The Fourth Annual Global Conference
Environmental Taxation Issues, Experience and Potential
Thursday, June 5 –Saturday, June 7, 2003
Sydney, Australia.

Taking Farmers' Property Rights Seriously and Just Compensation On Their Taking.

Bryan Pape*

The supreme power cannot take from any man part of his property without his own consent: for the preservation of property being the end of government, ... [1]

For what property have I in that which another may by right take, when he pleases, to himself? [2]

Children cannot well comprehend what injustice is, till they understand property. [3]

.

Contents

[1] John Locke, (1689-90), Of Civil Government, Book II, Chp. XI, ~138, *The Works of John Locke*, Vol. V, Thomas Tegg & Ors, London, 1823, p. 421.
[2] Ibid ~140, p. 423.
[3] John Locke, (1693), Of Education ~110, *The Works of John Locke*, Vol. IX, Thomas Tegg & Ors, London, 1823, p.101.

I. The General Issue

> *[T]he leaders of socialist thought in the field of law openly pronounced the doctrine that the private law aiming at the co-ordination of individual activities would progressively be replaced by a law of subordination, and that* ***'for a social order of law private law was to be regarded only as a provisional and constantly decreasing range of private initiative, temporarily spared within the all comprehensive sphere of public law'*** [4]

> *The general rule at least is, that while property may be regulated to a certain extent,* ***if regulation goes too far it will be recognized as a taking****. . . . . **We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we have already said, this is a question of degree – and therefore cannot be disposed of by general propositions****.*[5]

A desire to protect the environment and to manage natural resources in a sustainable way have caused the enactment of much legislation. These statutes work by 'commanding and controlling' the way in which natural resources are used. For example water, forests and farming lands. They are the antithesis of the idea that *freedom – not authority – will provide the most responsible and beneficial stewardship of the planet.*[6]

One result of the restrictions imposed by such legislation has been to reduce the economic value of farming lands and the income so generated from growing crops or grazing livestock. A question which arises is whether property owners so burdened, have any legal right to compensation and if not whether they ought to be so compensated? If they are to remain uncompensated for their losses, are these losses tantamount to taxation?

Generally in Australia where land is resumed or expropriated by Government it is done so with just compensation. For example s. 51(xxxi) of the Commonwealth of Australia Constitution Act provides that the Commonwealth has power to make laws for the:-

> *The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.*

Likewise in New South Wales there is provision for ***just compensation*** to be paid to the owners when their land is compulsorily acquired by a State Authority under the *Land Acquisition (Just Terms Compensation) Act* 1991.

---

[4] F.A. Hayek, Rules and Order, *Law, Legislation and Liberty*, Vol. 1, Routledge & Kegan Paul, London, 1973 at p. 143 including n. 34.

[5] Holmes J in *Pennsylvania Coal v Mahon* 260 U.S. 393 (1922) at pp.316-417 and which has been described as *both the most important and most mysterious writing in takings law;* Bruce A. Ackerman, *Private Property and the Constitution* 156 (1977).

[6] B. H. Siegan, *Property and Freedom: the Constitution, the Courts and Land-Use Regulation*, Transaction Publishers, 1997, New Brunswick, p. 203.

What is of present concern is the case where a statute works to bring about a decline in the economic value of property which is equivalent to its compulsory acquisition, resumption or expropriation. Where the enjoyment of property rights is adversely affected by such legislation so as to cause economic loss, is there a legal remedy?

The public international law rules referable to sovereign risk and the expropriation of foreign investment assets by host states are directly analogous to domestic environmental laws which approximate the expropriation of proprietary rights. International law recognizes situations where defacto expropriation of rights has occurred. In short, whether the law 'deprives the investor of the core economic and control functions of his investment, irrespective of the status of the legal title'[7].

> *In view of the fact that environmental regulations rarely take away all economic value in property or investment, it could be suggested that a more reasonable test of regulatory taking should be whether or not it affected* ***the core economic function of the property, such as the ability to use, control or dispose of the property as well as the ability to earn a reasonable rate of return on the investment.*** *.... To insist that the destruction of economic value must be one hundred per cent would place too much regulatory power in the state at the expense of individual proprietary rights.* [8]

Interestingly Article 1110 of the *North American Free Trade Agreement* speaks of measures *tantamount to nationalization or expropriation*. Paras 1 and 2 are in the following terms:

> *1. No Party shall directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or* ***take a measure tantamount to nationalization or expropriation*** *of such an investment ("expropriation"), except:*
>
> *(a) for a public purpose;*
> *(b) on a non-discriminatory basis;*
> *(c) in accordance with due process of law and the general principles of treatment provided in Article 1105; and*
> *(d) upon payment of compensation in accordance with paragraphs 2 to 6.*
>
> *2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value (including declared tax value of tangible property) and other criteria, as appropriate to determine fair market value.*

---

[7] *Air Canada v. United Kingdom* (1995) 20 EHRR 150

[8] A. Kolo & T. Waelde, *Multilateral investment treaties and environmental regulatory 'taking' of foreign-owned property under international law*, The Centre for Energy, Mineral Law and Policy, University of Dundee,Scotland. (http://www.gasandoil.com/goc/speeches/waelde1.htm, accessed 18 December 2002)

An interesting Australian illustration is the economic effect of the *Native Vegetation Conservation Act* 1997 (N.S.W.) in the Moree Plains Shire where it is argued that land values have been reduced by 21% and farm incomes by 10%. By 2005 it is estimated that farm incomes will be down by 18%.[9]

It is doubtful whether this kind of State environmental legislation could be successfully challenged on the grounds that it is contrary to s 5 of the *Constitution Act* 1902 (N.S.W.) in that it is not *for the peace, welfare and good government of N.S.W.* Dawson J. said in *Kable v. Director of Public Prosecutions for N.S.W.* [10]

> *This case throws up the question reserved in those cases and it should now be answered by saying that no non-territorial restraints upon parliamentary supremacy arise from the nature of a power to make laws for peace, order (or welfare), and good government or from the notion that there are fundamental rights which must prevail against the will of the legislature.*

On this aspect Brennan C.J. and McHugh J. agreed with Dawson J. Toohey J left open the issue of whether 'legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law' as tentatively identified in *Union Steamship Co. of Australia Pty. Ltd. v. King* [11]. Gaudron and Gummow JJ. found it unnecessary to consider the question.

Paragraph 2 of Article 17 of the *Universal Declaration of Human Rights,* 1947 of the United Nations provides that *'No one shall be arbitrarily deprived of his property'.* The Declaration has neither been ratified nor received as part of the municipal law of Australia.

Here it is worth noting that paragraph 2 of Article 17 of the *Universal Declaration of Human Rights* could be viewed in part as a restatement of *25 Edw. I c. 29* (1297), *(Magna Carta)* as preserved by s. 6 *Imperial Acts Application Act* 1969 (NSW) and Part 1 of the Second Schedule.

> *No freeman shall be taken or imprisoned or be* ***disseised of his freehold,*** *or liberties or free customs, or be outlawed or exiled or* ***any other wise destroyed;*** *nor will we not pass upon him, nor [condemn him] but by lawful judgment of his peers* ***or by law of the land.*** *We will sell to no man, we will not deny or defer to any man either justice or right.*[12]

The loss in the economic value of a farmer's rights to property and income raises the question of whether parts of the environmental legislation are contrary to c 29 of *25 Edw. I* (1297), *(Magna Carta).* It is noteworthy that c 29, (sic. c. 39 *John* (1215)), was

---

[9] J.A. Sinden, *Who pays to protect native vegetation? Costs to farmers in Moree Plains Shire, New South Wales*, Paper presented to the 46th Annual Conference of the Australian Agricultural and Resource Economics Society, Canberra , February 12th to 15th , 2002.

[10] (1996) 189 C.L.R. 51 at p. 76.

[11] (1988) 166 C.L.R. 1 at p.10.

[12] *Prisoners A-XX Inclusive v State of New South Wales* (1995) 38 NSWLR 622 at pp 633-4 [G-A].

interpreted by c. 3 of *28 Edw.III* (1354) by substituting the words *due process* for *judgment of his peers.* As to the importance of *the Great Charter,* Isaacs J. observed: [13]

> *It is essential, however, even at this advanced stage of our political development, and perhaps none the less because of that development, to bear constantly in mind certain fundamental principles which form the base of the social structure of every British community. Those fundamental principles and their working corollaries I have accepted and endeavoured to follow as unerring guides in reaching my conclusions on the matters directly in controversy. The principles themselves cannot be found in express terms in any written Constitution of Australia , but they are inscribed in that great confirmatory instrument, seven hundred years old, which is the groundwork of all our Constitutions – Magna Charta. Chap 29 (sometimes cited as Chap 39) contains them all. Its words, rendered into English, and so far as immediately material here, are: "No free man shall be taken or imprisoned . . . or exiled . . . but . . . by the law of the land."* ***The chapter, as a whole refers to other rights as well****, and recognizes three basic principles, namely, (1)* ***primarily every free man has an inherent individual right to his*** *life, liberty,* ***property*** *and citizenship; (2)* ***his individual rights must always yield to the necessities of the general welfare at the will of the State;*** *(3) the law of the land is the only mode by which the State can so declare its will. These principles taken together form one united conception for the necessary adjustment of the individual and social rights and duties of the members of the State. For their effective preservation and enforcement the Courts have evolved two great working corollaries in harmony with the main principles, and without which these would soon pass into merely pious aspirations. The first corollary is there is always an initial presumption in favour of liberty, so that whoever claims to imprison or deport another has cast upon him the obligation of justifying his claim by reference to the law.* ***The second corollary is that the Courts themselves see that this obligation is strictly and completely fulfilled before they hold that liberty*** (I interpolate for present purposes the word 'property') ***is lawfully restrained*** (interpolate the words 'taken' or 'expropriated')***. The second is often in actual practice and concrete result the more important of the two to keep steadily in view.***

Professor Alex Castles[14] in a note on the application of Magna Carta in Australia referred to an affirmation of the South Australian Law Reform Committee that Chapter 29 was *'the foundation of our whole system of justice'.* He quipped:

> *More than 750 years on after John Lackland bowed to his accusers, the Great Charter could even find a new place, a more settled home, on a continent the King's barons could never conceive existed.*

---

[13] *Ex Parte Walsh; Ex Parte Johnson; In re Yates* (1925) 37 CLR 36 at p.79.
[14] Alex C. Castles, Australian Meditations on Magna Carta, (1989) 63 ALJ 122.

For the present what Professor Helen M. Cam said in her lecture to the Selden Society is instructive:

> *In the light of seven and a half centuries of English history Magna Carta is no archaic curiosity. It stands for something alive, as precious to us today as ever it was to our ancestors. It is all very well to say that the sovereignty of Parliament is the key to our Constitution. No constitutional lawyer, be he Dicey or Jennings, can leave it that. If, as Maitland said, Magna Carta embodies the rule of law, we can say – as Coke said, though not exactly as he meant it-* ***'Magna Carta is such a fellow that he will have no sovereign.'***[15]

The idea that no person's property and indeed livelihood will be destroyed without due process of law underpinned the decision of the Supreme Court of Canada in *Manitoba Fisheries Ltd. v. The Queen* [16]. There the Court relied upon what was said by Lord Atkinson in *Attorney – General v. De Keyser's Royal Hotel Ltd.*[17]

> *The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.*

The requirement to observe fundamental principle in the interpretation of statutes was remarked upon by Lord Reid in *Smith v. East Elloe Rural District Council*[18]*:*

> *In general, of course, the intention of Parliament can only be inferred from the words of the statute, but it appears to me to be well established in certain cases, that without, some specific indication of an intention to do so, the mere generality of words used will not be regarded as sufficient to show an intention to depart from* ***fundamental principles.***

Whether Parliament had taken away rights without compensation where a local planning authority refused an application for development was later also considered by Lord Reid in *Westminster Bank Ltd. v. Minister of Housing and Local Government* [19]:

> *The appellants' argument is really founded on the principle that*
>
> *"a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms" (per Lord Warrington in Colonial Sugar Refining Co. Ltd. v. Melbourne Harbour Trust Commissioners [1927] A.C. 343, 359).*

---

[15] Helen C. Cam, Magna Carta – Event or Document?, *Selden Society Lecture*, Bernard Quaritch, London, 1965 at p. 26.
[16] (1979) 88 D.L.R. (3d) 462.
[17] [1920] A.C. 508 at p.542.
[18] [1956] A.C.736 at p.765.
[19] [1971] A.C. 508 at p.529 B-E.

> *I entirely accept the principle. It flows from the fact that Parliament seldom intends to do that and therefore before attributing such an intention to Parliament we should be sure that that was really intended. I would only query the last words of the quotation. When we are seeking the intention of Parliament that may appear from express words but it may also appear by irresistible inference from the statute read as a whole. But I would agree that, if there is reasonable doubt, the subject should be given the benefit of the doubt.*
>
> *It would be possible to distinguish this statement of the principle on the ground that planning legislation does not take away private rights of property: it merely prevents them from being exercised if planning permission is refused. But that would, in my view, be* ***too meticulous a distinction****. Even in such a case I think we must be sure that it was intended that this should be done without compensation.*
>
> *But it is quite clear that when planning permission is refused the general rule is that the unsuccessful applicant does not receive any compensation. There are certain exceptions but they have no special connection with street widening. If planning permission is refused on the ground that the proposed development conflicts with a scheme for street widening, the unsuccessful applicant is in exactly the same position as other applicants whose applications are refused on other grounds. None of them gets any compensation. So absence of any right to compensation is no ground for arguing that it is not within the power of planning authorities to refuse planning permission for this reason.*

Deane J. in *Mabo v. Queensland*[20] also observed that there is *the strong presumption against legislative intent to confiscate or* ***extinguish property rights and interests*** *without compensation.*

In the *Manitoba Fisheries*, Ritchie J. in delivering the judgment of the Court said [21] :

> *Once it is accepted that the loss of goodwill of the appellant's business which was brought about by the Act and by the setting up of the Corporation was a loss of property and that the same goodwill was by statutory compulsion acquired by the federal authority. It seems to follow that the appellant was deprived of property which was acquired by the Crown.*

[20] (1988) 166 C.L.R. 186 at p. 226.
[21] n.16, at p. 468.

He went on to say[22]:

> *It will be seen in my opinion the Freshwater Fish Marketing Act and the Corporation created thereunder had the effect of depriving the appellant of its goodwill as a going concern and consequently rendering its physical assets virtually useless and that the goodwill so taken away constitutes property of the appellant for the loss of which no compensation whatever has been paid. There is nothing in the Act providing for the taking of such property by the Government without compensation and as I find that there was such a taking, it follows in my view that it was unauthorized having regard to the recognized rule that " unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation": per Lord Atkinson in Attorney-General v. De Keyser's Royal Hotel, supra.*

Here it is important to note the view expressed by Mr A. H. Slater, Q.C. that *upon a proper analysis, goodwill is neither property, nor any sort of right, whether incorporeal or otherwise. Rather it is, like value, a quality or attribute which results from the presence of rights, assets, legal persons or qualities, none of which themselves are goodwill* [23]. He goes on to note that *(f)or the most part the proposition that goodwill is property has gone uncontested*[24]. For present purposes goodwill is treated as property.

The decision of the Supreme Court of Canada in *Manitoba Fisheries* is an example of the approach capable of being followed in Australian courts. A useful analysis was given by Mr R. J. Bauman in a paper presented in October 1993 to the first annual meeting of the British Columbia Expropriation Association, as to whether there is a rule of statutory construction which works to ensure that property cannot be taken without clear and unambiguous language and if it can, it can only be, if compensation is paid.[25]

The Supreme Court of Court of Canada affirmed this approach in *The Queen v. Tener* [26] where Estey J. concluded:

> *The denial of access to these lands occurred under the Park Act and amounts to a recovery by the Crown of a part of the right granted to the respondents in 1937. The acquisition by the Crown constitutes a taking from which compensation must flow. Such a conclusion is consistent with this Court's judgment in Manitoba Fisheries Ltd. v. The Queen, [1979] S.C.R. 101. . . . . .*
>
> *This process I have already distinguished from zoning, the broad legislative assignment of land use to land in the community. It is also to be distinguished from regulation of specific activity on certain land, as for example, the prohibition of specified*

---

[22] Ibid at p. 473.
[23] A. H. Slater, The Nature of Goodwill, (1996) 24 A.T.Rev. 31
[24] Ibid, at p. 32.
[25] R. J. Bauman, Exotic Expropriations: Government Action and Compensation, (1994) Vol 52 (4) The Advocate, pp 561-579.
[26] (1985) 17 D.L.R. (4th) 1 at pp. 11 -13.

> *manufacturing processes. This type of regulation is akin to zoning except that it may extend to the entire community. See Re Bridgman and City of Toronto, [1951] O.R. 489, at p. 491, for an example of such regulation. Here, the action taken by the government was to enhance the value of the public park. The imposition of zoning regulation and the regulation of activities on lands, fire regulation limits and so on, add nothing to the value of public property. Here the government wished, for obvious reasons, to preserve the qualities perceived as being desirable for public parks, and saw the mineral operations of the respondents under their 1937 grant as a threat to the park. The notice of 1978 took value from the respondents and added value to the park. The taker, the government of the province, clearly did so in exercise of its valid authority to govern. It clearly enhanced the value of its asset, the park. The respondents are left with only the hope of some future reversal of park policy and the burden of paying taxes on their minerals. The notice of 1978 was an expropriation and, in my view, the rest is part of the compensation assessment process.*

However there is an important distinction to be made between *Tener* and *Manitoba Fisheries.* In *Tener* compensation was payable because the *Park Act* picked up the *Ministry of Highways and Public Works Act* which provided for compensation when expropriation occurred. On the other hand in *Manitoba Fisheries* where there was an expropriation of goodwill and yet in the absence of an enabling statutory provision the Court held compensation was payable.

In *Tener*, Dickson C.J. and Wilson J. agreed with the conclusion of the majority but for different reasons. Wilson J. said[27]:

> *Where expropriation or injurious affection is authorized by statute the right to compensation must be found in the statute. As Lord Parmoor said in Sisters of Charity of Rockingham v. The King, [1922] 2 A.C. 315 (P.C.),at p.322:*
>
> > *Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage, on the ground that his land is "injuriously affected", unless he can establish a statutory right.*
>
> *Where land has been taken the statute will be construed in the light of a presumption in favour compensation (see Todd, The Law of Expropriation and Compensation in Canada, pp. 32-33) but no such presumption exists in the case of injurious affection where no land has been taken (see Todd, supra, at pp.292 et seq.; Challies, The Law of Expropriation (2nd ed), pp. 132 et seq.). In such a case the right to compensation has been severely circumscribed by the courts (see The Queen v. Loiselle, [1962] S.C.R. 624) and, although the policy considerations reflected in the restrictive*

[27] Ibid at p. 22

> *approach to recovery for injurious affection simpliciter have been seriously questioned (see Todd, "The Mystique of Injurious Affection in the Law of Expropriation" (1967), U.B.C.L. Rev.- - C. de D. 125), the concern over the indeterminate scope of the liability remains if recovery is permitted for any injury to private land resulting from the non-negligent, authorized acts of public authorities.*

On the authority of *Manitoba Fisheries* it seems that in Canada injurious affection simpliciter would give rise to compensation but *Tener* would deny compensation if there was no explicit statutory authority to make such a payment. This was no impediment to the House of Lords in *Burmah Oil Co v. Lord Advocate* where the appellant oil companies sought compensation for the destruction of their property so that it did not fall into enemy hands as an exercise of the royal prerogative. Lord Reid said [28]:

> *What we have to determine in this case is whether or when, in a case not covered by any statute, property can be taken by virtue of the prerogative without compensation. That could only be an exceptional case, because it would be impracticable to conduct a modern war by use of the prerogative alone, whether or not compensation was paid. The mobilisation of the industrial and financial resources of the country could not be done without statutory emergency powers. The prerogative is really a relic of a past age. Not lost by disuse, but only available for a case not covered by statute.*

A convenient summary of the juxtaposition of the approach followed in the United States with that followed in Commonwealth countries has been made by Professor Michael Taggart.[29]

> *As we have seen, in the United States it [sic, the principle against arbitrary dispossession] found its way into the Bill of Rights and early on became established as a constitutional limitation upon legislative competence to expropriate land. In the rest of the common-law world the expression has found expression in administrative law doctrine and the law and techniques of statutory interpretation. Notwithstanding the 'apples and oranges' problem of comparing the efficacy of constitutional protection of property in the United States with the less grand interpretive techniques employed by the Commonwealth courts, the latters' case law illustrates a remark made by Bernard Schwartz and Sir William Wade in their ground-breaking comparative study of Anglo-American administrative law over a quarter of a century ago: **'[t]he creative work that British judges can do is . . . not***

[28] [1965] A.C. 75 at p. 101, B-D.

[29] Michael Taggart, 'Expropriation, public purpose and the constitution' in Christopher Forsyth,and Ivan Hare, (eds.), *The Golden Metwand and Crooked Cord: Essays in Public Law in Honour of Sir William Wade, Q.C.*, Oxford, 1998 at p.112.

> ***greatly impaired by their constitutional subservience to Parliament***[30]*]'*

II. The Nature of Property Rights

> *Land is not publicly owned but there is an increasing recognition that a landowner owns something which is of such vital importance to the community that he should be publicly controlled for at least some purposes. Provided that we remember the vastly different social and economic context it is not fanciful* ***to see here the beginnings of a return to something in the nature of feudal tenure by which an occupier of land had to perform certain duties to his overlord or to the Crown****, many of which were of a public nature.*[31]

The meaning of property is extremely wide. "Property is the most comprehensive term that can be used"[32]. In *Bank of New South Wales v. The Commonwealth* [33] the High Court affirmed what it had said in *Minister of State for the Army v. Dalziel* [34] :

> *Proprietary interests are not confined pedantically to the taking of title. . . . . To some specific estate or interest in land recognized by law or equity and to some form of property in a chattel or chose in action similarly recognized, but that it extends* ***to innominate and anomalous interests.***

The notion of innominate and anomalous interests is peculiarly relevant to the concept of regulatory takings or what is otherwise tantamount or equivalent to the expropriation of property.

The plan under the *Banking Act* 1947 (Cth) to nationalize the private trading banks was described by Dixon J. in *Bank of New South Wales v. The Commonwealth*:

> *The Commonwealth Bank is authorized to purchase by agreement shares in a bank incorporated in Australia or in the United Kingdom. The Treasurer must approve. Shares in an Australian bank so purchased are, by force of the Act and in spite of anything the articles of association may say, vested in the Commonwealth*

---

[30] B.Schwartz & H.W.R. Wade, *Legal Control of Government*, Oxford, 1972, at pp.12-13.
[31] F. W. Guest, Freedom and Status – An Inaugural Lecture, University of Otago Press, Dunedin, 1961.
[32] *The Commonwealth v. The State of New South Wales* (1923) 33 C.L.R. 1 at pp. 20-2.
[33] (1948) 76 C.LR. 1 at p. 349.
[34] (1944) 68 C.L.R. 261 at p. 285.

Bank, which thereupon becomes a member of the company. This is the first operative provision (ss.12, 14, 10). Next, the Treasurer is enabled to publish a notice in respect of any bank incorporated in Australia that on a named date the shares situated in Australia shall vest in the Commonwealth Bank. The consequences are twofold. On the expiry of the notice shares then on the Australian register, or afterwards coming upon it, vest in the Commonwealth Bank which, as before, becomes a member of the company, notwithstanding the articles of association. ***At the same time the directors are removed and nominees of the Governor of the Commonwealth Bank, approved by the Treasurer, take the place of the directors and assume all the powers of the company*** *(ss. 13, 14, 10, 17-19). In the third place, provision is made for the purchase by the Commonwealth Bank by agreement or, in default of agreement, compulsorily, of the business in Australia of any private bank. The acquisition is the consequence of a notice by the Treasurer, upon whose discretion the exercise of the power depends. The acquisition of the business in Australia includes assets and liabilities which have or afterwards obtain a situation in Australia. The transfer of non-Australian assets may be required. A private bank is prohibited from carrying on banking business in Australia when its business is thus acquired (ss. 22, 24, 46 (1)-(3)). Fourthly, the Treasurer is armed with a discretionary power to forbid a private bank from carrying on banking business, a power that is independent of any acquisition of assets or shares. Fifthly, a provision is made for compensation for the acquisition of shares or assets (ss. 15, 25, 37-41, 42-45). A Court of Claims is set up with exclusive jurisdiction over claims for compensation (ss. 26-36, 40 (2) and (5), 42). Seventhly, there are elaborate provisions respecting the staff of banks whose business or shares are acquired, the general purport of which is to continue the officers in the employment of the Commonwealth Bank without prejudicing the rights accruing to them in their former service (ss.47-55).* [35]

…….

In Divisions 2 and 3 of Part IV. of the Banking Act 1947 *elaborate provision is made enabling the Treasurer to set in motion machinery for vesting in the Commonwealth Bank the Australian shares of an Australian Banking company, for displacing the directors in favour of nominees of the Commonwealth Bank, and for entrusting the latter with the entire conduct and management of the company, including the disposal of its business. From these provisions and from the possible uses in relation to them of s. 22, s. 46 (4)-(8) and ss. 43 and 44, a pattern of powers results which may fairly be described as intricate.* ***It is aimed at enabling the Commonwealth Bank by means of nominees to assume control of the business of an Australian bank without necessarily invoking***

[35] *Bank of New South Wales v. Commonwealth* (1948) 76. C.L.R. 1 at pp. 327-328.

the power for compulsorily acquiring the business, which would mean an assessment of the compensation for the whole undertaking. *The exercise of these powers would necessitate dealing directly with the shareholders as such, some, presumptively the greater number, by acquiring their shares and compensating them, others perhaps as contributories in an ultimate liquidation.*

I have formed the opinion that the provisions are bad because they would enable the Treasurer and the Commonwealth Bank to defeat the constitutional requirement imposed by s. 51 (xxxi.) that the acquisition of property shall only be upon just terms. [36]

……..

From the foregoing account of the material provisions of Divisions 2 and 3 of Part IV. and the relation thereto of ss. 22, 46 (4) and 43 (1) and 44(3), it will be seen that a notice by the Treasurer under s. 13 (1) ***operates to set in motion a process which <u>expropriates</u> the shares localized in Australia and at the same time displaces the authority over the affairs of the company, not only of the directors chosen by the shareholders, but of the shareholders themselves. It places all the property and all the activities of the company under the supreme control of the nominees of the Treasurer and the Bank and leaves them in entire control indefinitely with complete powers of disposition and complete power to bind the company as to the recompense it will receive for its assets.*** *The corporate entity of the company remains and in it the legal property in the assets continues to reside. Shareholders are entitled to dividends if the nominees see fit to declare any. In a winding up, if there be one, shareholders remain entitled to participate as contributories. But in all other respects the beneficial enjoyment and control of the undertaking has been placed in the hands of agents of the Commonwealth, or of the Commonwealth Bank if the distinction is insisted on and in this matter can be clearly maintained. The purpose of removing the directors appointed by the shareholders and replacing them with nominees of the Treasurer and of the Governor of the Bank is that agents of the Commonwealth may take command of the undertaking of the banking company and carry it on in the public, as opposed to private, interests pending decisions, in which they will play a part, concerning the acquisition of the assets by or their disposal to the Commonwealth Bank, the settling of the amount of compensation or the purchase price, and the transfer of the staff.* [37]

……..

[36] Ibid at pp. 343-344.
[37] Ibid at p. 348

> *In other words the undertaking is taken into the hands of agents of the Commonwealth so that it may be carried on, as it is conceived, in the public interest.* ***The company and its shareholders are in a real sense, although not formally, stripped of the possession and control of the entire undertaking.*** *The profits which may arise from it in the hands of the Commonwealth's agents are still to be accounted for and in some form they will be represented in what the shareholders receive.* ***But the effective deprivation of the company and its shareholders of the reality of proprietorship is the same.*** *It must be remembered that complete dispositive power accompanies the control of the assets which passes to the nominees. It is as if an intending purchaser were enabled to put a receiver in possession of an estate and also to take a power of sale in the receiver's name, remaining however accountable, until he pays the purchase money, for the rents and profits, which nevertheless he may apply towards the upkeep of the property and, subject thereto, accumulate.*
>
> *Upon consideration I have reached the conclusion that this is but* ***a circuitous device to acquire indirectly the substance of a proprietary interest*** *without at once providing the just terms guaranteed by s. 51 (xxxi**.)** of the Constitution when that is done.* [38]

It is submitted that the significance of the *Bank Nationalization* case for present purposes is that the High Court was not thwarted by the *circuitous device to acquire indirectly the substance of a proprietary interest.* The court looked at the substance of the acquisition to find that there was an expropriation of property. In other words the Court was concerned with what was tantamount to expropriation, constructive expropriation or economic equivalence. It struck down what was attempted to be done indirectly rather than directly. The 'command and control' devices which were used in the sterilized *Banking Act* 1947 (Cth) have resurfaced in some recent environmental legislation. **The test for expropriation is the effective deprivation of property and the reality of proprietorship**.

In N.S.W. the present regime of environmental laws generally work by prohibiting the right of use unless a licence is obtained to do so. Where for example land on which a business of primary production is carried on is affected by restrictions imposed on the way in which the land is to be grazed or cultivated by Acts such as the *Native Vegetation Conservation Act* 1997 (N.S.W.) or the *Threatened Species Conservation Act* 1995 (N.S.W.) an inquiry needs to be made as to the way in which the business is organized. It is not uncommon for the land to be owned by a family trust or a proprietary company and leased to a family partnership which carries on the primary production business. If the land available for lease has been so reduced it would not appear to be difficult to determine the losses suffered by the lessor and the lessee.

[38] Ibid. at p.349.

III. What is meant by 'taking'?

The participle 'taking' comes from the last clause of the Fifth Amendment to the United States Constitution which provides that:

> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;* ***nor shall any person be*** *subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be* ***deprived of*** *life, liberty, or* ***property, without due process of law****;* ***nor shall private property be taken for public use without just compensation.***

What is striking on reading the above words of the Fifth Amendment is that it is essentially the same as c.29 of *25 Edw. I*, (1297). *Nor shall any person be deprived of property without due process of law* sits comfortably with *(n)o freeman shall be disseised of his freehold ..or other wise destroyed…. nor will we pass upon him…but by law of the land. …(W)e will not deny …to any man either justice or right.*

As Professor Helen M. Cam noted in her 1965 address to the Selden Society:

> *Thus inevitably when the fathers of the Constitution completed their work by framing the Bill of Rights in 1791, what Bryce called 'the legitimate child of Magna Carta' was written into the fundamental law of the Fifth Amendment* [39]

The concept of 'taking' was referred to by Brennan J. and Deane J. in the *Tasmanian Dams Case* [40] in the context of the application of 51(xxxi) of the *Commonwealth of Australia Constitution Act* as to whether there had been an acquisition of property by the Commonwealth. Brennan J. observed [41]:

> *In the United States, where the Fifth Amendment directed that private property should not be "taken" without just compensation, the Supreme Court construed the provision as one "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole": Armstrong v. United States* [42]*. If this Court were to construe s. 51(xxxi) so that its limitation applies to laws which regulate or restrict use and enjoyment of proprietary rights but which do not provide for the acquisition of such rights, it would be necessary to provide a touchstone for applying the limitation to some regulatory laws and not to others. The*

[39] See n. 15 at p. 25.
[40] (1983) 158 C.L.R. 1
[41] Ibid at pp. 247-248
[42] 364 U.S.40(1960), at p. 49 (4 Law. Ed. 2d 1554, at p. 1561

> *experience of the Supreme Court of the United States was frankly stated in Penn Central Transport Co. v. New York City [43]:*
>
> *". . . this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."*

Deane J in the *Tasmanian Dams Case* also observed:[44]

> *The mere extinguishment or deprivation of rights in relation to property does not involve acquisition.*
>
> ***Difficult questions can arise when one passes from the area of mere prohibition or regulation into the area where one can identify some benefit flowing to the Commonwealth or elsewhere as a result of the prohibition or regulation.*** *Where the benefit involved represents no more than the adjustment of competing claims between citizens in a field which needs to be regulated in the common interest, such as zoning under a local government statute, it will be apparent that no question of acquisition of property for a purpose of the Commonwealth is involved. Where, however, the effect of prohibition or regulation is to confer upon the Commonwealth or another an identifiable and measurable advantage or is akin to applying the property, either totally or partially, for a purpose of the Commonwealth, it is possible that an acquisition for the purposes of s. 51(xxxi) is involved. The benefit of land can, in certain circumstances, be enjoyed without any active right in relation to the land being acquired or exercised; see, for example, Council of the City of Newcastle v. Royal Newcastle Hospital[45]. **Thus, if the Parliament were to make a law prohibiting any presence upon land within a radius of 1 kilometre of any point on the boundary of a particular defence establishment and thereby obtain the benefit of a buffer zone, there would, in my view, be an effective confiscation or acquisition of the benefit of use of the land in its unoccupied state notwithstanding that neither the owner nor the Commonwealth possessed any right to go upon or actively to use the land affected.***
>
> *In Trade Practices Commission v. Tooth & Co. Ltd [46], Stephen J. referred to the distinction which has been recognized in the United States between the regulation of proprietary rights and the taking of property; see, for example, Penn Central Transportation Co. v. New York City [47]. After referring to the differences between the*

---

[43] 438 U.S. 104 (1978), at p. 124 (57 Law.Ed.2d 631, at p. 648)
[44] n.41 at p. 283
[45] (1957) 96 C.L.R. 493; (1959) 100 C.L.R. 1.
[46] (1979) 142 C.L.R., at pp. 414-415.
[47] 438 U.S. 104 (1978), at pp. 123-128 and 139-146.

> *United States Fifth Amendment and s. 51(xxxi) of the Australian Constitution, his Honour quoted, as of "some guidance in the Australian context", the following passage from 29A Corpus Juris Secundum ("Eminent Domain", par. 6):*
>
> *"There is no set formula to determine where regulation ends and taking begins; so the question depends on the particular facts and the necessities of each case and the Court must consider the extent of the public interest to be protected and the extent of regulation essential to protect that interest."*
>
> *Stephen J. continued:*
>
> *"On the one hand, many measures which in one way or another impair an owner's exercise of his proprietary rights will involve no 'acquisition' such as pl. (xxxi) speaks of.* ***On the other hand, far reaching restrictions upon the use of property may in appropriate circumstances be seen to involve such an acquisition. That the American experience should provide guidance in this area is testimony to the universality of the problem sooner or later encountered wherever constitutional regulation of compulsory acquisition is sought to be applied to restraints, short of actual acquisition, imposed upon the free enjoyment of proprietary rights.*** *In each case the particular circumstances must be ascertained and weighed and, as in all questions of degree, it will be idle to seek to draw precise lines in advance."*

The 1992 decision of the United States Supreme Court in *Lucas v. South Carolina Coastal Council* [48] served to refocus the application of the principle enunciated by Holmes J. in *Pennsylvania Coal v. Mahon* [49].

In 1986 *Lucas* purchased two lots of residential land to erect family homes on the Isle of Palms, a South Carolina barrier island. These lots were not subject to South Carolina's coastal zone building permit requirements. However construction was later prevented by the enactment in 1988 of the Beachfront Management Act. The Supreme Court held that the Act brought about a 'taking' within the meaning of the Fifth Amendment. Scalia J. in delivering the opinion of the Court said [50]:

> *Justice Holmes recognized in Mahon, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits [51]. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of*

[48] 505 U.S. 1003 (1992)

[49] n.5 above at pp.415-416. *To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming the statute does…. The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.*

[50] n. 48 at p. 1015

[51] n. 5 at pp. 414-415

> *human nature [would be] to extend the qualification more and more until at last private property disappeared."* [52]

Scalia J continued [53]:

> *We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.*

(i) Police Taking

In the United States laws which regulate and work to administer the governance of functions such as the safety, health, morals and general welfare of the public were cited as police powers in *Lochner v. New York* [54].

> *There are, however certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public.*

Epstein [55] asks: *How, then, should a police power justification for admitted government takings of private property be read into the Constitution?*

> *In a word, the police power gives the state control over the full catalogue of common law wrongs involving force and misrepresentation, deliberate or accidental, against other persons, including private nuisances……..*
>
> *……..The sole function of the police power is to protect individual liberty and private property against all manifestations of force and fraud.*

In considering the application of the police power in *Lucas* , Scalia J. said[56]:

> *It is correct that many of our prior opinions have suggested that "harmful or noxious uses" of property may be proscribed by government regulation without the requirement of compensation. For a number of reasons, however, we think the South Carolina Supreme Court was too quick to conclude that that principle*

---

[52] Cf. with Hayek at n.4
[53] n.48 above at p. 1020
[54] 198 U.S. 45 (1905) at p.53
[55] Richard A. Epstein, *Takings. Private Property and the Power of Eminent Domain,* Harvard University Press, Cambridge, Massachusetts, 1985, at pp. 110-112
[56] n. 48 at pp.1023-1024

> *decides the present case. The "harmful or noxious uses" principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate -- a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power. See, e.g., Penn Central Transportation Co., 438 U.S. at 125 (where State "reasonably concludes that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land," compensation need not accompany prohibition); see also Nollan v. California Coastal Comm'n, 483 U.S. at 834-835 ("Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest[,]' [but] they have made clear . . . that a broad range of governmental purposes and regulations satisfy these requirements"). We made this very point in Penn Central Transportation Co., where, in the course of sustaining New York City's landmarks preservation program against a takings challenge, we rejected the petitioner's suggestion that Mugler and the cases following it were premised on, and thus limited by, some objective conception of "noxiousness"*

(ii) Regulatory Taking

The underlying concept of a 'regulatory taking' for the purposes of the Fifth Amendment is of two types. The first need not concern us for present purposes, but involves *regulations that compel the property owner to suffer a 'physical' invasion of his property*[57]. The second and important one for present purposes is *where regulation denies all economically beneficial or productive use of land* [58].

In *Penn Central Transportation Co. v. New York City*, Brennan J. in delivering the Court's opinion identified criteria which could be used to find whether a taking had occurred.

> *In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly,* ***the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.*** *See Goldblatt v. Hempstead, supra, at 594.* ***So, too, is the character of the governmental action. "taking" may more readily be found when the interference with property can be characterized as a physical***

[57] n. 48 above at p.1016.
[58] n. 48 and see, *Agins*, 447 U.S. at 260; see also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987); *Hodel v.Virginia Surface Mining & Reclamation Assn.*, Inc., 452 U.S. 264, 295-296, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981).

invasion by government, *see, e. g., United States v. Causby, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.*

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922), and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example. A second are the decisions in which this Court has dismissed "taking" challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes. See, e.g., United States v. Willow River Power Co., 324 U.S. 499 (1945) (interest in high-water level of river for runoff for tailwaters to maintain power head is not property); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913) (no property interest can exist in navigable waters); see also Demorest v. City Bank Co., 321 U.S. 36 (1944); Muhlker v. Harlem R. Co., 197 U.S. 544 (1905); Sax, Takings and the Police Power, 74 Yale L. J. 36, 61-62(1964).

More importantly for the present case, in instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. See Nectow v. Cambridge, 277 U.S. 183, 188 (1928). Zoning laws are, of course, the classic example, see Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (prohibition of industrial use); Gorieb v. Fox, 274 U.S. 603, 608 (1927) (requirement that portions of parcels be left unbuilt); Welch v. Swasey, 214 U.S. 91 (1909) (height restriction), which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property. See Goldblatt v. Hempstead, supra, at 592-593, and cases cited; see also Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 674 n. 8 (1976).[59]

……...

Finally, government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute "takings." *United States v. Causby, 328 U.S. 256 (1946), is illustrative. In holding that direct overflights above the claimant's land, that destroyed the*

[59] 438 U.S. 104 (1978) at pp.125 –129.

> *present use of the land as a chicken farm, constituted a "taking," Causby emphasized that Government had not "merely destroyed property [but was] using a part of it for the flight of its planes." Id., at 262-263, n.7. See also Griggs v. Allegheny County, 369 U.S. 84 (1962) (overflights held a taking); Portsmouth Co. v. United States, 260 U.S. 327 (1922) (United States military installations' repeated firing of guns over claimant's land is a taking); United States v. Cress, 243 U.S. 316 (1917) (repeated floodings of land caused by water project is a taking); but see YMCA v. United States, 395 U.S. 85 (1969) (damage caused to building when federal officers who were seeking to protect building were attacked by rioters held not a taking). See generally Michelman, supra, at 1226-1229; Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964).*

The 'takings' jurisprudence in the United States has been more recently examined by the Supreme Court in *Palazzolo v. Rhode Island*[60] and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*[61]. In *Palazzolo* the opinion of the Court was delivered by Kennedy J. who said [62]:

> *Since Mahon, we have given some, but not too specific, guidance to courts confronted with deciding* ***whether a particular government action goes too far and effects a regulatory taking.*** *First, we have observed, with certain qualifications, see infra at 19-21, that a* ***regulation which "denies all economically beneficial or productive use of land"*** *will require compensation under the Takings Clause. Lucas, 505 U.S. at 1015; see also id. at 1035 (KENNEDY, J., concurring); Agins v. City of Tiburon, 447 U.S. 255, 261, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980).* ***Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.*** *Penn Central, supra, at 124. These inquiries are informed by* ***the purpose of the Takings Clause, which is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."*** *Armstrong v. United States, 364 U.S. 40, 49, L. Ed. 2d 1554, 80 S. Ct. 1563 (1960).*

The Court held that Palazzolo's claim was not defeated by the fact that the land was acquired after the regulations came into force. However O'Connor J., in delivering a concurring opinion held that this was a factor which was relevant in determining whether

---

[60] 533 U.S. 606 (2001)
[61] 535 U.S. 302 (2002)
[62] n. 60 at pp. 618-619.

the regulation interfered with the reasonable investment-back decision criterion. Her Honour observed[63]:

> *The more difficult question is what role the temporal relationship between regulatory enactment and title acquisition plays in a proper Penn Central analysis. Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the Penn Central analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance.* ***Our polestar instead remains the principles set forth in Penn Central itself and our other cases that govern partial regulatory takings****. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine. Further, the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.*
>
> *The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee is "'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Penn Central, supra, at 123-124 (quoting Armstrong v. United States, 364 U.S. 40, 49, 4 L. Ed. 2d1554, 80 S. Ct. 1563 (1960)). The concepts of "fairness and justice" that underlie the Takings Clause, of course, are less than fully determinate. Accordingly, we have eschewed "any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Penn Central, supra, at 124 (quoting Goldblatt v. Hempstead, 369 U.S. 590, 594, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962)). The outcome instead "depends largely 'upon the particular circumstances [in that] case.'" Penn Central, supra, at 124 (quoting United States v. Central Eureka Mining Co., 357 U.S. 155, 168, 2 L. Ed. 2d 1228, 78 S. Ct. 1097 (1958)).*
>
> *We have "identified several factors that have particular significance" in these "essentially ad hoc, factual inquiries." Penn Central, 438 U.S. at 124. Two such factors are "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." Ibid. Another is "the character of the governmental action." Ibid. The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis. Id. at 127 ("[A] use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation*

[63] n. 60 above at pp. 633-637

of a substantial public purpose, [citations omitted], or perhaps if it has an unduly harsh impact upon the owner's use of the property"); see also Yee v. Escondido, 503 U.S. 519, 523, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992) (Regulatory takings cases "necessarily entail complex factual assessments of the purposes and economic effects of government actions"). ***Penn Central does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required.***

The Rhode Island Supreme Court concluded that, because the wetlands regulations predated petitioner's acquisition of the property at issue, petitioner lacked reasonable investment-backed expectations and hence lacked a viable takings claim. 746 A.2d 707, 717 (2000). The court erred in elevating what it believed to be "[petitioner's] lack of reasonable investment-backed expectations" to "dispositive" status. Ibid. Investment-backed expectations, though important, are not talismanic under Penn Central. ***Evaluation of the degree of interference with investment-backed expectations instead is one factor that points toward the answer to the question whether the application of a particular regulation to particular property "goes too far."*** *Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922).*

Further, the state of regulatory affairs at the time of acquisition is not the only factor that may determine the extent of investment-backed expectations. For example, the nature and extent of permitted development under the regulatory regime vis-a-vis the development sought by the claimant may also shape legitimate expectations without vesting any kind of development right in the property owner. ***We also have never held that a takings claim is defeated simply on account of the lack of a personal financial investment by a postenactment acquirer of property, such as a donee, heir, or devisee.*** *Cf. Hodel v. Irving, 481 U.S. 704, 714-718, 95 L. Ed. 2d 668, 107 S. Ct. 2076 (1987).* ***Courts instead must attend to those circumstances which are probative of what fairness requires in a given case.***

If investment-backed expectations are given exclusive significance in the Penn Central analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title. On the other hand, existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost. As I understand it, our decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of the Penn Central inquiry. It simply restores balance to that inquiry. Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in

> *determining whether a compensable taking has occurred. As before, the salience of these facts cannot be reduced to any "set formula." Penn Central, 438 U.S. at 124 (internal quotation marks omitted). The temptation to adopt what amount to per se rules in either direction must be resisted.* ***The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context.*** *The court below therefore must consider on remand the array of relevant factors under Penn Central before deciding whether any compensation is due.*

Scalia J. dissented from O'Connor J. on this aspect of investment–backed expectation. His Honour said [64].

> *In my view, the fact that a restriction existed at the time the purchaser took title (other than a restriction forming part of the "background principles of the State's law of property and nuisance," Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029, 120 L. Ed. 2d 798, 112 S.Ct. 2886 (1992)) should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking. The "investment-backed expectations" that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional. Which is to say that a Penn Central taking, see Penn Central Transp. Co. v. New York City, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978), no less than a total taking, is not absolved by the transfer of title.*

The question which arose for determination in *Tahoe – Sierra Preservation Council Inc v. Tahoe Regional Planning Agency* was whether a development moratoria totalling 32 months ordered by the respondent to enable it to make a land-use plan was an uncompensated taking in violation of the Fifth Amendment. In delivering the opinion of the Court Stevens J. said:

> *Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted. Cf. Agins v. City of Tiburon, 447 U.S. at 263, n. 9 ("Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended.* ***Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the***

[64] n. 60 above at p.645.

> ***constitutional sense'")*** *(quoting Danforth v. United States, 308 U.S. 271, 285, 84 L. Ed. 240, 60 S. Ct. 231 (1939))).*

IV. Taxation and Uncompensated Environmental Regulatory Takings

> *Taxation and takings are inherently in tension with each other. Without looking at independent constitutional limits, the scope of the government's power to tax seems virtually boundless.*[65]

> *There is simply no escaping the fact that the Takings Clause is intended to limit the government's power to seize private property without compensation for the purpose of redistributing it to others.*[66]

> *Because all taxation results in the permanent dispossession of taxpayer's property, but as taxation is presumptively valid,* ***there remains the problem of defining the frontier between valid taxation and taxation that constitutes an uncompensated regulatory taking***[67]

Is there a right to compensation for the constructive expropriation or taking of property rights? If there is no statutory remedy, the conservative answer is 'no'. A 'yes' answer relies upon the provisions of c. 29 of 25 Edw.I (1297), Magna Carta of which the Fifth Amendment to the United States Constitution has been called its child. If it has application, then it needs to be applied in the context of the *the strong presumption against legislative intent to confiscate or* ***extinguish property rights and interests*** *without compensation* referred to by Deane J. in *Mabo v. Queensland*

In examining s. 51(xxxi) of the *Commonwealth of Australia Constitution Act* 1900, the High Court in the *Bank Nationalization Case* was satisfied that there was an expropriation of property even though it had been achieved by an indirect and circuitous device. Similarly the Supreme Court of Canada held that there had been an expropriation of property, including goodwill in *Manitoba Fisheries*. These decisions are analogous to those dealing with sovereign risk and laws which have the effect of expropriating property. In other words those which are tantamount to expropriation. This is the essence of the reasoning in *Pennsylvania Coal v. Mahon* and *Lucas v. South Carolina Coastal Council.*

The ad hoc nature of determining whether there has been something tantamount to expropriation or a taking in US sense as observed by Brennan J. and Deane J. in the *Tasmanian Dams Case* where reference was made to the criteria set out in *Penn Central*

---

[65] Calvin R. Massey, Takings and Progressive Rate Taxation, (1996) Vol 20 (1) *Harvard Journal of Law & Public Policy* 85.
[66] Ibid
[67] Ibid

Transportation Co. v. New York City. Whether a taking exists is to be established on a case by case basis. This rule has been consistently applied by the U.S. Supreme Court in *Palazzolo v Rhode Island* and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency.*

The challenged statute needs to be investigated to show that the restrictions imposed upon the use of land have brought about an excessive diminution in value together with a commensurate reduction in the income expected to be earned from its use. Correspondingly that reduction in value of an agricultural enterprise may properly be revealed as a loss in goodwill like what occurred in *Manitoba Fisheries* .

An action brought against a State Government for a so called regulatory taking arising from the limitations imposed by environmental statutes on the way in which farming and grazing activities are carried on is to enter unchartered waters. To do so successfully, will require a court and ultimately the High Court to accept the reasoning adopted by the Supreme Court of Canada in the *Manitoba Fisheries Case.* I hasten to add that Magna Carta was neither referred to nor relied upon. It was very much a decision which relied upon the principle of statutory interpretation referred to by Estey J. that rights were not to be lost unless the statute expressly said so.

Whether such a taking could also be characterized as a form of taxation also needs to be examined. There seems to be thin line which marks the boundary between takings and taxation. In short the question could be reframed so that if there is no common law rule which authorizes compensation for a taking then is such a law one with respect to taxation. This immediately raises the question of what is a tax? The High Court's answer is that it is *"a compulsory exaction of money by a public authority for public purposes enforceable at law, and . . . . not a payment for services rendered*"[68]

The concept of an uncompensated regulatory taking being characterised as a tax gains some support from the notion of an implicit tax. Posner remarked:

> ***Many taxes are implicit. The draft – conscription is one.*** *The economic objections to the military draft are twofold. The first is that it gives the government an incentive to substitute excessive amounts of manpower for other defense inputs because the price of military manpower to the government is lower than the opportunity costs of the draftee's time. The objection is decisive (at least from the economic standpoint) in times of peace, when both the demand for and the dangers to military personnel are relatively small, thus limiting the amount of government expenditure necessary to obtain the desired personnel. But the expenditures necessary to man the armed forces in wartime on a purely volunteer basis would be very great. A substantial increase in tax rates (or in the rate of inflation, which is a form of taxation) would be required creating… highly inefficient substitution effects……..*

[68] *Matthews v. Chicory Marketing Board (Victoria),* (1938) 60 C.L.R. 263 at p.276.

> *The second economic objection to conscription is that it produces a suboptimal mixture of recruits because it disregards the differences between individuals in the opportunity costs of military service.*[69]

Laws such as the *Native Vegetation Conservation Act* 1997, operate by restricting the way in which land can be used and indirectly impose financial burdens on the property owner for the benefit of the public at large. In short if the burden, limitation or restriction answers the description of an uncompensated taking then it is tantamount to taxation. If the notion of economic equivalence is accepted then it warrants a conclusion that the burden is in truth a tax.

If it is a law with respect to taxation it appears to be one which would be unchallengeable and indiscriminate in its operation. In *Deputy Federal Commissioner of Taxation v. Brown* , Dixon C. J. spoke of an incontestable tax[70]:

> *Although there is no judicial decision to that effect, it has, I think been generally assumed that under the Constitution liability for tax cannot be imposed upon the subject without leaving open to him some judicial process by which he may show that in truth he* ***was not taxable or not taxable in the sum assessed,*** *that is to say that an administrative assessment could not be made absolutely conclusively upon him if no recourse to the judicial power were allowed.* ***This is not the occasion to go into the basis of this view. All that is necessary is to note that it exists and that hitherto the legislature has respected it.***

V. The Framing of a Takings Compensation Statute

Whether the High Court ultimately holds that there is a right for compensation for a regulatory taking is unlikely to provide a satisfactory long term solution. The costs of bringing individual actions would act as a significant deterrent to many potential litigants. In the US many States have enacted legislation to preserve property rights. For example in 1995 Texas passed the *Private Real Property Rights Preservation Act* and Florida passed the *Private Property Rights Protection Act.*

The Texas Act provides that a taking occurs if there has been a 25% or more reduction in the value of the property arising from a regulatory law. However compensation is only

---

[69] Richard A. Posner, *Economic Analysis of Law*, 4th ed., Little, Brown and Company, Boston, 1992 at pp. 480-481.

[70] (1958) 100 C.L.R. 32 at pp. 40-41.

payable if the State refuses to repeal the taking law. Assoc. Prof. Mark Cordes described its essential features[71]:

> *The statute is a combined assessment and compensation statute. The assessment provision is similar to those in other states that require formal, written assessments. The Act requires the Attorney General to promulgate takings guidelines reflecting current federal and state supreme court analysis. State agencies are then required to write "Taking Impact Assessments" (TIAs) for almost any rule that might affect property interests. As with other states requiring written assessments, the TIAs must evaluate the regulation's effect on property values, its benefit to society, and alternatives to the proposed action. The Act specifically provides that the failure to prepare an assessment provides a basis for judicial relief to set aside the regulation.*
>
> *The heart of the statute is its compensation provision. The Act provides that* ***a taking occurs when governmental action reduces the value of property by twenty-five percent or more.*** *The governmental entity can then choose to invalidate the action or pay the landowner damages for the reduced value of the land. Limiting relief in this way, rather than making compensation automatic, lessens the otherwise severe reach of the statute. Although the twenty-five percent threshold clearly has the potential to invalidate some environmental controls, the chilling effect on government action will be less because compensation is not mandatory.*

The so called bright-line legislation as illustrated by a nominated percentage reduction in value approach was not followed in Florida. Its essential character is described by Cordes[72]:

> *The heart of the Florida statute is its provision that landowners are entitled to relief when a government action* ***"inordinately burdens"*** *property use. The statute defines "inordinately burdened" to mean either that the landowner is "permanently unable to attain the reasonable, investment-backed expectations" for the property, or that an owner "bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large." As with other compensation statutes, the statute does not apply to regulations of common law nuisances.*
>
> *By adopting the above standard, Florida has eschewed the bright-line formulations of other compensation statutes in favor of a more flexible standard that will be responsive to the facts of any given situation. Moreover, the statute's definition of*

[71] Mark W. Cordes, Leapfrogging the Constitution: The Rise of State Takings Legislation, (1997) *24 Ecology L.Q.* 187 at pp.216-217.
[72] Ibid at p. 219.

> *"inordinate burden" largely reflects current Supreme Court takings principles. Indeed, by focusing the "inordinate burden" standard on interference with "investment-backed expectations" and "disproportionate burdens," the statute focuses on some of the basic fairness issues underlying the Court's takings jurisprudence.*

For present purposes the above examples should suffice to show the kind of matters which could be considered in framing a takings compensation statute. In drafting such legislation consideration could be given as to who bears the onus of proof, the extent of any limitation period in which to bring a claim as well as to the criteria for exemption from the Act. Christian Brooks offers this comment on the working of the Texas Act[73]

> *The Act was, for private property rights advocates, a welcome change. Property owners in Texas, tired of seeing their rights erode away year after year with little or no judicial abatement, banded together and marched on the state capitol. The legislature saw their numbers and heard their voices-as did the public-and offered them up a piece of legislation that, as it turns out, probably did more for the re-election efforts of the lawmakers that passed it than it will ever do, in its present form, for private real property owners.*
>
> *Governments, as well as private citizens, have important interests in real property. For this reason, it is important to all concerned parties that any takings statute be clearly defined and enforceable. The Act does not fit that bill. The Act is chock full of limitations and exceptions, and by the time they are negotiated, very few private real property owners can file claims under the Act. In addition, the statute of limitations of only six months does not afford the landowner of meager to moderate legal sophistication an ample opportunity to prepare a claim, much less bring it. The Act also does not provide a constitutionally adequate remedy in situations where a temporary taking has occurred. And the Act's loser pays provisions deter all but the most confident and the wealthiest of all Texas landowners from bringing suit.*
>
> *The Act was touted at the time of its passage as the toughest takings law in the nation. Yet very few have had any relief under it.* ***The Act, in reality, is a good start on the road toward building a set of laws that will replace the unpredictable and inconsistent common-law regulatory takings doctrine and finally provide private citizens and governments with a clearly defined legal framework within which to deal with private real property issues.***

[73] Christian Brooks, Political Bluff and Bluster: Six Years Later, A Comment on the Texas Private Real Property Rights Preservation Act, *(2001) 33. Tex. Tech. L. Rev*. 59 at p. 103

VI. Dispute Resolution

I have been ruined twice by going to Court.
First, when I lost and again when I won.
Voltaire

An important feature of any takings legislation are the provisions dealing with the resolution of claims for compensation. In New South Wales that can be readily achieved by requiring all such claims to be determined by the Land and Environment Court.

Nevetheless any means which affords the settlement of claims before litigation ensues is to be encouraged. Here Cordes favourably remarks on the working of the Florida statute[74].

> *The more innovative dimension of the statute is its procedural mechanism for resolving takings claims. The statute creates a settlement process to resolve issues prior to litigation and requires issuance of a "ripeness decision" to establish the scope of permissible uses for judicial review. Together these procedures address several of the problems in current takings litigation. Perhaps most important, the ripeness decision corrects the frustrating situation, often experienced by property owners challenging land use restrictions, in which challenges are repeatedly dismissed because the permissible uses have not been established, thus prohibiting judicial determination whether a taking occurred. The settlement process also deserves praise for seeking to identify ways to meet regulatory goals while addressing landowner concerns in a concrete, factual context. This might well lead to a more refined balance of private property interests and regulatory goals in which the public interest might be served in a manner imposing less of a burden on private property.*

VII. Conclusion

The perceived antagonism, if not irritation, between farmers and graziers and Government over the detrimental impact of environmental laws on the financial results of carrying on the business of primary production needs to be resolved.

It is a dispute arising from the property owner being burdened with the cost of environmental rules enacted for the community as a whole; a matter recognized by Deane J. in the *Tasmanian Dams Case.* It is the essence of the working of the last clause in the Fifth Amendment in the United States Constitution which in truth picked up the notions

[74] n. 71 above at p. 240.

of Magna Carta and is still relevant in modern jurisprudence. Whether a court would uphold such a claim is probably irrelevant for present purposes. What is needed is a statutory right to allow claims for compensation where a regulatory taking has occurred, based on the *Private Real Property Rights Preservation Act* of Texas or alternatively the *Private Property Rights Protection Act* of Florida where compensation for takings is grounded when the regulation 'inordinately burdens' property.

If no right to compensation, either statutory or otherwise is available against a regulatory taking there appears to be grounds for characterizing an uncompensated taking as an unchallengeable tax. Such an implicit tax may be regarded as invalid. The idea of takings under environmental statutes being stuck down on the grounds that the burden is implicitly an unchallengeable tax may persuade State Governments to provide a remedy by way of. compensation .

*Senior Lecturer in Law, The University of New England

[**Bold Print** – Emphasis Added]

17 June 2003
[12,384 words]

VIII. Bibliography

Ackerman, Bruce A., *Private Property and the Constitution,* Yale University Press, New Haven, 1978

Allen, Tom, *The Right to Property in Commonwealth Constitutions*, Cambridge University Press, 2000.

Anderson, Terry L.(ed), *Water Rights: Scarce resource allocation, bureaucracy and the environment,* Pacific Institute for Public Policy Research, San Francisco, California.

Andrews, William J., *Comment on the 'Schwindt Report',* West Coast Environmental Law Association, Feb. 12, 1993. http://www.wcel.org/wcelpub/7416.html (accessed 20/12/2002)

Apter, David. E and Sawa, Nagayo, *Against the State; Politics and Social Protest in Japan*, Harvard University Press, Cambridge, Massachusetts, 1984.

Baden, John and Stroup, Richard L., (eds.), *Bureaucracy vs. Environment, The Environmental Costs of Bureaucratic Governance*, Ann Arbor, The University of Michigan Press.

Bauman, Robert J., *Exotic Expropriations: Government Action and Compensation*, British Columbia Expropriation Association, 1993.

Bosselmann, K and Richardson, Benjamin J., (eds.), *Environmental Justice and Market Mechanisms, Key Challenges for Environmental Law and Policy*, Kluwer Law International, The Netherlands, 1999.

Brennan, Geoffrey and Buchanan, James M., *The Power to Tax: Analytical foundations of a fiscal constitution,* Cambridge University Press, Melbourne, 1980.

Brooks, Christian, Political Bluff and Bluster: Six Years Later, A Comment on the Texas Private Real Property Rights Preservation Act, *(2001) 33. Tex. Tech. L. Rev. 59*

Buck, A.R., McLaren, John and Wright, Nancy E., *Land and Freedom: law, property rights and the British diaspora,* Ashgate, Dartmouth, 2001.

Calder, Ian R., *The Blue Revolution, Land Use and Integrated Water Resources Management*, Earthscan Publications Ltd, London, 1999.

Cam, Helen C., Magna Carta – Event or Document?, *Selden Society Lecture*, Bernard Quaritch, London, 1965.

Castles, Alex. C. Australian Meditations on Magna Carta, *(1989) 63 A.L.J. 122*.

Clark, D., The Icon of Liberty: The Status and Role of Magna Carta in Australia and New Zealand Law, (2000) *24 Melbourne University Law Review 866.*

Cole, Daniel H., *Pollution and Property, Comparing Ownership Institutions for Environmental Protection*, Cambridge University Press, 2002.

Cordes, Mark W., Leapfrogging the Constitution: The Rise of State Takings Legislation, (1997) 24 *Ecology L.Q*. 187

Coyle, Dennis J., *Property Rights and the Constitution, Shaping Society Through Land Use Regulation,* State University of New York Press.

Czech, Brian and Krausman, Paul R., *The Endangered Species Act, History, Conservation, Biology and Public Policy,* The John Hopkins University Press, Baltimore, Maryland, 2001.

Ellickson, Robert C., Takings Legislation: A Comment, (1996) Vol 20 (1) *Harvard Journal of Law & Public Policy* 75

Epstein, Richard A., Chp. 15, Environmental protection and private property in *Simple Rules for a Complex World*, Harvard University Press, Cambridge, Massachusetts, 1995.

Epstein, Richard A., *Takings, Private Property and the Power of Eminent Domain*, Harvard University Press, Cambridge, Massachusetts, 1985.

Epstein, Richard A., *Principles for a Free Society*, Harvard University Press, Cambridge, Massachusetts.

Fischel, William, A., *Regulatory Takings: Law, Economics and Politics*, Harvard University Press, Cambridge, Massachusetts, 1995.

Fischel, William, A., *The Economics of Zoning Laws: A Property Rights Approach to American Land Use Controls*, The John Hopkins University Press, Baltimore, Maryland, 1985.

Guest, F. W., *Freedom and Status – An Inaugural Lecture,* University of Otago Press, Dunedin, 1961.

Hayek, F. A., Rules and Order, *Law, Legislation and Liberty, Vol. 1*, Routledge & Kegan Paul, London, 1973.

Irvine of Lairg, The Rt. Hon. Lord, The Spirit of Magna Carta Continues to Resonate in Modern Law, (2003) *119 L.Q.R. 22.*

Jacobs, Marcus S., *The Law of Resumption and Compensation in Australia,* LBC Information Services, 1998.

Kasper, Wolfgang, *Property rights and competition: an essay on the constitution of capitalism,* Centre for Independent Studies, St Leonards, N.S.W., 1998.

Knetsch, Jack L., *Property Rights and Compensation: Compulsory Acquisition and Other Losses*, Butterworths, Toronto, 1983.

Kolo, Abba & Waelde, Thomas, *Multilateral investment treaties and environmental regulatory 'taking' of foreign-owned property under international law*, The Centre for Energy, Mineral Law and Policy, University of Dundee,Scotland. http://www.gasandoil.com/goc/speeches/waelde1.htm (accessed 18 December 2002)

Law Reform Commission of Canada, *Report on Expropriation*, Law Reform Commission of Canada, Ottowa, 1978.

Lawson, F. H.and Rudden, B., *The Law of Property*, (2nd ed.), Clarendon Press, Oxford, 1982

Locke, John (1689-90), Of Civil Government, Book II, *The Works of John Locke*, Vol. V, Thomas Tegg & Ors, London, 1823,.

Locke, John (1693), Of Education, *The Works of John Locke*, Vol. IX, Thomas Tegg & Ors, London, 1823, p.101.

McLean, Janet (ed.), *Property and the Constitution*, Hart Publishing, Portland, Oregon, 1999.

Marzulla, N. C., The property rights movement, where it began and where it is headed? , in Yandle, Bruce (ed), *Land Rights: The 1990s Property Rights Rebellion*, Rowan and Littlefield, London, 1995.

Massey, Calvin R., Takings and Progressive Rate Taxation, (1996) Vol 20 (1) *Harvard Journal of Law & Public Policy* 85

Meiners, Roger E. and Yandle, Bruce, *Taking the Environment Seriously*, Rowman & Littlefield Publishers, Inc.,

Meltz, Robert, Merriam, Dwight, H. and Frank, Richard M., *The Takings Issue, Constitutional Limits on Land-Use Control and Environmental Regulation*, Island Press, Washington, D.C., 1999.

Melville, J Bruce, *Regulatory Takings in Canada*, http://www.expropriationlaw.ca/articles/art00300.asp (accessed 20/12/2002)

Mercuro, Nicholas (ed.), *Taking Property and Just Compensation, Law and Economics Perspectives of the Takings Issue*, Kluwer Academic Publishers Group, The Netherlands, 1992.

NSW Farmers' Association, A matter of trust, *The Primary Report*, 10/02, October 2002.

Paul, Ellen, F. and Dickman, Howard, (eds.), *Liberty, Property, and the Future of Constitutional Development.* State University of New York Press, Albany, 1990.

Pearce, D and Turner, R., *Economics of Natural Resources and the Environment*, Harvester, Wheatsheaf, New York, 1990.

Posner, Richard A., *Economic Analysis of Law*, 4th ed., Little, Brown and Company, Boston, 1992.

Redfield, Sarah E., *Vanishing Farmland, A Legal Solution for the States*, Lexington Books, D. C. Heath and Company, Lexington, Massachusetts, 1984.

Sands, Philippe, Arbitrating Environmental Disputes, Draft Remarks on the occasion of the annual ICSID/ICC/AAA Colloquium, Friday 10 November 2000, Washington, D.C.

Schwartz, B & Wade, H.W.R., *Legal Control of Government*, Oxford, 1972

Siegan,B .H., *Property and Freedom: the Constitution, the Courts and Land-Use Regulation*, Transaction Publishers,, New Brunswick, 1997

Sinden, J.A., Who pays to protect native vegetation? Costs to farmers in Moree Plains Shire, New South Wales, *Paper presented to the 46th Annual Conference of the Australian Agricultural and Resource Economics Society*, Canberra , February 12th to 15th , 2002.

Slater, A. H. The Nature of Goodwill, (1996) 24 *A.T.Rev.* 31

Taggart, Michael, 'Expropriation, public purpose and the constitution' in Forsyth, Christopher and Hare, Ivan, (eds.), *The Golden Metwand and Crooked Cord: Essays in Public Law in Honour of Sir William Wade*, Q.C., Oxford, 1998.

Todd, Eric C. E., *The Law of Expropriation and Compensation in Canada*, (2nd ed.) Carswell Co., 1992.

West Coast Environmental Law Association, Save BC'S Public Lands- Backgrounder on Compensation, http://www.wcelpub/1999/cplcompensation.html (accessed 20/12/2002).

[1085 words]

Bibliography, 3rd edition 17/6/2003