

**COMMENT ON PAPER “CONSTITUTIONAL ISSUES AND THE STRENGTH OF
ABORIGINAL PROPERTY RIGHTS” BY SEAN BRENNAN**

**AUSTRALIAN ASSOCIATION OF CONSTITUTIONAL LAW
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The Hon John Basten

Judge of the NSW Court of Appeal

Sean Brennan has done a remarkable job in summarising the reasoning in the four recent High Court cases dealing with Aboriginal property rights and in his thoughtful identification of the broader issues which they raise.

Subject to one specific matter, I wish to focus on statutory interpretation in the context of compulsory acquisitions.

The specific matter concerns the *Wagga Wagga Land Registry case*.¹ The paper identifies the parsimonious way in which the joint judgment in the High Court dealt with the concept of use in relation to the description of lands “not lawfully used or occupied” which may be claimable Crown lands under the State Land Rights Act.² The joint judgment eschewed broad propositions as to the proper construction of the legislation. The explanation, not clearly articulated in the judgment, may be that the appeal to the Court of Appeal, from which the further appeal was taken to the High Court, was restricted to a decision of the Land and Environment Court on a question of law. As the transcript of the hearing in the High Court reveals, objection was taken by Justin Gleeson SC, appearing for the respondent Land Council, to any expansion of the appeal to cover questions of occupation, which had not been the subject of fact-finding in the Land and Environment Court and therefore could not have been the subject of fact-finding in the Court of Appeal. Mr Gleeson invited the High Court to revoke special leave. That application was refused, but it is clear that the Court was left with the awkward task of construing what appeared to be a

¹ *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* [2008] HCA 48; 237 CLR 285

² *Aboriginal Land Rights Act 1983* (NSW), s 36(1)(b)

composite phrase by reference only to one part. Given the restricted nature of the appeal below, and hence the appeal in the High Court, the only question properly raised was whether the facts as found by the Land and Environment Court must, as a matter of law, satisfy the statutory terminology. Perhaps surprisingly, there was no discussion of the limit of an appeal from a decision on a question of law, although the authorities are all well-known. Nevertheless, this background may help to explain the unwillingness of the Court to become embroiled in questions of principle.

Returning to the broader issue, first, there has been a quiet revolution in statutory interpretation in this country, probably over the last 15 years, much of it occurring during the reign of the Chairman, as Chief Justice of the High Court. At the risk of hyperbole, the change involved the abandonment of an approach which looked to the general law, recognising the need to consider statutory modification, to an approach which looked to the statute, read in the context of the general law.³

To give an illustration, it is sufficient to compare statements in *Potter v Minahan*⁴ and in *Malika Holdings*.⁵ In *Potter v Minahan* O'Connor J stated:

"It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness."

But McHugh J said in *Malika Holdings*:

"Hallowed though the rule of construction referred to in *Potter v Minahan* may be, its utility in the present age is open to doubt in respect of laws that 'infringe rights, or depart from the general system of law'. In those areas, the rule is fast becoming, if it is not already, an interpretative fiction. Such is the

³ A more complete discussion of the issues may be found in two papers in Suzanne Corcoran and Stephen Bottomley, *Interpreting Statutes* (2005, Federation Press), Ch 3 "The Architecture of Interpretation: Dynamic Practice and Constitutional Principles" by Suzanne Corcoran and Ch 4 "Statutes and the Common Law: the Continuing Story", by Justice Paul Finn. Finn J refers to the absence of scholarly writing in this country on the common law–statute relationship, identifying two notable exceptions as the chapter by Gummow J "The Common Law and Statute" in Gummow, *Change and Continuity: Statute, Equity and Federalism* (1999) and an article by Professor Jack Beatson, "The Role of Statute in the Development of Common Law Doctrine" (2001) 117 LQR 247.

⁴ [1908] HCA 63; 7 CLR 277 at 304

⁵ *Malika Holdings Pty Ltd v Stretton* [2001] HCA 14; 204 CLR 290 at [29]

reach of the regulatory state that it is now difficult to assume that the legislature would not infringe rights or interfere with the general system of law.”

That view was affirmed by Gleeson CJ in *Electrolux*.⁶

“Reliance was placed in argument upon what was said to be a general principle of construction that, where a statute takes away or interferes with common law rights, then it should be given, if possible, a narrow interpretation. The generality of that assertion of principle requires some qualification. It is true that courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms However, ... modern legislatures regularly enact laws that take away or modify common law rights.”

In *Harrison v Melhem*⁷ Spigelman CJ explained that he no longer believed that “any weight can be attributed to the principle that Parliament is presumed not to intend to abrogate common law rights” and, after referring to authorities including *Malika Holdings*, noted that McHugh J “did not expressly distinguish in this respect between the presumption against altering common law doctrines and the presumption against invading common law rights”.⁸

I do not cavil with the change in approach; my concern is that the consequences of the change in emphasis have not been adequately explored. Arguably there have already been subtle variations in the approach taken in constitutional cases, the Constitution being a statute (albeit of a very special kind) which may be read in the light of general law principles extant at the time of its drafting. This may have ramifications for the power conferred on the Parliament in s 51(xxxi) with respect to the acquisition of property on just terms.

⁶ *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40; 221 CLR 309 at [19]

⁷ [2008] NSWCA 67; 72 NSWLR 380 at [2].

⁸ *Ibid* at [6]

Secondly, the change has come at the same time that the Court was required to come to terms with the inter-relationship between the general law and native title. Thus, before the inter-relationship was fully explored, the exercise was subverted by the enactment of the *Native Title Act 1993* (Cth) and then became an exercise in statutory construction.

For example, great emphasis has been placed on the language of s 223 as providing a definition of what constitutes native title for the purposes of the Act. The language used was derived from concepts identified by the High Court in *Mabo [No 2]*⁹ but has acquired a life of its own. In one sense, it may be unfortunate that that exercise has taken place after a limited opportunity for the courts to identify the form and content of native title, and its relationship with the common law, before it was moulded into a statutory definition. Whether the Parliament intended such a result may be doubted. At its commencement, the *Native Title Act* included s 12 which provided that,

12. Subject to this Act the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth.

That section was declared invalid in the *Native Title Act Case*,¹⁰ but it may be available (or might have been if relied upon earlier in time) to indicate the intention of the Parliament to permit the development of the common law concept to the extent that it was not inconsistent with the language of the statute. It may well be too late to take advantage of such an approach. In any event, my present concern is not the content of native title, but issues of compulsory acquisition.

*Griffiths*¹¹ provides a useful case study to which this analysis can be applied. The basic issue in *Griffiths* was whether the Northern Territory had power to acquire compulsorily land from private landowners in order to make the land available for purchase by other private landowners for private purposes. One approach to that question would have been to focus upon the proper limits of government. That would lead one to consider the public role of government and the extent to which (and the manner in which) it might properly promote private interests of individual

⁹ [1992] HCA 23; 175 CLR 1

¹⁰ *Western Australia v Commonwealth* (1995) 183 CLR 373

¹¹ *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20; 235 CLR 232

citizens. The *Lands Acquisition Act* (NT), as Sean Brennan has explained, provides for the acquisition of land “for any purpose whatsoever”. Noting the proper limits on the purposes of government, one might infer that even such deliberately broad language could not permit citizens to be deprived of their land otherwise than for public purposes, within a constitutional framework.

The phrase “any purpose” should not be seen as a conferral of unconstrained power by a legislature (which is itself constrained) on its own executive. The phrase self-evidently should not be read so as to permit the Minister for Lands to acquire property for the private benefit of the Minister, or the Minister’s family or other members of the government. Nor can land be acquired for purposes beyond the constitutional powers of the Territory government, in order to serve the needs or interests of the Commonwealth or New South Wales. Some purposes will, in the public law sense, be improper purposes.

Under the *Crown Lands Act* (NT), the government has power to dispose of Crown land (in earlier days referred to as the waste lands of the Crown). It may do that by way of sales to individuals, corporations or even other bodies politic. However, that is a power which may either be used to further some other governmental purpose, or which can be described as identifying its own purpose. In the latter sense, it is hardly the kind of purpose which would warrant compulsory acquisition for a public purpose. That would be a bootstraps operation. In other words, the term “purpose” in the *Land Acquisition Act* should be understood as a reference to an otherwise existing purpose and not merely an unidentified purpose of creating a land bank which can then be disposed of in exercise of a statutory power.

One source of support for such an approach might be found in the principles governing the valuation of land for the purposes of compulsory acquisition. For example, the *Point Gourde* principle¹² prevents the landowner obtaining the benefit of any increase in value of the land arising from the public purpose for which it is acquired. To allow the government to reacquire land which can then be rezoned, for

¹² Which finds a statutory reflection in the *Lands Acquisition Act* (NT), Sch 2, r 8. The precise scope of the rule is unclear, because it refers to “the proposal to carry out ... the proposal”, the proposal, at least in its second usage, apparently being the proposed acquisition of which notice was to be given under s 32.

example, and sold off to private developers should not be seen as the effectuation of a public purpose in itself, although it may have the consequence of augmenting the government coffers, at the expense of the former land-holder.

If, on the other hand, primary emphasis is placed on the statutory language, a matter of importance will be the change enacted by the legislature to remove reference to “public purpose” and replace it with “any purpose”. As a matter of semantics, that may be seen as the deliberate removal of a constraint. From the perspective of a proper understanding of the role of government, it is unlikely to have much significance at all. The antithesis of public is often thought of as private. However, it is not likely that the power of compulsory acquisition was being broadened so as to cover “private” purposes, whatever that might mean in context.

There was indeed statutory support for the broader understanding within the *Lands Acquisition Act* itself. Section 48 permitted the Minister to declare that “any land acquired under this Act is no longer required for the purpose for which it was acquired”. In that event, the land might be “dealt with as unalienated Crown land under a law in force in the Territory”. That provision might have been seen to support the argument that land was to be acquired for an identifiable governmental purpose, being something other than an exercise of the power of alienation.

As Sean Brennan has explained, some of these issues were addressed in a series of decisions in the US Supreme Court culminating in *Kelo*¹³. That line of authority deals with the tension between acquisition for a public purpose and acquisition for what might be broadly described as private purposes of development of underutilised land. The concept of public purpose has not been subject to strict constraints, but includes, for example, development which include slum clearance. Nevertheless, alienation to private purchasers, of itself, is treated as not a public purpose.

The importance of statutory interpretation in relation to compulsory acquisition arises from the fact that both compulsory acquisition and entitlements to compensation are

¹³ *Kelo v City of New London*, 545 US 469 (2005)

entirely creations of statute.¹⁴ It may thus be said that there is, relevantly for present purposes, no general law power, based on the prerogative of the Executive or otherwise, permitting compulsory acquisition of land. That absence of power, combined with the sensitivity of the general law to the protection of private property, might well lead to an approach which jealously guards private property interests against the unwelcome intrusions of the State, absent clear authority. However, by contrast, the Court has tended to adopt a highly statute-specific approach to the question. Thus, in *Marshall*,¹⁵ McHugh J decried the idea that courts “should slavishly follow judicial decisions of the courts of another jurisdiction in respect of similar or even identical legislation”. Such authorities were, his Honour said “guides to, but cannot control, the meaning of legislation in the court’s jurisdiction”.

In *Walker Corporation*, the High Court applied such an approach, avoiding reference to some general principle that compensation “cannot include an increase in value which is entirely due to the scheme underlying the acquisition” (the *Point Gourde* principle) in favour of the exercise required in terms by the statutory language of the particular Act under which the land was acquired.

There is another side to compulsory acquisition of land: because acquisition can only be carried out on just terms, payment of compensation is required, which involves expenditure by the executive government. If the compulsory acquisition is not for a public purpose of the government, there may be a question as to the validity of the expenditure. This, it may be said, is merely the other side of the same question which has been addressed above. Nevertheless, there are specific requirements relating to appropriation and control of executive expenditure of public funds. What is required in that respect was the subject of detailed consideration by the High Court in *Pape v The Commissioner of Taxation*,¹⁶ which has been the subject of recent consideration in this forum and does not require repetition.

¹⁴ See *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2008] HCA 5; 233 CLR 259, quoting Lord Pearson in *Rugby Joint Water Board v Shaw-Fox* [1973] AC 202 at 214.

¹⁵ *Marshall v Director General, Department of Transport* [2001] HCA 37; 205 CLR 603 at [62]

¹⁶ [2009] HCA 23; 238 CLR 1

Conclusions

These brief remarks have done no more than touch on some of the issues raised by the decision of the High Court in *Griffiths* and by Sean Brennan's insightful paper. Kirby J, dissenting in *Griffiths*, sought to identify in greater detail the interface between compulsory acquisition and native title. My comments suggest that there was another approach to the principles of compulsory acquisition which was not fully explored. You may infer that I see this as a missed opportunity. But then you will say, 'Well, he would, wouldn't he: he had been counsel for the unsuccessful applicants before the matter reached the High Court'.