effectiveness and implications of a number of provisions, including div 3, pt III of the *ASIO Act*.[130]

Conclusion

19.108 Many Commonwealth laws identified as interfering with personal property rights have been the subject of recent reviews or extended consideration by parliamentary committees or the High Court. The parliamentary committees included an assessment of the laws in terms of their impact on rights and liberties and, in the case of the Human Rights Committee, compatibility with international human rights instruments using a proportionality analysis.

19.109 The ALRC concludes that the breadth of the *Proceeds of Crime Act* is one area that may require further consideration. The 2002 Act expressly provided for a review, which took place in 2006. The legislation was expanded in 2010 to extend to 'unexplained wealth' and was amended further in 2015. The Law Enforcement Committee provides ongoing scrutiny of the Commonwealth legislation and the Australian Federal Police must provide annual reports. However, given the potential impact of unexplained wealth measures on personal property, and the Law Enforcement Committee's proposal for a national coordinated scheme, the ongoing scrutiny needs to ensure that such a scheme is proportionate in light of its objectives to meet the obligations agreed to under the *United Nations Convention Against Corruption*. The ALRC also suggests that a further review, like the one conducted in 2006, be scheduled in due course.

130 *Intelligence Services Act 2001* (Cth) s 29(1)(bb). The Intelligence and Security Committee also has the power to question ASIO officials about decisions to conduct a special intelligence operation, as part of its power to review the administration and expenditure of the intelligence agencies, including ASIO: Ibid s 29(1)(a).

20. Property Rights—Real Property

Contents

Summary

20.1 This chapter builds on the discussion in Chapter 18 about the nature of property rights. It is about the common law protection of real property rights and considers particular areas of concern about Commonwealth laws affecting the rights of landholders. The main focus is on interferences with the right to use land, although there is also a limited discussion of the right to exclude others from the land.

20.2 Property rights find some protection from statutory interference in s 51(xxxi) of the *Australian Constitution*, through the principle of legality at common law, and in international law. Section 51(xxxi) provides that any 'acquisition' of property must be on 'just terms'. An 'acquisition' of property is the most extreme form of 'interference' with real property rights. 'Interference', as used in the Terms of Reference, has a broader meaning than 'acquisition' as the term has been interpreted by the High Court with respect to s 51(xxxi).

20.3 Laws interfering with real property rights include the *Lands Acquisition Act 1989* (Cth), environmental laws, native title laws and criminal laws. Of these laws, environmental laws raised the most controversy and debate among stakeholders. Concerns were expressed that environmental laws may reduce the commercial uses to which property can be applied.

20.4 State and territory governments are primarily responsible for the management of native vegetation and biodiversity, and states have legislative power in relation to internal waters. Most of these jurisdictions do not have an equivalent provision to s 51(xxxi) of the *Australian Constitution*, which has given rise to complaint. State environmental laws are not the concern of this Inquiry; however, from the landholders' perspective the complexity of the 'interference' with property rights can only be understood in the light of both state and Commonwealth laws.

20.5 Concerns have been expressed about potential Commonwealth involvement in state 'interferences' with property rights because the Commonwealth may financially assist states with respect to natural resources management.[1] Further, the Commonwealth has significant policy responsibility for water management in the Murray-Darling Basin.[2] This Inquiry heard complaint about both the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*) and the *Water Act 2007* (Cth).

20.6 Justifications for interference with property rights from an environmental perspective include that environmental laws are necessary to implement international agreements, are in the public interest and that safeguards exist. Notably both the *EPBC Act* and the *Water Act* contain express provisions precluding the Commonwealth from acquiring property without providing compensation on just terms.[3] In the European context, a proportionality test has been used to determine whether interferences with real property rights caused by environmental laws are justified.

20.7 The *EPBC Act* interferes with the right to use land—but only to a limited extent. Whether the Act interferes with a farmer's ability to clear land is contested. The Act is constrained in its application. It does not interfere with the existing use of the land. Rather, it requires approval to change the existing use of the land where the proposed action has, or is likely to have, a 'significant' impact on a matter of national environmental significance. In most cases development proposals are approved, subject to conditions. Very few proposals have been refused. An independent review of the *EPBC Act* was completed in late 2009 and the next scheduled review is to be completed by 2019. The next scheduled review could reassess whether the interferences are proportionate and explore a range of compensatory mechanisms.

20.8 With respect to water, the common law recognised riparian rights: the proprietor of land abutting on water was entitled to certain rights in relation to that water as well as extensive rights in relation to groundwater. However, state and territory legislation

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1 *Natural Resources Management (Financial Assistance) Act 1992* (Cth).
2 *Water Act 2007* (Cth).
3 Ibid s 254; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 519.

has long provided that the primary right of access to water is vested in the Crown. The *Water Act* does not interfere in a negative way with the water entitlements in the Murray-Darling Basin that have been established under state and territory statutes. These water entitlements, that have been unbundled from land, may constitute a form of personal property. The Commonwealth has pursued consensual arrangements with the holders of water entitlements in order to deliver the desired policy outcomes with respect to water in the Murray-Darling Basin. Arguably the security and value of the water entitlements arising from state and territory law has been enhanced by the *Water Act* and non-legislative mechanisms such as water buy-backs. An independent review of the *Water Act* was completed in late 2014. It may be appropriate for the *Water Act* to be reviewed periodically as is the case with the *EPBC Act*.[4]

A common law principle

20.9 As noted in Chapter 18, the common law has long regarded a person's property rights as fundamental, and 'property rights' was one of the four areas identified as of concern in the national consultation on 'Rights and Responsibilities', conducted by the Australian Human Rights Commission in 2014.[5]

20.10 With respect to the right to exclude others from enjoyment of land, *Entick v Carrington* concerned trespass in order to undertake a search—an interference with real property in the possession of another.[6] Rights such as those protected by the tort of trespass to land have long been exercisable even against the Crown or government officers acting outside their lawful authority.

20.11 A consequence of the principle in *Entick v Carrington* was stated by Bingham MR in *R v Somerset County Council; Ex parte Fewings*:

> In seeking to answer that question it is, as the judge very clearly explained, critical to distinguish between the legal position of the private landowner and that of a land-owning local authority … To the famous question asked by the owner of the vineyard: 'Is it not lawful for me to do what I will with mine own?' … the modern answer would be clear: 'Yes, subject to such regulatory and other constraints as the law imposes'. But if the same question were posed by a local authority the answer would be different. It would be: 'No, it is not lawful for you to do anything save what the law expressly or impliedly authorises. You enjoy no unfettered discretions. There are legal limits to every power you have'. As Laws J put it, the rule for local authorities is that any action to be taken must be justified by positive law … [7]

4 Such a recommendation has been made to the Australian Government: Eamonn Moran et al, *Report of the Independent Review of the Water Act 2007* (2014) rec 23. A Bill introduced into the Parliament on 3 December 2015 would set 2024 as the date of the next review: Water Amendment (Review Implementation and Other Measures) Bill 2015 (Cth).

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

6 *Entick v Carrington* (1765) 19 St Tr 1029; 95 ER 807. See discussion in Ch 18.

7 *R v Somerset County Council; Ex parte Fewings* [1995] 3 All ER 20 25.

20.12 In *Plenty v Dillon*, Mason CJ, Brennan and Toohey JJ said that the principle in *Entick v Carrington* 'applies to entry by persons purporting to act with the authority of the Crown as well as to entry by other persons'.[8]

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

> The principle applies alike to officers of government and to private persons. A police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duty unless his entering or remaining on the premises is authorized or excused by law.[9]

20.14 Implicit in this statement of the law is the recognition that the law—common law or statute—may authorise entry onto private property. Examples of such statutes are discussed in Chapter 16, which deals with laws authorising what would otherwise be a tort.

20.15 The protection of the landowner by the common law was so strong that protection of uninvited entrants from intentional or negligent physical injury by occupiers was slow to develop. It was only in 1828, in *Bird v Holbrook*, that the courts declared unlawful the deliberate maiming of a trespasser, albeit only if it was without prior warning.[10]

Protections from statutory encroachments

20.16 As outlined in Chapter 18, property rights find protection in the *Australian Constitution*, through the principle of legality at common law, and in international law.

Australian Constitution

20.17 Section 51(xxxi) of the *Australian Constitution* concerns the acquisition of property on just terms.[11] However, the protection offered by the *Constitution* is limited. It does not extend to the acquisition of property by state governments. Further, it

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

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

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

11 Chapter 19 considered the application of this provision to Commonwealth laws concerning personal property. This chapter focuses upon real property.

relates only to 'acquisitions' of property, which does not capture all interferences with property rights.[12]

States and territories

20.18 As Latham CJ observed in *PJ Magennis Pty Ltd v Commonwealth* (*Magennis*), state parliaments do not have a constitutional limitation equivalent to s 51(xxxi) of the *Australian Constitution*: '[t]hey, if they judge it proper to do so for some reason, may acquire property on any terms which they may choose to provide in a statute, even though the terms are unjust'.[13]

20.19 States are able to, and often do, provide compensation even though there is no constitutional requirement for them to do so. As at 1 November 2015, the Parliament of Western Australia was considering two Bills which would change the position in that state on the issue. One is a private members Bill which seeks to provide that '[a] public authority must not take property from a person, whether by direct or indirect means and whether intentionally or otherwise, under a written law or policy except on just terms'.[14] The other is a Government Bill that is intended to 'ensure that compensation which is payable for the compulsory acquisition of a part of a property is assessed not only on the value of the land taken, but also on the greater impact it has on the entire property'.[15]

20.20 On some occasions the Commonwealth has used its influence to encourage states to provide compensation.[16] Further, the Commonwealth has imposed a requirement for just terms for any acquisition of property on both the Northern Territory and the Australian Capital Territory in their respective self-government statutes.[17]

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

> In some cases, this has resulted in States compulsorily or inadvertently acquiring or interfering with property rights, without any corresponding compensation for the right-holder.[18]

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12 See Lorraine Finlay, 'The Attack on Property Rights' (The Samuel Griffith Society, 2010) 23 <http://samuelgriffith.org.au/>. See also L Finlay, *Submission 97*.

13 *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, 397–8.

14 Taking of Property on Just Terms Bill 2014 (WA) cl 6. The Explanatory Memorandum states that 'there is a strong case for legislative confirmation of the common law right to compensation on just terms where there has been a taking of property without recourse to existing statutory processes': Explanatory Memorandum, Taking of Property on Just Terms Bill 2014 (WA) 6.

15 Explanatory Memorandum, Land Acquisition Legislation Amendment (Compensation) Bill 2014 (WA) 1.

16 See, eg, *Native Title Act 1993* (Cth) s 20(1). Sections 19 and 20 empower state and territory governments to extinguish or impair native title by 'validating' past acts but only if those schemes are consistent with the *Native Title Act*, including payment of compensation.

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

18 Law Council of Australia, *Submission 75*.

20.22 The federal referendum in 1988 included a proposed law to alter the *Australian Constitution*, among other things, 'to ensure fair terms for persons whose property is acquired by any government'. The vote in favour of the resolution was only 30%.[19] One commentator argued that the 'true level of public support for the idea was, however, impossible to gauge due to the way in which the question was presented as part of a larger package'.[20]

20.23 The Law Council was concerned by the utilisation by the Commonwealth of the limit in constitutional compensatory provisions in the states:

> Of particular concern to this Inquiry is where this may have occurred due to intergovernmental arrangements or agreements between the Commonwealth and States, which require or encourage States to interfere with property rights but with no corresponding duty to compensate on just terms.
>
> In such cases, there has been no remedy available to the land-owner because the scheme might have been established informally, through mutual agreement, rather than through a federal statute.[21]

20.24 In *Pye v Renshaw*, the High Court dismissed an appeal by a landholder (Mr Pye) with respect to the resumption of his land by New South Wales for the purpose of resettling returned soldiers.[22] NSW and the Commonwealth had earlier entered into a funding agreement in respect of the general scheme for resettling returned soldiers. Both jurisdictions had enacted a statute with respect to the agreement. The Commonwealth statute was struck down in *Magennis* on s 51(xxxi) grounds; and NSW subsequently repealed its statute—the *War Service Land Settlement Agreement Act 1945* (NSW). The state had sought to authorise the acquisition of land by way of a different statute, the *Closer Settlement (Amendment) Act 1907–1950* (NSW). In 1950, following the High Court's decision in *Magennis*, NSW amended the *Closer Settlement (Amendment) Act* 'by deleting all reference to any agreement with the Commonwealth' and 'also deleted from all relevant legislation all reference to any agreement with the Commonwealth and all reference to any direct or indirect participation of the Commonwealth in any scheme of soldier settlement'.[23] The High Court held that the effect of the amending legislation was

> to make it perfectly clear that all relevant legislation of the Parliament of New South Wales is intended to take effect unconditioned by any Commonwealth legislation and irrespective of the existence of any agreement between the Commonwealth and the State of New South Wales.[24]

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

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

21 Law Council of Australia, *Submission 75*.

22 *Pye v Renshaw* (1951) 84 CLR 58.

23 Ibid 79.

24 *Pye v Renshaw* (1951) 84 CLR 58, 80.

20.25 The Court concluded that '[t]here is no possible ground of attack on the validity of this legislation, there is no ground whatever for saying that it is inoperative, and all courts are bound to give effect to it according to its tenor'.[25]

20.26 In *ICM Agriculture Pty Ltd v Commonwealth* (*ICM Case*) there was a constitutional challenge to a funding agreement (and related legislation) under which the Commonwealth had paid financial assistance to NSW. While the claim failed,[26] the High Court held that a grant under s 96 of the *Constitution*—which relevantly provides that 'the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'—cannot be made on terms and conditions that may require a state to acquire property on other than just terms.[27] A majority of the High Court approved *Magennis* and held that 'the legislative power of the Commonwealth conferred by ss 96 and 51(xxxvi) does not extend to the grant of financial assistance to a State on terms and conditions requiring the State to acquire property on other than just terms'.[28] Hayne, Kiefel and Bell JJ noted that a law may contravene s 51(xxxi) 'directly or indirectly, explicitly or implicitly'.[29] Further, French CJ, Gummow and Crennan JJ indicated that the limitation in s 51(xxxi) may extend to executive action.[30]

20.27 The Law Council drew attention to *Spencer v Commonwealth*,[31] as demonstrating a possible inconsistency in relation to protection of property rights under Australian law.[32] The applicant, Peter Spencer, owned a farm, 'Saarahnlee', in NSW. He claimed that the restrictions on the clearing of vegetation imposed on his farm by the *Native Vegetation Conservation Act 1997* (NSW) and the *Native Vegetation Act 2003* (NSW)—in furtherance of agreements between NSW and the Commonwealth—constituted an acquisition of property other than on just terms pursuant to s 51(xxxi) of the *Constitution*.[33] Spencer alleged that, by reason of the state legislation, he had been prevented from clearing native vegetation on his land, which amounted to an acquisition of his property. His inability to clear his land rendered it commercially unviable. He argued that the scheme between the Commonwealth and NSW was designed to avoid the 'just terms' constraint on the exercise of legislative power under s 51(xxxi) of the *Constitution.* The Federal Court rejected Spencer's claim.[34]

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25 Ibid.
26 See discussion in Ch 18.
27 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [46] (French CJ, Gummow and Crennan JJ), [174] (Hayne, Kiefel and Bell JJ). See also [138]–[141] (Hayne, Kiefel and Bell JJ).
28 Ibid [46] (French CJ, Gummow and Crennan JJ); [249] (Heydon J). The extract quoted is from the joint judgment. Heydon J expressed different reasons. The joint judgment of Hayne, Kiefel and Bell JJ expressed no opinion on this issue.
29 Ibid [139].
30 Ibid [29].
31 *Spencer v Commonwealth* (2010) 241 CLR 118.
32 Law Council of Australia, *Submission 75*.
33 The relationship between the various Acts and agreements is set out in the judgment of French CJ and Gummow J: *Spencer v Commonwealth* (2010) 241 CLR 118, [5].
34 *Spencer v Commonwealth* [2008] FCA 1256 (26 August 2008).

20.28 The High Court granted special leave to appeal. French CJ and Gummow J stated:

> The case which Mr Spencer seeks to raise potentially involves important questions of constitutional law. It also involves questions of fact about the existence of an arrangement between the Commonwealth and the State of New South Wales which may justify the invocation of pre-trial processes such as discovery and interrogatories. The possible significance of those questions of fact has become apparent in the light of this Court's judgment in *ICM Agriculture Pty Ltd v The Commonwealth* … , which had not been delivered when the primary judge and the Full Court delivered their judgments.[35]

20.29 The case was referred back to the Federal Court for reconsideration, with the Federal Court subsequently ordering that Spencer's application be dismissed.[36]

20.30 Essentially, Spencer claimed that the State of NSW had enacted the two state laws in response to, and induced by, the Commonwealth providing funds and imposing pressure on the state,[37] in part so that the Commonwealth could meet its greenhouse gas emission targets under the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*.[38] Spencer challenged the validity of two federal laws,[39] four intergovernmental agreements,[40] the two state laws[41] and an 'informal arrangement' between the Commonwealth and NSW. Whether the two federal laws could be characterised as laws with respect to the acquisition of property lay at the heart of the case.

20.31 Under the *Natural Resources Management (Financial Assistance) Act 1992* (Cth), the Commonwealth may enter into an agreement with a state to provide financial assistance in respect of projects jointly approved by the relevant Commonwealth and state ministers or specified in the agreement.[42] The Federal Court observed that, according to the provisions of the Act, the state 'may accept the financial assistance on the terms offered, and if it does, then it will be subject to conditions concerning repayment'.[43] The *Natural Heritage Trust of Australia Act 1997* (Cth) established the Natural Heritage Trust of Australia Account, one purpose of which is to conserve remnant native vegetation.[44] Pursuant to an agreement with the Commonwealth in 1997, the State of NSW undertook to enact native vegetation conservation legislation.

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35 *Spencer v Commonwealth* (2010) 241 CLR 118, [4]. The Federal Court noted that 'the aspect of *ICM* on which some members of the Court focused was the possibility of an informal arrangement or agreement': *Spencer v Commonwealth* [2015] FCA 754 (24 July 2015) [475].

36 *Spencer v Commonwealth* [2015] FCA 754 (24 July 2015).

37 Ibid [34].

38 Ibid [1]. *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 2303 UNTS 162 (entered into force 16 February 2005).

39 *Natural Heritage Trust of Australia Act 1997* (Cth); *Natural Resources Management (Financial Assistance) Act 1992* (Cth).

40 Two Natural Heritage Trust agreements (described in the case as the '1997 NHT Agreement' and the '2003 NHT Agreement') and two salinity agreements (described as the '2000 Salinity Agreement' and the '2002 Salinity Agreement').

41 *Native Vegetation Act 2003* (NSW); *Native Vegetation Conservation Act 1997* (NSW).

42 *Natural Resources Management (Financial Assistance) Act 1992* (Cth) s 5(1).

43 *Spencer v Commonwealth* [2015] FCA 754 (24 July 2015) [483].

44 *Natural Heritage Trust of Australia Act 1997* (Cth) s 10(a).

In 1997 the *Native Vegetation Conservation Act 1997* (NSW) was introduced, restricting the clearing of native vegetation on land.

20.32 The Federal Court was of the view that the 1997 intergovernmental agreement

> does impose terms and conditions on New South Wales, requiring it to enact legislation to decrease vegetation clearance, and increase retention of native vegetation. However, unlike *Magennis*, the agreement says nothing about the content of the legislation, and certainly nothing about New South Wales having to acquire property as part of any native vegetation clearance legislative scheme.[45]

20.33 Further agreements provided for compensation to assist where property rights were lost, which were to be addressed in developing catchment or regional plans.[46]

20.34 The Court observed that there was 'considerable' state legislation controlling land management and native vegetation clearing that dated from 'well before 1997',[47] but found that both the *Native Vegetation Conservation Act* and the *Native Vegetation Act 2003* (NSW) were 'intended to continue, and increase, that control'.[48]

20.35 The Court was in 'no doubt' that each of the four intergovernmental agreements

> proposed a series of measures to be carried out principally by the State, to reduce the clearance of native vegetation and indeed to increase the total cover of native vegetation across New South Wales. They did so in the context of much broader measures to promote natural resources management and ecologically sustainable development, those purposes and objectives being shared (at least to a significant extent) by the Commonwealth and the State.[49]

20.36 The evidence revealed 'the Commonwealth relying on its grants power as a way to influence policy and reform initiatives over which it does not have exclusive legislative competence'.[50] However, the Court saw this as 'the working out of the federal system',[51] finding 'no evidence of any improper or inappropriate, let alone unlawful, collusion or conspiracy', nor 'any plan to "get around" s 51(xxxi)'.[52]

20.37 The Court considered the practical operation and effect of the two Commonwealth statutes as part of a broader scheme.[53] While the *Natural Resources Management (Financial Assistance) Act* obliges a payee (here the state) to repay the whole or part of the payment if a condition to which the agreement is subject is not fulfilled,[54] the Court concluded that the imposition of a liability is 'at the most general level, without regard to subject matter, and in particular without any reference, express

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45 *Spencer v Commonwealth* [2015] FCA 754 (24 July 2015) [488].
46 'The likelihood of adverse impacts on some farmers being sufficiently serious to warrant "structural adjustment", or compensation by way of the State purchasing properties, was recognised expressly in the two Salinity Agreements and by reports leading to the state legislative reforms': Ibid [324].
47 Ibid [544].
48 Ibid [545].
49 Ibid [481].
50 Ibid [370].
51 Ibid.
52 Ibid [371].
53 Ibid [3].
54 *Natural Resources Management (Financial Assistance) Act 1992* (Cth) s 8.

or implied, to proprietary interests, let alone the acquisition of property'.[55] With respect to the *Natural Heritage Trust Act*, the Court did not see a sufficient connection between the objectives of the National Vegetation Initiative that were set out in s 10 'and any conduct amounting to an acquisition of property'.[56]

20.38 The Federal Court concluded that the two federal laws should not be characterised as laws with respect to the acquisition of property;[57] that the four intergovernmental agreements did not require or effect an acquisition of property;[58] and that the two state Acts did not have the effect of acquiring 'Saarahnlee'.[59] Spencer did not prove the existence of an informal arrangement.[60]

20.39 In *Esposito v Commonwealth* (*Esposito*), a similar argument was made. The argument was that

> the funding agreement between the Commonwealth and New South Wales which provided the funds which were to be used to acquire the appellants' land was to be seen as a circuitous device by which the Commonwealth and the State could, by combination, avoid the prohibition in s 51(xxxi). … There were two steps. First, the Commonwealth would use its powers under the EPBC Act to render the land in the Heritage Estates effectively worthless. Secondly, New South Wales would then use its powers to acquire the land using the funds provided by the Commonwealth under the agreement.[61]

20.40 However, the Full Court of the Federal Court agreed with the primary judge that there had been no 'acquisition'[62] and that the alleged concerted action had not been established.[63]

'Acquisition'

20.41 As discussed in Chapter 18, there must be an 'acquisition' of property in order for s 51(xxxi) of the *Constitution* to be engaged. The Law Council observed that 'some limits on the use of property are not an "acquisition" by the Commonwealth'.[64] A number of High Court cases which have considered whether there has been an 'acquisition' of property on other than just terms have concerned the right to use land.

20.42 In *Commonwealth v Tasmania* (*Tasmanian Dam Case*), Tasmania argued that the relevant Commonwealth statute and regulations—which prohibited the construction of a hydro-electric dam in an area in south-western Tasmania—were invalid because they constituted an acquisition of property on other than just terms. The State argued

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55 *Spencer v Commonwealth* [2015] FCA 754 (24 July 2015) [393].
56 Ibid [395].
57 Ibid [3].
58 Ibid [485], [488], [489], [491].
59 Ibid [493].
60 Ibid [5], [371].
61 *Esposito v Commonwealth* [2015] FCAFC 160 (17 November 2015) [65].
62 Ibid [19], [66]–[71]. Importantly, the Full Court observed that 'New South Wales did not use any of its powers to acquire land compulsorily nor was it required to do so under the [inter-governmental] agreement': [67].
63 Ibid [72], [78].
64 Law Council of Australia, *Submission 140*. See also L Finlay, *Submission 97*.

that an 'acquisition can occur through the operation of legislation which so restricts the use of land that it assumes the owner's rights for an indefinite period'.[65] The High Court did not accept this contention.

20.43 Three of the four Justices who considered the issue rejected Tasmania's argument about s 51(xxxi) of the *Constitution* as they did not consider that there had been an 'acquisition' of property by the Commonwealth. While Mason J observed that the property is 'sterilised' in terms of its potential for use—as the provisions prevented any development of the property without the Minister's consent—he did not consider that the Commonwealth or anyone else had 'acquired' a proprietary interest in the property.[66] Similar views were expressed by Murphy and Brennan JJ.[67] Dr Gerry Bates has explained this judicial reasoning: 'sterilising' the land for this use did not 'prohibit other uses to which the property might be put and the Commonwealth had not effectively acquired the property'.[68]

20.44 By contrast, Deane J concluded that there had been an acquisition of property on other than just terms, as the 'Commonwealth has, by the Wilderness Regulations, brought about a position where the HEC [Hydro-Electric Commission] land is effectively frozen unless the Minister consents to development of it'.[69] His Honour continued:

> the Commonwealth has, under Commonwealth Act and Regulations, obtained the benefit of a prohibition, which the Commonwealth alone can lift, of the doing of the specified acts upon the HEC land. The range of the prohibited acts is such that the practical effect of the benefit obtained by the Commonwealth is that the Commonwealth can ensure, by proceedings for penalties and injunctive relief if necessary, that the land remains in the condition which the Commonwealth, for its own purposes, desires to have conserved. In these circumstances, the obtaining by the Commonwealth of the benefit acquired under the Regulations is properly to be seen as a purported acquisition of property …[70]

20.45 In *Newcrest Mining (WA) Ltd v Commonwealth* (*Newcrest*), the extension of the Kakadu National Park by proclamations made under the *National Parks and Wildlife Conservation Amendment Act 1987* (Cth) extinguished the appellant's mining rights.[71] As Kirby J explained:

> If s 7 of the 1987 Act is valid it purportedly exempted the Commonwealth from any liability to pay compensation to the appellants for such acquisition. Hence the appellants' assertion of invalidity based upon the constitutional requirement of just terms.[72]

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65 *Commonwealth v Tasmania* (1983) 158 CLR 1, 24.
66 Ibid 145–6.
67 Ibid 181 (per Murphy J); 248 (per Brennan J).
68 Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 2013) 151.
69 *Commonwealth v Tasmania* (1983) 158 CLR 1, 286.
70 Ibid 287.
71 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.
72 Ibid 639.

20.46 The Commonwealth contended that it had not acquired any property. A majority of the High Court rejected this contention. The termination of the right to mine was found to constitute an 'acquisition' of property partly because 'there was no other form of land use open to the plaintiff following the sterilisation of that particular form of land use'.[73] Brennan CJ explained that the sterilisation had amounted to an acquisition of property because

> the Commonwealth was left in undisturbed possession of the minerals on and under the land included in Kakadu National Park. The Commonwealth's interest in respect of the minerals was enhanced by the sterilisation of Newcrest's interests therein. … The property consisted not in a right to possession or occupation of the relevant area of land nor in the bare leasehold interest vested in Newcrest but in the benefit of relief from the burden of Newcrest's rights to carry on 'operations for the recovery of minerals'.[74]

20.47 That is, the benefit that passed to the Commonwealth was the unexpired term of the mining leases.[75] Gummow J stated that there is 'no reason why the identifiable benefit or advantage relating to the ownership or use of property, which is acquired, should correspond precisely to that which was taken'.[76]

20.48 *Commonwealth v Western Australia* also concerned the right to use land for mining.[77] The land had been acquired by the Commonwealth pursuant to the *Lands Acquisition Act 1955* (Cth), and was subsequently declared a defence practice area (DPA) pursuant to the Defence Force Regulations. Two mining companies applied for mining exploration licences over land within the DPA, pursuant to the *Mining Act 1978* (WA). The Commonwealth argued that such licences could not be granted in the DPA.[78] The State counterclaimed that the relevant Commonwealth laws[79] were invalid as amounting to an acquisition of the State's property other than on just terms. The counterclaim was unsuccessful. The majority thought that frequent or prolonged authorisations for defence operations under the Defence Force Regulations could amount to an acquisition of the state's property, but that the evidence of the frequency of authorisations was absent in this case.[80]

20.49 By contrast, Kirby J considered that the use of the land for defence operations was 'clearly substantial'.[81] Kirby J found that there had been an 'acquisition':

> Because of those Regulations the entire area, and access to it, come under the power of the Commonwealth. The identifiable benefit or advantage to the Commonwealth was the ultimately unimpeded control which it thereby gained over the entire DPA … The loss of property interests suffered by the State is the loss of control over, and potential revenue from the exploitation of minerals found in the DPA during the

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73 Bates, above n 68, 151 [5.34].
74 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 530.
75 Bates, above n 68, 151 [5.34].
76 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 634.
77 *Commonwealth v Western Australia* (1999) 196 CLR 392.
78 Ibid [3].
79 The laws are outlined at Ibid [66].
80 Ibid [72] (Gleeson CJ and Gaudron J), [77] (McHugh J agreeing with Hayne J), [156] (Gummow J), [259] (Hayne J).
81 Ibid [176]–[177].

> currency of the designation of the area as a DPA. There is an adequate correspondence between the loss of the State's interest and the countervailing benefit or advantage gained by the Commonwealth. The one is the result of the other. At the very least, the Commonwealth, by reason of the Defence Force Regulations, acquired the benefit of relief from the burden of the State's interests.[82]

20.50 However, Kirby J held that the Defence Force Regulations afforded 'just terms' to the state.[83]

20.51 The views expressed by Mason, Brennan and Murphy JJ in the *Tasmanian Dam Case* have generally continued to have majority support, while the view of Deane J has been carried on by Kirby and Callinan JJ in particular, but always as a minority view.[84]

20.52 In *Spencer*, the Court found that there had been a 'taking' of Spencer's 'bundle of rights' in his farm, but no 'acquisition' in constitutional terms.[85] Spencer alleged that he held a 'bundle of rights' over 'Saarahnlee' including rights to use and develop it as he saw fit and that the State had 'acquired' a benefit of a proprietary character, 'which was effectively to control what occurred on, or what was done' with it.[86]

20.53 The Court found that the impact of the state legislation had led to a 'taking' or 'sterilisation'.[87] The Court explained that, by 2006, the NSW Government had a 'specific exit assistance scheme for those farmers adversely affected by the State's native vegetation clearance laws'.[88] In 2007 'Saarahnlee' was assessed for the purposes of the Farmers Exit Assistance Program and public monies were offered to Spencer.[89] The Court stated that this evidence 'proves that ['Saarahnlee'] was considered, by those administering the scheme, not to be commercially viable by reason of the operation and application of the native vegetation clearance laws'.[90] There was 'a sterilisation of Mr Spencer's property, in terms of the uses to which it could be put'.[91] The Court was of the view that the offer under the Farmers Exit Assistance Package constituted a 'taking' because Spencer's bundle of rights in Saarahnlee was 'fundamentally' altered and impaired.[92]

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82 Ibid [187].
83 Ibid [198]. Callinan J similarly held that there was a purported 'acquisition' of the state's property, but considered that the Regulations did not provide 'just terms' and that the Declaration was invalid. See Ibid [271]–[293].
84 See further Andrew Macintosh and Deb Wilkinson, 'Evaluating the Success or Failure of the EPBC Act; A Response to McGrath' (2007) 24 *Environmental and Planning Law Journal* 81. The article they were responding to was Chris McGrath, 'Swirls in the Stream of Australian Environmental Law: Debate on the EPBC Act' (2006) 23 *Environmental and Planning Law Journal* 165.
85 *Spencer v Commonwealth* [2015] FCA 754 (24 July 2015) [4], [550].
86 Ibid [34].
87 Ibid [4].
88 Ibid [159]. The Court considered that there was insufficient evidence to make a positive finding that the exit assistance program was entirely funded and operated by the State: Ibid [362].
89 *Spencer v Commonwealth* [2015] FCA 754 (24 July 2015) [506], [509], [510].
90 Ibid [509].
91 Ibid.
92 Ibid [550].

20.54 Importantly, however, 'there was no acquisition by the State nor by any other person of an interest or benefit of a proprietary nature in the bundle of rights Mr Spencer held in his farm'.[93] The Court explained that for 'acquisition', 'what must be identified in the circumstances is the legal interest said to have been created between another party and Mr Spencer's land'.[94] In the Court's view, Spencer's rejection of the State's offer to pay the then market value for the property 'illustrates that he, and not anyone else, continued to be the person with a proprietary relationship over Saarahnlee'.[95]

20.55 Spencer also argued that his property, acquired pursuant to the scheme between the Commonwealth and NSW, included carbon sequestration rights.[96] Spencer alleged that he had rights in the carbon sequestered in vegetation on the property:[97]

> Absent the stricter vegetation clearance laws, he claims, he could have pursued his projects and development plans throughout the later 2000s and onwards. Emissions from his clearing of land would then have counted in Australia's inventory [of greenhouse gas emissions] and would have contributed to an increase in emissions reported.[98]

20.56 He alleged that the Commonwealth had obtained two kinds of benefits of a proprietary nature. First, it had 'acquired' a financial advantage in not having to implement other measures to reduce greenhouse gas emissions to meet targets under the Kyoto Protocol.[99] Secondly, it had obtained the benefit of the carbon stored in the native vegetation on the land as a result of banning land clearing.[100] The Court did not accept this claim, finding that Spencer 'has not established he ever held, at the requisite time, any carbon sequestration rights under the Conveyancing Act, and that no such rights existed as a profit à prendre at common law'[101] and that the alleged benefits or advantages that were secured did not have the necessary proprietary character.[102]

20.57 In *Esposito*, the appellants' arguments about s 51(xxxi) also failed on the basis that there was no acquisition of property.[103] The case concerned allotments of land, in an area called the Heritage Estates. The landowners were not permitted to build on the land because of the zoning. The applicants and other landowners within the Heritage Estates had been agitating for the land to be rezoned for a number of years. The Shoalhaven City Council sought the approval of the then Commonwealth Minister for the Environment, Water, Heritage and the Arts for the Council's proposal to rezone

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93 Ibid [4].
94 Ibid [564].
95 Ibid [567].
96 Carbon sequestration rights are mentioned in Ch 18. A carbon sequestration right is defined in NSW legislation as a right to the 'legal, commercial or other benefit … of carbon sequestration by any existing or future tree or forest on the land after 1990': *Conveyancing Act 1919* (NSW) s 87A. It is also deemed to be a profit à prendre, a defined interest in land: Ibid s 88AB.
97 *Spencer v Commonwealth* [2015] FCA 754 (24 July 2015) [34].
98 Ibid [247].
99 Ibid [22], [34].
100 Ibid.
101 Ibid [573].
102 Ibid [580]–[581].
103 The appellants (the landowners) were representative members of a class action.

some of the land and to undertake certain infrastructure works. The Minister made a decision under s 130 of the *EPBC Act* to refuse the approval sought. Subsequently, the relevant Commonwealth Department and the State of NSW entered into a cooperative arrangement to facilitate the Commonwealth providing funding to NSW to assist the State with the voluntary acquisition of the land within the Heritage Estates.

20.58 One of the arguments about s 51(xxxi) of the *Constitution*, concerning Commonwealth funding, was outlined earlier. The other argument was that the impact of the Minister's decision was to reduce the value of the land 'effectively to nil'

> by imposing upon them Federal legal constraints which, in substance if not form, have had the effect of barring them from the enjoyment of their land. At the same time, the Commonwealth has received what was said to be the correlative advantage of increasing the environmental amenity of the [nearby] Booderee National Park.[104]

20.59 The Full Court of the Federal Court explained that the Council had sought the Federal Minister's approval for both the rezoning of the land (despite such permission not being required by the *EPBC Act*) and for infrastructure works which would have involved actual development activity by the Council.[105] The latter approval was required under the *EPBC Act* because the Heritage Estates contained two threatened flora and two threatened fauna which were listed under the provisions of the *EPBC Act*.[106] The Minister had decided that the land should not be rezoned and that the infrastructure works should not be permitted to proceed.[107]

20.60 When examining the status of the land, the Full Court observed that, 'at the time the various members of the class acquired their lots they were acquiring land upon which, by State law, they were not permitted to build residential dwellings', noting that the landowners' use of their land 'was already largely sterilised by State law'.[108] With respect to the effect of the *EPBC Act*, the Full Court stated:

> Whatever the fetter on the development of the appellants' land was, it arose when the EPBC Act came into force on 16 July 2000. It was at that time that it became subject to a prohibition that prevented significant action which impacted on the Threatened Species or the environment of the Booderee National Park. What occurred on 13 March 2009 was not the imposition of some fresh prohibition by the Federal Minister but rather a decision by him under Pt 9 not to *lift* the prohibition which already existed under Pt 3.[109]

20.61 The Full Court explained that the appellants 'were not legally permitted to build residential dwellings on their land at any time and the EPBC Act did not change that state of affairs either when it became law on its proclamation or when the Federal

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104 *Esposito v Commonwealth* [2015] FCAFC 160 (17 November 2015) [11].
105 Ibid [5]–[6].
106 Ibid [4]. Relevant provisions of the EPBC Act are detailed later in this chapter.
107 Ibid [7].
108 Ibid [21].
109 Ibid [32].

Minister made his decision under it'.[110] Noting that a hope 'is not a species of property',[111] it concluded:

> it is clear to us that the appellants continue to own all of the property they have always owned. What they have lost—the fulfilment of a value adding hope and with it the destruction of much of the value of their property—are not themselves proprietary in nature.[112]

20.62 The two limitations in the protection afforded by s 51(xxxi) of the *Constitution*—the need for an 'acquisition' and the position in the states—have been viewed by some as problematic.[113] In June 2010, the Hon Bob Katter MP introduced a private member's Bill into the Commonwealth Parliament. The Constitution Alteration (Just Terms) Bill 2010 sought to do two things. First, it sought to alter the *Constitution* so as to extend the constitutional requirement for just terms to 'any restrictions on the exercise of property rights'. Secondly, it sought to alter the *Constitution* so as to 'prohibit state laws acquiring property or restricting the exercise of property rights of any person, except on just terms'.[114] The first reading speech referred to Spencer's legal action.[115] The Bill did not proceed.

Principle of legality

20.63 The 'principle of legality' provides some protection to vested property rights.[116] Blackstone commented:

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land … Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained … All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.[117]

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110 Ibid [57].
111 Ibid [59].
112 Ibid [61].
113 See, eg, National Farmers' Federation, *Submission 127*; L Finlay, *Submission 97*.
114 Diane Spooner, '*Property' and Acquisition on Just Terms* <www.aph.gov.au> 1. This second aspect is similar to the idea raised in the 1988 referendum.
115 For further information about the Bill see Diane Spooner, *'Property' and Acquisition on Just Terms* <www.aph.gov.au>.
116 See Ch 2 and Ch 18.
117 William Blackstone, *Commentaries on the Laws of England*, (Clarendon Press reprinted by Legal Classics Library, first published 1765–1769, 1983 ed) vol I, bk I, ch 1, 135.

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

> Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretive approaches where statutes are said to affect such rights. … The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights.[118]

20.65 However, the protection afforded by the principle of legality is not absolute. Rather, a significant qualification is placed on the principle in respect of regulatory restrictions on land use:[119]

> Across the common law world the standard response is that mere regulatory interference with land use or land management does *not* constitute a deprivation of property for which compensation need be paid. The words which ring in the common lawyer's ear are those of the English law lord, Viscount Simonds [in *Belfast Corporation v O D Cars Ltd* [1960] AC 490, 519], who acidly observed almost 50 years ago that regulatory diminutions of an owner's rights 'can be effected without a cry being raised that Magna Carta is dethroned or a sacred principle of liberty infringed'.[120]

International law

20.66 Article 17(2) of the *Universal Declaration of Human Rights* provides that '[n]o one shall be arbitrarily deprived of his property'.[121] This protection is, however, a limited one.

20.67 As discussed in Chapter 18, Australia has entered into a number of free trade agreements, and obligations under international law may also arise in this context.

20.68 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[122] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[123]

Bills of rights

20.69 As noted in Chapter 18, in other countries, bills of rights or human rights statutes provide some protection to property rights. The *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention on*

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118 *R & R Fazzolari Ltd v Parramatta City Council* (2009) 237 CLR 603, [43] (French CJ).
119 See D Farrier, *Submission 126*.
120 Kevin Gray, 'Can Environmental Regulation Constitute a Taking of Property at Common Law?' (2007) 24 *Environmental and Planning Law Journal* 161, 163.
121 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948).
122 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J).
123 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 2.

Human Rights) expressly added a recognition of property rights in protocol 1, art 1—'for the peaceful enjoyment of one's possessions'.[124]

Justifications for limits on real property rights

20.70 Arguably, there are a number of laws that interfere with real property rights. Whether such an interference is justified may be assessed by applying a structured proportionality analysis, of the sort widely used in international law, in countries with bills of rights and human rights Acts and by the Australian Parliamentary Joint Committee on Human Rights. The most general justification for laws that interfere with vested property interests is that the interference is necessary and in the public interest. This is also an often used justification in respect of laws which may be seen to interfere with rights in real property.

20.71 This section focuses on justifications which have been used with respect to environmental laws, as these laws generated the most debate among stakeholders in this Inquiry. This Inquiry heard from two groups of stakeholders concerned about property rights: those who emphasised an environmental perspective and those who emphasised a private property perspective. The National Farmers' Federation (NFF) represented those who emphasised a private property perspective. In the wider public debate, others have also defended private property.[125]

20.72 The Australian Network of Environmental Defenders Offices (the EDOs) and Environmental Justice Australia represented those who emphasise an environmental perspective. Generally, environmental defenders put forward the justifications for interferences with real property rights. Environmental Justice Australia noted '[t]he recognition, both internationally and domestically, of the right to property is tempered with the recognition that it will be subject to lawful limitations imposed by the state'.[126] Laws limit land and water use to balance competing private interests, to protect the environment[127] or for the public interest. The EDOs explained that planning and environmental laws 'evolved in part to address land use conflict arising from incompatible uses of private property (for example, industrial and urban uses), and competing use of natural resources'.[128] Those who emphasise an environmental perspective argued that environmental regulation—which may interfere with real property rights—is both necessary and in the public interest.

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

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

126 Environmental Justice Australia, *Submission 65*.

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

128 Australian Network of Environmental Defenders Offices, *Submission 60*.

International obligations

20.73 There are a range of environmental treaties which require Australia to take actions which may affect property rights.[129] For example, a number of provisions in the *EPBC Act* were enacted so as to comply with Australia's international obligations.[130] The Independent Review in 2009 of the *EPBC Act* (Hawke Report) stated that the need to meet Australia's international obligations is at 'the heart' of the Act and guides its framework. The Hawke Report listed 11 treaties and declarations which were of the 'most relevance' to environmental protection under the Act.[131] The EDOs observed that the *EPBC Act* is the 'principal legislative vehicle', at the Commonwealth level, to implement Australia's international environmental obligations. It also referred to literature that has argued that 'Australia could and should be doing more to protect species and areas listed under international conventions; that the EPBC Act may fall short of properly implementing Australia's international environmental obligations'.[132]

Public interest

20.74 The EDOs and Environmental Justice Australia argued that environmental laws are in the public interest. As the EDOs put it, environmental laws exist 'to protect the environment and conserve natural resources in the public interest, for the benefit of all Australians, including property owners'.[133] The EDOs cited Dr Nicole Graham, that environmental laws 'indicate the government's prerogative, indeed responsibility, to balance private rights against the public's interest in health and environmental protection'.[134] Environmental Justice Australia cited Professor Kevin Gray, who stated that

> privileges of ownership have always been intrinsically curtailed by community-oriented obligation. … The community is already entitled—has *always* been entitled—to the benefit of a public-interest forbearance on the part of the landowner.[135]

20.75 The EDOs called for recognition that rights and freedoms operate in an ecological context, and stated that the need for ecological sustainability meant that the

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

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

131 Allan Hawke, *The Australian Environment Act—Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2009) [85]. These same 11 were listed in the submission from the Department: see Department of the Environment (Cth), *Submission 149*.

132 Australian Network of Environmental Defenders Offices, *Submission 121*.

133 Australian Network of Environmental Defenders Offices, *Submission 60*.

134 Ibid citing Nicole Graham, 'Land Clearing Laws Bring Out Worrying Libertarian Streak', *The Conversation* (online), 4 August 2014 <http://theconversation.com>.

135 Environmental Justice Australia, *Submission 65* citing Gray, above n 120. With respect to the privileges of ownership having been curtailed in the context of Torrens Title, see *Oates v Director General of the Department of Infrastructure Planning and Natural Resources* [2004] NSWLEC 164 (14 April 2004).

public interest is more prominent today than in Blackstone's 18th century England.[136] They referred to Preston CJ of the NSW Land and Environment Court, who has argued that the increasing strain on ecological systems will mean that 'the *public benefit demands* from these resources will increasingly have to be met first, before the resources are available for *private benefits*'.[137] The EDOs submitted that there is 'evidence that the wider community values the environment and feels that regulation across a wide range of sectors is "about right"'.[138]

20.76 Another argument pertaining to the public interest is that a wider requirement to pay compensation to landholders would discourage regulators from implementing environmental protections.[139] The EDOs referred to 'takings' legislation in the United States[140] which, it argued, has had a 'chilling effect' on government regulatory activity.[141] Some consider that s 51(xxxi) of the *Constitution* can have a similar effect. However, others argue that placing a price on interferences with property rights leads to better regulatory design on the basis that what is costless is likely to be overindulged.[142]

20.77 The EDOs also submitted that the ALRC should consider 'the right of all Australians to a healthy environment' which it said, was 'emerging' in human rights law.[143]

Adequacy of existing protection

20.78 Both Environmental Justice Australia and the EDOs submitted that existing protections are adequate to safeguard against any encroachments.[144] Environmental Justice Australia submitted that the protection of s 51(xxxi) 'operates to protect

136 See Ch 18 for a discussion of water. EDOs of Australia submitted that, for the purposes of this ALRC Inquiry, the principles of ecologically sustainable development should be 'an integral part of any public interest test': Australian Network of Environmental Defenders Offices, *Submission 60*.

137 Ibid.

138 Ibid. They cited NSW Office of Environment & Heritage, *Who Cares About the Environment in 2012?* (2013) 41–2.

139 Pamela O'Connor, 'The Changing Paradigm of Property and the Framing of Regulation as a Taking' (2011) 36 *Monash University Law Review* 50, 73.

140 See Ch 18.

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

142 See, eg, L Finlay, *Submission 97*; Jonathan Adler, 'The Adverse Environmental Consequences of Uncompensated Land-Use Controls' in Bruce Benson (ed), *Property Rights: Eminent Domain and Regulatory Takings Re-Examined* (Palgrave Macmillan, 2010) 187.

143 Australian Network of Environmental Defenders Offices, *Submission 60*. The EDOs acknowledged that 'the human right to a healthy environment currently has an uncertain status in international law, and has not been formally recognised in any binding global international agreement'. It argued that '[d]espite lacking formal recognition, there are existing civil and political rights which could provide a basis for an individual to argue that they have a right to a healthy or sound environment' and that 'there is an increasing push for its formal recognition'.

144 Environmental Justice Australia, *Submission 65*; Australian Network of Environmental Defenders Offices, *Submission 60*. See also Andrew Macintosh and Richard Denniss, 'Property Rights and the Environment: Should Farmers Have a Right to Compensation?' (Discussion Paper No 74, The Australia Institute, 2004).

individuals and ensure that they do not bear a disproportionate burden for the benefit of the community'.[145]

20.79 Both stakeholders also referred to other measures that ensure that private and public interests are balanced fairly. Environmental Justice Australia referred to the requirement that laws not be arbitrary or without foundation but rather for a proper purpose.[146] The EDOs referred to 'public participation and transparency in decision-making, court review mechanisms and other procedural fairness'[147] that have characterised the implementation of existing environmental laws.

20.80 With respect to the *EPBC Act*, the EDOs submitted that the embedded objective of 'promot[ing] ecologically sustainable development'[148] guides decision-makers to effectively balance and integrate economic, environmental and social considerations before making a decision that affects property rights.[149]

Economic arguments

20.81 The EDOs referred to a 2012 Senate Inquiry that 'called into question' the suggestion that environmental laws are causing private developers to shoulder an unreasonable burden.[150] They also referred to a number of economic arguments in criticism of US-style 'takings' legislation.[151]

20.82 The economic arguments used to justify encroachments on real property rights were considered, for example, by the Productivity Commission in 2004.[152] In addition, Associate Professor Andrew Macintosh and Dr Richard Denniss analysed both equity and economic arguments in their paper assessing whether farmers should have 'additional statutory rights to compensation when restrictions are placed on their ability to use or clear land and when water allocations are reduced for environmental purposes'.[153] In part, the study responded to the claim that 'the provision of more secure property rights will stimulate greater investment and improve the allocation of scarce agricultural resources'.[154]

20.83 With respect to the economic arguments, Macintosh and Denniss explained that, because market failure causes many environmental problems, policy makers can choose between 'polluter-pays' policies and 'beneficiary-pays' policies.[155] The NFF advocated the implementation of a beneficiary-pays model—the person who obtains a

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145 Environmental Justice Australia, *Submission 65*.
146 Ibid.
147 Australian Network of Environmental Defenders Offices, *Submission 60*.
148 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(b).
149 Australian Network of Environmental Defenders Offices, *Submission 60*.
150 The reference was to Senate Environment and Communications Legislation Committee, Parliament of Australia, *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012* (2013).
151 Australian Network of Environmental Defenders Offices, *Submission 60*.
152 Productivity Commission, 'Impacts of Native Vegetation and Biodiversity Regulations' (Inquiry Report No 29, 2004).
153 Macintosh and Denniss, above n 144, v.
154 Ibid. However, some might counter that farmers and irrigators obtain a significant economic benefit from having healthy land and a healthy functioning river system.
155 Ibid vi.

benefit should pay the cost of undertaking it. So, if a landowner is prohibited from clearing land for the benefit of the wider community, then the community should pay that landowner compensation. Under the polluter-pays model, a person taking an action should be required to pay the full costs associated with taking that action. So, if a land owner clears the land, that landowner will have to pay the community for any environmental damage caused.

20.84 Macintosh and Denniss explain that, while polluter-pays policies are generally considered to be more economically efficient than beneficiary-pays policies, they typically have higher political costs.[156] They concluded that farmers should not be provided with additional statutory rights to compensation concerning interferences with land use, in part because such an approach would be unlikely to result in a significant increase in agricultural investment or output.[157] While they acknowledged that there was a more convincing economic argument with respect to the claim for compensation concerning interferences with water use, they similarly opposed the creation of additional statutory rights here, explaining that a number of studies had concluded that the economic gains could be limited.[158]

20.85 The Productivity Commission stated that a 'major aim' of its recommendations was 'to make the cost-benefit trade-offs involved in achieving various environmental objectives more transparent, so that optimal policy choices are made'.[159] It stated that the cost-benefit is 'obscured' in cases concerning native vegetation and biodiversity regulation of private land 'because the costs of regulation are largely borne by landholders':[160]

> Regulation of native vegetation clearing on private property effectively asserts public ownership of remnant native vegetation while leaving its ongoing day-to-day management in the hands of the (uncompensated) landholder. From the landholder's perspective, native vegetation loses much of its private value and becomes a liability. … When regulation reduces the private value to landholders of native vegetation, incentives to care for it are reduced. The prospective private loss also creates an incentive to circumvent the regulations … or to bring forward clearing as insurance against possible strengthening of regulations in future.[161]

20.86 It continued:

> Poor incentives for landholders to comply with current regulatory arrangements could be addressed to some extent by compensating landholders for their losses. Payment of compensation would also make the costs of regulation more transparent to the community, facilitating comparison with environmental benefits. However, the Commission does not recommend simply compensating landholders for the impacts of *existing* compulsory regulatory regimes. This is not only because of the numerous difficulties in assessing appropriate farm-level compensation … but because continued reliance on regulation to achieve a range of broadly-defined environmental goals appears unlikely to be the most effective, least-cost option from a whole-of-

156 Ibid.
157 Ibid.
158 Ibid vi–vii.
159 Productivity Commission, above n 152, 221.
160 Ibid 224.
161 Ibid 225.

> community perspective. In this case, compensation would merely shift an unnecessary large cost burden from landholders to taxpayers.[162]

20.87 Relevantly, it recommended:

> Landholders individually, or as a group, should bear the cost of actions that directly contribute to sustainable resource use (including, for example, land and water quality) and, hence, the long-term viability of agriculture and other land-based operations.[163]

20.88 Another relevant recommendation was that

> Over and above landholder responsibilities, additional conservation apparently demanded by society (for example, to achieve biodiversity, threatened species and greenhouse objectives), should be purchased from landholders where intervention is deemed cost-effective.[164]

20.89 Macintosh and Denniss explained that farm lobby groups welcomed the Productivity Commission's report, as supporting their claims for a statutory right to compensation. However,

> [d]espite the enthusiastic response by farm lobby groups, the Commission's position on the creation of a statutory right to compensation is unclear. The report does, however, support the notion that public good environmental benefits associated with the retention of native vegetation should be purchased from landholders. It is likely that a statutory right to compensation for the impacts of some native vegetation and biodiversity laws that are designed to achieve 'public good environmental benefits' could fit within the framework envisaged by the Productivity Commission.[165]

Distinguishing between rights

20.90 Some stakeholders submitted that an individual's rights pertaining to a particular property are a different order of rights from human rights. The EDOs argued that the inclusion of environmental law in the Terms of Reference 'as an area that potentially unreasonably impinges upon personal freedoms evidences a misunderstanding of human rights principles as they relate to property rights'.[166] Environmental Justice Australia submitted that clearing land of native vegetation is not an innate human right:

> The principle of a right to own property and not to be arbitrarily deprived of that property should not be confused with the substantive rights that an individual may have to any particular property and does not and should not be seen as a limitation on the ability of governments to enact laws to protect the environment.[167]

20.91 Environmental Justice Australia contrasted the rights to ownership of property and against arbitrary deprivation of that property that are protected in international law, which enjoy 'a fundamental foundation in the integrity and dignity inherent in every

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162 Ibid.
163 Ibid 238 (rec 10.7).
164 Ibid 239 (rec 10.9).
165 Macintosh and Denniss, above n 144, 2.
166 Australian Network of Environmental Defenders Offices, *Submission 60*.
167 Environmental Justice Australia, *Submission 65*. Similarly, the EDOs argued that 'there is no general proprietary right to clear vegetation or to undertake development'. Rather, activities such as clearing vegetation and farming are 'privileges' afforded to landholders on terms subject to change. See Australian Network of Environmental Defenders Offices, *Submission 60*.

person', with 'particular rights to certain property as they exist at a particular point in time', which do not.[168]

20.92 Environmental Justice Australia also pointed to the universality of human rights. In its view it would be problematic to protect the content of a particular interest in particular property as it would 'not be universal', but rather would 'be concentrated in the hands of the very few'.[169] Both it and the EDOs were critical of any attempt to use a human rights argument to challenge environmental law and regulation. The EDOs saw it as 'nonsensical'.[170] Environmental Justice Australia submitted that '[t]he protection of the content of particular property rights is simply not suitable to a human rights style evaluation framework', such as using a proportionality test.[171] Conversely, Lorraine Finlay argued:

> Firstly, it is not a question of challenging environmental laws and regulations wholly and absolutely. There is obviously a clear community interest in environmental protection, and the question is rather one of the appropriate balance. That is, how do we strike a sensible balance between protecting the environment and protecting property rights? Secondly, property rights are intrinsically centred in a human rights framework. This is apparent at the international level where, for example, property rights are featured in the *Universal Declaration of Human Rights*. Even more importantly for our purposes, it is apparent at the domestic level within Australia through s 51(xxxi) of the *Australian Constitution* which … provides for one of the few express rights guarantees within the *Australian Constitution*.[172]

Proportionality

20.93 In the European context, a proportionality test has been used to determine whether interferences with real property rights caused by environmental laws are justified. As discussed in Chapter 18, protocol 1, art 1 to the *European Convention on Human Rights* protects the right to 'the peaceful enjoyment' of 'possessions'. Further, it stipulates that 'no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'.

20.94 The European Court of Human Rights has heard a significant number of cases where a citizen has alleged that a state has violated their right to property as protected in art 1 by taking measures (authorised by environment-related legislation) to protect the environment.[173] For example, in *Papastavrou v Greece*, administrative authorities

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168 Environmental Justice Australia, *Submission 65*. Others may object to this argument on the basis of internal inconsistency because a person cannot own property except as owner of particular items of property.

169 Ibid.

170 Australian Network of Environmental Defenders Offices, *Submission 60*.

171 Environmental Justice Australia, *Submission 65*.

172 L Finlay, *Submission 97*.

173 See, eg, *Hamer v Belgium* [2007] V Eur Court HR 73; *Papastavrou v Greece* [2003] IV Eur Court HR 257; *Pine Valley Developments Ltd v Ireland* (1991) 222 Eur Court HR (ser A); *Oerlemans v The Netherlands* (1991) 219 Eur Court HR (ser A); *Fredin v Sweden (No 1)* (1991) 192 Eur Court HR (ser A); *James v United Kingdom* (1986) 98 Eur Court HR (ser A). See also Ch 18 for a discussion of *Pye v United Kingdom* [2007] III Eur Court HR 365, although note that this case concerned the law of adverse possession rather than environmental law.

decided to reafforest land which the applicants claimed belonged to them. It was not possible to obtain compensation under Greek law. The Court found that the applicants' complaint came within the protection of peaceful enjoyment in art 1. The Court concluded that there had been a violation of art 1 because 'there was no reasonable balance struck between the public interest and requirements of the protection of the applicants' rights'.[174]

20.95 With respect to the question of whether there was a 'reasonable relationship of proportionality between the means employed and the aim pursued'—the cases relating to environmental legislation outline a number of principles. For example:

- '… an interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of protection of the individual's fundamental rights'.[175]
- 'The requisite balance will not be found if the person concerned has had to bear "an individual and excessive burden"'.[176]
- States enjoy 'a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question'.[177]

Laws that interfere with real property rights

20.96 A range of Commonwealth laws may be characterised as interfering with vested property rights—whether or not this interference may be considered justified.

20.97 The *Lands Acquisition Act 1989* (Cth) is the key piece of legislation concerning Commonwealth acquisition of land. With some exceptions, the Commonwealth can only acquire an interest in land[178] in accordance with the procedures outlined in that Act.[179] The Act provides a detailed process for Commonwealth acquisitions of land[180] and protections—including compensatory mechanisms—for people whose interests in

174 *Papastavrou v Greece* [2003] IV Eur Court HR 257, [38]–[39].

175 *Fredin v Sweden (No 1)* (1991) 192 Eur Court HR (ser A), [51] citing the principle from *Mellacher v Austria* (1989) 169 Eur Court HR (ser A), [48] and *Sporrong v Sweden* (1982) 88 Eur Court HR (ser A), [69] (concerning 'fair balance'). See also *Pye* case discussed in Ch 18: *Pye v United Kingdom* [2007] III Eur Court HR 365.

176 *James v United Kingdom* (1986) 98 Eur Court HR (ser A), [50] citing the principle from *Sporrong v Sweden* (1982) 88 Eur Court HR (ser A), [73].

177 *Fredin v Sweden (No 1)* (1991) 192 Eur Court HR (ser A), [51] citing the principle from *Agosi v United Kingdom* (1986) 108 Eur Court HR (ser A), [52]. See also *Pye* case discussed in Ch 18: *Pye v United Kingdom* [2007] III Eur Court HR 365.

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

179 Ibid s 21(1).

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

land are adversely affected by a compulsory acquisition.[181] The *Lands Acquisition Act* was largely based on recommendations in the ALRC's 1977 report, *Lands Acquisition and Compensation*.[182] The Act was designed to modernise Australia's system of compulsory land acquisition and provide procedures to ensure fairness in decision making, including 'a mechanism for an individual adversely affected by a decision to compulsorily acquire property to require the acquiring authority to justify publicly the need for, and choice of, their property'.[183] The ALRC received no submissions that this Act is inconsistent with common law rights.

20.98 A number of Commonwealth laws may be seen as interfering with real property rights. These include:

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

20.99 Some of these laws may interfere with the right to use real property—for example, environmental laws—whereas others may interfere with the right to exclude others from one's land—for example, some criminal laws.

Environmental laws

20.100 Environmental laws may be understood as those that include provisions intended 'to protect the environment [including national heritage] and conserve natural resources in the public interest'.[184] There are approximately 60 Commonwealth environment-related statutes in force.[185]

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

- the compulsory acquisition of property;
- the regulation of land use, development and activities;[186]
- restrictions on the sale or lease of real property;[187]
- actions which adversely affect the 'enjoyment' (for example, search and enter powers), or value of real property;[188] and

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181 See, for example, the compensation scheme in pt VII of the Act.
182 Australian Law Reform Commission, *Lands Acquisition and Compensation*, Report No 14 (1980).
183 Department of Parliamentary Services (Cth), *Bills Digest*, No 114 of 1988, 24 October 1988, 1.
184 Australian Network of Environmental Defenders Offices, *Submission 60*.
185 See Department of the Environment (Cth), 'Legislation' <http://www.environment.gov.au>.
186 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12, 15A, 15B, 15C, 16, 17B, 18, 18A, 20, 20A; *Comprehensive Nuclear-Test-Ban Treaty Act 1988* (Cth); *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ss 9–11; *Great Barrier Reef Marine Park Act 1975* (Cth) s 38DD.
187 *Building Energy Efficiency Disclosure Act 2010* (Cth) s 11.
188 *Environment Protection and Biodiversity Conservation Act 1999* (Cth); *National Radioactive Waste Management Act 2012* (Cth) s 11.

- restrictions on the assignment/sale of tradeable resource-use property rights.[189]

20.102 Many environmental planning statutes that may be considered to interfere with property rights are state—not Commonwealth—Acts.[190] Particular concerns have been expressed about the actions of state governments,[191] however state legislation is not the concern of this Inquiry.

20.103 While Finlay observed that state laws lie beyond the scope of this Inquiry, she submitted that Commonwealth laws could not be 'neatly "carve[d] out"' and considered alone when discussing the protection of property rights in Australia.[192] First, she noted that the 'majority' of 'environmental laws that directly impact upon property rights are State laws'. This therefore makes it 'impossible' to discuss the protection of property rights in Australia in a 'practical and meaningful way' without referring to state law. Secondly, she pointed to the increasing use of intergovernmental arrangements, 'encouraging the States (often through the use of tied funding) to implement policies that impact upon property rights'.[193] A related factor is the substantial and growing number of laws which are part of a cooperative scheme, of one form or another, between the Commonwealth and the states (or between the states alone). These cooperative schemes provide for a significant level of consistency and intertwining of Commonwealth and state laws.[194] Further, the Australian Government has committed to delivering a 'One-Stop Shop' for environmental approvals, which would mean that state planning systems would be accredited under national environmental law 'to create a single environmental assessment and approval process for nationally protected matters'.[195]

20.104 The Australian Human Rights Commission also identified the need to look at environmental issues in an integrated way:

> a comprehensive approach is required to fully explore these issues and enable dialogue between all key stakeholders, including governments (federal, state and territory). It is anticipated that the outcomes of this work could then drive significant reform to law and policy.[196]

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

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

191 Dr Noeleen McNamara, 'A Home Is No Longer a Castle? Real Property Rights in the Context of Mining and Environmental Claims' (Speech, ALRC Freedoms Symposium, Federal Court of Australia, Brisbane, 2 September 2015); National Farmers' Federation, *Submission 127*; M Nixon, *Submission 98*; L Finlay, *Submission 97*; National Farmers' Federation, *Submission 54*. See also Suri Ratnapala, 'Vegetation Management in Queensland: A Case of Constitutional Vandalism' (2004) 56 *IPA Review* 10.

192 L Finlay, *Submission 97*.

193 Ibid.

194 These co-operative scheme laws, including the *Water Act 2007* (Cth), are listed in Australasian Parliamentary Counsel's Committee, *National Uniform Legislation—Acts of Jurisdictions Implementing Uniform Legislation* <http://pcc.gov.au/>.

195 Department of the Environment (Cth), *One-Stop Shop for Environmental Approvals* <http://www.environment.gov.au/epbc/one-stop-shop>. As at 1 November 2015 a Bill to facilitate the One-Stop Shop policy was before the Parliament: Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 (Cth).

196 Australian Human Rights Commission, *Submission 141*.

20.105 The EDOs submitted that 'there are currently no Commonwealth environmental laws that unjustifiably interfere with vested property rights'.[197] Other stakeholders contested this, raising the *EPBC Act* and the *Water Act.*

20.106 Most Commonwealth environmental statutes include an express provision precluding the Commonwealth from compulsorily acquiring property without providing compensation on just terms.[198] While both the *EPBC Act* and the *Water Act* contain such provisions,[199] nonetheless concerns have been expressed that these two statutes may unjustifiably interfere with property rights.

EPBC Act

Key aspects

20.107 The *EPBC Act* is the central piece of Commonwealth environmental legislation.[200] It is the 'primary environmental impact assessment legislation at the national level'.[201] The objects of the Act include 'to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance' and 'to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources'.[202] The South Australian Ornithological Association said that the Act and similar legislation was enacted 'to prevent further degeneration of the natural estate and the further extinction of native species'.[203]

20.108 The *EPBC Act* affects a landholder by imposing environmental land use restrictions. The Act is concerned with *development*—it does not interfere with the *existing use* of land. Section 43B permits a person to take an 'action',[204] without an approval, if that action constitutes a lawful continuation of a use of the land.[205] Emeritus Professor David Farrier explained:

> The continuation of the existing use right is conceded even where it is compromising nature conservation values. There are not even provisions in the legislation which allow existing uses to be terminated on payment of compensation, unless the land itself is compulsorily purchased.[206]

20.109 The *EPBC Act* requires approval of the Minister to change the existing use of the land where the proposed action has, or is likely to have, a 'significant' impact on a

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197 Australian Network of Environmental Defenders Offices, *Submission 60*. See also Australian Network of Environmental Defenders Offices, *Submission 121*; Australian Conservation Foundation, *Submission 93*.

198 See, eg, *Greenhouse and Energy Minimum Standards Act 2012* (Cth) s 174. See the discussion of s 51(xxxi) and historic shipwreck clauses in Ch 18.

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

200 For background on the scope of Commonwealth power with respect to the environment, see Department of the Environment (Cth), *Submission 149*.

201 Hawke, above n 131, 11.

202 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(a)–(b).

203 The South Australian Ornithological Association Inc, *Submission 82*.

204 An action includes a project, a development, an undertaking, an activity or series of activities, and an alteration to any of these: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 523.

205 See also s 43A which concerns actions with prior authorisation. The Department's submission outlines both provisions in detail, see Department of the Environment (Cth), *Submission 149*.

206 D Farrier, *Submission 126*.

matter of environmental significance. The concept of 'significant impact' is 'central' to the Act.[207]

20.110 For example, a person is prohibited from taking an 'action' that has or will have, or is likely to have a significant impact on

- the world heritage values of a declared 'World Heritage property'—s 12(1);
- the ecological character of a 'declared Ramsar wetland'—s 16(1);
- a 'listed threatened species' that is included in the extinct in the wild, critically endangered, endangered or vulnerable categories—s 18(1)–(4);
- a 'listed threatened ecological community' included in the critically endangered or endangered categories—s 18(5)–(6); and
- a 'listed migratory species'—s 20(1).

20.111 Contraventions of these laws attract civil penalties.

20.112 A person is prohibited from taking an 'action' that results or will result in, or is likely to have a significant impact on

- the world heritage values of a declared 'World Heritage property'—s 15A(1)–(2);
- the ecological character of a 'declared Ramsar wetland'—s 17B(1)–(2);
- a 'listed threatened species or a listed threatened ecological community'—s 18A(1)–(2); and
- a 'listed migratory species'—s 20A(1)–(2).

20.113 Contravention of any of these laws is an offence.

20.114 A person is prohibited from taking an 'action' that involves 'coal seam gas development' or 'large coal mining development' and the action has or will have, or is likely to have a significant impact on a 'water resource'.[208]

20.115 In *Greentree v Minister for the Environment and Heritage*, a farmer was prosecuted for breaching the *EPBC Act* by clearing, ploughing and sowing the land. The Full Court of the Federal Court upheld the Federal Court's decision that Greentree had taken an action which had a significant impact on the ecological character of a declared Ramsar wetland, contrary to s 16(1) of the *EPBC Act*.[209] The site had been degraded prior to the land clearing, but the Federal Court had found that despite this, there had been native trees and wetland plants on the site, that the site retained important attributes (for example, dead trees and fallen logs had provided 'a habitat critical to some species of birds') and that the site 'had the ability to regenerate

207 Hawke, above n 131, [95].
208 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 24D(2)–(3) (civil penalty); s 24E(2)–(3) (offence).
209 *Greentree v Minister for Environment and Heritage* (2005) 144 FCR 388, [45]–[50].

relatively quickly'.[210] The clearing, ploughing and sowing had 'virtually sterilised' the site as a wetland.[211]

20.116 Viewing this as a 'flagrant' breach of the *EPBC Act*, the EDOs submitted that the case 'highlights both the restricted scope of the Act and the importance of enforcement under environmental legislation'.[212]

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

> Not all actions impacting on a world heritage property will have, or are likely to have, a *significant impact* on the *world heritage values* of that property. This clause therefore does not regulate all actions affecting a world heritage property.[213]

20.118 Bates has commented that the question of significance is 'for subjective determination by the minister'.[214] Indeed, the *EPBC Act* places the Environment Minister 'at the centre of decision-making for matters of national environmental significance'.[215] The Department of the Environment explained:

> There are a variety of assessment processes available under the EPBC Act, depending on the nature and complexity of the action under assessment. At the end of the assessment process, the Minister may choose to reject any action that would have unacceptable impacts and may also attach approval conditions, to avoid, mitigate or offset impacts.[216]

20.119 While pt 17 div 16 of the *EPBC Act* provides for judicial review of administrative decisions, the statutory scheme may raise some concerns with respect to due process requirements.[217]

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210 Ibid [46].
211 Ibid [47].
212 Australian Network of Environmental Defenders Offices, *Submission 121*.
213 Explanatory Memorandum, Environment Protection and Biodiversity Conservation Bill 1998 (Cth) [23] (emphasis in original). See other examples at [49] ('Not all actions affecting a nationally threatened species or community will have, or are likely to have, a *significant impact* on that species or community'); [59] ('Not all actions affecting a migratory species will have, or are likely to have, a *significant impact* on that species').
214 Bates, above n 68, 174 [5.71].
215 Hawke, above n 131, [12].
216 Department of the Environment (Cth), *Submission 149*. The submission referred to the relevant policy on environmental offsets which provides 'transparency around how the suitability of offsets is determined' given that '[t]he suitability of a proposed offset is considered as part of the decision as to whether or not to approve a proposed action under the EPBC Act': Department of Sustainability, Environment, Water, Population and Communities (Cth), *Environment Protection and Biodiversity Conservation Act 1999 Environmental Offsets Policy* (2012) 4.
217 Some possible arguments include the following. First, that the offences are not clearly defined, which is a basic requirement of the rule of law. Second, there is a question of constitutional validity insofar as the provisions require federal courts to convict and sentence persons based on future potential harm. This suggests the exercise of non-judicial power by a federal court contrary to the rule in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. However, on the other hand, there is a publicly notified process of assessment in which interested people can participate and extended standing for

20.120 The *EPBC Act* does interfere with a landholder's right to use land—but only to a limited extent. This Inquiry heard conflicting claims about whether the *EPBC Act* interferes with a farmer's ability to clear land.

Concerns about interferences and counter-arguments

20.121 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) considered the provisions of the Environment Protection and Biodiversity Conservation Bill 1998 (Cth) but did not express concerns about any impact on property rights.[218] Nor did it express concerns in this regard about subsequent Bills that sought to amend the *EPBC Act* by imposing strict liability on certain elements of the offences in ss 15A, 17B, 18A and 20A of the *EPBC Act* (outlined above);[219] and which established a new matter of national environmental significance in relation to the significant impacts or likely significant impacts of coal seam gas development and large coal mining development on a water resource (the so-called 'water trigger').[220]

20.122 Since the commencement of the *EPBC Act* in 2000, there have been a number of reviews of the Act and natural resource management more broadly,[221] including an independent review of the Act[222] undertaken pursuant to s 522A.[223] Two of them are of particular relevance to the matters considered in this Inquiry.[224]

20.123 In March 2010, the NFF submitted to a Senate Committee Inquiry into native vegetation laws that where the operation of the *EPBC Act* results in landholders' property rights being reduced, the Act should require landholders to be compensated.[225] The Committee did not make a specific recommendation in this regard, but commented:

> While the committee does not believe that it is always inappropriate for government to regulate the use or utilisation of private landholdings, there comes a point at which regulation of land may be so comprehensive as to render it of a substantially lower

judicial review (although note that, as at 1 November 2015, a Bill is in the Parliament to reduce extended standing: Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (Cth)).

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

219 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *11th Report of 2006* (November 2006). The Committee did express concerns about the imposition of strict liability. See Ch 10.

220 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest* No 4 of 2013, 5.

221 Some of these reviews are outlined in National Farmers' Federation, Submission No 136 to 'Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999' (2009) 4, 7–12; Hawke, above n 131, 4, 8. Further, in its submission to this ALRC Inquiry, the EDOs outlined a number of inquiries and consultations that it had been involved in that were concerned with 'cutting green tape', see Australian Network of Environmental Defenders Offices, *Submission 60*.

222 Hawke, above n 131.

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

224 Senate Finance and Public Administration References Committee, Parliament of Australia, *Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures* (2010); Productivity Commission, above n 152.

225 National Farmers' Federation, Submission No 265 to Senate Finance and Public Administration References Committee, *Inquiry into Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures*, 2010, 4.

> economic value to the landowner. In such circumstances consideration should be given to compensation being provided to the landowner in recognition of this.[226]

20.124 In this ALRC Inquiry, the NFF again expressed the view that the degree of interference by the *EPBC Act* with property rights may be unjustified.[227] The NFF's main argument was that the Act 'is having a significant financial impact on farmers as a consequence of the limitations it places on property development and land use change'.[228] It suggested that the land use restrictions were resulting in adverse economic and environmental outcomes by preventing the effective introduction of modern agricultural technology. For example, it suggested that prohibitions on cutting down isolated paddock trees frustrates precision cropping practices, which may: reduce chemical and fertiliser use; prevent run-off into waterways; lower fuel consumption; and mitigate soil loss. In its view, such restrictions 'substantially limit the continued profitability and viability of farms'.[229] The NFF submitted that

> the direct impact on property values, and uncertainties in the complex operational aspects of the EPBC Act … mean that farmers are denied the ability to plan in the longer term and subsequently derive optimum value from their land assets. Such impacts are unjustified and disproportionate in comparison to the environmental benefit that flows to the landholder.[230]

20.125 It noted that the compensation provision in s 519 was limited to situations where there had been an 'acquisition' and called for legislation to be introduced to provide compensation for a 'taking'—'in the sense of a fundamental alteration or interference with the property rights of a landholder'. It submitted that the Senate Committee's comments in the inquiry into native vegetation laws 'represent an acknowledgment that compensation may be appropriate in circumstances that do not amount to a direct acquisition of property within the meaning of section 51(xxxi)'. It expressed the view that 'a "significant impact" does not justify landholders carrying the bulk of the financial burden that necessarily arises in the pursuit of achieving the goals of these measures, which are primarily aimed at protecting a broader public good'.[231]

20.126 Dr Noeleen McNamara expressed the view that not all environmental constraints imposed by the *EPBC Act* are equal, considering 'the restriction or prohibition of land clearing consequent upon the protection of endangered species and ecological communities' to be the 'most egregious' in terms of the economic cost imposed on the landholder.[232]

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226 Senate Finance and Public Administration References Committee, Parliament of Australia, *Native Vegetation Laws, Greenhouse Gas Abatement and Climate Change Measures* (2010), [5.13].

227 National Farmers' Federation, *Submission 127*; National Farmers' Federation, *Submission 54*.

228 The NFF also claimed that the 'complexity' of the Act's operation frustrates farmers from achieving 'optimum value from their land assets': National Farmers' Federation, *Submission 54*.

229 Ibid.

230 National Farmers' Federation, *Submission 127*.

231 Ibid.

232 Dr Noeleen McNamara, 'A Home Is No Longer a Castle? Real Property Rights in the Context of Mining and Environmental Claims' (Speech, ALRC Freedoms Symposium, Federal Court of Australia, Brisbane, 2 September 2015).

20.127 By contrast, the EDOs submitted that the *EPBC Act* 'does not unduly encroach on private property rights'. The EDOs and Farrier considered that the *EPBC Act* would rarely interfere with a farmer's ability to clear land.[233] This is because state and territory legislation regulates land clearing—other than in those 'very rare' instances where the clearing is likely to have a significant impact on a matter of national environmental significance.[234] The EDOs considered the 'significant impact' requirement to be a 'high' threshold and observed that the 'vast majority' of development proposals would be assessed at a local or state level only. The EDOs maintained that private landholders wanting to develop their farm or residential lot are 'largely unaffected' by the *EPBC Act*. The EDOs explained that, for the most part, the *EPBC Act* 'only regulates high-impact developments (such as mining operations or large infrastructure projects)' and 'the majority of these actions are undertaken by large companies on land that has been purchased for the purposes of commercial exploitation'.[235]

20.128 Both stakeholders observed that the Minister may approve an action which is likely to have a significant impact on a matter of national environmental significance—and the EDOs noted that in 'almost all cases' the Minister does.[236] Farrier noted that when the Minister decides whether or not to approve the taking of the action, and what conditions to attach to an approval, the Minister is required to consider 'economic and social matters'.[237] He also submitted that 'approvals are rarely denied'.[238] Figures released by the Department of the Environment support these statements. Since 2000, when the *EPBC Act* commenced, 799 actions have been approved and only 11 have been refused.[239] The EDOs concluded that

> the Act is not prohibitive or particularly restrictive in the way it is applied. Rather—and like most environmental legislation in Australia—it is based on a system of permits and approvals which authorise and mitigate activities with adverse environmental impacts.[240]

20.129 Further, the EDOs submitted that the *EPBC Act* confers 'significant' benefits on landholders, giving two examples. First, they referred to the fact that pursuant to the Act, the Minister may impose further conditions on mining developments, even though they have already been approved under the relevant state or territory laws. They gave the example of the Gloucester Coal Seam Methane Gas Project and remarked that conditions imposed under the *EPBC Act* framework 'may reduce impacts on

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233 D Farrier, *Submission 126*; Australian Network of Environmental Defenders Offices, *Submission 121*.
234 Australian Network of Environmental Defenders Offices, *Submission 121*.
235 Ibid.
236 Ibid.
237 D Farrier, *Submission 126* citing s 136(1)(b).
238 D Farrier, *Submission 126*.
239 Department of the Environment (Cth), *Annual Report 2014–2015* (2015) 200.
240 Australian Network of Environmental Defenders Offices, *Submission 121*. The EDOs said that 'it is difficult to argue that the requirement to obtain a permit for an action that is likely to have a significant impact on a matter protected under international law constitutes an undue burden on private property holders'.

neighbouring properties or the environment in general, particularly in relation to water resources'.[241]

20.130 Secondly, the EDOs referred to the addition of the 'water trigger' to the matters of national environmental significance. The development of coal seam gas resources in NSW and Queensland has been contentious. Those opposed to coal seam gas development have expressed concerns about conflicts with land use and the impact on the environment (particularly concerns about water resources such as aquifer drawdown and possible contamination).[242] Concerns have also been expressed about the impacts on water resources from large coal mining development.[243] In the second reading speech for the relevant Bill to amend the *EPBC Act*, the then Minister stated

> people quite reasonably expect the minister for the environment and water to take into account, by law, the impacts of coal seam gas and large coal mining on water resources. They want to know what I am considering: if there is an irreversible depletion and contamination of our surface and groundwater resources; the impacts on the way critical water systems operate; and the related effects on our ecosystems.[244]

20.131 The addition of the 'water trigger' to the *EPBC Act* was welcomed by some agricultural representative bodies and by environmental groups.[245] The EDOs submitted that the *EPBC Act* was amended to protect 'a resource used by private landholders, in the knowledge that natural resources are interconnected and their value is shared'.[246]

Redressing the perceived interference with property rights

20.132 To redress the perceived impacts of environmental legislation, the NFF called for the introduction of legislation to compensate for a 'taking'—an interference that falls short of an 'acquisition'. Finlay supported such calls, arguing that individual landholders should be compensated 'when they are required to "sterilize" their land for environmental purposes'.[247] However, other stakeholders and commentators did not consider this to be a necessary or viable option. The EDOs reiterated its view that 'there is little evidence to suggest that the EPBC Act constitutes an undue burden on private landholders'.[248] Farrier submitted that it

> would be a massive departure from existing understandings to say that government cannot control the development of land without compensating the landowner: that there is some kind of right to development for which compensation should be paid if it is removed. This would have significant implications in an urban context.[249]

241 Ibid.
242 See Department of Parliamentary Services (Cth), *Bills Digest*, No 108 of 2012–13, 13 May 2013, 8–12.
243 Ibid 12.
244 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2013, 1846 (Tony Burke).
245 Department of Parliamentary Services (Cth), *Bills Digest*, No 108 of 2012–13, 13 May 2013, 19–20.
246 Australian Network of Environmental Defenders Offices, *Submission 121*.
247 L Finlay, *Submission 97*.
248 Australian Network of Environmental Defenders Offices, *Submission 121*.
249 D Farrier, *Submission 126*.

20.133 The Australian Property Institute similarly considered that the distinction between an acquisition of property attracting compensation and regulatory activity—such as land use zoning—not attracting compensation to be 'an established feature of Australian real property'.[250]

20.134 McNamara considered it unlikely that the Parliament would amend the *EPBC Act* to provide a compensatory mechanism that could result in large amounts being paid to individual landholders. However, she was of the opinion that other mechanisms—an economic 'toolkit'—could be used instead:

> My suggestion is that the Act or Regulations could incorporate a rebate and subsidy whereby a proprietor affected by EPBC designation would qualify for one or all of the following economic adjustments:
>
> 1. a rebate on local government rates, which could be administered through the State departments of local government.
> 2. a rebate, or indeed, abolition, of any land tax liability administered through state treasuries.
> 3. a subsidy to enable the purchase of appropriate herbicides and pesticides, administered through the relevant local government.
> 4. a subsidy to enable the land owner to institute a program of culling feral pests on the land.
> 5. an environmental rebate against the landholder's income tax.
> 6. an interest rate subsidy for Commonwealth development assistance.[251]

20.135 The Department of the Environment explained that, if it is not possible to avoid impacting property rights, the Australian Government's preferred approach is to attempt to mitigate the impact by way of an 'offset'.

> Environmental offsets are measures that provide compensation for the residual adverse impacts of an action on the environment, once all reasonable avoidance and mitigation measures have been applied. For example, where the habitat of a threatened species is to be cleared as a result of a proposed action, an appropriate offset could include protecting an equivalent piece of habitat elsewhere, or alternative measures such as revegetation, weed management or feral animal control.
>
> ... Using the [*EPBC Act* environmental offsets] policy, offsets are negotiated with project proponents and then built into the conditions of approval. This gives landowners, developers and government a degree of flexibility in managing impacts identified during the assessment process.[252]

20.136 Farrier submitted that 'landowners significantly affected by conservation legislation can frequently take advantage of rural adjustment programmes which

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250 The Australian Property Institute, *Submission 138*.

251 Dr Noeleen McNamara, 'A Home Is No Longer a Castle? Real Property Rights in the Context of Mining and Environmental Claims' (Speech, ALRC Freedoms Symposium, Federal Court of Australia, Brisbane, 2 September 2015).

252 Department of the Environment (Cth), *Submission 149*. The relevant policy referred to is Department of Sustainability, Environment, Water, Population and Communities (Cth), above n 216.

provide funding to allow them to exit their industry', citing the facts in *Spencer*.[253] He further commented:

> Apart from this, the focus of the current debate in Australia about conservation management on private land has changed radically in recent years and is still in the process of evolving. Funding transfers by government to rural landowners are now increasingly framed as payments for the provision of environmental services not as compensation for lost expectations. This usually involves payments for active management by landowners to advance biodiversity conservation objectives.[254]

20.137 Such 'stewardship payments' send a positive message to landholders, that 'they have a vital role to play, a role which the community regards as being sufficiently important that it is prepared to pay for it'.[255]

20.138 The next scheduled independent review of the *EPBC Act* is to be completed by 2019. The Department of the Environment submitted that that review 'may provide a suitable opportunity for more detailed consideration of the EPBC Act's interaction with property rights'.[256] The ALRC considers that the next review could reassess whether interferences with property rights are proportionate and could explore a range of compensatory mechanisms. This review may also afford an opportunity for consideration of the interrelationship of Commonwealth and state laws, as this ALRC Inquiry heard that Commonwealth and state environmental laws should be considered in an integrated way.[257] Any review of the *EPBC Act* could also consider the application of strict and absolute liability in environmental offences.[258]

Water Act 2007

Key aspects

20.139 Chapter 18 provides background on the legal nature of water rights, including reference to the common law recognition of riparian and groundwater rights and to state and territory legislation which has long provided for water resource management by government and replaced common law rights. While in many cases water rights have been uncoupled from land, they are discussed in this chapter, rather than Chapter 19, because many view rights to water in a non-technical way, as intrinsically related to real property, as it was reflected in the common law.

20.140 The *Water Act* was informed by, and builds upon, key aspects of the National Water Initiative (NWI),[259] as well as the Australian Government's 2007 policy, *A National Plan for Water Security*.[260] It is also supported by two other

253 D Farrier, *Submission 126*.
254 Ibid. See also Department of the Environment (Cth), *Submission 149*.
255 David Farrier, 'Implementing the In-Situ Conservation Provisions of the United Nations Convention on Biological Diversity in Australia: Questioning the Role of National Parks' (1996) 3 *Australasian Journal of Natural Resources Law and Policy* 1, 22.
256 Department of the Environment (Cth), *Submission 149*.
257 See Australian Human Rights Commission, *Submission 141*; L Finlay, *Submission 97*.
258 See Ch 10.
259 An intergovernmental agreement between the Commonwealth and all state and territory governments.
260 Department of Agriculture and Water Resources (Cth), *Submission 144*.

intergovernmental agreements.[261] The NWI sought to establish clearly defined and tradeable statutory rights in water access entitlements,[262] thereby facilitating water users with increased security of access to water resources.[263] The 2007 policy sought to address the 'over-allocation' of water in the Murray-Darling Basin by state and territory governments, where 'more entitlements to water' had been issued 'than can be supplied on a sustainable basis'.[264] The policy sought to reduce the use of water by reducing the allocation and improving the efficiency of the use by funding programs to invest in irrigation infrastructure.[265]

20.141 The development of the Murray-Darling Basin Plan (Basin Plan) has been described as the 'central concept' of the *Water Act*.[266] Section 22 of the *Water Act* outlines mandatory content to be included in the Basin Plan, including the maximum long-term annual average quantities of water that can be taken, on a sustainable basis, from the Basin water resources as a whole and from the water resources of each of the water resource plan areas.[267] These averages are referred to as sustainable diversion limits (SDLs).[268] In effect, SDLs limit water resources that can be extracted from the Murray-Darling Basin.[269] The intention was 'to ensure that water is taken from Basin water resources on an environmentally sustainable basis rather than based on historical levels of surface water use'.[270] SDLs will be 'implemented' under Basin State legislation.[271]

20.142 It was expected that the Basin Plan would be in place by 2009.[272] However, extensive community discussion and debate, including about the SDLs,[273] led to a later commencement date: 24 November 2012.[274] The Basin Plan will not be fully implemented until 1 July 2019 when the SDLs take effect.[275] It is expected that Basin State water resource plans, which give effect to the SDLs, will have been accredited under the *Water Act* by 1 July 2019. Until then, Basin State water resource plans continue to determine diversion limits.

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261 The *2008 Intergovernmental Agreement on Murray-Darling Basin Reform* and the *2013 Intergovernmental Agreement on Implementing Water Reform in the Murray-Darling Basin*. See Moran et al, above n 4, ix.

262 An access entitlement is 'the long term right to receive annual allocations': Henning Bjornland and Geoff Kuehne, 'Water Soft Path Thinking in Other Developed Economies—Part C: Australia' in David B Brooks, Oliver M Brandes and Stephen Gurman (eds), *Making the Most of the Water We Have: The Soft Path Approach to Water Management* (Earthscan) 220, 223.

263 Department of Agriculture and Water Resources (Cth), *Submission 144*.

264 Australian Government, *A National Plan for Water Security* (2007) 1, 4.

265 Australian Government, above n 264. See also Australian Government Solicitor, *Swimming in New Waters: Recent Reforms to Australian Water Law*, Legal Briefing No 90 (July 2009).

266 *Lee v Commonwealth* (2014) 229 FCR 431, [33].

267 *Water Act 2007* (Cth) s 22(1) item 6.

268 Section 23 provides further detail about long-term average SDLs.

269 Department of Agriculture and Water Resources (Cth), *Submission 144*.

270 Explanatory Memorandum, Water Bill 2007 (Cth) [54].

271 Department of Agriculture and Water Resources (Cth), *Submission 144*. A Basin State means NSW, Victoria, Queensland, South Australia and the Australian Capital Territory: *Water Act 2007* (Cth) s 4.

272 Moran et al, above n 4, ix.

273 Ibid 5.

274 Ibid ix.

275 Ibid xxiv.

20.143 The impact of the diversion limits on the individual holders of water access entitlements, such as farmers, is that the amount of water that may be taken may be reduced through the limiting of the allocation made under state and territory plans—once the SDLs come into effect. This involves a risk to individual rights holders: 'they may simply have less water to use or trade'.[276]

20.144 However, the Commonwealth has committed to 'bridge the gap' between the 'baseline diversion limits'[277] and the SDLs.[278] The Department of Agriculture and Water Resources, which has responsibility for the *Water Act*, explained:

> The purpose of Commonwealth policy is to ensure that there is no effect on the reliability and hence value of any water access entitlements and rights as the result of the Basin Plan. Water recovery programs are undertaken by agreement with willing partners who agree to undertake irrigation infrastructure improvements or to sell entitlements to the Commonwealth.[279]

20.145 The *value* of water access entitlements was therefore to be maintained by virtue of the scheme's effect on the reliability of water access. This is to be achieved through Commonwealth support for improved efficiency in water use and also increasing the environmental pool of water, through consensual purchase of water access entitlements from willing sellers and investment in water-saving irrigation infrastructure. Infrastructure investment is prioritised over buying water access entitlements, and water purchases are capped at 1,500 gigalitres.[280]

20.146 Notwithstanding that the Commonwealth has committed to achieve the target SDLs in these two ways, s 77 sets out the circumstances where a water entitlement holder may claim a payment from the Commonwealth for a reduction in the diversion limit. Further, the Basin Plan contains 'additional protective provisions', known as 'reasonable excuse provisions', in the event that a Basin State does not comply with the SDL as a result of circumstances beyond its control.[281] The Department of Agriculture and Water Resources explained that the effect of the reasonable excuse provisions is that 'all the water recovery risk associated with meeting the SDLs sits with the Commonwealth'.[282]

20.147 The *Water Act* also established the Commonwealth Environmental Water Holder (CEWH) to manage Commonwealth-held environmental water.[283] There are three ways that the Commonwealth can use this environmental water:

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276 Department of Parliamentary Services (Cth), *Bills Digest*, No 30 of 2007–08, 14 August 2007, 19.
277 Baseline diversion limits 'establish a baseline from which to determine required reductions in diversions': Explanatory Statement, Basin Plan 2012 (Cth), [105].
278 Successive Commonwealth governments have committed to bridging the full gap: Department of the Environment (Cth), Submission No 50 to Senate Select Committee Inquiry into the Murray-Darling Basin Plan, Parliament of Australia, September 2015, 4.
279 Department of Agriculture and Water Resources (Cth), *Submission 144*.
280 Ibid. See Department of the Environment (Cth), *Water Recovery Strategy for the Murray-Darling Basin* (2014).
281 Department of Agriculture and Water Resources (Cth), *Submission 144*.
282 Ibid.
283 Moran et al, above n 4, ix.

- delivering water to a river or wetland to meet an indentified environmental demand
- leaving water in storage and carrying it over for use in the next water year (referred to as 'carryover')
- trading water, that is, selling water and using the proceeds to buy water in another catchment or in a future year.[284]

Concerns about interferences and counter-arguments

20.148 The Scrutiny of Bills Committee expressed some concerns about the impact on property rights when considering the provisions of the *Water Act*. Specifically, it expressed concern about provisions relating to entry to premises, without warrant, as it considered that they may trespass unduly on personal rights and liberties.[285]

20.149 In this Inquiry, the NFF had a different complaint. It submitted that the *Water Act* has the potential to cause unjustified interferences with property rights. Its two particular concerns were first, that the Act, particularly the Basin Plan, has the potential to erode farmers' water rights and entitlements without full compensation; and, secondly, that the Basin Plan's Constraints Management Strategy could potentially result in the flooding of private land.[286]

20.150 With respect to the first issue, the NFF expressed concern that Commonwealth laws 'fail to fully ensure that full compensation provisions are in place for any diminution in water access'. It submitted that where such action undertaken by government 'results in diminution of entitlement reliability, water access entitlement holders should be fully compensable at the market rate'. It called for the Commonwealth to provide just compensation 'where States fail to do so'.[287]

20.151 The NFF referred to the litigation in *Lee v Commonwealth*.[288] Each landowner in this litigation—Lee and Gropler—operated an irrigated horticultural farm that draws water from the Murray River. These landowners argued that the *Water Act* had effected an acquisition of property otherwise than on just terms and claimed compensation under s 254 of the *Water Act*—the statutory just terms provision in that Act.[289] The Federal Court rejected the claim,[290] the Full Federal Court dismissed the appeal,[291] and the application for special leave to the High Court was refused.[292] The

284 Commonwealth Environmental Water Office, Submission No 45 to Senate Select Committee Inquiry into the Murray-Darling Basin Plan, Parliament of Australia, 17 September 2015, 1.
285 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *First Report of 2008* (March 2008) 43–4.
286 National Farmers' Federation, *Submission 54*.
287 Ibid. See also National Farmers' Federation, *Submission 127*.
288 National Farmers' Federation, *Submission 127*.
289 There were essentially four claims in respect of s 254. The focus of discussion in this chapter is the claim concerning carryover water.
290 *Lee v Commonwealth* (2014) 220 FCR 300. The trial judge ordered summary judgment in favour of the Commonwealth and the Murray-Darling Basin Authority in respect of all the claims made in the proceeding: Ibid [234].
291 *Lee v Commonwealth* (2014) 229 FCR 431.
292 Transcript of Proceedings, *Lee v Commonwealth* [2015] HCATrans 123 (15 May 2015).

NFF expressed disappointment at the outcome in this litigation, preferring the approach taken by Heydon J, in dissent, in the *ICM Case*.[293]

20.152 Before the Federal Court, Lee had argued that, as a result of the CEWH conserving water for environmental use, his entitlement to carryover water—that is, water that could be carried over from one year to the next pursuant to state law—would be reduced and consequently the value of his water entitlements had been reduced.[294] The Court found that, even if there were rights taken from Lee, there was 'no acquisition of property from him by any other person', observing that s 254 is 'directed to acquisition, not deprivation'.[295] The Federal Court considered the case in respect of s 254 to be analogous to that in the *ICM Case*, rather than that in *Newcrest*.[296]

20.153 In the *ICM Case*, French CJ, Gummow and Crennan JJ said:

> To acquire the substance of proprietary interests in the mining tenements considered in [*Newcrest*] is one thing, to cancel licences to extract groundwater is another. The mining tenements were interests carved out of the radical title of the Commonwealth to the land in question, and the radical title was augmented by acquisition of the minerals released from the rights of another party to mine them. As Brennan CJ later explained, the property of the Commonwealth had been enhanced because it was no longer liable to suffer the extraction of minerals from its land in exercise of the rights conferred by the mining tenements held by Newcrest.[297]

20.154 The NFF submitted that Heydon J's approach in the *ICM Case* 'indicates that there is some support for the proposition that Commonwealth or State Governments may obtain an advantage within the meaning of s 51(xxxi) in some circumstances where water rights are removed for environmental purposes'.[298] When considering whether there had been a contingent increase in the capacity of NSW to take or grant rights to water, Heydon J stated that the Commonwealth's arguments assumed that 'if groundwater resources are to be employed sustainably, the allocations of 2008 will leave no surplus water available to New South Wales or anyone but the aquifer access licensees'.[299] However,

> to the extent that [the Commonwealth's assumption] turns out to be pessimistic, New South Wales will have gained something it did not have before 2008—a capacity to take more water itself or to issue more rights to others without damaging the goal of sustainability. This capacity, if it turns out that it has been gained, will be a benefit or advantage which New South Wales has acquired within the meaning of s 51(xxxi). And the possibility that that capacity will be gained is a presently existing, direct and identifiable benefit or advantage accruing to New South Wales as a result of the extinguishment of the bore licensee's rights, even though it may not be proprietary in a conventional sense: it is thus an acquisition of property by New South Wales.[300]

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293 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140.
294 *Lee v Commonwealth* (2014) 220 FCR 300, [197].
295 Ibid [200].
296 Ibid [206]. See *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.
297 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [85]. The reference to Brennan CJ is to *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1, [17].
298 National Farmers' Federation, *Submission 127*.
299 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [235].
300 Ibid.

20.155 The Department of Agriculture and Water Resources stated that claims that the Basin Plan could lead to water rights being eroded without compensation were 'incorrect'.[301] Similarly, the EDOs expressed the view that the NFF's concern about the erosion of rights is not reflective of the statutory scheme.[302] Both stakeholders referred to a number of the same features of the *Water Act*.

20.156 First, s 255 of *Water Act* does not permit the compulsory acquisition of a water access right or an interest in a water access right.[303] The EDOs noted that farmers who sell their entitlements to the CEWH do so 'voluntarily' and presumably 'following full consideration of the advantages and disadvantages of doing so'.[304]

20.157 Second, both stakeholders submitted that the *Water Act* enhances the value of water rights and ensures that water rights cannot be eroded without compensation. The EDOs observed that the 'decision to unbundle water entitlements from land has created an entirely new asset which has in turn generated additional wealth for many landholders'.[305] The Department specifically mentioned pt 4 of the Act which concerns Basin water charge and water market rules and chapter 12 of the Basin Plan which outlines trading rules. It submitted that '[t]hese arrangements help to enhance the security and value of entitlements'.[306]

20.158 Third, both stakeholders referred to div 4 of pt 2 of the Act which 'provides that water access entitlement holders may be eligible for financial payments from the Commonwealth if their water allocations are reduced in certain circumstances'. The EDOs submitted that

> the Water Act provides for entitlement holders to be compensated in certain circumstances where allocations are reduced due to the operation of the Basin Plan. These provisions are to be considered in tandem with State laws, which also enable entitlement holders to be compensated (subject to meeting certain criteria) for reductions in allocations.[307]

20.159 The Department also referred to s 77, noting that it 'provides an important backstop to the bridging the gap commitment and reasonable excuse provisions by providing that the Commonwealth will make payments to any qualifying water access holders'.[308] The EDOs additionally submitted that, as water allocations are not fixed, it was 'impossible' to argue that increasing the pool of environmental water has a greater detrimental impact on allocations and entitlements than factors such as rainfall, the amount of water in storage, and state allocation policies.[309]

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301 Department of Agriculture and Water Resources (Cth), *Submission 144*.
302 Australian Network of Environmental Defenders Offices, *Submission 121*.
303 But see The Australian Property Institute, *Submission 138*. The Institute suggested that s 255 of the *Water Act* may merit further review, presumably because a water access right and an interest in a water access right 'may be property for the purposes of s 51(xxxi)'. See Ch 18 for a discussion of 'property'.
304 Australian Network of Environmental Defenders Offices, *Submission 121*.
305 Ibid.
306 Department of Agriculture and Water Resources (Cth), *Submission 144*.
307 Australian Network of Environmental Defenders Offices, *Submission 121*.
308 Department of Agriculture and Water Resources (Cth), *Submission 144*.
309 Australian Network of Environmental Defenders Offices, *Submission 121*.

20.160 Both stakeholders also referred to the *Water Amendment Act 2015* (Cth), which limits the volume of water that can be bought from water access entitlement holders by the CEWH to 1,500 gigalitres per year.[310] The Explanatory Memorandum states that the Bill provides 'increased assurance to rural and irrigation communities regarding the implementation of the Basin Plan and the commitment to minimise the potential socio-economic impacts of Commonwealth environmental water purchases'.[311] The EDOs have criticised this legislative change, viewing the purchase of entitlements as 'the principal—and most effective—means of returning water to the environment'. In its view, this amending Act is 'underpinned by the assumption that the (entirely voluntary) sale of entitlements to the CEWH has a negative impact on Basin communities'.[312]

20.161 These two stakeholders viewed the situation differently from the NFF. In sum, the EDOs submitted that there has been 'a strong desire to protect private interests to the greatest extent possible' and in its view socio-economic considerations have driven the development and implementation of the Basin Plan and the interpretation given to the Act.[313] It expressed the opinion that this approach has compromised environmental outcomes.[314] The Department concluded that the *Water Act* 'has had the effect of enhancing the security and value of statutory water entitlements in the Murray-Darling Basin as established under state and territory law'.[315]

20.162 The NFF argues that a 'diminution' of water access entitlements, unaccompanied by compensation 'at market rates', is an unjustifiable interference with property rights. However, the judgments in the *Lee* litigation and information provided by stakeholders—including the Department responsible for the administration of the *Water Act*—suggest that any diminution of the consumptive pool caused by the Commonwealth under the *Water Act* will be by consensual purchase of water entitlements and from water savings associated with investments in more efficient infrastructure. Such measures may be seen as addressing any interference with property rights.

20.163 The NFF were also concerned by the potential for land to be flooded pursuant to the Constraints Management Strategy (CMS).[316] The CMS was finalised by the Murray-Darling Basin Authority in 2013. 'Constraints' are 'rules and structures that influence the volume and timing of regulated water delivery'.[317] The CMS is

310 At 1 November 2015 the Act had not commenced.
311 Explanatory Memorandum, Water Amendment Bill 2015 (Cth) 2.
312 Australian Network of Environmental Defenders Offices, *Submission 121*.
313 Ibid. See also Emma Carmody, 'The Silence of the Plan: Will the Convention on Biological Diversity and the Ramsar Convention Be Implemented in the Murray-Darling Basin?' (2013) 30 *Environmental and Planning Law Journal* 56.
314 Australian Network of Environmental Defenders Offices, *Submission 121*.
315 Department of Agriculture and Water Resources (Cth), *Submission 144*.
316 National Farmers' Federation, *Submission 127*.
317 Department of Agriculture and Water Resources (Cth), *Submission 144*.

concerned with 'relaxing' some 'constraints'[318]—for example, releasing water that may flood land.

20.164 The NFF called for the ALRC

> to explicitly explore the issue that is likely to arise under the Government's constraint management strategy—whereby private land is deliberately flooded in order to deliver environmental water held by the Commonwealth Environmental Water Holder. The CMS Annual Progress report itself highlights our concerns. As stated in the report *'there are some hotspots where access, crops, livestock, sheds and pumps can be affected'*—ie where private property will be flooded.[319]

20.165 The NFF expressed concern that the *Water Act* and the Basin Plan 'do not seem to explicitly protect rights' in the case of possible deliberate flooding.[320] The CMS Annual Progress Report, referred to above, notes that '[d]elivering higher flows would in many cases cause some negative effects for landholders' but that these could be mitigated.[321] One of the mitigation options identified, and referred to by the NFF in its submission, is '[n]egotiated agreements with landholders to create easements that enable regulated water to access the privately owned parts of the floodplain'.[322]

20.166 The Department submitted that concerns about the CMS permitting deliberate flooding of private land 'represent a misunderstanding of how the CMS framework will be implemented'. It explained:

> the CEWH has said that it has not and will not place water orders that would result in flooding of private land without the consent of the landowner and in any case the CEWH can only place orders. Decisions on the volume of water released from storages are made by the state government agency responsible for managing that storage.[323]

20.167 The EDOs referred to s 110(2) of the *Water Act*, which concerns application of state laws to the CEWH and specifically provides that s 110 does not authorise the environmental watering of land without the land owner's consent.[324] It also referred to the CEWH's website which states that the CEWH seeks to obtain consent by negotiation if potentially unacceptable impacts on private property are identified. The website notes that '[i]n many situations landholders support watering events because the outcomes are mutually beneficial, such as by creating environmental benefits while also supporting the productivity of floodplain pastures'.[325]

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318 Murray-Darling Basin Authority, *Constraints Management Strategy Annual Progress Report 2013–14* (2014) 3.
319 National Farmers' Federation, *Submission 127*. (Footnotes omitted)
320 Ibid.
321 Murray-Darling Basin Authority, above n 318, 12.
322 Ibid 24.
323 Department of Agriculture and Water Resources (Cth), *Submission 144*.
324 Australian Network of Environmental Defenders Offices, *Submission 121*.
325 Ibid.

20.168 The ALRC is of the view that the operation of the *Water Act* does not appear to amount to an unjustifiable interference with property rights in this respect.

Redressing the perceived interference with property rights

20.169 As explained in Chapter 18, the common law regime of water rights has been replaced in Australia by statutory water access licences or rights. The current scheme as a whole has an impact—but one that is being managed.

20.170 A number of stakeholders considered that the *Water Act* does not need to be reviewed to ensure that it does not unjustifiably interfere with rights pertaining to real property.[326] An independent review of the *Water Act* was completed in late 2014,[327] pursuant to s 253. This review included significant consultation with stakeholders, including all states and territories, and 'addressed impacts on private property and entitlement holders'.[328] The Australian Government accepted all recommendations made in this review. On 3 December 2015, a Bill was introduced to Parliament to amend the *Water Act* to implement the Government's response to the recommendations.[329]

20.171 The EDOs submitted that an additional review is 'unnecessary as it would duplicate existing statutory and non-statutory review processes which tend to emphasise socio-economic assessment'.[330] The Department emphasised the need for stakeholders to have stability and certainty:

> The Basin Plan is currently being implemented in anticipation of the SDLs taking effect in 2019. During this time it is vital for the Murray-Darling Basin's communities and industries that there is certainty as to the function and effects of the Water Act and Basin Plan.[331]

20.172 The independent review had heard a similar appeal, noting that some stakeholders had stated that, 'after such a long period of significant policy change, communities and businesses need stability and certainty, and consider that effort should now be directed to implementing agreed reforms'.[332]

20.173 The ALRC dos not suggest a further review be conducted at this time. However, the ALRC notes that the *Water Act* does not provide for periodic review, as

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326 Department of Agriculture and Water Resources (Cth), *Submission 144*; Australian Network of Environmental Defenders Offices, *Submission 121*. However, the Australian Property Institute suggested that s 255 and 'other matters' in the *Water Act* 'may' merit further review: The Australian Property Institute, *Submission 138*.

327 Moran et al, above n 4.

328 Australian Network of Environmental Defenders Offices, *Submission 121*.

329 Explanatory Memorandum, Water Amendment (Review Implementation and Other Measures) Bill 2015 (Cth); Water Amendment (Review Implementation and Other Measures) Bill 2015 (Cth).

330 Australian Network of Environmental Defenders Offices, *Submission 121*. The EDOs referred to the Senate Communications and Environment Legislation Committee Inquiry into the Water Amendment Bill 2015 and the Select Committee on the Murray-Darling Basin Plan.

331 Department of Agriculture and Water Resources (Cth), *Submission 144*.

332 Moran et al, above n 4, i.

is the case with the *EPBC Act*. It may be appropriate for the *Water Act* to be reviewed periodically.[333]

20.174 The ALRC also notes that the terminology accompanying the scheme is new and some apprehensions about the scheme may reflect difficulties in understanding the full effect of the scheme. A clear explanation of the new terms may assist stakeholders to appreciate the positive changes that are intended by the scheme.

Native title laws

20.175 As discussed in Chapter 18, native title is not a common law tenure but rather has its source in the traditional laws and customs of the relevant Aboriginal and Torres Strait Islander peoples. The case of *Mabo v Queensland [No 2]* is significant because it was the first time that native title was recognised under common law in Australia.[334] The content of native title rights and interests is defined by traditional laws and customs. This means that native title rights and interests 'may not, and often will not, correspond with rights and interests in land familiar to the Anglo-Australian property lawyer'.[335] It also means that, as Gummow J noted in *Wik Peoples v Queensland*, the 'content of native title, its nature and incidents, will vary from one case to another'.[336]

20.176 The *Native Title Act 1993* (Cth) (*Native Title Act*) established a regime to facilitate the common law's recognition of native title by providing a claims process for the determination of native title. As the ALRC has previously observed, the Act 'provides the framework in which the facts in the other normative system—Aboriginal and Torres Strait Islander law and custom—must be proved'.[337] The Act does not create new rights and interests in land. Instead,

> the native title rights and interests to which the *Native Title Act* refers are rights and interests finding their origin in pre-sovereignty law and custom, not rights or interests which are a creature of that Act.[338]

20.177 As native title concerns rights in relation to land and waters, it is considered here. In this Inquiry, the ALRC received three submissions discussing native title in a broad sense.[339]

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333 Such a recommendation has been made to the Australian Government: Ibid rec 23. A Bill introduced into the Parliament on 3 December 2015 would set 2024 as the date of the next review: Water Amendment (Review Implementation and Other Measures) Bill 2015 (Cth).

334 *Mabo v Queensland [No 2]* (1992) 175 CLR 1. See also *Milirrpum v Nabalco* (1971) 17 FLR 141.

335 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [40] (Gleeson CJ, Gummow and Hayne JJ).

336 *Wik Peoples v Queensland* (1996) 187 CLR 1, 169.

337 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) [2.62].

338 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [45] (Gleeson CJ, Gummow and Hayne JJ).

339 Australian Human Rights Commission, *Submission 141*; Arts Law Centre of Australia, *Submission 50*; D Wy Kanak, *Submission 38*. The Arts Law Centre's submission concerned traditional knowledge and traditional cultural expressions. See Ch 18.

20.178 For native title rights and interests to be recognised by Australian law, the Aboriginal and Torres Strait Islander peoples' rights and interests must be possessed under laws and customs with origins in the period prior to the Crown's assertion of sovereignty.[340] Between settlement and the decision in *Mabo [No 2]* there was much disruption of the relationship that Aboriginal and Torres Strait Islander peoples had with their traditional lands and waters. As a result of this disruption, for many Aboriginal and Torres Strait Islander peoples, providing evidence of continuity with pre-sovereign rights and interests is very difficult.[341] The ALRC considered some of these issues in its 2015 report, *Connection to Country: Review of the Native Title Act 1993 (Cth)*. This report made 30 recommendations, including about how the existence of native title rights and interests is established.[342]

20.179 In addition to difficulties associated with proof, native title may be 'extinguished' by acts of the executive pursuant to legislative authority, or grants of rights to third parties, that are inconsistent with the claimed native title rights and interests.[343] The grant of freehold title has been held to be 'wholly inconsistent with the existence thereafter of any right of native title'.[344]

20.180 The *Native Title Act* provides a statutory regime for managing issues of extinguishment.[345] Extinguishment of native title constitutes the highest example of interference with Aboriginal and Torres Strait Islander peoples' traditional rights and interests in land and waters. As noted in Chapter 18, the Crown's power to extinguish native title is not in question (as is also the case with respect to titles resting in Crown grants).

20.181 Given the limitations of native title under the *Native Title Act*, other options to facilitate 'land justice' and economic development for Aboriginal and Torres Strait Islander peoples have been suggested and, in some cases, developed. For example, progress is being made via settlements that encompass land, economic development and compensation for dispossession.[346] In 2015, the Australian Human Rights

340 *Native Title Act 1993* (Cth) s 223; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

341 See further Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) chs 5–7.

342 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015). Other countries have facilitated the recognition of the rights to land of their own Indigenous peoples in different ways. For example, in Canada, First Nations peoples' rights may amount to 'aboriginal title', which is akin to a possessory title to land. Aboriginal title may amount to exclusive rights whereas 'aboriginal rights' are non-exclusive rights. See Ibid ch 9.

343 *Western Australia v Ward* (2002) 213 CLR 1, [26], [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Western Australia v Brown* (2014) 306 ALR 168, [33]; *Akiba v Commonwealth* (2013) 250 CLR 209, [31]–[35] (French CJ and Crennan J); [52], [62] (Hayne, Kiefel and Bell JJ). See also *Native Title Act 1993* (Cth) pt 2 div 2B, s 237A. See also Ch 18.

344 *Fejo v Northern Territory* (1998) 195 CLR 96, [47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

345 See Ch 18 for a discussion of the interaction with the *Racial Discrimination Act 1975* (Cth).

346 See Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) ch 3.

Commission has had a significant role in discussions about the economic development of land held by Aboriginal and Torres Strait Islander peoples.[347]

Criminal laws

20.182 A number of Commonwealth criminal law provisions may interfere with property rights. Some are considered in Chapter 19, dealing with personal property.

20.183 A small number of criminal offences may be characterised as interfering with a person's interests in real property. For example:

- *Crimes Act 1914* (Cth) s 3ZB empowers a police constable to enter premises to arrest an offender if the constable has a warrant for that person's arrest and has a reasonable belief that the person is on the premises; and
- *Criminal Code* (Cth) s 105.22 allows the police to enter premises if a preventative detention order is in force against a person and the police have a reasonable belief that the person is in the premises.[348]

20.184 Other Commonwealth statutes also contain offence provisions for preventing entry to land where an officer or other specified person is empowered to enter.[349]

Search warrants to enter premises

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

20.186 At common law, whenever a police officer has the right to arrest, with a warrant, they may enter private premises without the occupier's permission in order to execute the warrant.[350] Police powers to enter and search private premises through the issue of search warrants are, however, a relatively modern phenomenon. Historically, courts were not empowered to issue search warrants on private property, unless in relation to the search and seizure of stolen goods.[351]

20.187 Where legislation has been passed to derogate from the principle of a person's right to undisturbed enjoyment of their premises, the legislation is to be construed so as not to derogate from the common law right without express words or

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347 Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015); Australian Human Rights Commission, *Communiqué: Indigenous Leaders Roundtable on Economic Development and Property Rights* (Broome, 19–20 May 2015). See Australian Human Rights Commission, *Submission 141*.

348 See Ch 16.

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

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

351 See, eg, *Entick v Carrington* (1765) 19 St Tr 1029. See discussion in Ch 18.

necessary implication.[352] This is underscored by the principle that there is no common law right for law enforcement to enter private property without a warrant.[353]

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

> to make much needed reforms of the law relating to search, arrest and related matters for the investigation of most Commonwealth offences. These areas of the law have been the subject of careful examination by the Australian Law Reform Commission in its report entitled Criminal Investigation, and more recently by the Review of Commonwealth Criminal Law established by Mr Bowen as Attorney-General and chaired by the Rt Hon Sir Harry Gibbs. The bill closely follows the recommendations made by the Review of Commonwealth Criminal Law in its fourth and fifth interim reports.[354]

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

> A power to enter should be available, first, in order to arrest a person named in a warrant of arrest and reasonably believed to be on the premises, and, secondly, where no warrant exists, to accomplish the lawful arrest of a person reasonably believed to have committed a serious offence and reasonably believed to be on the premises.[355]

20.190 In light of this commentary, s 3ZB appears to be uncontroversial.[356]

Conclusion

20.191 The primary focus of this chapter has been on Commonwealth environmental laws and whether and how these laws interfere with the right to use land and water. The *EPBC Act* interferes with the right to use land—but only to a limited extent. The extent to which the Act interferes with a farmer's ability to clear land was contested in this Inquiry. The ALRC concludes that the *EPBC Act* could be further reviewed to determine whether limits on real property rights are appropriately justified. The next scheduled independent review of the *EPBC Act* is to be completed by 2019. The ALRC suggests that the next appointed *EPBC Act* reviewer could reassess whether the interferences are proportionate and explore a range of compensatory mechanisms as

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352 *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206. See also *Coco v The Queen* (1994) 179 CLR 427. 'Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language': 436.

353 *Entick v Carrington* (1765) 19 St Tr 1029; 95 ER 807.

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

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

356 The ALRC did not receive any submissions on this provision or other entry pursuant to arrest or search warrants under Commonwealth or state and territory law. Further, the ALRC's literature review did not disclose academic commentary on criminal statutes that encroach on real property rights.