>1) is where dwelling supply responds strongly to an increase in prices, keeping price increases relatively modest.

A study of the housing price elasticity of supply (“HPES”) in Australia for the period 2001 to 2019 in 341 spatially disaggregated local government areas (“LGAs”) found that the HPES for houses is inelastic, “averaging around 0.3, while it is much higher, at around 1.0 on average, for units”.⁵⁷ Because virtually all units are strata titled, whereas detached houses are not strata titled, these results suggest a big gap in the elasticity of supply between the two, which underlines the continuing great importance of strata title with respect to housing market supply.

There is one qualification. It is reported anecdotally that regulations associated with strata title have become significantly more complex over the decades. This might well contribute to inelasticity of supply of units, particularly in lower price ranges. If it has not already done so, the Productivity Commission might wish to consider consulting with solicitors with long experience in the field, such as Cordato Partners, to determine the extent to which some such regulation should be pared back.

THE PATH TO HOUSING DISEQUILIBRIUM & PRODUCTIVITY DESTRUCTION

⁵⁷ Melser, Daniel, Ong Fijorj, Rachael & Wood, Gavin, “Exploring the many housing elasticities of supply: The case of Australia *Cities*, Vol. 128, (2022) 103817.

Having outlined the three great productivity Innovations of Australian real property law, attention may turn to the causes of the development of the now chronic housing market disequilibrium and productivity destruction.

So, how did we get from there to today where, as the Treasurer noted in the Terms of Reference: “over the past several decades, the volume and complexity of regulations affecting the housing sector have increased significantly”? Indeed, the privately published *Australian Zoning Atlas*⁵⁸ estimates that as of July 2026, approximately “81% of residential land in the average capital city is highly restricted”.

Each State has its own story, but on this topic all six have a lot in common. Wilcox⁵⁹ outlined the development of town planning law in Australasia:

“The first true town planning legislation in Australasia was the *New Zealand Town Planning Act* 1926. The Act was obviously modelled upon the English legislation....Curiously it was the less populous States which pioneered town-planning legislation in Australia. The first Australian legislation to provide for planning schemes on private land was the *Western Australian Town-Planning and Development Act*, 1928.....It was closely modelled on the New Zealand Act of 1926...the first town-planning Act in Queensland was the *City of Mackay and Other Town-Planning Schemes Approval Act* of 1934..... Tasmania entered the town-planning field in 1944 with its *Town and Country Planning Act*. The scheme of the Act followed that of the other states..... [with also in same year, the] *Town and Country Planning Act*, 1944 of Victoria.....Not until 1955 [in South Australia] was statutory provision made for a comprehensive development plan for Adelaide...

.....it is obvious that the basic scheme of legislation in the United Kingdom, in New Zealand and in the other Australian states is similar. That scheme was adopted by the New South Wales legislation of 1945.”

Zoning as a planning instrument was first used in the United States in 1916.

The focus here shall be on New South Wales, as the most populous State and an exemplar of the trend.

The path to chronic housing market disequilibrium commences at the end of World War II, in 1945, with the *Local Government (Town and Country Planning) Amendment Bill* NSW County of Cumberland Planning Scheme (“Scheme”). Wilcox explained key aspects of the Scheme:⁶⁰

“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.....”

⁵⁸ <http://zoning.org.au/>

⁵⁹ Wilcox, M.R., *The Law of Land Development in New South Wales*, Law Book Co., (1967) at 181ff, (citations omitted).

⁶⁰ Wilcox, M.R., *The Law of Land Development in New South Wales*, Law Book Co., (1967) at 206.

Wilcox repeated and expanded on this:⁶¹

“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 metropolises.

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....

Wilcox also noted that “Common sense and justice demand” that the “sacrifices” imposed on individuals should be compensated”. Wilcox observes further:

“the then Minister for Local Government, the Hon. J.J. Cahill M.L.A., made much of these provisions. He said of them: ‘it is provided in the bill that such schemes may contain provision for the recovery by the councils of a proportion of the increased value of the land brought about by the scheme - called ‘betterment’. When hon. members receive the bill I invite them to pay this provision particular attention because it is something that has been discussed by reformers in the past. Where the operation of a town-planning scheme improves land values the owner of the land is not to receive the full advantage of the extra value added to it by this public service. Provision is made in the bill for the major portion of the increase in value to be taken by the council, and for the money to be used to compensate those whose lands have been injuriously affected, or to further the schemes that the councils have prepared.’ *New South Wales Parliamentary Debates*, vol. 176 at 1720-1721.”

It is immediately evident that the introduction of zoning and “betterment”, being potentially “a substantial individual windfall” and “worsenment”, being an injurious affection which was a “substantial sacrifice in the common good” was done without any reference at all to the existing law of tenure by Crown grant of freehold estates. Provision for worsenment compensation was based merely on “common sense and justice”.

Had the provision for worsenment compensation been carried out, then it might have been reasonably argued that the derogation caused by a zoning inflicted injurious affection was remedied. However, this did not happen. Further, insofar as zoning worsenment restricted the use of land for housing, it not only cut off a source of land supply, but it left the uncompensated property owners, who might have very often been put in technical breach of their mortgages due to the inevitable plunge in land value, without the means to acquire alternate land for housing development or any other use.

The betterment tax and worsenment compensation completely failed. Wilcox reported:⁶²

⁶¹ *Ibid.*, at 277-278.

⁶² Wilcox at 278.

“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, there is not one single reported case where compensation has been awarded by a court.”

Similarly, Ashton & Freestone⁶³ wrote:

“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 Since 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.”

There is no evidence that any property owner was ever paid anything in compensation for adverse rezoning, worsenment, sterilisation or injurious affection. (Please choose your preferred term.) The idea of being able to confidently estimate value changes of particular properties caused by zoning was always completely impractical. Properties subjected to betterment and worsenment are not in a closed system. They exist in an open system, with market values interacting with other unzoned properties. The difficulty of accurately valuing the effects of zoning changes in dynamic markets where all sorts of other factors are continuously affecting market values, whether it be changes in population, interest rates, the weather, technology, export terms of trade, economic factors generally or any number of other possibilities must be acknowledged.

Many years later, the *Henry Tax Review*⁶⁴ recommended against the use of betterment taxes, because they are economically inefficient and prone to disputation.⁶⁵

This did not stop the Dan Andrews government from introducing a so-called “Windfall Gains Tax” in 2021, which was to levy 50 percent of any uplift in value in a property over \$100,000 gained by a rezoning. This was a betterment tax, although as a matter of record, no lawyer, accountant or economist in Victoria realised this publicly. The potential effect on housing prices and supply was explained by one interstate observer: :⁶⁶

“....The proposal also increases development risk. Not every rezoning application is completely successful, or successful at all. The profit from the successful applications has to underwrite the losses from the unsuccessful ones. To economically justify paying tax on successful rezonings, the developer will be forced to increase their win/loss ratio, leaving deserving, but more marginal, proposals, untouched.

It is frequently foreseeable that some areas will eventually be rezoned as urban densities increase. Land and houses near transport and retail hubs are likely to be rezoned for higher-density dwellings, as is rural land on the edge of towns. This

⁶³ Ashton P. & Freestone R., *Planning, Dictionary of Sydney*, 2008. (Citation omitted.)

⁶⁴ The *Australia's Future Tax System: Report to the Treasurer- Part Two: Detailed Analysis 2009 "Henry Review"* at Box E4-2

⁶⁵ Betterment taxes and their pitfalls are explored in detail subsequently at Part II, Chapter 7.

⁶⁶ Young, Graham, “Victorian ‘windfall tax’ kicks entrepreneurs and home buyers”, *Australian Financial Review*, 2021.

potential uplift will figure in all purchasing decisions in these areas and be part of the contract value.

Because the tax raises costs and stifles development, it will suppress supply, forcing prices up. It will also force a developer to charge a higher price for the end product. Development feasibilities do not count company tax or personal tax as a cost, but they do count taxes levied on the way through, such as land tax, stamp-duty and GST. A developer who rezones a property and increases its value effectively buys more cheaply, making it easier for them to bring affordable product on stream. In fact, they will probably end up sharing some of their good fortune with the purchasers. Increasing tax on the way through means they are going to load all of that onto the end product, or they won't do the project at all.

Ironically, to combat housing affordability, the Victorian government has a number of schemes to lower costs for developers and subsidise build-to-rent schemes. So on the one hand they charge a tax that decreases housing affordability, and on the other they will probably end up using most of the windfall, and more, subsidising housing affordability elsewhere as well as paying for the deadweight of increasing layers of bureaucracy.”

It is clear that the introduction of the use of zoning under Part XIA of the *Local Government (Town and Country Planning) Act* NSW was done without any reference whatsoever to the law of tenure by Crown grant of freehold estates. In contrast to the three Great Productivity Innovations, it marked the start of a legislative evolution causing a chronic housing market disequilibrium, and productivity destruction not only in relation to housing, but also in the wider economy. Certainly “common sense and justice” was a concept never heard of since. The failure to either provide compensation, or to reverse zonings in the alternative, created a new form of sovereign risk in the States. That it was also a breach of the *Universal Declaration of Human Rights* (“UDHR”) was of no concern whatsoever. Article 17 of the *Universal Declaration of Human Rights*, which had recently been adopted (in 1948) by the UN General Assembly under the direction of NSW QC and former High Court justice, ‘Doc’ Evatt, reads:

- (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.*

It is at this stage, where legislation was introduced without any kind of reconciliation with the existing law of tenure whatsoever, and then where the legislated promise of compensation for worsenment was not fulfilled, that the die was cast for the gradual and subversive development of State planning controls which are causing the chronic housing market disequilibrium of today.

Where the Crown adopts a legislative scheme such that its instrumentalities, in resuming a fee simple estate, may adversely zone, or by other instrument purport to limit, the permitted use of an estate by a proprietor, thus lowering its market value, without proper compensation for same, then the Crown is derogating from its grant, and to that extent the legislative scheme or instrument must be invalid. Put another way: part of the proprietor's bundle of rights is being denied, without compensation sufficient to avoid derogation from the grant.

The failure to reconcile the new legislation with this law of tenure is evidently explained by pure ignorance, creating a jurisprudential void, a black hole that no one seems to see. One reason this void was allowed to exist appears to have been an eagerness to copy foreign law.

The introduction of the use of zoning under Part XIIA of the *Local Government (Town and Country Planning) Amendment Bill* NSW cannot be characterised as an Australian invention. In fact, zoning was an American concept, originally introduced in New York, New York and Berkeley California in 1916.⁶⁷ It was reportedly intended to be a new technique to manage nuisance [redacted]. At any rate, its constitutionality was uncertain at the time, and was only affirmed by the United States Supreme Court in 1926 when it ruled that the power to adopt zoning regulation was derived from the States' "police power", which is the ultimate power of each State to police order within its boundaries. In doing so, the Chief Justice (for the majority) observed:⁶⁸ "very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district."

While the United States and Australia are both federated, common law countries which have much in common, American law is not the same as Australian law. Certainly, there is no record of the High Court referring to apartment houses as "parasites", or anything like it.

However from the city which invented zoning in 1916, New York, comes opinion that the use of zoning should be abolished:⁶⁹ According to the former New York City planner, as reviewed by Millsap:

"In many U.S. cities housing is too expensive. Housing prices in coastal cities such as New York and San Francisco are notoriously outrageous, but even in inland cities such as Nashville and Denver prices are rising rapidly. Research shows that zoning is a big contributor to America's high housing costs, and in a new book, *Arbitrary Lines: How Zoning Broke the American City and How to Fix It*, former New York City planner M. Nolan Gray persuasively argues that cities should abolish zoning root and branch....

The book is divided into three parts. Part one explains what zoning is and why it was established. Part two presents four critiques of zoning: It increases housing costs, reduces economic growth, foments economic and racial segregation, and mandates sprawl. Part three discusses current zoning reform efforts and early successes; makes the case for abolishing zoning; and considers what city planning could look like in a world without zoning."

Arbitrary Lines is an excellent easy-to-read book written by someone who understands the zoning and planning system from the inside, as well as economics. Although the author Gray has nothing to say about Australian law, the reader will readily recognise many similarities between the American and Australian zoning systems, which is not surprising because the latter was derived from the former.

The irony is, that in recognising that housing in American cities is too expensive, it seems that Australian housing has actually caught an American disease.

⁶⁷ M. Nolan Gray, *Arbitrary Lines: How Zoning Broke the American City and How to Fix It*, (2022) Island Press at 21 & 24. ("*Arbitrary Lines*")

⁶⁸ *Village of Euclid v Ambler Realty Co.*, 272 U.S. 365 (1926) at 394.

⁶⁹ Millsap, Adam A., "Time To Abolish Zoning? New Book Makes The Case", *Forbes*, Jul 29, 2022.

RECOMMENDATION: Everyone should read *Arbitrary Lines*. Ideally, someone should bring the author to Australia for a lecture tour.

By the 1960's, the lesson which seems to have been learnt by New South Wales, consciously or unconsciously, is that they "got away with it". Although no one was paid compensation, and despite the large number of objectors, the injuriously affecting plans continued to exist. No doubt over the years, objectors, finding that they were a minority, relatively isolated from each other, dealing with a paralysing bureaucracy, and offered no apparent legal remedy, were worn down into submission. Over time, many properties inevitably changed hands, with the affected vendors absorbing the losses. The inertia of unaccountable state power prevailed. Subsequent developments reveal how New South Wales gave up any pretence of common sense and justice when injuriously affecting privately owned land. The uninhibited evolution of fiefdoms and petty tyranny within consent authorities, including the planning bureaucracies and the bodies politic of local government authorities, was set in train.

Thus, with respect to the operation of s 342Y of Part XIIA of the Act, Fricke QC 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."

That's right: Interim Development Orders ("IDOs") were actually used as "Permanent Non-Development Orders". An example of an IDO from 1974 is attached. Analysis of same will reveal a variety of derogations from the granted fee simple estate (the existence of which is not noted thereon), but for our purposes, it may be noted in Column 5 "Development which *may not* be carried out" includes *inter alia*, "residential buildings". Clause 6(1) provides that the minimum allotment size is to be 100 hectares. Despite being entitled as an "Interim" order, no limitation period is provided.

These are clearly derogations from the granted estate, and limit any housing development, indefinitely. The document is stamped "Central Hills Lands Scenic Protection Area". It was always open to the Crown to resume the land for scenic protection purposes, or negotiate with the proprietor in good faith a restrictive covenant which could be noted on title on ;payment of the negotiated sum with the proprietor. This was not done.

The Minister, in answering a representation from the local State MLA in 1977, made these observations:

I have noted your comments regarding planning in this area and it would be appropriate for me to mention the eight months delay by Campbelltown City Council in responding to the Board's request for it to put forward its views, on the suggestion that the minimum area for subdivision in the Central Hill Lands area be reviewed. As you will appreciate, regulations to achieve the planning objectives for the Scenic Protection Area at Campbelltown raise many difficult questions of principle and complex questions relating to the regulation and control of the use of land. While the Council has taken a long time to respond to the request for comment, I can understand that with the difficulties and complexities involved, it could take a while for the Council to reach conclusions as to change. Indeed, the complex nature of planning problems are such that in many respects it is quite difficult, if not impossible, to contemplate speedy decisions. In fact, this has been the experience of all administrations over the past thirty years.

On the matter of other important planning measures at Campbelltown, you will be pleased to know that the preparation of plans, exhibition of same, receipt of objections, consideration by Campbelltown Council and the Board of such objections and formal submission of Interim Development Control Plans and Maps and subsequent Gazettal of Interim Development Orders in respect to the six districts which comprise the whole of the City of Campbelltown, are proceeding in a most expeditious manner.

Such bureaucratic sludge is worthy of Sir Humphrey Appleby, and exemplifies the very real impediments faced by proprietors, as imposed by the growing and unaccountable planning bureaucracy. Clearly in this case, the proprietor's interest in land was sterilised and the uncertainty - for an unknowable period of years – rendered almost any land dealing impossible.

The views of the N.S.W. Planning & Environment Commission from the same period may be noted:⁷⁰

“The imposition of planning control in the Sydney Region has followed a course which has a good deal in common with the experience of other Australian State capital cities. Planning thought from the United Kingdom, together with the idealistic underpinnings of post-World War II reconstruction in Australia, led the New South Wales Government to move, at much the same time as the other Australian States, to introduce more ambitious planning controls than had previously been considered acceptable.

An amendment of the Local Government Act in 1945 provided for the preparation of planning schemes by municipal and shire councils and for the constitution of the Cumberland County Council.....The County of Cumberland Planning Scheme was completed in July 1948 but was not given statutory effect for a further three years.

⁷⁰ Extracts from *Review: Sydney Region Outline Plan*, N.S.W. Planning & Environment Commission (1980) at 21-23. Emphases added.

.....The County Scheme contained broadly based zonings and reservations – living, industrial, business and commercial, open space, green belt, rural, special uses, and a definition of the major commercial centres. It contained provisions for conservation, through definition of foreshore scenic protection areas, provision for preservation of historic buildings and places, and the definition of a green belt around the then existing urban development.

The effective *centralisation of control over land use* was consolidated in 1964 when the Cumberland County Council was replaced by the State Planning Authority, a statutory authority with State-wide responsibilities under the control of a Minister. The State Planning Authority was given wide powers to acquire and develop land. It continued the functions of the County Council, but undertook a review of the County Scheme and this led to the publication of the Sydney Region Outline Plan in 1968.

.....The Scheme was... substantially overtaken by events in the form of rapid urban growth and change. It nevertheless represented *an important step in the imposition of public control* over a process of urban expansion, a first generation plan, similar to counterparts developed in other State capitals during the 1950s. To this extent, it was the most important single advance in implementation of metropolitan land use policy. It provided an essential basis for the second generation plan, the Sydney Region Outline Plan ('SROP'), and all its successors.

....During the preparation of the SROP it was contemplated that local councils, in consultation with their local communities and landowners, would undertake the detailed planning for early development areas, through *the quicker and more flexible process of Interim Development Orders rather than by the preparation of local planning schemes*.....

SROP also differed from the County Scheme in that it was *never debated in Parliament nor endorsed by Cabinet. It thus lacked not only statutory force, but also perhaps the political legitimacy of the County Scheme, which was legislatively mandated.*"

This passage is revealing in a number of ways. Firstly, the inspiration is taken from the United Kingdom, which does not have the same land tenure system as in New South Wales.

Secondly, the State's intention was to: exercise *planning control* over land; achieve *centralisation of control over land use*, and again the *imposition of public control*. This is the first time that the fundamental driving force for the use of zoning is openly documented.

It was in this context that for example, the Valuer General and Land Resumption Officer of New South Wales could say:⁷¹

"Today we are discussing the Macarthur Growth Centre; for which land to be acquired has been identified. Some land has been acquired, some other land has been identified for future acquisitions whilst further land has had imposed on it use limitations without prospects that it will ever be acquired....

⁷¹ Bird, Frank, "Land Acquisition and Compensation", *Public Seminar on the Planning and Development of the Macarthur Growth Centre*, N.S.W. Government 2 Dec. 1978 at 3 and 14-15.

....it is axiomatic that Governments cannot marshal the financial resources to pay for every public intrusion on private land rights, hence it is inevitable that any decision to provide redress will be limited and selective. Those who fail to be provided with means to claim compensation will be expected to suffer any disability as part of their contribution to the common good.”

Note that this policy was being announced by an unelected public servant. No political party ever ran for office espousing such a policy. Rather, it is substantially left to the planning bureaucracy which naturally adopts the policy most convenient to achieving its own planning objectives of “control”, with substantial or total disregard for adversely affected landowners. This is the “Rule of ‘No-Law’” in action, where bureaucracy, in imposing public control over private land, has the power to arbitrarily deprive property owners of rights of use, including to develop housing, and are free to adopt its own policies unconstrained by the human rights of landowners, or any apparent obligation to provide compensation, which both injurious affection of the freehold estate, and common sense and justice, would require.

This might be characterised as a variety of “stealth authoritarianism”, which has been described as:⁷²

“...the use of legal mechanisms that exist in regimes with favorable democratic credentials for anti-democratic ends. Although the various ends that incumbent officeholders pursue are not always clear, anti-democratic ends, as used here, refer to the erosion of “partisan alternation,” defined as the cycling of political power among more than one party.”

In New South Wales, there had not been a general erosion of alternation as between the dominant political parties, namely the Labor Party on one hand and the Liberal & National (Country) Party coalition on the other, yet both have presided over a planning bureaucracy which government permitted to behave in an authoritarian manner as described above for decades. In this way, the initiative to build housing has been gradually and surreptitiously taken from proprietors and become under bureaucratic control.

It might be noted that because zoning impositions generally apply to particular properties on any given occasion, most proprietors (let alone people who do not have a proprietary interest) have no idea that the State is developing this power. It is only when directly affected by an instrument that they become aware of the sovereign risk being imposed. The usual reaction of proprietors who thought that an estate in fee simple offered security, is shock and disbelief.

The Valuer General in fact correctly recognised that the English law of tenure differed from that in New South Wales:⁷³

“... Rural land is not ratable in United Kingdom and where rates are payable, the occupier is liable. The levy is based on the rental value of land; in effect it is its worth to the occupant from present use. Much of the land in England is held by building leases of long duration and rural tenants occupy half the farmlands. Contrast this with New South Wales where we have a predominantly freehold land system. Control of use of rural land has been a ‘non event’...”

⁷² Varol, Ozan O., “Stealth Authoritarianism”, 100 *Iowa L Rev* (2015) 1673 at 1684.

⁷³ Bird, Frank, “Land Acquisition and Compensation”, *Public Seminar on the Planning and Development of the Macarthur Growth Centre*, N.S.W. Government 2 Dec. 1978 at 2.

Given the extensive development of legislation designed to regulate land uses on private land in recent decades, without provision for compensation, the Valuer General's comment that "Control of use of rural land has been a non event" may be considered in retrospect to be decidedly sinister for any rural proprietor of a freehold estate. The irony and inconsistency of announcing such a policy of land use control by non-acquisition and non-compensation in a seminar entitled "Land Acquisition and Compensation" seems to have escaped the Valuer General's attention.

In the same decade, the term "Rule of No-Law" was coined by a jurist in Western Australia. Wickham (later Wickham J. of the Supreme Court of Western Australia) was in 1964 very critical of Western Australia's town planning laws - which, the reader might recall, was, in common with other states, substantially based on New Zealand and English laws:⁷⁴

"...a topical example of the 'rule of no-law' in Western Australia and which directly affects the interests of individuals is contained in the Metropolitan Region Town Planning Scheme Act 1959-1962 [MRTPSA]. The procedure is laid down by section 31.....The interesting thing about this procedure is that it is dressed up with some democratic trappings: the publication of the scheme, the right of objectors to be heard, the laying of the scheme before the Houses and the right of the Houses to disallow. The untutored might think that this provides an example of the Rule of Law. Actually, it is an example of some artificial legal flowers being planted in an arid area of no-law....If Parliament proclaims the rule of 'no-law' then administrators and ministers can do nothing but make the best of it.

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.."

Wickham also commented⁷⁵ that the:

"legal profession has been largely inert because it has continued to believe in some vague way in the existence of the Rule of Law - to put faith in a myth of uncertain and perhaps no content. We have declined to enter the public arena and instead are loyal to a spook."

Anyway, having noted the existence of a difference between the types of tenure existing in England and New South Wales, the Valuer General failed to consider the legal implications of same, as did everyone else involved in planning as it related to private land. Indeed, one reason that the control of use of rural land had been historically a "non event" would have been the intended effect of land tenure policy: that the proprietor of the fee simple estate could perform any act of ownership within the imagination.

As Dr Fry observed⁷⁶, control of use of rural land had been achieved in many locations - especially in Queensland - by the grant of a wide variety of Crown leases designed to suit particular uses. Such control was achieved without any derogation or injustice because they were included in the original Crown grant.

⁷⁴ 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 95 to 97.

⁷⁵ *Ibid.*, at 91.

⁷⁶ Fry, Dr TP, "Land Tenures in Australian Law" [1947] *ResJud* 158.

It is striking that no party in any State has ever run for political office advertising a policy platform to increase the power to enforce land use planning by removing proprietary rights without compensation. They have just done it, because they could.

In Houston Texas, three referenda were held to decide on the adoption of zoning in 1948, 1962 and 1993. Voters rejected it each time, and Houston remains a big city without zoning.⁷⁷ No Australian State has ever provided its electorate a choice.

The next major legislative step in New South Wales was the *Environmental Planning and Assessment Act* 1979 (NSW) (“*EPA Act*”). Conspicuously absent from the s 1.3 “Objects of Act” is any provision to respect the real property of proprietors, any commitment to avoid arbitrarily depriving them of their property rights, any requirement to avoid derogation from Crown grants, any right of natural justice etc. Given that the single group of people most likely to be significantly affected by the operation of the *EPA Act* is that of private landowners, the omission of such an Object is remarkable, and fundamental, but not surprising, being a mere continuation of existing policy since the failure and effective repudiation of the worsenment compensation scheme decades previously. The same could be said for other legislation since passed, such as for example the *Heritage Act* 1977 (NSW) and the *Coastal Management Act* 2016 (NSW).

The Productivity Commission has previously examined the imposition of land use restrictions, many of which apply to housing. See:

- Productivity Commission 2004, *Impacts of Native Vegetation and Biodiversity Regulations*, Report no. 29, Melbourne (“PC Vegetation 2004”)
- Productivity Commission 2006, *Conservation of Australia’s Historic Heritage Places*, Report No. 37, Canberra. (PC Heritage 2006”)
- Productivity Commission 2016, *Regulation of Australian Agriculture*, Report no. 79, Canberra. (PC Agriculture 2016”)

PC Vegetation 2004 Relevance

PC Vegetation 2004 did not relate to housing, except by inference given the typical situation where farmers lived on their farms. The point of including this extract is to demonstrate that many proprietors were reluctant to make submissions and this is likely to be true of other groups, including in relation to the current inquiry. Thus:⁷⁸

“Around 150 landholders and over 30 organisations representing landholders gave evidence to the Commission detailing a range of impacts (almost uniformly negative) on them as a result of the restrictions imposed by native vegetation and biodiversity regulations (see appendixes B–J). Available information indicates that many similarly affected landholders have not made submissions.

⁷⁷ *Arbitrary Lines* at 145-146.

⁷⁸ PC 2004 at 121.

For example, Rod Young (trans., p. 945) of Coonabarabran in New South Wales, noted there were close to 40 people negatively affected by the regulations who he had encouraged to make a submission, but who had not done so. He commented that ‘there are many hundreds of cases of victimisation and discrimination out there that you will never be made aware of for several reasons’. The submission by Peter Pacers (sub. 93) of Lower Gellibrand in Victoria was endorsed by a further 51 landholders, while Geoff Sebire (sub. DR319) of Strathbogie Shire in Victoria noted that many landholders supported his submission but did not feel confident to prepare a submission of their own. The South Australian Farmers’ Federation (trans., p. 487) considered that because the regulations in that State were over a decade old, even those who had lost considerable potential production were resigned to the new situation. The Western Australian Farmers Federation (sub. 94) submitted that it had numerous members adversely affected by environmental regulations but they were very reluctant to be used as case studies.”

PC Heritage 2006

PC Heritage 2006 noted a clear distinction between “planning” and “heritage” controls:⁷⁹

“While there are many common elements, there are also fundamental differences between the ways planning controls and heritage regulatory controls are applied at the local level. Planning uses zonal controls applying *common* restrictions on all properties within a designated area. Heritage controls, by contrast, apply added restrictions selectively to individual properties, irrespective of zone.”

Costs to Affected Landowners

Four types of costs associated with heritage protection legislation identified in the PC Heritage Report can apply to private property owners:⁸⁰

“For many historic heritage places, contemporary use and enjoyment, and ongoing adaptation and development by the owners (government and non-government (private)) are compatible with and provide sufficient incentives for the continued conservation of their cultural values. However, for some places conservation of their heritage significance necessarily involves costs to individuals and the community. These costs include:

- the costs of the heritage regulatory systems;
- the added costs above normal repairs and maintenance for conservation of the heritage features;
- costs of the compromises to contemporary use and enjoyment to retain them; and
- the opportunity cost of forgone development opportunities otherwise permitted for the property.

⁷⁹ Productivity Commission 2006, *Conservation of Australia’s Historic Heritage Places*, Report No. 37, Canberra at xxii.

⁸⁰ *Ibid.*, at xix-xx.

Where the places are government-owned, governments, as representatives of their communities, can directly consider such costs and weigh them against the cultural benefits conservation of the places provides to their communities. Where places are privately-owned, the owners have limited ability to capture the wider community benefits of conservation.”

It is further bluntly concluded that:⁸¹

“For privately-owned places, the existing arrangements are often ineffective, inefficient and unfair.”

Former High Court judge, The Hon. Ian Callinan AC has observed even more bluntly:⁸²

“I have heard it said that if you wish to do your neighbours a bad turn, apply to have their property heritage-listed. This, I emphasise, is not an argument against heritage listing. It is just a plea for sharing its financial burden. A heritage listing can only be made in an actual or supposed public interest. As a listing comes at a cost, the public, as the beneficiary, should logically bear it.....

Not surprisingly, restrictive covenants can be worth a great deal of money. There is a clear analogy between a legislatively imposed involuntary restriction on a land owner and one given for value and noted on the title.

Each is equally a matter of public record and has all other relevant qualities in common. Yet under Australian law rarely does the former give rise to a right to compensation.

If, as heritage and other authorities often contend, a listed property does have economic potential as such, and the owner thinks differently, why should not the owner have the right to require the authority to buy the property and then make good its contentions of valuable utility, either itself or by leasing it to someone who can?

Laws to that effect have the further salutary result of discouraging excessive and indiscriminate listings.”

Callinan’s final point in that passage was in fact corroborated in PC Heritage 2006 which found that:⁸³

“some in the community have an incentive continually to seek more listings as they do not bear the costs of conservation.”

The widespread use of heritage listings on private dwellings in 2016 - for example anecdotally over one hundred on parts of Sydney’s North Shore – all without compensation paid is itself a restraining factor on housing supply. Given that the vast majority, if not all, such properties are fee simple estates, all such cases are examples of derogating from the Crown’s grant.

⁸¹ *Ibid.*, at xviii.

⁸² Callinan AC, Ian, “For the sake of our heritage, the buck must stop somewhere”, *The Australian - Summer Living* at 10, 3 January 2008.

⁸³ PC Heritage Report, Finding 7.4 at 172.

Some concrete examples of the types of losses alluded to by Callinan were provided in the PC Heritage 2006 as per the extract below⁸⁴.

“Box 7.3 Cost of heritage listing

Don Brew highlighted the additional maintenance costs of conserving a heritage property:

... I just went through in replacing a slate roof and doing some joinery work, I think I spent something like \$70,000 to \$80,000. In a straightforward house that would have been maybe 30 or 40. So there is about a \$40,000 differential. You could almost say twice the cost just to maintain the house faithful to its original structure. (DR trans., p. 130)

The Property Owners Association of Victoria discussed the impact of listing in Stonnington:

In Stonnington, these heritage orders have seriously devalued the properties compared to previous real valuations by over 25% on average. The foremost valuer Herron Todd – an international firm – has ... measured the devaluations specifically for 300 properties in Malvern, and in many cases, the losses exceeded \$100,000 in 1998 dollars. After the mortgage, all their assets – gone. (sub. 134, p. 5)

A number of inquiry participants provided an independent valuation of the impact of listing on the value of their property. For example, Saman Rahmani:

I purchased this house in good faith in October 1998 with no indication of any potential heritage listing. This house was and is the perfect candidate for demolishing and rebuilding. I would never have purchased this house if there was the slightest hint that it would have heritage significance ... I have since obtained an official valuation for my property. It clearly indicates that if it becomes listed as a heritage item its value will drop by \$170,000. (sub. DR214, pp. 1,3)

Diana Anderson:

My Mother and Father worked very hard to buy the land and build the property which was completed in the early 50's. Dad has since died and Mum lives there alone. ... We had some independent Real Estate Agents value the property with and without the Heritage listing on it, and they estimate that Mum will lose approximately \$500,000 when she sells it, because of the heritage listing. (sub. DR202, p. 2)

David Miller, speaking about the Victor Harbour RSL Clubrooms:

We have had appraisals by two separate land agents in the local town; they have said that the value of the property with the heritage listing in place, as you see it now, is in the vicinity of \$500,000. If we didn't have the heritage listing on there, given that

⁸⁴ *Ibid.* at 171.

it's on the main boulevard right in front of the seashore, they start talking 1.2, 1.3, 1.4, 1.5 million dollars. (DR trans., p. 316)

John and Janet Boyd:

... we engaged the services of a fully qualified property surveyor at a cost of \$700. His valuation put the value without heritage listing at \$720,000, and with heritage listing at \$600,000, a reduction of \$120,000. (sub. DR373, p. 1)”

For some more private land heritage stories, see the footnote.⁸⁵

PC Agriculture 2016

PC Agriculture 2016 observed:⁸⁶

“Concerns about planning and zoning regulation and development assessment and approval processes are not new. The Commission has previously undertaken a number of studies in this area (PC 2011d, 2012b, 2013a, 2014e). Many of the concerns raised in this inquiry were in line with those raised in previous reviews. These include concerns about:

- unnecessarily complex regulation and processes
- the time and cost associated with development assessment processes
- prescriptive and over-restrictive regulation
- poorly designed or targeted regulations.

Most state and territory governments have recently conducted, or are conducting, major reviews of their planning and zoning regulations. However, progress implementing the recommended reforms has been patchy and slow.

Previous Commission studies have also identified an increase in the stated objectives for planning, zoning and development regulation over time (PC 2011d). This has led to an ‘objectives overload’ and regulatory objectives that are unclear and conflicting (PC 2011d, 2012b, 2013a).”

The same could be said about planning, zoning and development assessment with regard to housing. This poses a question for the Productivity Commission about the practical achievability of the sort of reform necessary to solve the chronic housing market disequilibrium, which shall be expanded upon below. It also indicates that the housing supply problem is part of a bigger situation, including rural lands.

⁸⁵ Pascoe, Michael, “Heritage laws should be demolished”, *Sydney Morning Herald*, 4 Nov. 2015; Masters, Clare, “Owner outrage at heritage listing of ‘typical’ homes”, *Daily Telegraph*, 23 Oct. 2007; Jensen, Rodney, “Heritage homes a headache or a duty?”, *The Australian*, 5 May 2012; Higgins, Alice, “More than 70 buildings are set to be added to the local heritage list despite 58 owners opposing their inclusion”, *City Messenger Adelaide*, 11 Oct. 2012. See also: *Law v Brisbane City Council* [2021] QPEC 65.

⁸⁶ At 80.

The above outline of the unrestrained development in land use regulation over the decades illustrates the legislative underpinnings of the path to chronic housing supply disequilibrium in New South Wales, as an example of comparable developments in the other States.

While tenure by Crown grant of fee simple estates, Torrens title and strata title constitute the three great productivity *innovations* of Australian real property law, post World War II planning legislation has effectively constituted a long term *regression* in two ways, namely by the:

1. growing bureaucratic complexity; and
2. erosion of the benefits of tenure by Grant of fee simple estates, Torrens title, and strata title.

(Before explaining this, and providing more real examples of constricted housing supply, attention may turn to legal objections which may well be raised in relation to the above argument.)

The common law, as has been explained, clearly provides that a grantor may not derogate from his own grant, and that includes the Crown as grantor of a fee simple estate. Clearly, much modern land use regulation does exactly that.

A metaphor for the legal terminology of such “derogation from a grant” may be the “debasement” of the proprietary estate. Take the debasement of currency due to inflation. The notes and coins may still look the same, with an unchanged face value and the owner may still have good title to any particular note, but their real market value is diminished. Restrictive land use regulation without provision for compensation operates in a similar way: the fee simple and the Torrens registration look unchanged, but the estate and its value are diminished, or debased.

In this context, the textbook *Sackville & Neave’s* implied presumption that the fee simple estate is a constant – which as a matter of law might ordinarily be regarded as correct – appears to have become demonstrably false. The textbook does not recognise that fee simple estates are being debased by legislated restrictive land use regulation, without compensation, and the application of such legislation being a relatively new area of property law, being relatively peripheral compared to traditional concerns of property law textbooks.

Impairing Torrens Title Conveyancing Efficiency

Another aspect of Torrens title is the ability to note on title **encumbrances**, common examples of which include: registered mortgages, easements, caveats, charges, restrictive covenants and other interests. Interests (such as second mortgages or an equitable interest pending completion of a sale contract) may also be protected by lodgement of a caveat.

If a party has registered on title an encumbrance which does not exist (such as a bank registering a discharged mortgage), then the proprietor may apply to the Supreme Court to have the baseless interest removed from the register. The willingness of the Courts to protect the integrity of the register was demonstrated early on.

In *Ex Parte Smart*⁸⁷, the Registrar General of New South Wales, under the *Real Property Act*, 26 Vic., No. 9, issued a certificate of title with a clause endorsed thereon, reserving or purporting to reserve “any lawful rights incident to the alignment of streets or roads abutting on the land”.

The Supreme Court of New South Wales was unanimous in finding that this was a case of jurisdiction being exceeded. Faucett J. states:⁸⁸

“I think the words were inserted without any authority whatever. The certificate when issued is conclusive evidence of the title of the proprietor. Where a grant of certain land has issued, the grantee and those claiming under him are entitled to a certificate following the terms of the grant, and nothing more. The commissioners are not entitled to insert in the certificate any additions or restrictions which are not contained in the grant.....The insertion of the memorandum complained of is a cloud on the title, and a purchaser is unwilling to have anything to do with the land upon which there is any such cloud.”

The Registrar General (i.e., the Crown) was ordered to cancel the certificate, and to issue a new one in the same terms, but without the offending clause. It is clear that the unauthorised endorsement on the certificate of title constituted a derogation from the grant, or “a cloud on the title”.

One type of encumbrance which may be registered is the restrictive covenant. Former High Court Justice Ian Callinan AC has observed (as already quoted):

“Not just adjacent people but also the public generally always do acquire something of value when another person’s right to use their property in a way that would not cause a legal nuisance is reduced. English law has long recognised restrictive covenants, agreements by which an owner agrees not to exercise a lawful proprietary right in order that a neighbour may have an enhanced enjoyment of their own property.

Not surprisingly, restrictive covenants can be worth a great deal of money. There is a clear analogy between a legislatively imposed involuntary restriction on a land owner and one given for value and noted on the title.

Each is equally a matter of public record and has all other relevant qualities in common. Yet under Australian law rarely does the former give rise to a right to compensation.”

A restrictive covenant is “a promise, restricting land use, given for the benefit of other land, the benefit and burden of which will run in equity provided that certain conditions are satisfied. It is an interest in land”.⁸⁹ Some examples of restrictive covenants include:

- **Single dwelling covenants:** only one house can be erected on the property;
- **Building envelope covenants:** a building can only be erected in a certain position on the property;
- **Building materials covenants:** a building on the property can only be constructed with certain building materials; or

⁸⁷ [1867] 6 SCR 188 (NSW).

⁸⁸ [1867] 6 SCR 188 (NSW) at 193.

⁸⁹ Bradbook AJ & MacCallum SV, *Bradbook and Neave’s Easements and Restrictive Covenants in Australia*, 3rd ed. (2011) at 281.

- **Use covenants:** a property must not be used for specified purposes such as particular commercial or industrial activities.

In the above passage, Callinan AC puts his finger on a curiosity. The “legislatively imposed involuntary restriction on a land owner” clearly refers to uncompensated zoning and other planning instruments which purport to limit the scope of a proprietor’s acts of ownership. Restrictive covenants, to be valid and enforceable, cannot be imposed unilaterally by one party: they are agreements, which must be made voluntarily by both parties, with one party paying the agreed sum for the benefit of the covenant made with the other party.

Clearly, zoning and other restrictive planning instruments are in the nature of restrictive covenants, but there is no opportunity for the proprietor to agree, or even to be consulted, much less paid, by the State for the benefit imposed on itself. This possibility only exists because the law of tenure by Crown grant has been blindly ignored: it is in reality clear that any such arrangement is a derogation from the Crown’s own grant and capable of being declared invalid by a Supreme Court.

Bearing in mind, as demonstrated by *Ex Parte Smart*, that the Crown cannot validly register unilateral restrictions which derogate from its grant, it has not attempted to do so: it would be a “cloud on the title”. Instead, such legislative restrictions simply avoid the Torrens title system, giving rise to risk and confusion when it comes to land purchase.

Concerns about the impaired efficacy of the Torrens system were expressed in submissions to an Inquiry into Private Property Rights in Western Australia. Here are some examples, firstly by WA Farmers:⁹⁰

“....the threat to the probity of the Torrens title system, which guarantees disclosure, and re-establishes the necessity for registration of all encumbrances that affect land including environmentally sensitive areas, bushfire-prone areas and implied easements for Western Power that currently sit behind the certificate of title;

The effect of registration of an interest in Torrens titles is to give the registered owner an indefensible (*sic*) title to that interest. There is no doubt that Torrens' system was constructed on firm foundations: reliability, simplicity, low cost, speed and suitability. However its ability to register all the encumbrances, interests and limitations on land usage has struggled to keep up with the wave of restrictions that commonwealth and state governments are imposing over landholders.

WAFarmers holds that the position that any encumbrance, or limitation on a landholders use or enjoyment of a property must be communicated to the landholder and registered in a easily accessible electronic format linked to the Torrens title.”

A long-established valuation and real estate agency business made much the same point:⁹¹

“...the threat to probity of the Torrens title system, which guarantees disclosure, and re-establishes the necessity for registration of all encumbrances that affect land

⁹⁰ WA Farmers Submission, Standing Committee on Public Administration Inquiry into Private Property Rights, 11 July 2019. (Emphasis in original.)

⁹¹ WA Land Compensation Submission, Standing Committee on Public Administration Inquiry into Private Property Rights, undated. (Emphasis in original.)

including environmental sensitive areas bushfire-prone areas and implied easements for Western Power that currently sit behind the certificate of title.”

Lawyer Lorraine Finlay made more extensive observations on the topic. Here is an extract:⁹²

“ [The] Minister for Environment argued that there was never an intention for all encumbrances to be shown on the Certificates of Title within the Torrens Title system. He stated that ‘[t]he State is not willing – in fact it is not able – to guarantee such a large category of other interests’⁷ and noted that adding these interests to Certificates of Title may lead to increased complexities and costs. Of course, the *failure* to add these interests to Certificates of Title most certainly does already lead to increased complexities and costs – it is just that these are currently borne exclusively by the individual property owner who finds their land burdened with an ESA declaration. We should also ask *why* the State is not willing or able to provide such a guarantee. After all, these are encumbrances created entirely by the State itself. If the government contends that the interests created are so numerous and complicated that it is simply too onerous a task to track and record them, perhaps that is an indication that the State is simply creating too many encumbrances and imposing too great a burden on individual property owners....

A fundamental difficulty with simply noting unilateral uncompensated encumbrances on title is that, not being valid interests in land, they could be removed on application to the Supreme Court, just as with *Ex Parte Smart*. The bigger point is that this panoply of necessarily unregistered legislative restrictions impairs the efficacy of the Torrens system and to that extent is a productivity destroyer.

Lawyerly Disquietude

Various eminent lawyers, individually as practitioners or academics, and also the Bar Association of New South Wales, the Law Council, the High Court and the Productivity Commission (for example PC Heritage 2006 at Box 7.3), have expressed serious concern about the existence of injustices caused by arbitrary and uncompensated land use regulation. They have not identified a clear solution, but former High Court judge Ian Callinan AC opined:⁹³

“Restrictions on reasonable usage, obligations of preservation, insistence on expenditure for little or no return, and on planting or replanting, are all potentially expensive. I see the crafting of a means of ensuring a fair and equitable sharing of this expense as a real challenge to the legislatures and the courts, including the High Court as the constitutional court, for 2008 and beyond.”

His call has been ignored, which is no reflection on its merit. Other lawyers who have made observations of similar character include the following:

⁹²Finlay, Lorraine, *Submission to the Standing Committee on Public Administration Inquiry into Private Property Rights*, 30 July 2019 at 3-5. (Emphases in original.)

⁹³ Callinan AC, Ian, “For the sake of our heritage, the buck must stop somewhere”, *The Australian - Summer Living* at 10, 3 January 2008.

- McLeod, Glen, “The *Tasmanian Dam Case* and Setting Aside Private Land for Environmental Protection: Who Should Bear the Cost?” [2015] 6 *WAJ* 125
- Boulten SC, Phillip, President of the New South Wales Bar Association, *Submission of the New South Wales Bar Association To The Just Terms Compensation Legislation Review* (2013)
- Law Council of Australia in ALRC, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Report 129)* (2016), Chapter 20 Property Rights—Real Property, at 20.21.
- Pape, Bryan, “Taking Farmers’ Property Rights Seriously and Just Compensation On Their Taking”, *Australian Centre for Agriculture and Law*, UNE (2003). See also: Williams, Prof. G, “OBITUARY: Bryan Pape and his Legacy to the Law”, (2014) vol 26 *The Samuel Griffith Society*.
- Staley, Louise, “Property Rights in Western Australia: Time for a Changed Direction”, *Institute of Public Affairs Occasional Paper*, July 2006.
- Staley, Louise, “Reshaping the Landscape: The quiet erosion of property rights in Western Australia”, *Institute of Public Affairs & Mannkal Economic Education Foundation, Project Western Australia Discussion Paper*, December 2007.
- Finlay, Lorraine --- “The Attack on Property Rights” [2010] *SGSocUphAUCon* 6; (2010) 22 *Upholding the Australian Constitution*.
- Gadiel, Aaron, “Rezoning appeals in the Land and Environment Court: Overcoming arbitrary development prohibitions”, *Mills Oakley* (July, 2020).
- “Ask Gadens”, *Planning Institute of Australia*, July 2013.

Gadens observed:

“The [New South Wales] 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.”

Indeed, State land use authorities have developed a culture of impunity which has not gone unnoticed, including by the High Court. In the 2004 *Temwood Case*, Callinan J found:⁹⁴

“Although town planning Acts had been enacted in Australia from time to time in various rather rudimentary forms, sophisticated and detailed town planning enactments and procedures have only gradually evolved¹⁴⁹ and, I would suggest, come to be well understood in this country in the last 30 or so years. During that period there has been a great increase in population, and in the development and subdivision of land to accommodate it. Over those years many instances have been noted of aggressive action,

⁹⁴ *Western Australian Planning Commission v Temwood Holdings* [2004] HCA 63 at [145]. (“*Temwood Case*”)

even impropriety, and excess of power on the part of planning authorities in regulating that development and subdivision¹⁵⁰. Even the most cursory resort to planning law reports will throw up examples of that¹⁵¹.

¹⁴⁹ See Fogg, *Australian Town Planning Law: Uniformity and Change*, 2nd ed (rev) (1982) at 11-31.

¹⁵⁰ *Prentice v Brisbane City Council* [1966] Qd R 394; *Brisbane City Council v Mareen Development Pty Ltd* (1972) 46 ALJR 377; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170. A commission of inquiry (conducted by Bennett QC and established on 3 October 1966 by the Governor in Council of Queensland) inquired into the planning activities of the Brisbane City Council, a planning authority under Queensland enactments. The report of the Inquiry was made on 10 April 1967. It recorded many instances, not only of aggressive, but also of highly unreasonable and unlawful conduct by the Brisbane City Council in imposing conditions on subdivisional approvals or in refusing approvals altogether: see Queensland, Bennett QC, *Report of the Brisbane City Council Subdivision Use and Development of Land Commission*, June 1967 at 68-72.

¹⁵¹ See for example: *Finlay v Brisbane City Council* (1978) 36 LGRA 352; *Corsi v Johnstone Shire Council* (1979) 38 LGRA 316; *Carroll v Brisbane City Council* (1981) 41 LGRA 446; *Allsands Pty Ltd v Shoalhaven City Council* (1993) 78 LGRA 435; *Trehy & Ingold v Gosford City Council* (1995) 87 LGRA 262; *Western Australian Planning Commission v Erujin Pty Ltd* (2001) 115 LGRA 24; *Ben-Menashe v Kuring-gai Municipal Council* (2001) 115 LGRA 181.”

These completely justified lawyerly concerns have until today gone unanswered. They all refer to restrictions by the States and their bodies politic (local government authorities) and their planning departments and other associated planning bodies which have an obstructive effect on the development of housing, as well as other land uses including agriculture, being reminiscent of Wickham’s “Rule of No-Law” and leading to a chronic housing market disequilibrium.

So, these lawyers have identified the problem, if not the solution. The law of tenure by Crown grant of freehold estates is still good law, even if it is effectively forgotten or misunderstood and dismissed by many.

Defending the Indefensible

The common law with respect to the law of tenure by Crown grant of freehold estates in Australia is long-established and clear. However, contemporary practitioners have overlooked its critical importance in relation to contemporary land use and the proprietary rights of landowners, including their ability to develop housing.

This, it must be said, is not the result of any policy of the legal profession to do so, but rather simply due, with respect, to a passive evolution of ignorance over many decades. This process might have been inadvertently encouraged by the very success of Torrens title, which from a routine conveyancing perspective of vendor and purchaser (although not as a matter of

law), has broken the links between the vendor proprietor and the original grant of the estate itself.

Fee simple tenure has been seen in some quarters, in more recent times, as something vastly diminished, and has even been dismissed, in the Federal Court, as a mere “formality”. The view that Parliament by legislation can override the common law is however in this context a gross overgeneralisation that one might tolerantly expect from a first year law student.

The nature and existence of the Great Productivity Innovation #1: The Estate in Fee Simple is set out by the authority of superior courts as outlined above. To have any validity in law, any argument dismissing same must be supported by sound legal authority – which is impossible because it does not exist.

Governments and others who support the view that States may injuriously affect/sterilise private land without being required to pay any compensation cite various authorities which, when properly examined, fail to stand up to scrutiny. Here follows some such scrutiny.

*The Russell Review*⁹⁵

In 2012, the New South Wales Government commissioned David Russell SC to examine the State's just terms compensation legislation as it applies to real property rights. The first term of reference of the Russell Review⁹⁶ was to “define and clarify what real property rights or interests in real property are”.

The Russell Review concluded:

“Each State Parliament may enact legislation to compulsorily acquire land with or without the payment of compensation or with reduced compensation. [*Commonwealth v New South Wales* (1915) 20 CLR 54].”

The only judicial authority cited for this conclusion by the Russell Review is (incorrectly cited, with the plaintiff and defendant transposed) “*Commonwealth v New South Wales*”⁹⁷. Yet this is a case about *chattels* – namely wheat – not real property. Wheat, like cars, handbags and melons, for example, is a *chattel personal*. It is not “real property” as epitomised by an estate in fee simple. Indeed, the High Court case cited is popularly referred to in superior court judgments as “the *Wheat Case*”.

The Russell Review, in relation to New South Wales, failed to reconcile the law of tenure by Crown grant of fee simple estates on the one hand, with restrictive land use legislation on the other: even the mere existence of the former not being recognised. This would be shocking, except that the same failure has been endlessly repeated since the mid-20th century.

Worse, it is clear that New South Wales has believed the Russell Review’s false and indefensible conclusion and continued to act on that basis, actively using legislation to limit dwelling construction on private land, without paying compensation to proprietors.

⁹⁵ Review of the Land Acquisition (Just Terms Compensation) Act 1991 by Mr David J. Russell SC (February 2014).

⁹⁶ *Ibid.*, at 6.

⁹⁷ Actually: *The State of New South Wales v The Commonwealth* (1915) 20 CLR 54.

Note further that Barton J. did provide a helpful observation:⁹⁸

“I am clearly of opinion that in respect of property real or personal, the power of the Parliament to **assume or resume** that property is as absolute quoad New South Wales as the power of the Parliament of the United Kingdom in its sphere, with this qualification only, that the power of any State of the Commonwealth must be exercised subject to the Federal Constitution.”

To “assume” property clearly refers to the acquisition of ownership by expropriation, that is, to compulsorily acquire property without an obligation for making any, or “sufficient”, compensation.

To “resume” property on the other hand, suggests the taking back of something which had previously been granted by the Crown in right of New South Wales.

Barton J. did not state that Parliament could “assume or repudiate” (as in, repudiate a grant). None of the judges in the *Wheat Case* held that the Crown, in resuming property, could validly repudiate or derogate from its grant, and neither has any subsequent High Court case, including *Durham Holdings v New South Wales*⁹⁹ - which reaffirmed the general reasoning in the *Wheat Case* - and the *Tobacco Plain Packaging Case*¹⁰⁰.

The Principle of Legality

If any Parliament wishes to extinguish a fundamental right, then it must express that intention expressly and clearly. It can’t simply be inferred from the wording of the Act. Thus, if State planning legislation were intended to override the law of tenure by Crown grant of fee simple estates, then it would have to so provide expressly and not merely by inference. A striking aspect of all such legislation is that not only has that not been done, but the pre-existence of the law of tenure is not even acknowledged.

Thus in *Clissold v Perry*¹⁰¹, Sir Samuel Griffith CJ observed that statutes:

“are not to be construed as interfering with vested interests unless that intention is manifest”.

More recently, French CJ in an extra-judicial speech explained that Griffith CJ’s statement:
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“can be regarded today as a particular aspect of the principle of legality — a *principle which says that laws are not to be interpreted as interfering with common law rights and freedoms generally unless that interpretation is required by the clear words of the statute. The principle is one which we share with the United Kingdom. It has been explained in the House of Lords as requiring that Parliament ‘squarely confront what it is doing and accept the political cost’*.[*R v Secretary of State for the Home Department Ex parte Sims* [2000] 2 AC 115, 131 (Lord Hoffmann).] *Parliament cannot override fundamental rights*

⁹⁸ (1915) 20 CLR 54.at 98. Bold emphasis added.

⁹⁹ (2001) 205 CLR 399. (The “*Durham Holdings Case*”.)

¹⁰⁰ *JT International and Ors v. The Commonwealth of Australia* [2012] HCA 43; 250 CLR 1.

¹⁰¹ (1904) 1 CLR 363 at 373.

¹⁰² French, Robert, C.J., A.C., “Property, Planning and Human Rights”, *Planning Institute of Australia, National Congress 2013* at 1 and 10 - 12. (Emphases added.)

by general or ambiguous words. The rationale of the principle is that, in the absence of clear words, the full implications of a proposed statute may pass unnoticed:

In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.”¹⁰³

So, if anyone were to suggest that the law of tenure is overridden by planning legislation of any kind, they would first have to point to express legislative language to that effect – which does not exist. They would be attempting to defend the indefensible.

Further, even if such express language did exist, it would not be capable of overcoming the prohibition of derogation from grant, being a derogation itself.

The requirement that “Parliament 'squarely confront what it is doing and accept the political cost” is, one would think, obvious enough – but this is precisely not what State Parliaments have been doing since the first introduction of planning laws, which has always been low-key, with no explanation of policy to proprietors in particular or voters in general. Thus, SROP was never debated in Parliament nor authorised by Cabinet, and as already explained, gazetted Interim Development Orders served as permanent non-development orders.

State Limitation of Its Own Power

A power possessed by each State is the ability to limit its own power by denying itself the ability to repeal or alter existing State law, including by:

- (a) passing legislation conjointly with other jurisdictions under the Crown, to such an effect;
- (b) use of the manner and form requirements of double entrenchment, in legislation; and
- (c) with respect to interests in land, the adoption of a system of tenure by Crown grant of freehold or leasehold.

Examples of (a) include:

1. the formation of the Commonwealth of Australia in 1901, where the Colonies assumed the role of States in the context of a new entity, the Commonwealth of Australia, which now possessed, *inter alia*, specific heads of power in s. 51 and within that scope a limited legal supremacy via s.109 to which State legislation was subordinated;
2. the Australia Acts of the 1980’s, which *inter alia*, terminated the right of appeal from State Supreme Courts to the Privy Council; and
3. the Offshore Constitutional Settlement (“OCS”) of 1983 (although this was an example moving in the other direction), where the Commonwealth surrendered to the

¹⁰³ See also: *Mabo (No. 2) Case* per Brennan J at [75]; ALRC, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC IP 46) (2014), Chapter 1 *Introduction—Protections from Statutory Encroachment*, at 1.24-1.32 & Chapter 6 *Property Rights—Principle of Legality*, at 6.22-6.24.

states jurisdiction over the sea and seabed within three miles of the baselines of the territorial sea, which the Commonwealth can only re-acquire subject to the “just terms” requirement of s 51(xxxi), or subject to a suitable treaty ratification, s 51(xxix).

An example of (b) is the technique of double entrenchment by use of manner and form legislation:¹⁰⁴

“...in *Trethowan's Case* (1931) 44 CLR 394, [the High Court considered the] doubly entrenched manner and form provision [in] s.7A of the *Constitution Act* 1902 (NSW) which provided that the Legislative Council could not be abolished nor could its constitution or powers be altered except by a bill which was passed by both Houses and approved by the electors at a referendum. Both the High Court and the Privy Council upheld the validity of s.7A and its binding effect.”

As to (c):

Clearly, the alienation of an estate in fee simple by New South Wales is designed to provide security of tenure to the grantee proprietor, his heirs and successors forever. Being sovereign, the Crown in right of New South Wales may resume all or any part of any grant at any time, but it must do so without derogating from its grant. It cannot plead ignorance of this limitation, which it has imposed on itself. Over three hundred years ago, the Full Court of Star-chamber found that:¹⁰⁵“*ignorantia juris non excusat* (especially in sheriffs and other ministers of law and justice)”.

As (a) (b) and (c) demonstrate, there is no doubt about the possession of self-limiting power by the States.

Examples of Housing Development Obstructionism

Here are some examples of housing development obstructionism.

Schofields NSW

[Redacted] registered Proprietor

- Acquired lots [redacted] in 2011.
- The fee simple estate was granted in the name of the Crown by Governor Macquarie on 10 June 1815. The subdivision forming the lots was made in 1886.
- In 2011, the land was zoned “General rural” pursuant to the Blacktown LEP
- Without any notice, on 11 May 2012, the lots were rezoned to Conservation E2 and have remained so since, despite numerous objections and representations being made by the proprietor to government departments and politicians.
- Under the General Rural 1(a) zoning, [redacted] could have subdivided each 1,700 square metre block into four or five 300 to 400 square metre blocks. At current property values, each such block would be valued at, say, at least \$600,000, with a total value of say nine such blocks for our two properties amounting to over \$5 million. Instead, the land is unsaleable at any price.

¹⁰⁴ Carney, Gerard, “An Overview of Manner and Form in Australia” (1989) 5 *QUTLJ* 69 at 80.

¹⁰⁵ *Countess of Rutland's Case* (6 Coke 52b).

- Instead of 4 or 5 homes, none has been built, or will be built.
- A number of other properties in the immediate area have been similarly affected and no dwelling has been constructed on them either, even though that had been the general intention. [redacted]
- Land of the same quality across the road has all been developed.
- The treatment by government has been completely arbitrary.

Lizard Rock/Patyegarang, Morgan Road, Belrose NSW

Metropolitan Local Aboriginal Land Council (“MLALC”)

- The 71-hectare estate in fee simple was claimed and granted to the [Metropolitan Local Aboriginal Land Council](#) under the *NSW Aboriginal Land Rights Act 1983* circa 2005.
- Since 2006, the MLALC has attempted to obtain planning approval, including up to 450 dwellings, a cultural centre with new open space and conservation areas, without success. That’s 20 years of housing construction delay, so far.
- The proposal has experienced significant Council, State MP and community [redacted] opposition, but there has been no offer to resume the estate either for payment in cash, or in kind, by another estate of similar value where housing development would be permitted. The MLALC in the meantime, as proprietor, incurs at its own cost, liability for public liability required insurance, maintaining and preserving and protecting access to the land, attending to issues of invasive plant species, and illegal dumping on the land.
- The Chief Executive Officer of the MLALC, Nathan Moran, has made the point:¹⁰⁶ “IT’S NOT ACTUALLY LAND RIGHTS UNLESS YOU GET SOME RIGHTS ON THAT LAND.”
- The intention of the 1983 Act was to enable local Aboriginal land councils to utilise “land holdings to form an ability to provide community benefits. In essence today in the *Land Rights Act*, we utilise land to run our business.”¹⁰⁷ This has been completely frustrated by compliance with the operation of planning laws, so the Crown policies are contradicting themselves.

Sancrox, Port Macquarie NSW

[Redacted] – Registered Proprietor

- Acquired Lot [redacted] & Lot [redacted] in Sancrox, Port Macquarie.
- The area is 401 acres and was zoned RU1 Primary Industry; with existing rural subdivision approval [redacted]; and existing Native Forestry Plan [redacted]. The Property is used for farming activity. The approved DA is for the construction of four residences.
- In 2021, the Port Macquarie Hastings Council issued the “Draft Fernbank Creek and Sancrox Draft Structure Plan” which represented the Property as “Potential Environmental Conservation” zone.
- The Port Macquarie-Hastings Local Environmental Plan 2011 provides that under E2 Environmental Conservation zoning: “Nil” is permitted without consent; and with consent, only “Environmental facilities; Environmental protection works; Oyster aquaculture; Recreation areas; Research stations; Roads”.

¹⁰⁶ *NSW PIA - Planning and the NSW Land Rights Act 1983: improving practice* 2 Aug 2018. <https://www.youtube.com/watch?v=52UTSiO-LQs> 1:25.52 at [45.25].

¹⁰⁷ *Ibid.*, at [24.08].

- Mr [redacted] was advised that the Draft was not an actual rezoning (“just” a draft), but nonetheless, its effect has been to “sterilise” the land, destroying its market value and to create fundamental uncertainty as to use of the land, for example with respect to the planned construction of four houses and the continued operation of farming activities.
- Despite numerous objections being made, the “draft plan” remains in place in 2026, effectively being a permanent injurious affection – just like the so-called Interim Development Orders of the 1970’s.
- Meanwhile, the proprietor is living on the land in a “donga”.
- Please view Mr [redacted] video: **Australian Land Rights - You Tube** It has 10,000 likes and 195,000 views. Read the comments.

Bangalow NSW

[Redacted]– Registered Proprietor

- Acquired the fee simple estate at [redacted] Bangalow in 2002, being a successor in title to the original grantee [redacted], the grant having been made pursuant to the *Crown Lands Alienation Act* 1861 on 5 December 1889.
- The land was (and remains) adjacent to the town proper and at the time of purchase was zoned RU4 (rural). It was [redacted]’s intention to obtain rezoning for the cleared land to allow medium density housing development.
- Shortly afterwards, the land was rezoned to E3 Environmental. Being thus sterilised, the value of the land dropped from \$3.75m to \$750,000, [redacted].
- Since that time, [redacted], who remains the registered proprietor at the pleasure of the mortgagee, has been attempting to have the land rezoned to allow housing.
- A few years ago, at the request of Council, [redacted] developed a plan, at considerable cost, for eighty-two (82) “affordable houses” on the property. On considering the proposal, prepared at significant expense, the Council “changed its mind” and requested a new proposal with a “mixture” of affordable housing and medium density. [Redacted] developed and presented a second proposal. Once again, the Council “changed its mind”, asking for a medium density housing proposal, which is what [redacted] had originally proposed decades previously.
- According to a 2023 media report, the Deputy Secretary NSW Planning wrote that:¹⁰⁸ “Byron Shire Council risks losing its planning powers to ‘independent intervention’ if it does not ‘demonstrate how it intends to improve its housing supply’.”
- As of 2026, after decades of dithering by Council, there are no dwellings on the property – for sale or rent. Bangalow has an acknowledged housing shortage. [Redacted] is still working to satisfy Council.

Kemps Creek NSW

[Redacted]– Registered Proprietor

- Acquired ten (10) hectare property, with his brother, in 1988.
- In more recent times, the land on three sides of his property has become an industrial park.
- In 2022, the Cumberland Plain Conservation Plan was issued, supporting new planning controls which sterilised [redacted]’s land.

¹⁰⁸ Lovejoy, Hans, *The Echo*, 9 Aug. 2023.

- Note:¹⁰⁹ "The CPCP has been developed to meet requirements for strategic biodiversity certification under the *Biodiversity Conservation Act 2016* (NSW) (BC Act) and strategic assessment under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). It provides the biodiversity approvals required for new development in 4 nominated areas in Western Sydney and also supports the delivery of major transport infrastructure across the region."
- According to a media report:¹¹⁰
 "[Redacted]'s only option to escape is via a voluntary acquisition by the NSW government.
 While nearby properties have sold for more than \$50 million, the biodiversity zoning means he has been offered a tiny fraction of what it would otherwise have been worth.
 He owns the property with his brother and his sole income is from tenants in the main home while he lives in a granny flat.
 'I'm retired, I have no income apart from the tenants, if I sold it for what the government is offering I wouldn't have enough to buy a decent home.'"
- Needless to say, under the current regime, there is no prospect of the land being used for industrial, much less housing development.

Aerotropolis NSW

Maria Zucco Channel 7 Speech video (2021);

- In 2020, in the Wiannamatta-South Creek area of the Western Sydney Aerotropolis and the Western Parkland City, 100 or more landowners (almost all with 5 acre lots) had some or all of their land rezoned by the New South Wales Policy 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 *State Environmental Planning Policy (Western Sydney Aerotropolis) 2020* under the *Environmental Planning and Assessment Act 1979* imposed the restrictions, with no provision for compensation.
- This clearly amounted to derogation from grant, although no-one understood that. Proprietors just understood the injustice, not to mention the consequent restrictions on housing.
- The prior value of a typical five acre block approximated \$5m, but following the rezoning, no "sterilised" land was sold because no buyer wanted the uncertainty associated with the newly imposed restricted use. Real estate agents in the area found that buyer interest in any affected property had plummeted to zero. Properties were worthless. One of the many implications was that any mortgagors would have been instantly in technical breach of their loan conditions for having inadequate loan security. Even building a granny flat was to be banned.
- As word spread amongst the landowners, they began to mobilise a campaign against the new zoning. Social media were adopted so that they could make contact with each other, keep informed of developments, and to co-operate in the organisation of protest

¹⁰⁹ "The Cumberland Plain Conservation Plan: A conservation plan for Western Sydney to 2056", *NSW Department of Planning and Environment*, Aug. 2022 at 2.

¹¹⁰ McGowan, Michael, "This Sydney backwater transformed into an industrial zone. But Ted has been left behind", *Sydney Morning Herald*, 11 Mar. 2024.

initiatives. The most significant Facebook private group - *Bringelly Aerotropolis Core re-zoning* – soon enough grew to over 2,800 members.

- Please see below a video of a fine speech given by proprietor Maria Zucco in 2021 recorded by Channel 7 in March 2021.
- The story became headline news in Sydney:

“REZONING SHOCK LEAVES PROPERTIES WORTHLESS: Kemps Creek locals devastated after properties made worthless.”¹¹¹

“Western Sydney Residents Will Be 'Completely Screwed'.....'really shocking..... ultimate betrayal'....”¹¹²

“FRUSTRATION OVER AIRPORT GREEN SPACE REZONING: Rezoned homes will be rendered worthless - "...no one's accountable.....no one from the state government attended landowners' meeting..”¹¹³

See also this video story:

Nat Wallace reporting,
“Properties ‘virtually worthless’ after
government rezones them”,
A Current Affair - Channel 9 Sydney,
27 April 2021
<https://www.youtube.com/watch?v=dd4UDsX2Q5U>

[redacted]

Here is a brief extract from the *Daily Mail Australia* story:¹¹⁴

“Michael and Jenny Schweers live on a nearby 30 hectare block which have been in the family for more than 200 years.

Their land has since been earmarked by the government as green space.

'It's devastating. What you think might be your kids' future, within a matter of a piece of paper it's gone downhill,' Mr Schweers said.”

- “Western Sydney Aerotropolis rezoning submissions detail heartbreak after homes rendered 'worthless’”¹¹⁵.

Here are some extracts from the *ABC Western Sydney* story:

[redacted]

“Angela Spagnol wrote the submission from her hospital bed. ‘I sit helplessly in hospital literally fighting for my life.

¹¹¹ *Channel 7 News Sydney* - 5 Feb 2021.

¹¹² *Sky News* - 7 Feb 2021.

¹¹³ *Channel 7 News Sydney* 20 Feb 2021.

¹¹⁴ *Daily Mail Australia*, Stevens, Kylie, 5 Feb 2021.

¹¹⁵ *ABC Western Sydney*, Hanrahan, Catherine, 3 Apr 2021.

‘My husband is on one salary trying to pay off our home that they want to declare worthless, instead of being able to be at my bedside possibly exchanging limited time together.’

Just weeks later, she died, aged 40, after battling with pulmonary hypertension.

Her submission was in response to the NSW government's plans for the new Western Sydney Aerotropolis.

There’s much more...

- At this point, the minister decided to appoint a “Western Sydney Aerotropolis Independent Community Commissioner” to review the situation. The Commissioner would not be legally independent of the minister – as might be the case with a royal commission, or any judge – because she would report to the minister. However, the Commissioner was able to make any necessary inquiries and recommendations independently from other state planning authorities.
- Professor Roberta Ryan was appointed by the minister to the new position of Independent Community Commissioner for the Western Sydney Aerotropolis in May 2021, and additionally for the nearby area of Orchard Hills in October 2022. Her appointed role was “to assess the issues and concerns of landowners impacted by the governments’ plans and to make recommendations on the optimal way forward....Following consultation with more than 100 landowners, the Commissioner delivered her report and recommendations [relating to] the Aerotropolis in August 2021.”¹¹⁶
- While the creation of the “Independent Community Commissioner” was a step forward, her authority did not extend to other areas of the State affected by housing and other restrictions and in that sense has been completely arbitrary, to remedy a political problem.

[redacted]

Speech by Maria Zucco

¹¹⁶ NSW Government Planning website at: <https://www.planning.nsw.gov.au/plans-for-your-area/priority-growth-areas-and-precincts/independent-community-commissioner>.

A pattern seems to have developed in Western Australia where the discontent of landowners leads to the conduct of a parliamentary inquiry which makes findings which are then not substantially implemented, or which address on an *ad hoc* basis only some owners' particularly acute concerns, the consequence of which is the gradual build-up of pressure for another inquiry.

In 2019-2020, the Western Australian Parliament conducted yet another inquiry (the "*Private Property Rights Inquiry*") into private property rights which found:

¹¹⁷

"FINDING 1: Private property rights in Western Australia have been the subject of several inquiries and reviews over the past 20 years."

Here are just a few submissions which directly relate to constriction of housing supply.

Private Property Rights Inquiry Submission #1: Shire of Chapman Valley:

"The Shire of Chapman Valley has had a situation where the Oakajee Narngulu Industrial Corridor (ONIC) has been in the planning stage for almost two decades. This has resulted in land over which the ONIC is proposed being sterilised for development and the sale at market value of the land adversely affected.

The ONIC is an example of where the State Government plan for land to be developed for public purpose at some time in the future, yet do not assist the affected landowners by acquiring the land or subdividing the land to allow the landowners to move on or develop as they require.....

It is imperative the State Government deals with land tenure issues associated with future planning & development in quicker and more efficient manner, rather than the current ludicrously long periods of time taken...

As this Shire has stated on numerous occasions, the planners, State Government departments and parliamentarians need to deal with land tenure issues linked to State Government future planning & development as if it was their own personal land and ensure the tenure issue are dealt with as soon as possible, with adequate funds being

¹¹⁷ "Private property rights: the need for disclosure and fair compensation", Report 33, *Standing Committee on Public Administration* (2020) at 5.

made available to acquire the land from the affected land owners as a priority. Not leave people lingering for decades as happens now.”

Private Property Rights Inquiry Submission #22: [redacted]

“Most of the families living in Mandogalup are at or near retirement age. [redacted]. There are a number of others who are in a similar situation and will be required to sell their homes to fund retirement living or nursing care. It is extremely difficult to sell land and homes in Mandogalup and has always been this way because of the presence of the Alcoa Residue Lakes and uncertainty in relation to planning and zoning. Many properties remain on the market for years without being sold....

Since 2015 we have written dozens of letters to ministers, local governments and planning agencies with the intention of fighting for our property rights...”

Private Property Rights Inquiry Submission #44: [redacted]

“I [am] the owner of the property of the address mentioned above, being lots m2051 and m2052 of which constitutes approximately 815 acres or 330 hectares, wish to convey to the committee the absolute distress and disillusionment of the effect of environmental laws currently enacted within my shire. These laws are restricting and prohibiting any development of the majority, approximately seven hundred acres of my property and has greatly impacted on my physical and mental wellbeing.

My property was my superannuation and legacy to be inherited by my family on my death. Under current environmental legislation, neither myself or my family in inheritance will see the property deliver its full potential due to severe restrictions applied. My council land rates rise un-abated, while the earning capacity is nil and no hope of matching anything remotely close to it.

The council knows from its own surveys that the area in which my property is located is agriculturally un-viable. I have property's bordering me that were sub-divided into 5-acre small holdings, but I am denied the same privilege. I was constantly told by councils planning department for some approximately ten years up until approx. three years ago that I was in a priority area for development, but then with a rate notice I was told I would no longer be considered for development due to environmental impact. It was at this time that I found out how legally weak FREE-HOLD TITLE was....
.....I can't sub-divide as my neighbours have or access any resource on the property, but expected to pay ever increasing exorbitant rates.

To date there has been no offer of compensation or offer of purchase from any Government or environmental entity and why do they need to. It doesn't cost them anything. Under current law they merely just have to wait for me to die or go bankrupt for them to pick my property up cheaply. Joseph Stalin would be proud, he had to shoot them, they found a more diplomatic way. The pen is mightier than the sword, an asset has been turned into a liability in one foul swoop.”

Housing Development Obstructionism - Conclusions

Above is just a small number of examples where housing development has been obstructed by the States. In every case, it is very clear that the State instrument is used to derogate from

the proprietor's fee simple estate, yet no action is taken to have the derogation declared as such.

There is clearly a great disparity of power between individual landowners on one hand, and substantial government authorities on the other. This disparity of power is due to a legislated predisposition of the latter to oppress the former, which legislative predisposition exists unchecked by the law of tenure by Crown grant of freehold and leasehold estates due to the continuing existence of the jurisprudential void.

Given the existence of the jurisprudential void, Parliaments have gradually realised that they can provide public benefits at little or no cost to their budgets by arbitrarily imposing sovereign risk, in the form of uncompensated injurious affections, on landowners. It is in this context that land use authorities have tended to continually expand unchecked in size and power, with a culture of impunity with respect to proprietors. With respect to the supply of housing in particular, this virtually unchecked power manifests itself in a Serbonian bog of technicalities¹¹⁸ which guarantees that many housing investments which might otherwise be financially viable never commence. Further, the virtually unaccountable planning law ecosystem appears to give rise to petty tyrannies (for example within council planning departments) which can and do act arbitrarily. Anecdotally, proprietors report that these days, government departments treat them with contempt.

Proprietors are on the back foot right from the start, because:

1. they (and their banks as mortgagees) thought that a fee simple estate in Australia was essentially free of sovereign risk;
2. there is often no warning, or the courtesy of a direct communication, about the imposition of an impairment, so the landowner is taken by surprise when learning of its existence as a *fait accompli*;
3. such impairments have an immediate impoverishing effect on the landowner;
4. appealing to government authorities for relief is a Kafkaesque experience;
5. the legal profession generally offers no help in this field due to the operation of Wickham's "Rule of No-Law" – or the jurisprudential void;
6. they tend to be isolated from each other, with injurious affection not necessarily inflicted on their neighbours;
7. no political party in Australia has ever won government espousing a policy advocating the imposition of arbitrary uncompensated injurious affection - yet that unannounced policy has been the policy adopted; and
8. the wider public, including a sizeable proportion of unaffected proprietors, have not the foggiest idea about the existence and impact of these issues on affected proprietors, which exacerbates the latter's political isolation.

¹¹⁸ To use a popular judicial phrase adopted by Higgins J. See: Potter Jr, Parker B., "Surveying the Serbonian Bog: A Brief History of a Judicial Metaphor", 28 *Tul. Mar. LJ* 519 (2003-2004) 519.

Demolishing Zoning

[Redacted]

Recently published book *Arbitrary Lines* makes the case for abolishing zoning. It is written by a professional planner who also understands economics. Although American constitutional law and law of tenure differ from Australia's, the author's analysis of American zoning practices will seem very familiar to the circumstances in Australia.

Without in any way trying to summarise the book (*which must be read*), some observations are quoted here as setting the general direction which should be taken. Thus:¹¹⁹

“we can do better than small reforms. After all, zoning isn't merely a good policy misapplied toward selfish ends. Zoning is a fundamentally flawed policy that deserves to be abolished. Set aside for a moment the debilitating local housing shortages [in the USA], the stunted growth and innovation, the persistent racial and economic segregation, and the ever-expanding sprawl: the very concept of zoning – the idea that state planners can rationally separate land uses and efficiently allocate density – has repeatedly failed to materialize. Far from the fantastical device imagined by early twentieth-century planners, zoning has little to do today with managing traditional externalities and works largely untethered from any guiding comprehensive plan.

Part II [of *Arbitrary Lines*] examines four contemporary critiques of zoning: its role in increasing housing costs, restricting growth in our most productive cities, institutionalising racial and economic segregation, and mandating sprawl.”

The author adds:¹²⁰

“it would have been easy to add chapters on its role in holding back urban design and architectural innovation, undermining property rights, or fostering corruption.”

Interestingly:¹²¹

“Most local governments had quietly adopted zoning, at times as a condition for receiving coveted federal funding”

Further:¹²²

“The main thing that I learned at the help desk [New York City] is that most people don't know the first thing about zoning.”

The only jurisdiction which has ever held a plebiscite or referendum about the adoption of zoning is Houston Texas, and it was rejected three times. With a population approximately 50% larger than Sydney NSW, it continues to operate free of zoning.

¹¹⁹ *Arbitrary Lines* at 6.

¹²⁰ *Arbitrary Lines* at 7.

¹²¹ *Arbitrary Lines* at 13.

¹²² *Arbitrary Lines* at 32.

As to how zoning actually increases housing costs:¹²³

“But what *exactly* is the mechanism by which zoning increases housing costs? There are three. The most obvious way is by blocking new housing altogether, whether by prohibiting affordable housing altogether [the Bangalow example above is an example] or through explicit rules restraining densities. This results in less housing being built, resulting in the supply-demand mismatches we see in most US cities today. A subtler way that zoning drives up housing costs is by forcing the housing that is built to be of a higher quality than residents might otherwise require, through policies such as minimum lot sizes or minimum parking requirements. Beyond these written prohibitions and mandates, zoning often raises housing costs simply by adding an onerous and unpredictable layer of review to the permitting process.”

The current American experience sounds like the current Australian experience, if on a larger scale:¹²⁴

“the arbitrary lines that zoning imposes on our built landscape have deformed the American city. In cities like New York and Los Angeles, zoning has blocked new housing construction, perpetuating a housing shortage that has shoved millions of people into precarious financial situations, unsustainable commutes, and, in extreme cases, homelessness. In cities like Boston and San Francisco, zoning has locked American workers out of those places where they could contribute the most to our country, leaving us all poorer as a result.”

Another thought:¹²⁵

“zoning can only *stop* development; to start it, you need demand for new buildings and a stable of developers capable of profitably supplying it.”

In Australia, in the absence of sufficient political will to do what is necessary, there is a tool available for use to effectively abolish zoning: the long forgotten application of the law of tenure by Crown grant of fee simple estates. Generally, this would be applied on application to the State Supreme Courts, which have original jurisdiction in such matters.

Here are two examples of judicial power: the first is of the Supreme Court of New South Wales, the second is of the New South Wales Land and Environment Court.

In *Pedashenko v Blacktown City Council*¹²⁶, the New South Wales Supreme Court ordered a property sale be cancelled after it found that Blacktown City Council breached its fiduciary duty to a vendor and misled the vendor by withholding information on a proposed rezoning of land. Fiduciaries must not use that position of trust to acquire an advantage for themselves: to do so is inequitable. The Council owed this duty to the Pedashenkos because:

- the facts concerning the value of the properties were almost wholly within the knowledge of the Council; and

¹²³ *Arbitrary Lines* at 52-53.

¹²⁴ *Arbitrary Lines* at 180.

¹²⁵ *Arbitrary Lines* at 183.

¹²⁶ (1996) 39 NSWLR 189.

- the Council had agreed to act on behalf of the interests of the Pedashenkos in providing information to them regarding the development potential of the land.

Consequently, the Council was ordered by the Court to give up the benefit it had obtained. The sale contract was set aside and the Council was ordered to transfer the properties back to the Pedashenkos. Although the point was not argued, this decision also had the effect of voiding a derogation from the Crown grant by the Council.

In *Warringah Council v Franks & Ors*¹²⁷, Warringah Council sought a mandatory injunction requiring the demolition of a seawall erected by a property owner. The Court refused to grant the injunction and allowed the wall to stand:

“...the first Respondent in so acting to protect his property, was doing no more than what other beachfront owners had apparently done to protect their properties from damage by avulsion by the sea during the significant storm events experienced at Collaroy/Narrabeen beaches in the 1960s and 1970s... what the Respondent did.... appears to be indistinguishable from what other beachfront landowners have done over the past decades to protect their valuable properties from storm damage caused by the sea, inasmuch that in the emergency conditions then prevailing, seawalls have been erected without regard to the relevant planning laws....

...In my judgment, to grant the Council’s claim in its amended class 4 application to a mandatory injunction requiring the immediate removal of the seawall would involve a manifestly disproportionate remedy for the admitted breach of the Environmental Planning and Assessment Act, and may involve an outcome that is unintended (namely the restoration of the beachfront to its threatened and damaged state caused by the storm which prompted the first Respondent to cause the seawall to be erected.)”

Clearly, the owner had a right to protect his land and the court would not allow a breach of planning law to prevent him from doing so. Although the point was not argued, this decision also had the effect of voiding an attempt by the Council to derogate from the Crown grant: preserving the existence of the land being a valid “act of ownership” within the terms of the grant.

THE CURE

The cure for the chronic housing market disequilibrium - that is to say the long-run housing inelasticity of supply - is straightforward in principle: it is to revive the active use of the law of tenure by Crown grant of fee simple estates, and in so doing, eliminate zoning and other regulations of a derogating nature. The faster the better.

There are a number of possible paths to achieve that, which the Productivity Commission might consider.

The first path is via the Productivity Commission’s final report, which might no doubt, consistent with the “game of inches” view, contain 10,001 economically sound observations as to the simplification of housing regulation and in so doing answer the terms of reference.

¹²⁷ [1999] NSWLEC 65.

While that is an essential process, the question might be asked: how likely is it to be adopted in practice by the many thousands of planners, lawyers and other practitioners whose livelihoods are directed to using and maintaining those very regulations? The PC Heritage 2006 soundly analysed the impacts of heritage listings of private land, including the frequent injustices imposed. Yet, twenty years later, is there any evidence that any change was made by government in response? It would seem not. There are more heritage listed private houses in Sydney than ever.

The planning bureaucracy of the States operates substantially by producing reports, and reports on reports. Producing another report, even if by the Productivity Commission, risks just “playing their game”. The Serbonian bog would beckon. [redacted]s, who are enabled by zoning (and disabled by the fee simple estate), will be screaming to resist any such changes.

State Ministers are typically “captured” by their huge planning departments which might be considered very likely to “push back” against significant ministerial initiatives. How will “stealth authoritarianism” be overcome? Petty tyrannies and fiefdoms abound in the prevailing “Rule of No-Law”.

Another example of long term reform inertia is the 2021 above-mentioned Western Australian *Private Property Rights Inquiry* which found:

“FINDING 1: Private property rights in Western Australia have been the subject of several inquiries and reviews over the past 20 years.”

What might be done to avoid a similar fate for the PC Housing Regulations 2027?

Here are some thoughts.

Housing market efficiency is best served by the three great productivity innovations of Australian real property law: the law of tenure by Crown grant of estates in fee simple, Torrens title, and strata title. They need to be freed of the shackles imposed by the deadweight of the great productivity regression of Australian States’ planning legislation.

In the case of fee simple estates, the existing common law is perfectly capable of protecting their integrity by Court declaration that a legislative instrument derogating from the Crown grant is invalid to the extent of the derogation. For Courts to do this, they have to be presented with argument on the point. If they are not presented with any case arguing the point, they will have nothing to say about the matter. If the Court is presented with such a case, all it has to do is follow existing authorities: this involves no new law, just the application of existing, neglected, law.

As to nuisance, don’t worry, everyday nuisances would still be regulated by Councils, and major nuisances by the Courts.

Apart from the general community, which is itself more interested in more available and more affordable housing, the people who are most interested in seeing their fee simple estates freed of the shackles of planning legislation, and most capable of supporting housing (and other uses) are the proprietors themselves. Individually, these people tend to be isolated from each other. So, anything which facilitates them coming together to make a common effort to

re-establish the primacy of their estates must be of interest. Here are some points which should be included in the Productivity Commission final report:

- A. If nothing else, the Productivity Commission should stake out the position that to make housing more available and more affordable, the use of zoning must be abolished, promptly.**

The essential need for this initiative needs to be boldly announced in bright lights and set the agenda for action.

- B. Clearly advocating to proprietors (and the disparate property rights organisations) that they take any opportunity to co-operate and run at least one case (to start) in a Supreme Court seeking equitable relief for any derogation of grant.**

The prospect with strategy B, is that once one case is won, the demonstration effect will cause more to flow through quickly enough, like a bursting dam. The State is constrained from legislating to overrule such findings, because to do so would be itself a derogation from its grant.

- C. Suggest to the Commonwealth that with respect to s 96 grants made to each State relating to (say) land use or infrastructure, there be included a condition that the use of zoning in any local government area where the funds are to be applied is abolished.**

The attraction of strategy C for the Commonwealth would be that it requires no additional funding or legislation. It could be done very quickly. It is not only doing something, it looks like it's doing something. If the Commonwealth declines to do so, one might ask how serious is it about doing its part to remove unnecessary and counter-productive regulation to solve the housing crisis?

- D. Propose that the author of *Arbitrary Lines* be brought to Australia for an extended lecture and study tour to explain to planners, proprietors, politicians and the general public how the abolition of zoning and refocusing of other planning efforts will improve affordability and availability.**

It seems that in the chronic housing market disequilibrium, we have an American disease, so let's learn from one of them.

- E. Propose the simplification of accumulated regulation relating to strata title to improve its elasticity of supply, particularly in lower price ranges, as suggested by solicitors with long experience in the field, such as [redacted].**

This would potentially increase the speed and cost efficiency of strata title projects, especially at the lower-priced end of the market.

These steps would also eliminate the threat to the probity of the Torrens system.

It should be evident from all of the above that the chronic housing market disequilibrium is the constitutional and legislative responsibility of the States. It is the States that have to solve the problem, either by taking the initiative, or by being forced to in the superior Courts.

Having said that, no doubt there would be a howl from some quarters, that the Commonwealth and the Productivity Commission in so finding, were allowing the Commonwealth to avoid its presumed responsibility. Because of the vertical fiscal imbalance which provides the Commonwealth huge revenue (and these days much used borrowing capacity), there is a tendency by some to presume that the Commonwealth should spend money on things for which it has no constitutional responsibility, including housing, and that consequently the housing shortage must be solved by the Commonwealth.

However, the idea that the housing crisis can or should be solved by Commonwealth spending on “aspirational targets” is complete fantasy, if only because it completely fails to address the regulatory roadblocks existing at State level.

Having said that, there are some things the Commonwealth may usefully do to assist, as follows.

Role of the Commonwealth

Macroeconomic Policy

The Commonwealth is well positioned to use macroeconomic policy to influence the supply of (and demand for) housing. *Ceteris paribus*, it can use the tools available to it, including for example – taxation simplification and moderation; fiscal restraint including avoidance of “crowding out” private sector investment and employment with huge public sector projects; and net migration management, to increase general market flexibility and ultimately to improve productivity and real wages, both in the housing market, and more generally.

This is all obvious and no doubt clearly understood by the Productivity Commission and more fully explained in others’ submissions.

Relaxing the *ceteris paribus* assumption, such macroeconomic initiatives would have a greater positive effect where the States have removed unnecessary regulation (especially by abolishing zoning). Where regulation remains quite like the current levels, with merely some tinkering in a “game of inches”, the positive macroeconomic impact will be constrained.

Working with the States to improve the price elasticity of supply and property market efficiency more generally, the Commonwealth might try harder, to co-operatively replace or reduce State stamp duty. That’s easier said than done, but at least put it on the agenda.

Reforms to the *Environment Protection and Biodiversity Conservation Act* 1999 (“EPBC Act”)

The Terms of Reference require the Productivity Commission take into account the “recently passed reforms” to the *EPBC Act*. The following observations relate to the *EPBC Act* both pre- and post amendments and its application with respect to private land (fee simple estates) in the States, insofar as its possible negative effect on housing development is concerned.

As explained previously, the grant of a fee simple estate by the Crown in right of a State(/Colony) constitutes, as the Productivity Commission itself has stated: “the most complete form of land interest that can be held by a person”.

So, from where does the Commonwealth derive its power to regulate private land in a State under the *EPBC Act*? Short answer: its power is derived from the Constitution s 51(xxix) relating to external affairs. As is well known, the High court established in the *Tasmanian Dam Case* that by the *World Heritage Properties Conservation Act 1983* (Com.) (“*World Heritage Act*”), the Commonwealth validly prohibited construction of a dam (per Mason, Murphy, Brennan & Deane JJ), the legislation having been validly passed pursuant to s. 51(xxix) of the Constitution.

The *World Heritage Act* gave effect to an international treaty to which Australia was a party, in this case, the *Convention Concerning the Protection of the World Cultural and Natural Heritage* (“*Heritage Convention*”) which governed UNESCO's *World Heritage Site* programme.

It has been said that large parts of Australia's main national environmental law, the “*EPBC Act*” - including the protection of World Heritage properties, Ramsar wetlands, threatened species and threatened ecological communities, and migratory species - depend for their constitutional validity on the decision in the *Tasmanian Dam Case* regarding the external affairs power.

However, the *Tasmanian Dam Case* related to an issue of competing sovereignty between the Commonwealth and Tasmania: there was no proprietary interest at issue at all.¹²⁸ Indeed, “Article 6 [of the *World Heritage Convention*] acknowledges the sovereignty of the States in whose territory the heritage is situated and is expressed ‘without prejudice’ to ‘property rights provided by national legislation’.

As is clear from the common law, and has been stated by the Productivity Commission, an estate in fee simple is the most complete form of land interest that can be held by a person. It is of course a proprietary interest.

Once this is accepted, it is immediately apparent that any provision of the *EPBC Act* which purports, without compensation, to restrict a proprietor’s use of his estate, by for example restricting housing development, would be unconstitutional and invalid.

Prior to the *Yunupingu Case*¹²⁹, such a deprivation would not be considered an “acquisition” by the Commonwealth, and so not attract the Constitutional protection of s 51(xxxi), which provides that any acquisition of property must be “on just terms”.

Putting *Yunupingu* aside, where Commonwealth legislation purports to, by reliance upon its external affairs power, affect freehold estates in the Australian states, by for example restricting the construction of houses on private land under the *EPBC Act*, the scope of its

¹²⁸ *Tasmanian Dam Case* [1983] HCA 21 per Brennan J at [94]; per Mason J at [29], [32] & [70]; per Gibbs J at [87].

¹²⁹ *Commonwealth of Australia v Yunupingu* [2025] HCA 6. In determining that the extinguishment of native title could be characterised as a s 51(xxxi) “acquisition”, the decision by inference raises the question as to whether the deprivation of (for example) a fee simple proprietary right should also be regarded as a s 51(xxxi) acquisition, which would open a floodgate of claims from proprietors against the Commonwealth for private land usage restrictions already imposed under the *EPBC Act*. This question has not been tested in Court as yet.

validity and enforceability may be seen to rely on three links in a short chain, as it were. The three links in this chain of legislative validity are:

1. the *scope* of international agreements (including conventions) which are ratified by the Commonwealth;
2. the *conformity* within the scope of such agreements of Commonwealth legislation passed in reliance on the s. 51(xxix) Constitutional external affairs power; and
3. the *prevailingness* of the Commonwealth legislation over any inconsistent state law by the operation of s.109 of the Constitution.

If any one or more of these links is broken, then the Commonwealth legislation shall be relevantly invalid and unenforceable, and the landowner's estate unaffected.

As to the first, the scope of the *Heritage Convention* is as we have seen “without prejudice to property rights”, which qualification is incapable of supporting the *EPBC Act* in so far as it purports to be able to do otherwise. Secondly, the *Heritage Convention* does not repudiate Art. 17 of the *Universal Declaration of Human Rights*, which provides that “no one shall be arbitrarily deprived of his property”.

As to the second, the *EPBC Act* in relying on the s 51(xxix) external affairs power, if purporting to restrict the construction of housing on private land without compensation, would be *ultra vires* and relevantly invalid because it would not be conforming to the source of the power, namely the *Heritage Convention*.

Thirdly, such an offending use of the *EPBC Act* could not operate by s 109 of the Constitution to prevail over the State law of the fee simple estate, if only because of its *ultra vires* invalidity.

In short, it is recommended that the Productivity Commission, in answering the Terms of Reference in relation to the *EPBC Act*, warn that any use of the Act to restrict the construction of houses on private land without compensation is subject to challenge for invalidity.

Commonwealth Conditions to s 96 Grants

This is explained above.

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END

Encl.: Interim Development Order example. (Original printed on foolscap.)